NOTE

CENSURE AS SPEECH? *HOUSTON COMMUNITY COLLEGE SYSTEM V. WILSON* AND THE GOVERNMENT SPEECH DOCTRINE*

ABSTRACT

A controversial local figure wins election to the school board, making headlines for his public criticism and defiance of the elected majority. The negative press leads to a public censure from the board. Stories like these regularly make headlines in local news all over the country. What happened next is much rarer: the school board member sued for an alleged violation of his First Amendment rights. First, the board succeeded on a motion to dismiss, but an appellate panel reversed. Then, in a petition for rehearing en banc, an amicus brief raised an issue in a young and underdeveloped area of law: is the censure a form of government speech? With only a handful of Supreme Court cases addressing government speech, the suit presents an issue fraught with uncertainty. In April 2021, the Supreme Court granted certiorari to answer whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member's speech in *Houston Community College System v. Wilson*. With two paths down which the Court could find government speech in a legislative censure, this case provides an excellent vehicle to probe the hazy borders of the government speech doctrine and the policy implications of extending it.

 J.D. Candidate, University of Houston Law Center, 2022. The Author is indebted to Professor Leslie C. Griffin of the William S. Boyd School of Law at the University of Nevada, Las Vegas for her helpful feedback on an early draft of this Note. She also expresses her appreciation to Boards 59 and 60 of the *Houston Law Review* for their diligent editorial work. Finally, the Author thanks her wife, Jessica U. Wright, DrPH, and their three children for their love and support.

TABLE OF CONTENTS

I. INTRODUCTION

David Wilson is no stranger to controversy.[1] In 2013, Wilson ran against a longtime incumbent for the District 2 position to the Houston Community College Board of Trustees (the Board).[2] Wilson, who is White, campaigned in the predominately Black district using stock photos of African Americans on his mailers and campaign website; he won "by a razor-thin margin of [twenty-six] votes."[3] Wilson's nascent term of office became further embroiled in controversy when the State of Texas brought a *quo warranto* action against him, alleging that Wilson did not reside within District 2 at the time of the election and was ineligible to take office.[4]

1. *See, e.g.*, Matt Levin, *Dave Wilson Controversies*, HOUS. CHRON. (Oct. 21, 2015), https://www.chron.com/news/slideshow/Dave-Wilson-controversies-119059/photo-6743783.php [https://perma.cc/L4NB-AWPN] (covering controversies involving Wilson through October of 2015).

2. Renée C. Lee, *Incumbent in Tight HCC Race Will Seek a Recount*, HOUS. CHRON., https://www.chron.com/news/politics/houston/article/Incumbent-in-tight-HCC-race-will-seek-a-recount-4961921.php [https://perma.cc/N8KD-FEUY] (Nov. 6, 2013, 11:01 PM). Under Texas law, the Houston Community College System is a type of "local government entity." *See, e.g.*, TEX. LOC. GOV'T CODE ANN. §§ 271.151(3), 172.003(3), 271.003(4), (9); *see also* TEX. EDUC. CODE ANN. § 130.001(a) (vesting general control of all public junior colleges in the State of Texas in a centralized coordinating board).

3. Lisa Falkenberg, Opinion, *Trickery Aside, Can New HCC Trustee Show His True Colors?*, HOUS. CHRON., https://www.houstonchronicle.com/news/columnists/falkenberg/article/Trickery-aside-can-new-HCC-trustee-show-his-true-4979149.php [https://perma.cc/2UHX-R3U4] (Nov. 12, 2013, 10:43 PM).

4. State v. Wilson, 490 S.W.3d 610, 612–13 (Tex. App.—Houston [1st Dist.] 2016, no pet.). The State lost both a jury trial and an appeal in its *quo warranto* suit against Wilson. *Id.* at 615, 623; Benjamin Wermund, *Jury Rules for HCC Trustee Wilson in Residency Case*,

But when Wilson's later actions as a trustee—including publicly disagreeing with the Board's decisions, arranging robocalls to the public, hiring a private investigator, and filing suit against the college and its trustees—led to a formal censure,[5] and when Wilson subsequently sued the Board for alleged violations of his First and Fourteenth Amendment rights,[6] his controversial tenure squarely collided with ongoing debates in the lower courts about the application of the Supreme Court's government speech doctrine.[7] In so doing, Wilson's claims laid bare the circuit courts' difficulty in reading the Court's government speech jurisprudence to determine whether the government is speaking at all.[8] Wilson's case further complicates this clash through its intersection with the uncertain terrain of the free speech rights of elected officials post-*Garcetti v. Ceballos*, which held that *unelected* officials do not speak "as citizens for First Amendment purposes" when their speech is "pursuant to their official duties."[9]

This Note examines *Houston Community College System v. Wilson* within the present contours of the government speech doctrine—including the uncertain footing of the post-*Garcetti* free speech rights of elected officials. Part II examines the factual background of Wilson's censure and the legal background of the Supreme Court's government speech jurisprudence. Part III highlights the ways in which the case provides a perfect setting for jurists to reach different conclusions about whether Wilson is a

---

HOUS. CHRON. (July 17, 2014), https://www.chron.com/news/houston-texas/houston/article/Jury-rules-for-HCC-trustee-Wilson-in-residency-5629213.php [https://perma.cc/6LCD-QGC8].

5. Wilson v. Hous. Cmty. Coll. Sys. (*Wilson II*), 955 F.3d 490, 493–94 (5th Cir.), *reh'g denied*, 966 F.3d 341 (5th Cir. 2020), *cert. granted*, No. 20-804 (2021).

6. Wilson v. Hous. Cmty. Coll. Sys. (*Wilson I*), No. 18-CV-00744, 2019 WL 1317797, at *1 (S.D. Tex. Mar. 22, 2019), *rev'd and remanded*, 955 F.3d 490 (5th Cir. 2020), *cert. granted*, No. 20-804 (2021).

7. Wilson v. Hous. Cmty. Coll. Sys. (*Wilson III*), 966 F.3d 341, 344 (5th Cir. 2020) (Jones, J., dissenting) ("[P]olicymakers—like HCC's Board of Trustees—must be able to 'speak' by issuing official resolutions, censures, or reprimands."); *see* Mark Strasser, *Government Speech and Circumvention of the First Amendment*, 44 HASTINGS CONST. L.Q. 37, 54 (2016) (arguing that the lack of clear criteria for determining when the government speech doctrine applies presents a difficult question for the circuit courts).

8. *Wilson III*, 966 F.3d at 341–42 (Jones, J., dissenting) ("According to the panel opinion, however, the 'government,' i.e. Houston Community College's Board, does not enjoy First Amendment protection to 'speak' by issuing a censure against this gadfly legislator.").

9. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006); *see, e.g.*, Christopher J. Diehl, Note, *Open Meetings and Closed Mouths: Elected Officials' Free Speech Rights After* Garcetti v. Ceballos, 61 CASE W. RSRV. L. REV. 551, 567, 572 (2010) ("The Supreme Court has yet to address the free speech rights of elected officials in the wake of *Garcetti*—and it has never squarely addressed the extent of their free speech protection when they are performing their official duties.").

government speaker or whether the censure is a form of government speech. Part IV discusses the policy implications of extending the Supreme Court's government speech jurisprudence to cover censures by legislative bodies like the Board. Finding an elected official to be a government speaker would represent a significant expansion of the government speech doctrine with consequences that extend far beyond legislative censures. Arguably, the regulation of elected officials' speech to deliver "the government's message" has the potential to significantly erode public trust by reducing the flow of information and diverging viewpoints available to the public. On the other hand, extending the government's First Amendment privilege to speak *only* to cover a legislative censure has less far-reaching consequences but may raise thus far unanswered questions as to when—if ever—government speech violates the Due Process Clause. Finally, Part V briefly surveys the potential implications of the Court's alternate paths—those avoiding the government speech doctrine. With the Supreme Court granting Houston Community College System's (HCC's) petition for writ of certiorari in April 2021,[10] the question of whether a censure of an elected official is government speech has never been more pressing.

