

Navigating Board Member Free Speech Rights and Board Censure

Presented by

Karla Schultz & Elena M. Gallegos



WALSH GALLEGOS
TREVIÑO KYLE & ROBINSON P.C.

*The Law Says: Elected
Officials Have Free Speech
Rights, but Not Unlimited*

The Right to Free Speech

- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

U.S. Const. amend. I.

But...

- “No right is absolute.”

McDonald v. City of Chicago, Ill., 561 U.S. 742, 879 (2010) (Stevens, J., dissenting).



Elected Officials Have a Right to Political Views

- ❑ The State has an interest in requiring its legislators to swear to a belief in the constitutional processes of government, but it cannot limit its legislators' capacity to discuss their views of local or national policy.
- ❑ Officials have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office.

Bond v. Floyd, 385 U.S. 116 (1966).

Elected Officials Cannot Use the “Trappings” of Office to Promote a Personal Message

- ❑ An elected judge held a press conference in the courtroom during business hours, in his judicial robe, to complain about an attorney’s “abusive tactics” which involved removing the judge from a case over “baseless and vicious allegations,” particularly about his wife.
- ❑ He was censured by the State Commission on Judicial Conduct and appealed, in part based on the First Amendment.
- ❑ The court said that while communication between an official and his or her constituents cannot be “shut down,” an elected official cannot “use the trappings” of his or her public office to promote a personal message.
- ❑ As “political actors,” elected officials must “take it outside” the “trappings” of their office.

Jenevein v. Willing, 493 F.3d 551 (5th Cir. 2007).

New Mexico Attorney General on Public Office and Political Activity

- ❑ “People who take jobs in government do not give up all their rights to participate as citizens in our democracy. They can vote, donate to candidates, and work on their own time for candidates and political parties and causes. Those elected to office or appointed by elected officials are entitled, and expected, to use public resources at their disposal to fulfill their public commitments made during their political campaigns, consistently with their other duties of office.”
- ❑ “At the same time, election to office does not entitle officials to use publicly funded resources to finance their political campaigns.”
- ❑ “...the challenge is how to respect the civil rights of individuals and the legitimate political expectations of office-holders, while protecting the public against political misuse of their resources.”

This Is Not Unlike Prohibitions on Electioneering and Political Advocacy with Public Resources

- ❑ A public officer is prevented from “directly or indirectly coercing or attempting to coerce another public officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for a political purpose.” NMSA 1978, § 10-16-3.1(A) (2011).
- ❑ “Any public officer making any profit out of public money *or using the same for any purpose not authorized by law*, shall be deemed guilty of a felony and shall be punished as provided by law and shall be disqualified to hold public office.” N.M. Const. art. VIII, § 4.
- ❑ “Any person diverting or expending any public school money contrary to the approved budget is, in addition to being subject to any other civil or criminal action, liable along with his sureties to the state for the amount diverted or expended.” NMSA 1978, § 22-8-42(B) (1988).
- ❑ “Any person falsifying any record, account or report required to be kept or filed pursuant to the Public School Finance Act or *knowingly using any money budgeted or appropriated for public school use or for any other purposes than that provided in the appropriation or budget* is guilty of a petty misdemeanor and shall, in addition to all other civil or criminal penalties, forfeit his office or employment.” NMSA 1978, § 22-8-42(D) (1988).

Does an Elected Official Have a “Right” to Vote?

- ❑ Not necessarily.
 - ❑ An elected city official said he did not have to recuse himself from voting on a matter where he had conflict of interest under state law, because he felt he had a First Amendment “right” to vote.
 - ❑ The court said: Voting is an act of governance. The legislative power is not personal to the legislator but belongs to the people; the legislator has no personal right to it.

Nevada Comm’n on Ethics v. Carrigan, 564 U.S. 117 (2011).

No Right to Pray at Meetings When Acting in Official Capacity

- ❑ An elected official's religious expression in the performance of his or her official duties is "government speech," not private speech protected by the First Amendment.

Turner v. City Council of City of Fredericksburg, VA, 534 F.3d 352 (4th Cir. 2008).

Elected Officials' Private Deliberations about Public Business Are Not Protected by the First Amendment if They Violate OMA

- ❑ There is no First Amendment right to privately discuss public policy and public business among a quorum because "...the First Amendment does not protect the right of government officials to deliberate in private, given that [the open meetings law] sometimes requires them to open their proceedings to the public."
- ❑ Open meetings law and penalties are content-neutral time, place, or manner restrictions, and are not an unconstitutional criminalization of political speech based on content.

Asgeirsson v. Abbott, 696 F.3d 454 (5th Cir. 2012).



