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What About My Rights?
School Board Members and the First Amendment

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What About My Rights?

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“Office holders remain free to draw upon their personal beliefs and motivations and advocate their positions in the public square. But when acting as public officials, they are not free to apply personal convictions, religious or other, in place of the defined responsibilities of their public offices. All government officers should exercise their civil authority according to the principles and within the limits of civil government.”

—Mormon Church Elder Dallin Oaks, former president of Brigham Young University (BYU), Professor of law at University of Chicago Law School, and Utah Supreme Court justice

I. Introduction

The events of 2015 shined a spotlight on the issue of the limits on public officials' First Amendment rights. Most notably, Rowan County (KY) Clerk Kim Davis, claimed that her religious beliefs prevented her from performing some of her official duties, *i.e.*, issuing marriage licenses to same-sex couples. Other elected officials have argued that they have a free speech right to use their vote to "convey a message," while others have contended that they have a constitutional right to privately discuss public business with a quorum of the governmental body outside of a duly posted official meeting.

While school attorneys are familiar with the legal analysis applicable to public school employees, what is less clear is the extent to which elected school board members' First Amendment rights begin, and end. This paper will look at what the courts have said about that issue, and how those judicial analyses can be used to help advise client school boards.

II. Freedom of Speech

A. Elected Officials Have a Free Speech Right to Political Views

Perhaps not surprisingly, it was in the 1960s that the U.S. Supreme Court issued a key decision about the First Amendment rights of elected officials. In it, the Court addressed the claims of Julian Bond, who had been elected to the Georgia House of Representatives, but was disqualified from taking the position by the House because of his political statements. That, said the Court, violated the free speech provisions of the First Amendment. *Bond v. Floyd*, 385 U.S. 116 (1966).

Bond v. Floyd, arose after Julian Bond, the then Communications Director of the Student Nonviolent Coordinating Committee, issued a statement on behalf of the organization following his 1965 election to the Georgia House of Representatives. *Id.* at 118. The statement was critical of U.S. policy in Vietnam and compared the plight of the Vietnamese people to that of African-Americans' "struggle for liberation and self-determination." *Id.* at 119. The statement further questioned whether the U.S. could guarantee free elections abroad and expressed sympathy to those Americans who resisted the draft. *Id.* at 120.

When asked in a radio interview if he shared the views expressed in the SNCC statement, newly elected Bonds said:

Why, I endorse it, first, because I like to think of myself as a pacifist and one who opposes that war and any other war and eager and anxious to encourage people not to participate in it for any reason that they choose; and secondly, I agree with this statement because of the reason set forth in it—because I think it is sorta hypocritical for us to maintain that we are fighting for liberty in other places and we are not guaranteeing liberty to citizens inside the continental United States . . . . Because I'm against war, I'm against the draft.

Bond v. Floyd, 385 U.S. 116, 121-22 (1966). However, when the interviewer asked Bond if his views were inconsistent with taking the oath for his new office, he said he saw nothing

inconsistent between his statements and the oath he was about to take. *Id.* at 122. Pressed as to whether his statements might become treasonous, Bond replied that he did not know "if I'm strong enough to place myself in a position where I'd be guilty of treason." *Id.*

After that radio interview, 75 members of the Georgia House of Representatives filed petitions challenging Bond's right to be seated, claiming his statements gave aid and comfort to the enemies of the United States and Georgia, violated Selective Service laws, and "tended to bring discredit and disrespect on the House." *Id.* at 123. The petitions further contended that Bond's endorsement of the SNCC statement was "totally and completely repugnant to and inconsistent with the mandatory oath prescribed by the Constitution of Georgia for a Member of the House of Representatives to take before taking his seat." *Id.* For these same reasons, the petitions asserted that Bond could not take an oath to support the Constitution of the United States. *Id.* When Bond appeared at the House on January 10, 1966 to be sworn in, the clerk refused to administer the oath to him until the issues raised in the challenge petitions had been decided. *Id.*

A special committee was appointed and a hearing was held by that committee. *Id.* The special committee concluded that Bond's endorsement of the SNCC statement and his supplementary remarks showed that he "does not and will not" support the Constitutions of the United States and of Georgia; that he "adheres to the enemies of the State of Georgia" contrary to the State Constitution; that he gives aid and comfort to the enemies of the United States, in violation of federal law; and that his statements "are reprehensible and are such as tend to bring discredit to and disrespect of the House." *Id.* at 125. By a vote of 184 to 12, the House voted that Bond would not be allowed to take the oath of office as a member of the House of Representatives nor would he be seated as a member of the House of Representatives. *Id.* The governor ordered a special election, at which Bond was again elected to his office. *Id.* at 128.