II. WILSON'S LAWSUIT AND THE SUPREME COURT'S GOVERNMENT SPEECH JURISPRUDENCE

A. The Fly in the Ointment or the Gadfly of the State[11]

Whether Wilson served as the fly in the ointment or the gadfly of the state during his tenure on the Board is a matter of

10. Petition for a Writ of Certiorari at 1, Hous. Cmty. Coll. Sys v. Wilson, No. 20-804 (2021); *Docket for 20-804*, SUPREME COURT, https://www.supremecourt.gov/docket/docketfiles/html/public/20-804.html [https://perma.cc/92FE-PWUA] (last visited Aug. 29, 2021). Petitioners have advanced three potential grounds on which the Court could find that a legislative censure is not actionable under 42 U.S.C. § 1983: (1) legislative censures do not inflict a cognizable injury; (2) legislative censures are a longstanding practice and therefore presumptively constitutional; and (3) legislative censures are a form of government speech. Brief for Petitioner at 11, 18, 28–33, Hous. Cmty. Coll. Sys v. Wilson, No. 20-804 (2021). This Note considers the third ground: whether a legislative censure is a form of government speech. See Recent Case, *Fifth Circuit Creates Circuit Split by Finding a Legislature's Censure Can Violate the First Amendment:* Wilson v. Houston Community College System, 134 HARV. L. REV. 2638, 2644–45 (2021), for an examination of the second ground.

11. A "fly in the ointment" is someone who "spoil[s] a situation that could have been very positive." *Fly in the Ointment*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/fly-in-the-ointment [https://perma.cc/67RR-QFLB] (last visited Aug. 29, 2021). The "gadfly of the state" is a reference to Socrates. PLATO, *Apology*, *in* FIVE DIALOGUES 21, 35 (G.M.A. Grube trans., Hackett Publ'g Co. 2d ed. 2002) ("I was attached

perspective. In 2015, he filed a criminal complaint against HCC officials for allegedly overpaying for real estate.[12] The Board voted to publicly reprimand Wilson as a result of legal fees incurred by that complaint but stopped short of a public censure.[13] Two years later, Wilson sued his fellow trustees and the Board after the Board's vice-chair allegedly voted improperly by video.[14] Following another trustee's guilty plea to bribery charges, Wilson hired a consulting firm to investigate HCC's "procurement, facilities, employment and related financial matters" and to determine whether one of Wilson's fellow Board members lived in her district.[15] Wilson was outspoken in his criticism of some of the Board's decisions on his personal website, in an interview with a Houston radio station, and in robocalls he arranged to send to the public.[16]

In January 2018, under pressure from HCC's accrediting body to show that the Board could "act collectively without control by a minority of trustees," the Board voted to censure Wilson.[17] The resolution cited Wilson's robocalls, radio interview, publication of

---

to this city by the god . . . as upon a great and noble horse which was somewhat sluggish because of its size and needed to be stirred up by a kind of gadfly.").

12. Benjamin Wermund, *Trustee Files Criminal Complaint over HCC Land Deal*, HOUS. CHRON., https://www.chron.com/local/education/campus-chronicles/article/Wilson-files-criminal-complaint-over-HCC-land-deal-6452997.php [https://perma.cc/PTZ5-JHBZ] (Aug. 20, 2015, 10:53 AM); *Dave Wilson Criminal Complaint*, ABC13 EYEWITNESS NEWS, https://dig.abclocal.go.com/ktrk/PICS/AUGUST15/081915-ktrk-wilson-complaint.pdf [https://perma.cc/74GY-XNPC] (last visited Aug. 29, 2021).

13. Samantha Ketterer, *HCC Board of Trustees Approve Public Reprimand of Member*, HOUS. CHRON., https://www.houstonchronicle.com/news/houston-texas/houston/article/HCC-board-of-trustees-approve-public-reprimand-of-8272934.php [https://perma.cc/TR8S-HLHC] (June 16, 2016, 9:43 PM). When HCC's Board finds a violation of its internal ethics code, "it can reprimand or censure the Board member, the only sanctions available under Texas law"; reprimands or censures can include additional consequences like restrictions on the Board member's right to reimbursement for expenses. Bylaws of the Board of Trustees of the Houston Community College, art. A, § 11(d) (2020), https://www.hccs.edu/about-hcc/board-of-trustees/board-information/board-bylaws/ [https://perma.cc/LDN3-Y483]. The Board's bylaws do not define the terms "reprimand" or "censure," and it is unclear from HCC's exercise of either power what differentiates a reprimand from a censure.

14. Lindsay Ellis, *Dave Wilson Sues HCC, Fellow Trustees Alleging Improper Vote*, HOUS. CHRON., https://www.chron.com/local/education/campus-chronicles/article/Dave-Wilson-sues-HCC-fellow-trustees-after-12270096.php [https://perma.cc/Z2EP-PLLQ] (Oct. 12, 2017, 9:18 AM).

15. Lindsay Ellis, *Legal Fees Focus of Inquiry into Houston Community College*, HOUS. CHRON., https://www.chron.com/news/houston-texas/article/Legal-fees-focus-of-inquiry-into-Houston-12393652.php [https://perma.cc/V6FQ-U9XD] (Nov. 30, 2017, 11:14 AM).

16. Wilson v. Hous. Cmty. Coll. Sys. (*Wilson II*), 955 F.3d 490, 493 (5th Cir.), *reh'g denied*, 966 F.3d 341 (5th Cir. 2020), *cert. granted*, No. 20-804 (2021).

17. Lindsay Ellis, *HCC Trustee Dave Wilson Censured*, HOUS. CHRON. (Jan. 18, 2018), https://www.chron.com/local/education/campus-chronicles/article/HCC-Wilson-Censure-12509066.php [https://perma.cc/MKH2-WJTR].

allegations against the Board on his website, hiring of private investigators, filing of two lawsuits against HCC and the Board, and usage of HCC's name on his personal website as the basis for its censure.[18] According to the resolution, through these actions, Wilson violated HCC's bylaws by failing to "(1) respect the board's collective decision-making process; (2) engage in open and honest discussions in making board decisions; (3) respect trustees' differing opinions; (4) interact with trustees in a mutually respectful manner; and (5) act in Houston Community College System's best interest."[19]

Following the censure, Wilson amended his ongoing state court suit against HCC to add a complaint under 42 U.S.C. § 1983 for violations of his First Amendment free speech and Fourteenth Amendment rights.[20] Wilson sought an injunction to prevent the Board from enforcing the censure, as well as damages for mental anguish, punitive damages, and attorney's fees.[21] After removal to federal court in the Southern District of Texas, HCC filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6).[22] The district court found a parallel in a Tenth Circuit case, *Phelan v. Laramie County Community College Board of Trustees*, which determined that a community college board's censure of one of its members did not injure the censured member's free speech rights.[23] Finding that Wilson similarly had not stated an injury-in-fact as a result of the censure, the district court dismissed Wilson's suit for lack of subject matter jurisdiction.[24]

On appeal, a panel of the Fifth Circuit Court of Appeals found that the district court erred in its reliance on *Phelan* to dismiss for lack of subject matter jurisdiction because the *Phelan* court determined that the plaintiff had standing.[25] Deciding that Wilson's claim of retaliatory censure resulting in mental anguish sufficiently stated an injury-in-fact, the panel then turned to the issue of whether Wilson's claims gave rise to a violation of the First

18. Petition for Writ of Certiorari Appendix §§ 42a–44a, Hous. Cmty. Coll. Sys v. Wilson, No. 20-804 (2021).

19. Wilson v. Hous. Cmty. Coll. Sys. (*Wilson I*), No. 18-CV-00744, 2019 WL 1317797, at *1 (S.D. Tex. Mar. 22, 2019), *rev'd and remanded*, 955 F.3d 490 (5th Cir. 2020), *cert. granted*, No. 20-804 (2021).

20. *Id.*

21. *Wilson II*, 955 F.3d at 494.

22. *Wilson I*, 2019 WL 1317797, at *1–2.

23. *Id.* at *3.; Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs., 235 F.3d 1243, 1245, 1248 (10th. Cir. 2000).

24. *Wilson I*, 2019 WL 1317797, at *3–4.

25. *Wilson II*, 955 F.3d at 495.