*The Exercise of Free Speech
Rights By Elected Officials Can
Have Political Consequences*

Houston Community College System v. Wilson, 142 S.Ct. 1253 (2022)

- ❑ In June of 2022, the US Supreme Court ruled on a Board censure.
- ❑ Background facts:
 - ❑ In 2013, David Wilson was elected to the Board of Trustees of the Houston Community College System (HCC).
 - ❑ Mr. Wilson often disagreed with the Board about the best interests of HCC, and he brought multiple lawsuits challenging the Board's actions.
 - ❑ By 2016, these escalating disagreements led the Board to reprimand Mr. Wilson publicly. Mr. Wilson continued to accuse the Board—in media outlets as well as in state-court actions—of violating its ethical rules and bylaws.

Houston Community College System v. Wilson, 142 S.Ct. 1253 (2022)

- ❑ Background facts (continued):
 - ❑ Mr. Wilson also arranged robocalls to constituents of some of the trustees and hired a private investigator to engage in surveillance of one trustee. He filed two more lawsuits against the Board, which cost the College more than a quarter of a million dollars.
 - ❑ At a 2018 meeting, the Board adopted another public resolution, “censuring” Mr. Wilson and stating that Mr. Wilson’s conduct was “not consistent with the best interests of the College” and it was “not only inappropriate, but reprehensible.”
 - ❑ The Board imposed penalties in addition to the verbal censure, among them deeming Mr. Wilson ineligible for a Board officer position during 2018.

Houston Community College System v. Wilson, 142 S.Ct. 1253 (2022)

- ❑ Court proceedings:
 - ❑ Mr. Wilson sued, alleging that the Board's censure violated his First Amendment rights. Ultimately, the lawsuit landed at the U.S. Supreme Court.
 - ❑ The Supreme Court ruled in favor of the Board and held that Mr. Wilson does not possess an actionable First Amendment claim arising from the Board's purely verbal censure.



Houston Community College System v. Wilson, 142 S.Ct. 1253 (2022)

- ❑ Key quotes from the U.S. Supreme Court:
 - ❑ “[E]lected bodies in this country have long exercised the power to censure their members.”
 - ❑ “...Congress has censured Members not only for objectionable speech directed at fellow Members but also for”
 - ❑ “comments to the media,”
 - ❑ “public remarks disclosing confidential information, and”
 - ❑ “conduct or speech thought damaging to the Nation.”
 - ❑ Censure is “a form of speech by elected representatives...[which] concerned the conduct of another elected representative.”



Houston Community College System v. Wilson, 142 S.Ct. 1253 (2022)

- ❑ More U.S. Supreme Court Key Quotes:
 - ❑ “The censure did not prevent Mr. Wilson from doing his job, it did not deny him any privilege of office, and Mr. Wilson does not allege it was defamatory.”
 - ❑ “...the Board’s censure does not qualify as a materially adverse action capable of deterring Mr. Wilson from exercising his own right to speak.”
 - ❑ “The 1st Amendment surely promises an elected representative like Mr. Wilson the right to speak freely on questions of government policy. But just as surely, it cannot be used as a weapon to silence other representatives seeking to do the same.”

That Supreme Court Decision Upheld a Similar Ruling from Our Tenth Circuit

- ❑ In that case, the Board adopted its own ethics policy which included a provision that all members would “abide by and uphold the final majority decision of the Board.”
- ❑ After the Board voted in favor of presenting a project and tax assessment to the public, one Board member bought a newspaper ad encouraging the public to vote against the measure.
- ❑ The Board censured her for violating its ethics policy, and she sued, claiming her free speech rights had been violated.
- ❑ Like the Supreme Court, the Tenth Circuit said the Board merely expressed its own opinion, which did not prevent the dissenting member “from performing her official duties or restrict her opportunities to speak, such as her right to vote as a Board member, her ability to speak before the Board, or her ability to speak to the public.”

Phelan v. Laramie County Community College Bd. of Trustees, 235 F.3d 124 (10th Cir. 2000).

The “give-and-take of the political process” Does Not Violate an Official’s Constitutional Rights

- ❑ This case involved a School Board’s removal of one of its members from an officer position, rather than censure.
- ❑ The Court said:
 - ❑ Board’s decision to remove a member from his officer position did not violate his free speech rights because it did not prevent him from continuing to speak out, vote his conscience, and serve his constituents as a member of the Board.
 - ❑ It was simply a “minor indignity” for the board member to be properly removed from an honorary position by the board member peers who had “elected him to the position in the first place.”

Blair v. Bethel Sch. Dist., 608 F.3d 540 (9th Cir. 2010).

Public Officials Need to Have “Thicker Skin”

- ❑ A Board’s vote to censure another member for his “demeaning, insulting, abusive...discriminatory, and inappropriate” comments and actions towards the Administration was not unlawful retaliation.
- ❑ “Public officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views.”

Dillaplain v. Xenia Cmty. Schs. Bd. of Educ., 2013 WL 5724512 (S.D. Ohio Oct. 21, 2013).

Political Backlash for Speech Does Not = Violation of the First Amendment

- ❑ A member of a Board of Supervisors said his colleagues violated his free speech rights when they insulted and threatened him, directed obscene gestures at him, and changed the locks on the township garage.
- ❑ The court disagreed and said the First Amendment does not “guard against every form of political backlash that might arise out of the everyday squabbles of hardball politics.”