When Bond sued, the lower court ruled against his free speech claim and decided that Bond's right to dissent as a private citizen was limited by his decision to seek membership in the Georgia House. *Id.* at 127. Moreover, the majority concluded, the SNCC statement and Bond's related remarks went beyond criticism of national policy and provided a rational basis for concluding that he could not in good faith take an oath to support the State and Federal Constitutions. *Id.* Bond appealed that decision directly to the U.S. Supreme Court. *Id.* at 128.

The High Court acknowledged that an elected official can be required to swear to support the Constitution of the United States as a condition of holding office, but said that a majority of state legislators could not test the sincerity with which another duly elected legislator could swear to so uphold the Constitution. *Id.* at 132. More importantly, said the Court, the State could not "circumvent the protection the First Amendment would afford to these statements if made by a private citizen by arguing that a State is constitutionally justified in exacting a higher standard of loyalty from its legislators than from its citizens." *Id.* at 135. Therefore, while the State has an interest in requiring its legislators to swear to a belief in the constitutional processes of government, it could not limit its legislators' capacity to discuss their views of local or national policy. *Id.* Rather, "[t]he interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. *Id.* at 136. Legislators

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; also so they may be represented in governmental debates by the person they have elected to represent them." *Id.* at 136-37.

In a related case, the U.S. Supreme Court ruled on the constitutionality of "announce clauses," which prohibit elected judicial candidates from expressing their political views. In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Court held that a content-based restriction of speech by candidates for public office must be narrowly tailored under the strict scrutiny test, and must demonstrate that the restriction does not unnecessarily circumscribe protected expression.

The decision involved Gregory Wersal, a candidate running for the elected position of associate judge on the Minnesota Supreme Court. *Id.* at 768. Wersal challenged a rule of judicial conduct that prohibited a "candidate for a judicial office" from "announc[ing] his or her views on disputed legal or political issues" (referred to as the "announce clause"). *Id.* During the campaign, Wersal asked the Lawyers Board whether it planned to enforce the announce clause. *Id.* at 769. Though the Board said it had "significant doubts" about the constitutionality of the provision, it could not answer his question because he had not submitted any specific announcement that he wished to make. *Id.* Wersal sued, asking the federal district court to rule that the "announce clause" violated the First Amendment. *Id.* at 769-70. Other plaintiffs, including the Minnesota Republican Party, joined his suit and alleged that, because the clause kept Wersal from announcing his views, they were unable to learn those views and support or oppose his candidacy accordingly. *Id.* at 770. The district court held that the announce clause did not violate the First Amendment and the Eighth Circuit agreed, after concluding that two sufficiently compelling interests justified the announce clause: "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary." *Id.* at 775.

During the pendency of the suit, the Minnesota Judicial Board issued an opinion stating that judicial candidates could criticize past decisions, and clarifying that the "announce clause" was intended "to reach only disputed issues that are likely to come before the candidate if he is elected judge." *Id.* at 771. The Supreme Court of Minnesota also adopted these interpretations in accordance with the Eighth Circuit's opinion. *Id.* at 772. When the decision got to the U.S. Supreme Court, the justices ruled in a 5-4 vote that the "announce clause" was unconstitutional because "the First Amendment does not permit [opponents of an elected judiciary] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about." *Id.* at 778. The Court said: "…the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." *Id.* at 774.

Justice Ginsberg, in the dissent, countered that the judiciary was unique and said that "the rationale underlying unconstrained speech in elections for political office—that representative

government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench." *Id.* at 806.

Though these cases are not specific to school board members, they do demonstrate the courts' commitment to a candidate's rights to express his or her personal views, opinions, and positions, even if unpopular, during the election process. The cases in the next Section point to the courts' unwillingness to allow an official to use his or her official position to promote those views, opinions, and positions.

B. Content of political speech is protected, but not use of "the trappings" of an office to promote a personal message

In the context of a government employee's free speech rights, well-settled precedent establishes a content-form-context balancing test. See *Garcetti v. Ceballos*, 547 U.S. 410, 417-20 (2006) (discussing the Court's First Amendment free speech analysis as applied to public employees and creating the *Pickering-Garcetti* balancing test). At least one Circuit has concluded that "[while t]his approach summons informing principles of free speech of employees, their categorical divisions of public and private speech fail to illuminate the state's interest in constraining speech by an elected public official, political speech at the core of the First Amendment, and its necessity." *Jenevein v. Willing*, 493 F.3d 551, 557 (5th Cir. 2007) (citing *Republican Party of Minn. v. White*, 536 U.S. 765 (2002)).