Amendment.[26] The panel determined that the district court had effectively concluded against Wilson on this issue in its reliance on *Phelan* and reasoned that Fifth Circuit precedent bound the district court to recognize First Amendment protection of an elected official's speech on matters of public concern.[27] Relying on a trio of Fifth Circuit cases involving censures of elected judges,[28] the panel held that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983."[29]

Until this point, neither Wilson, HCC, nor the courts' opinions had discussed government speech.[30] Following HCC's petition for rehearing en banc, the Texas Association of School Boards Legal Assistance Fund (TASB) filed an amicus curiae brief in support of HCC.[31] In its brief, TASB raised the argument that HCC had a right to "speak for itself"—government speech.[32]

The Fifth Circuit narrowly denied the petition for rehearing en banc, with eight judges voting to rehear the case and eight

26. *Id.* at 495–96. The panel dismissed Wilson's claims for declaratory and injunctive relief, rendering them moot because Wilson no longer served on the Board at the time of the appeal. *Id.* at 496. Wilson resigned from his position as the District 2 trustee in August 2019 after filing an application to run for the position of District 1 trustee, revealing that he had moved out of District 2. Roy Kent, *HCC Moves Quickly to Fill Board Spot After Trustee Moves*, HOUS. CHRON. (Aug. 27, 2019), https://www.chron.com/neighborhood/bellaire/news/article/HCC-moves-quickly-to-fill-board-spot-after-14383223.php [https://perma.cc/8VP2-BZ39]. Wilson later lost the District 1 race after a run-off election. Jacob Carpenter, *Flores Richart, Skillern-Jones Earn Seats on HCC Board*, HOUS. CHRON., https://www.chron.com/news/houston-texas/houston/article/Flores-Richart-Wilson-in-close-race-for-HCC-14907282.php [https://perma.cc/SG7C-CGHD] (Dec. 15, 2019, 1:10 AM).

27. *Wilson II*, 955 F.3d at 496–97.

28. *See* Scott v. Flowers, 910 F.2d 201, 212–13 (5th Cir. 1990) (finding in expunging the censure of an elected judge that the judge's First Amendment rights outweighed the state's interest in judicial system efficiency and impartiality); Colson v. Grohman, 174 F.3d 498, 511–12 (5th Cir. 1999) (finding formal reprimands actionable under § 1983); Jenevein v. Willing, 493 F.3d 551, 556, 558 (5th Cir. 2007) (applying strict scrutiny to a censure of an elected state judge as a regulation of the official's speech).

29. *Wilson II*, 955 F.3d at 497–98.

30. At oral argument before the Fifth Circuit panel, one judge asked HCC's counsel, "Have you got any cases on the record now that is government speech, that is a defense?" Oral Argument at 35:30, *Wilson II* (No. 19-20237), http://www.ca5.uscourts.gov/OralArgRecordings/19/19-20237_2-6-2020.mp3 [https://perma.cc/T2BC-M8DT]. But HCC's counsel appeared to understand this question as related to its arguments regarding legislative immunity. *Id.* at 35:36 ("Um, yes, your honor, plenty. I think all the cases that we've cited suggest that that is considered legislative speech [unclear]."). The issue did not come up again during oral argument.

31. Brief of Amicus Curiae the Texas Ass'n of School Boards Legal Assistance Fund in Support of Appellee's Petition for Rehearing En Banc, Wilson v. Hous. Cmty. Coll. Sys., 955 F.3d 490 (5th Cir. 2020) (No. 19-20237).

32. *Id.* at 6 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009)).

judges voting against.[33] The denial sparked two dissents, one by Judge Jones, joined by Judge Willett, Judge Ho, Judge Duncan, and Judge Oldham,[34] and a second by Judge Ho.[35] Judge Jones's dissent framed the issue as one finding that the government "does not enjoy First Amendment protection to 'speak' by issuing a censure against this gadfly legislator."[36] Judge Jones also pointed to (1) disagreement among the circuit courts as to whether such a claim is actionable under the First Amendment; (2) factual distinctions between elected judges and an elected official in a legislative body; and (3) questions about how to apply strict scrutiny to a legislative body's censure of one of its members.[37] But she also clearly viewed the case as implicating government speech:

> Because the sanction of fellow Board members generally lies with the voters, policymakers—like HCC's Board of Trustees—must be able to "speak" by issuing official resolutions, censures, or reprimands. Otherwise, as in this case, the First Amendment becomes a weapon to stifle fully protected government speech at the hands of a fully protected speaker.[38]

In April 2021, the Supreme Court granted certiorari to hear Wilson's suit, and government speech is one of three grounds on which HCC argued that the Court could find that a legislative censure is not actionable under § 1983.[39]

B. The Young and Underdeveloped Doctrine of Government Speech

The familiar text of the First Amendment's Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech."[40] The crux of the government speech doctrine is that "[t]he Free Speech Clause restricts government regulation of *private* speech; it does not regulate *government*

33. Wilson v. Hous. Cmty. Coll. Sys. (*Wilson III*), 966 F.3d 341, 341 (5th Cir. 2020). Senior Judge Davis, who wrote the panel's opinion in *Wilson II*, 955 F.3d at 493, did not participate in the petition for rehearing en banc. *Wilson III*, 966 F.3d at 341. *See generally* 5TH CIR. R. 35.6 (composition of en banc court).

34. *Wilson III*, 966 F.3d at 341 (Jones, J., dissenting).

35. *Id.* at 345 (Ho, J., dissenting).

36. *Id.* at 341–42 (Jones, J., dissenting).

37. *Id.* at 342–45.

38. *Id.* at 344.

39. Brief for Petitioner, *supra* note 10, at 11, 18, 29.

40. U.S. CONST. amend. I.

speech."[41] This doctrine is relatively young and "underdeveloped";[42] scholars frequently trace its origins to the Supreme Court's 1991 decision in *Rust v. Sullivan*,[43] in which the Court found that a law prohibiting doctors from providing abortion counseling or abortion referrals to patients under the government's Title X program did not violate the First Amendment rights of doctors who participated in the program.[44] But the term "government speech" is not found anywhere in the *Rust* decision; only later did the Court construe it as a government speech case.[45]

The government speech doctrine has been described alternately as "a First Amendment monster that has the potential to allow the government to dominate the marketplace of ideas,"[46] "a powerful weapon in a state's arsenal for expression,"[47] "the ugly stepchild of First Amendment doctrine,"[48] and "either completely irrelevant or a constitutional makeweight."[49] From the Court's "hodgepodge of cases lacking coherence,"[50] it remains unclear whether the government speech doctrine grants the government First Amendment rights as a speaker, or whether it merely privileges the government's speech when it may otherwise

41. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (emphasis added). Without the freedom to "speak for itself," the Court reasoned, "it is not easy to imagine how [the] government could function." *Id.* at 467–68.

42. Strasser, *supra* note 7, at 38.

43. *E.g.*, Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 374 (2009); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 612 (2008). *But see* David S. Day, *Government Speech: An Introduction to a Constitutional Dialogue*, 57 S.D. L. REV. 389, 390 (2012) (arguing that the doctrine instead traces back to the Court's more recent decision in Legal Servs. Corp. v. Velasquez, 531 U.S. 533 (2001)).

44. Rust v. Sullivan, 500 U.S. 173, 179, 192 (1991).

45. Strasser, *supra* note 7, at 38–40.

46. Steven H. Goldberg, *Government May Not Speak Out-of-Turn*, 57 S.D. L. REV. 401, 420 (2012).

47. Clay Calvert, *The Government Speech Doctrine in* Walker*'s Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression*, 25 WM. & MARY BILL RTS. J. 1239, 1243 (2017).

48. Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2432 (2004).

49. Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1314 (2010). Note that this is Gey's "best" characterization of the government speech doctrine; at worst, he argues it is "a nefarious and surreptitious way of providing the government with a method of engaging in illicit speech or suppressing private speech with which the government disagrees." *Id.*

50. Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1199 (2016).

trammel on the First Amendment rights of another speaker.[51] And the Court's government speech cases have thus far largely dealt with what Professor Helen Norton has termed "first-stage" problems: determining whether and when the government is speaking.[52] Practitioners and circuit courts seeking to apply the government speech doctrine have few cases to guide their efforts; a brief tour of these "guideposts," six cases in which the Supreme Court has invoked or rejected government speech, is helpful to illuminate the doctrine's hazy contours.