Willson v. Yerke, 604 F. App'x 149 (3rd Cir. 2015).

Managing a Member's Disruptive or Unruly Behavior Does Not Violate His/Her Free Speech Rights

- ❑ A governmental body has significant discretion to regulate its own meetings in the manner it sees fit.
- ❑ Therefore, the Board could keep a sitting member from speaking during the time reserved for citizen comment.
 - ❑ *"...federal courts are not the forum for redressing political injuries."*

Shields v. Charter Twp of Comstock, 617 F. Supp. 2d 606 (W.D. Mich. 2009).

Why Might a Board Censure a Member?

- ❑ Violations of Board policy including:
 - ❑ Board Member Ethics
 - ❑ Board Member Conflict of Interest
- ❑ Violations of law including:
 - ❑ NMSA 1978, § 22-5-4 (Local school boards; powers; duties)
 - ❑ NMSA 1978, § 10-16-1 et seq. (Governmental Conduct Act)
- ❑ Combination of Violations of Board Policy and Law.
- ❑ To show an effort to distinguish individual Board conduct from conduct of the entire Board, and demonstrate the Board's efforts to police itself, thereby reducing the risk of Board suspension under NMSA 1978, § 22-2-14 (Local school boards; public schools; suspension; procedures).

How Might a Board Censure a Member?

- ❑ What do your policies say about Board censure?
- ❑ Are you prohibited from censuring a Board member in the absence of policy?
- ❑ Can you go into Executive Session to discuss censure of a Board member?
- ❑ What are the Open Meetings Act implications?
- ❑ What do the cases say about lawful parameters of a censure?



About the Governmental Conduct Act

- ❑ The Governmental Conduct Act (GCA):
 - ❑ Establishes ethical principles of public service.
 - ❑ Prohibits certain official acts.
 - ❑ Prohibits disclosure of confidential information.
 - ❑ Imposes penalties for violation.



Ethical Principles under the GCA

- ❑ “The ... public officer ... shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.” NMSA 1978, § 10-16-3 (A).
- ❑ “[P]ublic officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.” NMSA 1978, § 10-16-3 (B).
- ❑ “Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.” NMSA 1978, § 10-16-3 (C).

GCA's Comprehensive Coverage

- ❑ 10-16-1. Short title.
- ❑ 10-16-2. Definitions.
- ❑ 10-16-3. Ethical Principles of Public Service; Certain Official Acts Prohibited; Penalty.
- ❑ 10-16-3.1. Prohibited Political Activities.
- ❑ 10-16-4. Official Act for Personal Financial Interest Prohibited; Disqualification from Official Act; Providing a Penalty.
- ❑ 10-16-4.1. Honoraria Prohibited.
- ❑ 10-16-4.2. Disclosure of Outside Employment.
- ❑ 10-16-4.3. Prohibited Employment.



More of the GCA's Comprehensive Coverage

- ❑ 10-16-6. Confidential Information.
- ❑ 10-16-7. Contracts Involving Public Officers or Employees.
- ❑ 10-16-8. Contracts Involving Former Public Officers or Employees; Representation of Clients after Government Service.
- ❑ 10-16-13. Prohibited Bidding.
- ❑ 10-16-13.2. Certain Business Sales to the Employees of State Agencies and Local Government Agencies Prohibited.
- ❑ 10-16-13.3. Prohibited Contributions; Financial Service Contractors.
- ❑ 10-16-14. Enforcement Procedures.
- ❑ 10-16-17. Criminal Penalties.



Role of the State Ethics Commission

- ❑ "The state ethics commission may investigate suspected violations of the Governmental Conduct Act and forward its findings and evidence to the attorney general, district attorney or appropriate state agency or legislative body for enforcement. If a suspected violation involves the office of the state ethics commission, the attorney general may enforce that act. If a suspected violation involves the office of the attorney general, a district attorney may enforce that act."
- ❑ "Subject to the provisions of this section, the provisions of the Governmental Conduct Act may be enforced by the state ethics commission. Except as regards legislators, state employees or statewide elected officials, a district attorney in the county where a person who allegedly violated the provisions resides or where an alleged violation occurred may also enforce that act. Enforcement actions may include seeking civil injunctive or other appropriate orders."



GCA Resources

- ❑ New Mexico Governmental Conduct Act Compliance Guide, Office of the Attorney General (2nd Edition 2015) located at:
 - ❑ <https://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Governmental%20Conduct%20Act%20Compliance%20Guide%202015.pdf>
- ❑ New Mexico State Ethics Commission website located at:
 - ❑ <https://www.sec.state.nm.us/>

Karla A. Schultz

kschultz@wabsa.com

Elena M. Gallegos

egallegos@wabsa.com



Walsh Gallegos Treviño Kyle & Robinson P.C.

500 Marquette Ave NW, Suite 1310

Albuquerque, NM 87102

Phone: (505) 243-6864

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