The Fifth Circuit observed that while an elected official may also be an employee of the state, "as an elected holder of state office, his relationship with his employer differs from that of an ordinary state employee." *Jenevein*, 493 F.3d at 557. Unlike a typical government employee, the public is obliged to inform itself about an elected official and, as a practical matter, the public itself is the "employer" with the power to hire and fire. *Id.* at 557-558. For this reason, government regulation of an elected official's speech to his constituency must withstand strict scrutiny, requiring such regulations to be narrowly tailored to address a compelling government interest. *Id.* at 558.

In *Jenevein*, the plaintiff in a lawsuit filed what an elected state judge considered to be a "false and baseless…abusive litigation tactic," which contained personal attacks on the judge and his wife. *Id.* at 553. The judge responded by sending a statement to the local media and holding a press conference, in his courtroom, wearing his judicial robes. *Id.* In both the statement and press conference, the judge discussed the case, his view that certain motions had been filed only for purposes of harassment and delay, and made critical remarks about the plaintiff's legal counsel. *Id.* at 553-55. That attorney filed a complaint with the Texas Commission on Judicial Conduct, alleging that by holding a press conference in his courtroom, while in his judicial robes, to express his personal opinions, the judge had violated certain canons of judicial conduct. *Id.* at 555.

The judge argued that his statements were protected by the First Amendment and when he was censured by the Commission on Judicial Conduct, he sued arguing that the censure order violated his First Amendment right of free speech. *Id.* at 555-56. The district court concluded that the

judge's speech was "predominantly a matter of private concern [that] was outweighed by the State's interest in protecting the efficiency and impartiality of the state judicial system." *Id.* at 557. Although the Commission also argued that it had censured Judge Jenevein not for his speech, but for his use of taxpayer-funded facilities to aid his and his wife's private interests, the magistrate judge rejected that argument. *Id.*

When the censured judge appealed, the Fifth Circuit concluded that strict scrutiny must be applied when the government regulates an elected official's speech. *Id.* at 558. Noting that "Texas has persisted in electing its judges, a decision which, for good or ill, casts judges into the political arena," the court struck down the censure order "[t]o the extent that [it] censured Judge Jenevein for the content of his speech, shutting down all communication between the Judge and his constituents…" *Id.* at 560. However, the Fifth Circuit held that the portion of the order that was directed at the judge's "use of the trappings of judicial office to boost his message, his decision to hold a press conference in his courtroom, and particularly stepping out from behind the bench, while wearing his judicial robe, to address the cameras" survived strict scrutiny. *Id.*

In applying this standard, the court concluded that "[t]he state has a compelling interest in preserving the integrity of the courtroom, and judicial use of the robe, which symbolically sets aside the judge's individuality and passions. And while these interests cannot be met by broadly censuring the content of speech the commission finds offensive, they can be met with lesser if not minimal impact on the message: by accepting as we must that elected judges are political actors, but insisting that judges take it outside." *Id.* at 560-61.

This same standard is generally applicable to elected school board members, and state law prohibitions against using school district resources for electioneering or political advocacy. Plainly such laws advance the compelling interest of preserving the use of public funds for public, rather than private, purposes.

C. Voting is not the protected personal speech of the elected official

Perhaps the most important function of an elected official is the act of voting. Voting is, fundamentally, the expression of a person's preference or opinion, formally manifested, regarding a decision made by the elected body as a whole. VOTE, Black's Law Dictionary (10th ed. 2014). But, does an elected official have a personal, First Amendment right to vote on any given matter?

In *Nevada Comm'n on Ethics v. Carrigan*, 131 S.Ct. 2343 (2011), the U.S. Supreme Court considered this question when a city council member challenged his censure by the Nevada Commission on Ethics for failing to recuse himself, pursuant to state ethics law, from voting on a matter in which he had a potential conflict of interest.