1. Rosenberger v. Rector of the University of Virginia.[53] In *Rosenberger*, a case concerning a university's refusal to pay printing fees for a registered student organization because the university viewed the organization's newsletter as a "religious activity," the Court recognized "the principle that when the State is the speaker, it may make content-based choices."[54] The Court found that the State, through the University, spoke when it either regulated the content of an expression or when it appropriated public funds to convey a message through other, private entities.[55] Finding no such State expression in the private expression of the student organization at issue, the Court held that the State could not regulate speech by student organizations based on viewpoint.[56]

2. Johanns v. Livestock Marketing Association.[57] The Court again invoked the government speech doctrine in its 2005 decision

---

51. *Compare* Helen Norton, *Government Speech in Transition*, 57 S.D. L. REV. 421, 423–24 (2012) ("[T]he Court's imprecision has led many inaccurately to understand the Court to have created a 'right' for the government to speak . . . ."), *and* Goldberg, *supra* note 46, at 408 ("The Constitution, though it does not give government the power to speak, is all about giving the government power to act . . . . It is not remarkable, then, that government can speak about what it enacts and the actions it takes."), *with* Gey, *supra* note 49, at 1269 (describing the government speech doctrine as "giv[ing] the government a constitutional right to speak"). Professor Helen Norton has asserted that the government "is better understood as possessing not a right but a privilege to its own speech." HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 27 n.1 (2019). Professor Norton clearly views legislative censures as falling within that privilege as a form of "counterspeech." *Id.* at 13–15.

52. NORTON, *supra* note 51, at 5, 30. In contrast, Professor Norton describes "second-stage" problems as those considering when the government "as a *speaker*" violates the Constitution. *Id.* at 6–7 (emphasis added).

53. Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995).

54. *Id.* at 827, 833.

55. *Id.* at 833; *see also id.* at 823 (explaining that the university is an instrumentality of the State).

56. *Id.* at 834–35. Four justices in dissent would have held that, notwithstanding the majority's view of the Free Speech concerns, the payments would have violated the Establishment Clause. *Id.* at 863–64 (Souter, J., dissenting).

57. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

in *Johanns*.[58] Here, the Court found that advertisements created by a board appointed by the Secretary of Agriculture—and subject to the Secretary's final approval—did not offend the First Amendment.[59] In its reasoning, the Court held that "[w]hen, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine" by utilizing sources outside of the government to develop its messages.[60] The Court further characterized its previous holdings as supporting a general assumption "that compelled funding of government speech does not alone raise First Amendment concerns."[61]

3. Pleasant Grove City v. Summum.[62] The Court went further in *Summum*, where it considered the display of donated monuments on public property and a city's rejection of one such donation.[63] Citing (1) the long history of governments "us[ing] monuments to speak to the public"; (2) the strong association in the minds of the public between landowners and the messages displayed through monuments on their land; (3) the "selective receptivity" of governments to donated monuments; and (4) the close identification in the public mind between public parks and the governmental department that owns them, the Court found that accepted monuments "are meant to convey and have the effect of conveying a government message, and they thus constitute government speech."[64]

Justice Breyer, concurring in the judgment, advocated that the Court apply the government speech doctrine and the varying levels of public forum analysis "with an eye toward their purpose—lest we turn 'free speech' doctrine into a jurisprudence of labels."[65] Justice Breyer recommended weighing the governmental objective against its burden on speech—a disproportionate burden on speech might not pass muster, even in furthering a "legitimate government objective."[66]

58. *Id.* at 562.
59. *Id.* at 553, 561–62.
60. *Id.* at 562.
61. *Id.* at 559.
62. Pleasant Grove City v. Summum, 555 U.S. 460 (2009).
63. *Id.* at 465–66, 470–71.
64. *Id.* at 470–72.
65. *Id.* at 484 (Breyer, J., concurring).
66. *Id.*

4. Walker v. Texas Division, Sons of Confederate Veterans, Inc.[67] The Court again looked to the government speech doctrine in *Walker* in the context of state specialty license plate designs.[68] The State of Texas had rejected a specialty license plate design submitted by the Texas Division of the Sons of Confederate Veterans because public comments found the design offensive.[69] With Justice Breyer now writing the majority opinion, and relying on the Court's reasoning in *Summum*, the Court noted that (1) states have long used license plates to communicate messages to the public; (2) the designs are often closely identified with the State in the mind of the public; and (3) the State maintains direct control over the messages through final approval authority over specialty plate designs.[70] Taking these factors together, the Court found the license plates "similar enough to the monuments in *Summum* to call for the same result."[71]

But Justice Alito disagreed with the majority's rationale in *Walker*, characterizing it as taking "a large and painful bite out of the First Amendment."[72] Describing the majority's view as "badly misunderstand[ing]" *Summum*, the dissenters focused on (1) the relatively short history of the Texas specialty plate program; (2) the lack of selective receptivity on the State's part in approving plate designs; and (3) the lack of spatial concerns presented by the approval of additional license plate designs.[73] The four dissenting justices would have resolved the case under the public forum doctrine, which forbids viewpoint discrimination by the government.[74]

5. Matal v. Tam.[75] The Court rejected application of the government speech doctrine in the context of trademark applications in *Tam*.[76] Justice Alito, author of the Court's opinion in *Summum*[77] and of the dissent in *Walker*,[78] wrote the Court's

67. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015).
68. *Id.* at 208.
69. *Id.* at 206.
70. *Id.* at 202, 210–13.
71. *Id.* at 213.
72. *Id.* at 221–22 (Alito, J., dissenting). Chief Justice Roberts, Justice Scalia, and Justice Kennedy joined Justice Alito in dissent. *Id.* at 221.
73. *Id.* at 227, 229–33.
74. *Id.* at 221, 234.
75. Matal v. Tam, 137 S. Ct. 1744 (2017).
76. *Id.* at 1760.
77. Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009).
78. *Walker*, 576 U.S. at 221.

opinion.[79] The Court warned that "the government-speech doctrine is important—indeed, essential . . . [but] is susceptible to dangerous misuse," specifically that it could be wielded to "silence or muffle the expression of disfavored viewpoints."[80] In *Tam*, the potential for misuse lay in the government's ability to translate systems of government registration into government speech, potentially chilling free expression in areas like copyright registration.[81] Warning that the Court "must exercise great caution before extending our government-speech precedents," and determining that none of the Court's precedents on government speech supported extending the doctrine to trademarks, the Court held that trademarks were private speech, not government speech.[82]

6. Garcetti v. Ceballos.[83] Finally, while no Supreme Court case has yet addressed the free speech rights of *elected* public officials, the free speech rights of *unelected* public officials collided with the government speech doctrine in *Garcetti*.[84] Ceballos worked as a calendar deputy district attorney in a branch of the county district attorney's office and wrote two memos to his supervisors recommending dismissal of a case.[85] After a tense meeting between Ceballos and his supervisors, the district attorney decided to continue prosecution of the case, and Ceballos was later reassigned, transferred, and denied a promotion.[86] Believing these subsequent developments to be retaliatory, Ceballos sued the county for a § 1983 violation of his First and Fourteenth Amendment rights.[87]

After walking through the Court's jurisprudence in the area of public employees' First Amendment rights, the Court recognized the right of a public employee "to speak as a citizen addressing matters of public concern."[88] But the Court explained that invoking the right involves "determining whether the [actor]

79. *Tam*, 137 S. Ct. at 1751.

80. *Id.* at 1758.

81. *Id.* at 1760.

82. *Id.* at 1758–60. Justice Alito further noted in dicta that the court's decision in *Walker* "likely marks the outer bounds of the government-speech doctrine." *Id.* at 1760.

83. Garcetti v. Ceballos, 547 U.S. 410 (2006).

84. *See id.* at 421–22; *see also* Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring) (characterizing *Garcetti* as one of the Court's decisions relying on the government speech doctrine).

85. *Garcetti*, 547 U.S. at 413–14.

86. *Id.* at 414–15.

87. *Id.* at 415.

