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FINAL REMINDER: MUNICIPAL ROUNDTABLE ON FRIDAY JUNE 24TH

Don't forget that the Municipal Roundtable on Diversity, Equity and Inclusion Programs is on Friday, June 24—this week. Tune in from 9:00 a.m. to 11:00 a.m. for this hot-topic discussion.

Although we may be presenting on a host of legal issues, the Municipal Roundtable is designed for discussion and information-sharing. It is not a lecture. We learn most when we talk with each other. See the link below to this free seminar:

https://us06web.zoom.us/j/86320585219?pwd=VUFzNkZGOExmbi9BS2hqTXg1ZlhkQT09

AN OVERLOOKED BUT PERTINENT DECISION OF U.S. SUPREME COURT

On March 24th of this year, the U.S. Supreme Court unanimously decided a case that many of us seem to have overlooked until now. The question presented was: What authority does an elected body have to censure one of its own members, if they deem his/her conduct inappropriate or reprehensible? As you will see below, we have actually dealt with that precise issue at least once before and developed a process and remedy to deal with this type of conduct, and now the highest Court in the land has vindicated our approach in a reported decision.

In *Houston Community College System v. Wilson,* No. 20-804,[1] a unanimous Court, in an opinion by Justice Neil Gorsuch, held that it was *not* a violation of First Amendment rights of an elected official for the other elected officials to issue a censure for his conduct they found not only inappropriate but reprehensible.

Mr. Wilson's time in office was stormy from the very beginning. He brought various lawsuits challenging the nine-member board's actions. He charged, in public media outlets, that the board violated its bylaws and ethical rules. He hired a private investigator to surveil a fellow board member in an attempt to prove she did not reside in her district. The board incurred a total of $270,000 in legal fees defending against this lawsuits. Although the board implemented some other punishments against Mr. Wilson, the Supreme Court did not address those measures, focusing only on the First Amendment question of the censure resolution. The Court held that a purely verbal censure does not present an actionable First Amendment free speech claim in favor of the censured official.

The Court distinguished such a censure from any sort of exclusion from office. It noted that it has been a long-standing practice of both federal legislative bodies and local or state elected bodies that censure is within the power of the elected body. The Court referenced various authorities such as the Congressional Research Service and the Congressional Record, and Justice Story's "Commentaries on the Constitution of the United States." At the local level, the model manual of the National Conference of State Legislatures contemplates such procedures. Indeed, as the briefing before the Court in this case showed, in August 2020 alone, elected local government bodies issued no fewer than 20 censures.

Absent proof of a retaliatory motive, Justice Gorsuch's unanimously approved opinion held that such a censure resolution is *itself* an exercise of the rights of free speech protected by the First Amendment. The Court stressed that its decision was a narrow one, confined to the situation presented by an elected official being censured by fellow elected officials. As the Court said here:

> "In this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers --and to continue exercising their free speech rights when the criticism comes."

This decision of the Court reminds us of a situation we dealt with locally many years ago. One of our clients had a dissident commissioner, who, like Mr. Wilson, often opposed most actions taken by the rest of his board of commissioners. He even opposed some ballot measures or led the Committee Against the measure. Matters reached an ugly point when he actually assaulted a fellow commissioner with a coffee cup during a recess at a board meeting.

Ultimately, that commissioner was censured by his peers and after more back and forth proceedings, he stopped attending meetings and his office was declared vacant. In the aftermath of that experience, WFCA asked Joseph Quinn in 2008 to teach on the subject of discipline of commissioners and we developed a Model Code of Ethics, as a model for fire districts to follow. The Policy was very specific including investigative procedures and culminating in a

[1] https://www.supremecourt.gov/opinions/21pdf/20-804_j426.pdf

letter or resolution of censure as was done in the *Wilson* case, which is the subject of this article.

We have always insisted that the board does not have the power to remove an offending commissioner from office; that is the role of the voters in a potential recall petition. Other legal officials such as a county prosecutor may have certain powers in this regard, but this much is clear: the board itself has no power to remove and may not have the constitutional power to impose monetary sanctions or penalties, but this case clearly affirms the power of legislative bodies to censure one of their own for misconduct such as demonstrated malfeasance, misfeasance or violation of the oath of office.