Prior to a vote on a hotel and casino project, the Sparks, Nevada city attorney advised city council member Michael Carrigan that he needed to disclose his business relationship with an individual who stood to benefit from the project under consideration. *Id.* at 2347. Carrigan did not do so and

voted in favor of the project. *Id.* The Nevada Commission on Ethics investigated and ultimately censured Carrigan for failing to abstain from the vote. *Id.* Carrigan sued in state court, arguing that the relevant provisions of the state ethics laws were unconstitutional because they violated his First Amendment right to vote. *Id.* The state district court denied Carrigan's petition, but a divided Nevada Supreme Court reversed. *Id.* The majority agreed with Carrigan, holding that voting is speech protected by the First Amendment and that certain provisions of the state ethics laws were unconstitutionally overbroad. *Id.*

The U.S. Supreme Court granted certiorari and unanimously disagreed with the Nevada Supreme Court's decision. *Id.* The Supreme Court directly addressed the question of whether restrictions upon a legislator's vote are a restriction upon the legislator's protected speech. *Id.* "The answer is that a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id.* at 2350.

As Scalia explained in the majority opinion, a legislator casts his vote "as trustee for his constituents, not as a prerogative of personal power." *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 821 (1997)). In this respect, voting by a legislator is different from voting by a citizen. While "a voter's franchise is a personal right," "[t]he procedures for voting in legislative assemblies . . . pertain to legislators not as individuals but as political representatives executing the legislative process." *Id.* (citing *Coleman v. Miller*, 307 U.S. 433, 469–470 (1939)).

Carrigan had argued in the case that voting can be a symbolic act because legislators often use their votes to express deeply held and highly unpopular views, often at great personal or political peril. *Id.* Scalia opined that there are, to be sure, instances where action conveys a symbolic meaning—such as the burning of a flag to convey disagreement with a country's policies. *Id.* But, held the Court, the act of voting symbolizes nothing. *Id.* "[T]he fact that [a legislator's vote] is the product of deeply held personal belief—even if the actor would like it to convey his deeply held personal belief—does not transform action into First Amendment speech." *Id.*

The U.S. Supreme Court concluded that "[e]ven if the mere vote itself could express depth of belief (which it cannot), this Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message." *Id.* at 2345 (citations omitted).

D. Private deliberations among elected officials about public business is not protected speech

All fifty (50) states have some form of open meeting law that governs public access to meetings of the governing bodies of state and local governmental entities. In Texas, the Open Meetings Act (TOMA) prohibits a quorum of a governmental body from deliberating public business without first giving proper notice to the public at least 72 hours before the scheduled time of the meeting. Tex. Gov't Code §§ 551.001-.146. A member of a governmental body may be subject to criminal

penalties for knowingly calling or organizing a meeting that is not permitted under the law. Tex. Gov't Code §551.144.

The case of *Asgeirsson v. Abbott* involved a Brewster County grand jury indictment of city council members in Alpine, Texas for alleged violations of the criminal provisions of TOMA based on an exchange of private emails discussing the need to call a council meeting to consider awarding a contract to an engineering firm to design and implement water improvements to parts of the city. *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684 (W.D. Tex.2011). Ultimately, the district attorney dismissed the indictment, but the city council members, joined by elected officials from a number of other municipalities across the state, filed suit in federal court contending that TOMA's criminal penalties violated the First Amendment because they were a content-based restriction on political speech, unconstitutionally vague, and overbroad. *Id.* at 688-91. After a bench trial, the district court held that the criminal provisions of TOMA are constitutional because they are not vague or overbroad, do not restrict speech based on its content, and require disclosure rather than restricting speech. *Id.* at 707.

On appeal, the Fifth Circuit agreed with the lower court that the challenged open meetings provisions are content-neutral time, place, or manner restrictions, rather than a criminalization of political speech based on content as the plaintiffs argued. *Asgeirsson v. Abbott*, 696 F.3d 454, 467 (5th Cir. 2012). The court dismissed the argument that the law is also content-based because it is identity-based—applying only to speakers who are members of governmental bodies. *Id.* at 462. The court explained that the statute does not apply to government officials because of any hostility to their views. *Id.* Rather, TOMA is applicable only to private speech by government officials which lessens government transparency, facilitates corruption, and reduces confidence in government. *Id.* Therefore, the identity-based application of the statute was not evidence of a content-based purpose. *Id.*

Plaintiffs also contended that the contested provision of TOMA is overbroad because it criminalizes all private speech among a quorum of a governing body that is about public policy, and most of such speech does not lead to corruption. *Id.* at 464. The court concluded that this argument failed because it ignores the other purposes of TOMA, such as increasing transparency, fostering trust in government, and ensuring that all members of a governing body may take part in the discussion of public business. *Id.*

The Fifth Circuit concluded that the plaintiffs offered no support for the proposition that government officials have a First Amendment right to discuss public policy and public business among a quorum of their governing body in private, and added that "there is reason to think that the First Amendment does not protect the right of government officials to deliberate in private, given that it sometimes requires them to open their proceedings to the public." *Id.* at 465. The court stated that the law "is content-neutral and is not unconstitutionally overbroad or vague;" rather it is a disclosure statute that is content-neutral and the law is properly subject to intermediate scrutiny. *Id.* at 467.