88. *Id.* at 417.

spoke as a citizen on a matter of public concern" and, if so, whether the government "had an adequate justification for treating the employee differently from any other member of the general public."[89] Ultimately, the Court found *Garcetti* concerned the first half of that test, holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."[90] Characterizing speech pursuant to official duties as similar to government appropriation of funds to convey a message—described in *Rosenberger*—the Court determined that the government could exercise complete control over speech it originated without implicating the First Amendment.[91]

Writing for three Justices in dissent, Justice Souter proposed a rule in which the First Amendment may protect public employees' speech on matters of "official wrongdoing and threats to health and safety," suggesting a balancing test in which the importance of the issue is weighed against any interference the speech may cause in the government's ability to conduct regular business.[92] Noting that not every government job requires speaking from the party line, Justice Souter further predicted that the majority's reliance on *Rosenberger*'s understanding of government speech would yield "a bloated notion of controllable government speech going well beyond the circumstances of this case."[93] Justice Souter also emphasized that the county did not raise the issue of government speech in its answer to Ceballos's complaint; the county—and the Federal Government as amicus—raised the government speech doctrine on appeal.[94]

III. LEGISLATIVE CENSURES AS GOVERNMENT SPEECH?

Houston Community College System v. Wilson provides an excellent vehicle for examining how the Supreme Court's limited

89. *Id.* at 418.

90. *Id.* at 421.

91. *Id.* at 422.

92. *Id.* at 427–28 (Souter, J., dissenting). Justice Souter characterized his proposed test as an adapted form of the *Pickering* balancing test. *Id.* at 434–35. Justice Stevens and Justice Ginsburg joined Justice Souter. *Id.* at 427. Justice Stevens also penned a separate dissent, *id.* at 426 (Stevens, J., dissenting), and Justice Breyer dissented separately, *id.* at 444 (Breyer, J., dissenting).

93. *Id.* at 437–38 (Souter, J., dissenting).

94. *See id.* at 436, 438. This lapse offers an interesting parallel to Wilson's case, in which the government speech doctrine came up for the first time at oral argument on appeal and received no significant treatment until the petition for rehearing en banc. *See supra* notes 30–32 and accompanying text.

government speech jurisprudence poses a difficult question as to whether the censure of an elected official states a claim for relief under § 1983. Under the government speech doctrine, the generally dispositive question is who is speaking, or alternately, whether the government is speaking at all. For a legislative censure of an elected official, there are two routes through which the Court could find that the government is speaking.

A. Route A: Whether Garcetti *Applies to Elected Officials*

For a legislative censure, the issue may turn on a single question: does the government have the same right to control the speech of an elected public official speaking pursuant to her official duties as it does to control the speech of an *unelected* public official under similar circumstances?[95] If so, a censure would not implicate the First Amendment because the government (the voting body) would be regulating its own speech (the speech of the censured member), rather than the speech of a private individual. That analysis likely turns on whether an elected public official is an "employee" of the state in the same manner as an unelected public official.[96] The Supreme Court has stated that the "manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their [own] views on issues of policy."[97] As a result, excluding elected officials from the protection of the First Amendment under the government speech doctrine when they speak pursuant to their official duties has the potential to run headlong into decades of precedent supporting the right of elected officials to comment on

95. *See Garcetti*, 547 U.S. at 421–22 (majority opinion) ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."). Judge Jones contends that, post-*Garcetti*, even elected judges may not be protected from discipline by "governmental employers," calling application of pre-*Garcetti* First Amendment caselaw to such cases "tenuous." Wilson v. Hous. Cmty. Coll. Sys. (*Wilson III*), 966 F.3d 341, 343 n.5 (5th Cir. 2020) (Jones, J., dissenting).

96. District and circuit courts disagree on the answer to this question. *Compare* Parks v. City of Horseshoe Bend, 480 F.3d 837, 840 n.4 (8th Cir. 2007) (commenting that an elected official's speech "would not be protected under the First Amendment if it was made in the course of her official duties"), *and* Shields v. Charter Twp. of Comstock, 617 F. Supp. 2d 606, 616 (W.D. Mich. 2009) (finding the rights of an elected official during a public meeting "more analogous to the employee in *Garcetti* than to a private citizen sitting in the audience"), *with* Jenevein v. Willing, 493 F.3d 551, 557–58 (5th Cir. 2007) (finding that even though an elected official was an employee of the state, "his relationship with his employer differs from that of an ordinary state employee" and therefore declining to apply *Garcetti*). *See generally* Werkheiser v. Pocono Twp., 780 F.3d 172, 180–81 (3d Cir. 2015) (collecting cases).

97. Bond v. Floyd, 385 U.S. 116, 135–36 (1966).

policy matters. Further complicating the issue, the line between when an elected official is speaking pursuant to his official duties regarding a matter of public concern is difficult to define. Observant citizens will recognize that the "official duties" of an elected official resist easy classification. Do those duties only encompass his actions in official meetings of the elected body? What about his actions in campaigning for reelection? Or his activities in the community: attendance at events, appearances before community groups, and so on? What about his conversations with the media or his posts on a personal website or social media?[98] The extension of the government speech doctrine to cover the speech of elected officials speaking pursuant to their official duties—when the scope of those "official duties" is far from clear—seems destined to fulfill Justice Souter's prophetic warning of "a bloated notion of controllable government speech going well beyond the circumstances of" *Garcetti*.[99]

In Wilson's case, assuming *arguendo* that the government has a right to regulate his speech as an elected official when he speaks pursuant to his official duties, determining whether his actions fell within those duties is no easy task. HCC claimed that Wilson had a duty under the Board's bylaws to "(1) respect the board's collective decision-making process; (2) engage in open and honest discussions in making board decisions; (3) respect trustees' differing opinions; (4) interact with trustees in a mutually respectful manner; and (5) act in Houston Community College System's best interest."[100] But these expectations of an elected official differ significantly from the performance of tasks expected of an unelected public official, and the actions that seem to have inspired the censure occurred largely outside of the Board's official meetings.[101] Unlike Ceballos, who "wrote his disposition memo because that is part of what he, as a calendar deputy, was

98. And then there is the question of "official" social media accounts versus "unofficial" accounts. Is the elected official speaking pursuant to his official duties on either of those accounts? Is the answer context-dependent? *See* Melemaikalani Moniz, *To Tweet or Not to Tweet: Government Employees and Social Media*, FREEDOM F. INST. (Apr. 24, 2017), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-and-government-employees-overview/to-tweet-or-not-to-tweet-government-employees-and-social-media/ [https://perma.cc/M646-HEEY] (discussing unelected government employees).

99. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

100. Wilson v. Hous. Cmty. Coll. Sys. (*Wilson I*), No. 18-CV-00744, 2019 WL 1317797, at *1 (S.D. Tex. Mar. 22, 2019), *rev'd and remanded*, 955 F.3d 490 (5th Cir. 2020), *cert. granted*, No. 20-804 (2021).

101. *See supra* text accompanying notes 14–19.

employed to do,"[102] Wilson did not personally hire a consulting firm to investigate HCC because he was employed or elected to do so. Nor was he employed or elected to publicly criticize the Board's decisions on his personal website, in a radio station interview, and in robocalls to the public. If he had not won election to the Board, Wilson could have taken these same actions as a private citizen; thus, his actions were neither a requirement nor a privilege of his elected position. HCC's list not only draws no clear line between Wilson's actions as trustee and those he undertook as a private citizen but also fails to even *distinguish* those actions.

B. Route B: Whether the Government Speaks in the Form of a Censure

Finding that *Garcetti* does not apply to elected officials—or finding that it does and then answering the puzzling question of *when* an elected official speaks pursuant to his official duties—is one route to resolve the government speech issues present in *Wilson*, but it is certainly not the only route the Court could take. Instead of determining whether the government is speaking through the elected official—and therefore regulating its own speech through the censure—the Court could seek to determine whether the government is speaking directly through the censure itself. In the government speech cases discussed in Part II, the Supreme Court advanced and answered a number of questions, in varying combinations, to determine whether the government is speaking in any given instance, including: (1) does the government intend to convey a message; (2) does the speech have the effect of conveying a government message;[103] (3) does the government exercise control over or have authority in the crafting of the

102. *Garcetti*, 547 U.S. at 421.

103. Matal v. Tam, 137 S. Ct. 1744, 1759–60 (2017) (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009)); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 214 (2015) (quoting *Summum*, 555 U.S. at 472); *Summum*, 555 U.S. at 472 ("The monuments that are accepted . . . are meant to convey and have the effect of conveying a government message."). These first two questions are quoted together and arguably form a type of "purpose-and-effect" test, although the Court has never explicitly adopted such a test in this sphere. But Justice Alito's "simple example" in *Tam* of a government program to produce and distribute posters to support the war effort demonstrates the application of such a test. *Tam*, 137 S. Ct. at 1758; *see* Will Soper, Comment, *A Purpose-and-Effect Test to Limit the Expansion of the Government Speech Doctrine*, 90 U. COLO. L. REV. 1237, 1267 (2019) (arguing that the Court has implicitly invoked a purpose-and-effect test).

message;[104] (4) has the government traditionally used that form of speech to speak to the public;[105] (5) does the public view the speech as "closely identified" with the government;[106] (6) do spatial limitation concerns impact the government's decision to accept certain viewpoints as its own;[107] and (7) is the government's message coherent?[108] With only a small number of government speech cases having reached the Supreme Court, district and circuit courts have been left to fill in the gaps in applying the Court's precedent to unconsidered areas—like a legislative censure—where the relevance and impact of these questions may not be clear-cut. In Wilson's case, these questions point to different answers.

1. Does the Government Intend to Convey a Message? As to the first question, the answer is unclear. HCC failed to argue that it was speaking in the form of a legislative censure to the district court and the Fifth Circuit panel.[109] Instead, HCC had earlier characterized itself as "*acting* on a matter of public policy" rather than speaking.[110] If HCC intended to speak as a governmental

104. *Tam*, 137 S. Ct. at 1758; *Walker*, 576 U.S. at 213; Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2005); *Garcetti*, 547 U.S. at 421–22; Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 833 (1995).

105. *Tam*, 137 S. Ct. at 1759; *Walker*, 576 U.S. at 210–11; *Summum*, 555 U.S. at 470.

106. *Walker*, 576 U.S. at 212; *Summum*, 555 U.S. at 471; *see also Garcetti*, 547 U.S. at 419, 422 ("Official communications have official consequences, creating a need for substantive consistency and clarity.").

107. *See Summum*, 555 U.S. at 471–72, 478–79 (referring to the exercise of "selective receptivity" in the acceptance of donated monuments). *But see Walker*, 576 U.S. at 214 (finding this question inapplicable when the speech does not occur in a traditional public forum for private speech).

108. *See Tam*, 137 S. Ct. at 1758; *Johanns*, 544 U.S. at 569–70 (Ginsburg, J., concurring). *But see Summum*, 555 U.S. at 477 ("The 'message' conveyed by a monument may change over time."). The Court has not squarely held that coherence is necessary to a finding of government speech, but its opinion in *Tam* seems to indicate that a lack of external coherence—or coherence with other government messages—cuts against finding government speech. *Tam*, 137 S. Ct. at 1758.

109. At least one of the HCC trustees stated that he voted for the resolution of censure to send a message. Ellis, *supra* note 17 ("The only reason I'm supporting this is to send the message to SACS that we are doing everything in our power, that we are not controlled by any minority.").

110. Brief of Appellee at 29, Wilson v. Hous. Cmty. Coll. Sys., 955 F.3d 490 (5th Cir. 2020) (No. 19-20237) (emphasis added). The resolution of censure similarly stated that Wilson's conduct "warrants disciplinary action" and characterized the censure as a "sanction." Petition for Writ of Certiorari Appendix, *supra* note 18, § 44a. Wilson likewise characterized the censure as "punishment" rather than speech. Brief in Opposition at 16, Hous. Cmty. Coll. Sys. v. Wilson, No. 20-804 (2021). ("[A] censure is manifestly different from the sort of 'government speech' addressed by the Court in *Walker* . . . . The issue here is not officials' use of speech to promote the policies that they were elected to pursue. It is,

body—or surmised after the fact that it had spoken as such—it is strange that it failed to advance this argument to the lower courts. On the other hand, the county in *Garcetti* did not raise the issue of government speech until appeal, suggesting that the issue of government speech may be raised at any point in the litigation process.[111] This leaves several important questions unanswered: Can governments speak without intending to do so? Given the Court's unclear jurisprudence, how and when do governments *know* that they have spoken? Should courts find government speech if the governmental body does not claim to have spoken?

2. Does the Speech Have the Effect of Conveying a Government Message? Regarding the second question, it is likely that HCC's censure does have the effect of conveying a government message regarding Wilson: that HCC believes Wilson has violated its code of conduct. Certainly, the message of the censure is much more explicit than the monuments at issue in *Summum*, which "evoke different thoughts and sentiments in the minds of different observers."[112] But it is unclear if this question is dependent on the answer to the first question—whether the government intended to create a message.[113] Even if these two questions together form a "purpose-and-effect" test, the Court's jurisprudence is unclear as to whether affirmative answers to both questions are a prerequisite to finding government speech or merely additional factors that can point toward government speech in certain cases.

3. Does the Government Exercise Control over or Have Authority in the Crafting of the Message? As to the third question, assuming *arguendo* that there is a governmental message, then the answer is a clear "yes." The HCC Board of Trustees explicitly adopted the language of the censure resolution in a recorded vote. This direct vote and approval are at least as strong as the actions of the city's rejection of a monument request in *Summum* or the

instead, about bare government punishment of political dissention." (citation omitted)). HCC now characterizes censures as a form of government "counter-speech." Reply Brief for Petitioner at 9–10, Hous. Cmty. Coll. Sys. v. Wilson, No. 20-804 (2021). *See generally* NORTON, *supra* note 51, at 13–15.

111. In 2020, the Supreme Court clarified that "defense preclusion"—or failure to raise a defense in an earlier proceeding as a bar to invoking it in future proceedings—is not a separate, stand-alone category of res judicata but instead must satisfy the requirements of either issue preclusion (collateral estoppel) or claim preclusion (res judicata). Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc., 140 S. Ct. 1589, 1594–95 (2020).

112. *Summum*, 555 U.S. at 475.

113. This question is arguably the second half of a "purpose-and-effect" test created by the first two questions. *See* sources cited *supra* note 103 (discussing how these two questions arguably form a purpose-and-effect test).

State's rejection of a specialty license plate design proposal in *Walker*. However, this third question again points back to the importance of the first question—whether the government intended to create a message: the government could not have exercised any control over the crafting of a message it did not intend to create. But again, because the Court has never explicitly adopted a purpose-and-effect test in the realm of government speech, some jurists may see a government message even where the governmental body itself does not, and the control question may come into play regardless of whether the governmental body claims that it intended to create a message.

4. Has the Government Traditionally Used That Form of Speech to Speak to the Public? The fourth question illustrates, again, the interlocking importance of the first two purpose-and-effect questions in determining government speech. If the government has not intended to speak, then it likely also has not traditionally used that form of speech *to speak to the public*. Again, assuming *arguendo* that there is an intention to speak and an effect of sending a message, the record is unclear on the traditional use of a legislative censure to send a message as it specifically relates to HCC's historical use of the censure power. In other contexts, the use of a censure as a form of official reprimand or condemnation is longstanding.[114] HCC, which only established its Board of Trustees roughly thirty years ago,[115] has used the power frequently in the last decade.[116] However, considering again that HCC never advanced the argument that it intended to speak to the public through Wilson's censure to the lower courts, it is unclear whether HCC has historically used the censure power to

114. *See Censure*, BLACK'S LAW DICTIONARY (11th ed. 2019) (dating the term to the 14th century when used as a noun and to the 16th century when used as a verb); *see also Censure Motion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (dating to 1934); HENRY M. ROBERT III ET AL., ROBERT'S RULES OF ORDER, NEWLY REVISED § 61 (11th ed. 2011) (citing censure as a punishment a society can impose on a member). Noting the long history of censures and other methods of "self-policing" in legislative bodies, the Fourth Circuit has sidestepped the government speech issue entirely to hold "that legislatures may discipline members for speech" with absolute immunity. Whitener v. McWatters, 112 F.3d 740, 744–45 (4th Cir. 1997).

115. *About HCC*, HOUS. CMTY. COLL., https://www.hccs.edu/about-hcc/ [https://perma.cc/X4LT-GVWG] (last visited Aug. 31, 2021).

116. *E.g.*, Trent Seibert, *HCC Trustees Vote to Censure Chris Oliver After Bribery Scandal*, TEX. MONITOR (July 14, 2017), https://texasmonitor.org/chris-oliver-hcc-censure-bribery-scandal/ [https://perma.cc/F3WN-4VYH]; Ericka Mellon, *HCC Vows to Take Action After Trustee Turmoil*, HOUS. CHRON. (May 20, 2011), https://www.chron.com/news/houston-texas/article/HCC-vows-to-take-action-after-trustee-turmoil-1689753.php [https://perma.cc/JJ95-B6GK].

communicate a message to the public, or whether it has used the power for some other purpose, such as actions of internal governance. But regardless of HCC's specific use of—or motive for using—the censure power, the longstanding use of the censure power by other governmental bodies likely tips this question toward a "yes."[117]

5. Does the Public View the Speech as "Closely Identified" with the Government? Considering the fifth question, the answer is also likely "yes." Again, assuming *arguendo* that the censure is a form of speech, the fact that the Board explicitly adopted the language of the censure resolution in a recorded vote is probably dispositive on this question. The public is likely to view a recorded vote by the Board at a public meeting as closely identified with the governmental body, HCC.

6. Do Spatial Limitation Concerns Impact the Government's Decision to Accept Certain Viewpoints as Its Own? In contrast, as to question six—whether spatial limitation concerns, like the physical boundaries of the city-owned park in *Summum* impact the government's decision to accept certain viewpoints as its own—the *Walker* majority is unlikely to see this question as relevant because legislative sessions are not traditional public forums for private speech. If the question were relevant, the answer is likely "no." Simply put, legislative sessions do not have fixed physical boundaries, and censures do not take up physical space. Within its legislative sessions, HCC could adopt any number of resolutions—including censure resolutions—against its own members. Even if the time constraints of a particular meeting are viewed as creating a kind of "space" that a legislative censure might occupy, the Board is not limited to only one space, unlike the city in *Summum*.[118] Political will is likely the only limitation on the number of censure resolutions adopted by the Board, not spatial concerns.

7. Is the Government's Message Coherent? The seventh question is difficult to determine from the record. In terms of internal coherence, the message has no problems; the Board's

117. *See supra* note 114 and accompanying text (discussing the historical origins of the term "censure").

118. Arguably, the Board has a virtually unlimited number of "spaces"; it holds regular meetings every month and can call special meetings at any time. *See* Bylaws of the Board, *supra* note 13, art. G, §§ 3, 12; *see also* Pleasant Grove City v. Summum, 555 U.S. 460, 471–73 (2009).

resolution of censure delivered a consistent message of concern with Wilson's actions.[119] But the Court has framed the coherence question as one of external coherence—not whether an individual message is coherent itself but whether that message is coherent and consistent with other governmental messages.[120] Although the Court has not squarely held that coherence is necessary to find government speech, a lack of external coherence seems to cut against finding that the government is speaking.[121] Presumably, the Court could consider the Board's previous meeting minutes to determine whether it had offered contradictory messages about Wilson.

To summarize, one question has a likely "no" answer, four questions have likely "yes" answers, and two questions have unclear answers. Further, there is no clear test as to which questions are necessary, which questions depend on the circumstances, and how much weight should be afforded to each question. For example, if the first two questions of whether the speech at issue has the purpose and effect of advancing a government message serve a gatekeeping function in government speech cases, then HCC's failure to assert any purpose of advancing a government message in the lower courts weighs against—but likely does not preclude—consideration of the doctrine. On the other hand, if jurists can find government speech even when the governmental entity does not assert that it has spoken, then the importance of the purpose-and-effect questions is less clear-cut. Even if the purpose-and-effect questions are *not* necessary prerequisites to finding government speech, the remaining questions of control, traditional use to communicate with the public, close identification with the government, spatial limitations, and coherence point toward—but do not conclusively establish—finding government speech in a legislative censure of an elected official.

Justice Alito has warned that the Court "must exercise great caution before extending [its] government-speech precedents,"[122] but the Court's lack of clarity on when the government is speaking has left circuit courts to fill in the gaps for this relatively new

119. *See* Ellis, *supra* note 17; Petition for Writ of Certiorari Appendix, *supra* note 18, §§ 42a–45a (full text of resolution of censure).

120. Matal v. Tam, 137 S. Ct. 1744, 1758 (2017) (observing that if the government was speaking through registered marks, it was "babbling prodigiously and incoherently" and "expressing contradictory views").

121. *See id.*

122. *Id.*

doctrine. Moreover, in a previously unconsidered area like legislative censures, jurists can look to the Court's precedents to find legal analysis to support either conclusion.

IV. IMPLICATIONS OF EXTENDING THE GOVERNMENT SPEECH DOCTRINE

A. Route A: Finding that Garcetti *Applies to Elected Officials*

If the Court finds that an elected official who is speaking pursuant to his official duties is speaking as the government—and consequently that the government has the right to regulate his speech à la *Garcetti*—this represents a broad extension of the government speech doctrine with potentially far-reaching consequences. Not only does it open the door to the difficult question of when an elected official is speaking pursuant to his official duties,[123] it also potentially opens the door to other regulations of elected officials' speech. Justice Alito warned of such a danger in *Tam* when he cautioned that the government speech doctrine could be wielded to "silence or muffle the expression of disfavored viewpoints."[124] A legislative majority empowered to police the speech of its members through the government speech doctrine possesses a nuclear weapon, the deployment of which obliterates any potential free speech considerations raised by the silencing of others.

For example, an elected majority might vote to prevent any elected official from speaking to the news media. Or it might require that he only speak from a preapproved script, direct all communication through another member of the elected body, or obtain preapproval for all social media posts. An emboldened majority could envision any number of ways to restrict elected officials speaking pursuant to their official duties to ensure that they deliver "the government's message." The potential consequences of such regulations are similarly easy to imagine—at a minimum, regulation of elected officials' speech may lead to a reduction in the amount of information and variety of viewpoints flowing from public officials. Such regulations could erode public trust in officials operating under Orwellian restraints to deliver only "the government's message."

123. *See* discussion *supra* Section III.A (discussing the difficulty of determining when an elected official speaks pursuant to her official duties).

124. *Tam*, 137 S. Ct. at 1758.

B. Route B: Finding that the Government Speaks in the Form of a Censure

On the other hand, if the Court finds that an elected official is not speaking as the government but that the *government* is speaking in the form of a censure, it is a far-less-significant expansion of the government speech doctrine, excluding only the legislative censure from First Amendment protection, rather than any government regulation of an elected official's speech.[125] Nevertheless, extending the government speech doctrine even in this narrow way may pose problems for elected individual speakers and their constituents when an elected majority freely implements the censure power to stifle less popular speech. While government speech cases have often highlighted the government's right to "interject its own voice into public discourse,"[126] the Court's opinions in these cases have not seriously grappled with the consequences of allowing the government to interject its voice when the purpose of the government's voice is to silence other voices.[127] For example, while the censure in *Wilson* seems rather innocuous on the whole, one can imagine a less restrained majority crafting a censure designed to seriously impugn the reputation of a fellow elected official in order to stifle his expression or to encourage the electorate to vote for a different candidate. The censure may intend to silence the voice of a minority party member, a frequent critic, or a legislator who brings evidence of corruption to light. These types of implications open the door to what Professor Norton has termed "second-stage" government

125. This is the route suggested by HCC in its brief. Brief for Petitioner, *supra* note 10, at 30–33. The United States also has filed a petition in support of this route and the alternate ground that legislative censures are presumptively constitutional as a longstanding practice. Brief for the United States as Amicus Curiae Supporting Petitioner at 8–10, 17–19, Hous. Cmty. Coll. Sys v. Wilson, No. 20-804 (2021). See Brief *Amicus Curiae* of the Foundation for Individual Rights in Education (FIRE) in Support of Neither Party at 3–6, 8–9, Hous. Cmty. Coll. Sys v. Wilson, No. 20-804 (2021), for arguments as to why the Court should limit its holding on government speech to only encompass censures of elected officials.

126. Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs., 235 F.3d 1243, 1247 (10th Cir. 2000).

127. Justice Souter's dissent in *Garcetti* arguably best recognizes the consequences of allowing the government to silence other voices in the public discourse, commenting that the "interest at stake is as much the public's interest in receiving informed opinion as it is the [speaker's] own right to disseminate it." Garcetti v. Ceballos, 547 U.S. 410, 433–34 (2006) (Souter, J., dissenting) (quoting San Diego v. Roe, 543 U.S. 77, 82 (2004)). Some have suggested that the legislative censure is a form of protected government speech unless it is coercive. Brief for Petitioner, *supra* note 10, at 14–15; Brief for the State of Texas, the District of Columbia, and Fifteen Additional States as Amici Curiae in Support of Petitioner at 11, Hous. Cmty. Coll. Sys v. Wilson, No. 20-804 (2021).

speech problems, or "whether and when the government's speech violates the Due Process Clause."[128] Because the Supreme Court's jurisprudence to date has dealt largely with first-stage problems, a decision expanding the government speech doctrine to cover legislative censures seems likely to push these types of second-stage problems to the front burner for the circuit courts.[129]

V. A GLANCE DOWN ALTERNATE PATHS

Though this Note has focused on *Wilson*'s intersection with the government speech doctrine, here, we divert for a quick look at the alternate paths available to the Court. Because if the Court finds that an elected official does not speak as the government and that the government is not speaking in the form of a censure, this does not foreclose its inquiry. HCC has presented two alternate grounds on which the Fifth Circuit panel's decision could be overturned: (1) legislative censures are a longstanding practice and therefore presumptively constitutional; and (2) legislative censures do not inflict a cognizable injury.[130] Though beyond the scope of this Note, these approaches are not without their own implications. Because both alternate routes may eliminate any First Amendment claim by an elected official for a legislative censure, their implications may differ largely in form, rather than in substance, from finding that the government speaks in the form of a censure.[131]

There is one final alternative for the Court to consider: affirming (in whole or in part) the Fifth Circuit's holding that "a reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment

128. NORTON, *supra* note 51, at 134. For example, it remains an open question whether the Due Process Clause constrains defamatory government speech that causes a reputational injury. *Id.* at 148–49. And Professor Norton has noted the potential for government speech to affect voters' decisions in casting their ballots. *Id.* at 146.

129. *See supra* note 52 and accompanying text.

130. Brief for Petitioner, *supra* note 10, at 11, 18; *cf.* Zilich v. Longo, 34 F.3d 359, 363 (6th Cir. 1994) ("A legislative body does not violate the First Amendment when some members cast their votes in opposition to other members out of political spite or for partisan, political, or ideological reasons."); Blair v. Bethel Sch. Dist., 608 F.3d 540, 544 (9th Cir. 2010) ("[D]e minimis deprivations of benefits and privileges on account of one's speech do not give rise to a First Amendment claim."). *Compare* Whitener v. McWatters, 112 F.3d 740, 743–44 (4th Cir. 1997) (granting legislatures absolute immunity in disciplining their members due to the longstanding nature of the practice), *with* Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs., 235 F.3d 1243, 1245, 1248 (10th. Cir. 2000) (finding no injury to a censured member of a community college board).

131. *See* discussion *supra* Section IV.B (considering the potential implications of finding that the government speaks in the form of a censure).

claim."[132] The implications of such a holding would depend at least in part on the level of review the Court chose to impose, with strict scrutiny posing the greatest potential governance problems for elected bodies seeking to enforce internal codes of conduct and rational basis review likely to provide recourse against only the most egregious abuses.[133] Moreover, jurists have yet to note the complication that legislators can (and do) vote for—or even draft—their own resolutions of censure.[134] If an elected official can sue the legislative body for a violation of his free speech rights, then he may be able to sue that body even if he drafted—or merely voted for—the censure that caused the injury.[135]

VI. CONCLUSION

The long-term impacts of the Court's decision cannot be overstated. Censures are common in local politics from coast to coast[136] and can perform valuable functions, including distancing

132. Wilson v. Hous. Cmty. Coll. Sys. (*Wilson II*), 955 F.3d 490, 498 (5th Cir. 2020), *cert. granted*, No. 20-804 (2021).

133. Under strict scrutiny review, the government must show that the burden on speech "furthers a compelling [government] interest and is narrowly tailored to achieve that interest." Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010). But under rational basis review, the government need only believe that the burden on speech rationally relates to its interests. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2465 (2018).

134. *E.g.*, *Council Censures Member for Racial Remark*, UPI ARCHIVES, Nov. 4, 1989, https://www.upi.com/Archives/1989/11/04/Council-censures-member-for-racial-remark/9220626158800/ [https://perma.cc/C636-AU38] ("[The city council member] prepared a resolution condemning his own words and urged its adoption by the council."); *Embattled City Council Member Votes to Censure Himself*, CBS DFW (May 23, 2018, 9:43 PM), https://dfw.cbslocal.com/2018/05/23/council-member-censure-himself/ [https://perma.cc/L7AE-9J7A]; Alex Butler, *Mea Culpa: South Miami Commissioner Votes to Censure Himself*, MIAMI HERALD (Dec. 6, 2013, 2:27 PM), https://www.miamiherald.com/news/politics-government/article1958274.html [https://perma.cc/7WQ8-D4F5]. As for why a legislator would vote to censure himself, these votes seem designed to emphasize an acceptance of responsibility. *See, e.g.*, Butler, *supra*.

135. Courts that have considered the question have found that § 1983 claims are non-comparative fault claims, likely making this prospect even less appealing for many jurists. *See, e.g.*, Cordova v. City of Albuquerque, 816 F.3d 645, 649, 659 (10th Cir. 2016) (quoting Quezada v. County of Bernalillo, 944 F.2d 710, 721 (10th Cir. 1991)).

136. *E.g.*, Lex Talamo, *Yakima City Council Censures White for Facebook Posts*, YAKIMA HERALD-REPUBLIC (Apr. 21, 2020), https://www.yakimaherald.com/news/local/yakima-city-council-censures-white-for-facebook-posts/article_8bbf736a-f985-52b1-bad1-71a31da23e5f.html [https://perma.cc/ECT8-7SLN] (Washington); Jana Benscoter, *Middletown Borough Council Votes to Censure Councilman Who Posted Controversial Facebook Posts*, PENNLIVE (June 16, 2020), https://www.pennlive.com/news/2020/06/middletown-borough-council-votes-to-censure-councilman-who-posted-controversial-facebook-posts.html [https://perma.cc/66KM-SZZK] (Pennsylvania); *see also* Petition for a Writ of Certiorari, *supra* note 10, at 25 ("Every two days on average, a local government somewhere in the country censures one of its elected members for his or her speech.").

the government from unpopular speech by a single elected member or encouraging intransigent legislators to perform their duties. Some states allow a harsher penalty—legislative contempt—which the Court has found constitutional,[137] but in other states, like Texas, censures or reprimands are the only sanctions available to legislative bodies under state law.[138]

Judge Jones framed the *Wilson* case as a clash between "fully protected government speech" and "a fully protected speaker,"[139] but the reality is that if government speech is involved, nongovernment speakers have no clear protection. The Supreme Court has certified the question of whether the First Amendment restricts the legislative censure of an elected official. The answer to that question—and whether the Court takes a government speech path to reach it—will have serious implications for elected bodies and for individual elected officials.

Shannon M. Wright

137. *See* Groppi v. Leslie, 404 U.S. 496, 499–500 (1972); *see also* C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 780, 780–82 (1926).

138. *E.g.*, Bylaws of the Board, *supra* note 13, art. A, § 11d.

139. Wilson v. Hous. Cmty. Coll. Sys. (*Wilson III*), 966 F.3d 341, 344 (5th Cir. 2020) (Jones, J., dissenting).