E. The "give-and-take of the political process" does not constitute retaliation for exercising right to free speech

The First Amendment forbids government officials from retaliating against individuals for speaking out. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). To recover under 42 U.S.C. § 1983 for such retaliation, a plaintiff must prove: (1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action. *Blair v. Bethel Sch. Dist*., 608 F.3d 540, 543 (9th Cir. 2010). Given this case law, under what circumstances can a governmental body be liable under Section 1983 for retaliating against a member of the body based on that member's speech?

In *Blair v. Bethel Sch. Dist.*, Ken Blair, a school board member in Spanaway, Washington, was removed from his position as vice president by his fellow board members after he made denigrating comments about the district's superintendent in the local newspaper. *Id.* at 542-43. Blair had been the lone critic of the superintendent, had consistently voted against renewing the superintendent's contract, and had repeatedly impugned the superintendent's integrity and competence. *Id.* at 542. After the board voted to remove him as vice president, Blair sued the district, the superintendent, and the other board members under 42 U.S.C. § 1983, alleging that he had been retaliated against for exercising his First Amendment rights to free speech and petition. *Id.* at 543. The district court granted summary judgment in favor of the defendants, finding that the Board's act of removing Blair as an officer didn't prevent him from continuing to speak out, vote his conscience, and serve his constituents as a member of the Board. *Id.* at 543.

On appeal, the Ninth Circuit agreed that Blair's First Amendment free speech rights were not violated noting that this was not a typical First Amendment retaliation case because the adverse action being challenged was one taken by the board member's peers in the political arena. *Id.* The record indicated that Blair's fellow board members wanted a vice president who shared their views, and because Blair did not, they removed him by a procedurally legitimate vote. *Id.* at 544. The court noted that the peculiar context in which Blair's case arose distinguished it from ordinary retaliation cases in three ways. *Id.*

First, the adverse action being complained of was a "rather minor indignity." *Id.* The court noted that de minimus deprivations of benefits and privileges on account of one's speech do not give rise to a First Amendment claim. *Id.* For the action to be found to violate the First Amendment, the actions would have to be "of a nature that would stifle someone from speaking out." *Id.* Here, that did not occur. Rather, the board member was simply "removed from a titular position on a school board by the very people who elected him to the position in the first place." *Id.*

Second, the First Amendment doesn't shield public figures from the give-and-take of the political process. *Id.* The court noted that there is "little difference between what the Board's internal vote against Blair accomplished and what voters in the general public election might do if they too

were dissatisfied by Blair's advocacy. . . . [i]t wouldn't have been controversial—and certainly not a violation of the First Amendment—had Blair's constituents refused to support his reelection on account of his outspoken opposition to [the Superintendent]. We see no reason the Board members' vote here should be regulated in a way that the general public's are not." *Id.* at 545.

Third, all Board members have a "protected interest in speaking out and voting their conscience" on important school issues. *Id.* While Blair had a First Amendment right to criticize the superintendent, his fellow Board members had the corresponding right to replace Blair with someone who, in their view, represented the majority perspective of the Board. *Id.* at 545-46.

The Ninth Circuit concluded that "[d]isagreement is endemic to politics, and naturally plays out in how votes are cast. While the impetus to remove Blair as [school board] vice president undoubtedly stemmed from his contrarian advocacy against [the Superintendent,] the Board's action did not amount to retaliation in violation of the First Amendment." *Id.* at 546.

A federal district court in the Sixth Circuit reached a similar conclusion in a school board member's challenge to his censure by the other board members. *Dillaplain v. Xenia Cmty. Schs. Bd. of Educ.*, 2013 WL 5724512 (S.D. Ohio Oct. 21, 2013), appeal dismissed (Mar. 20, 2014). In granting the defendant school board members motion to dismiss, the court ruled that the board members who censured Robert Dillaplain were entitled to qualified immunity on his free speech claim because "[t]he Board's speech in expressing its opinion and publicly censuring Dillaplain is not conduct arising to a level that would deter a person of ordinary firmness from continuing to engage protected speech, at least with regard to a public official engaged in the political process." *Dillaplain*, 2013 WL 5724512, at *5.

That case involved Robert Dillaplain, an elected member of the Xenia Community Schools Board of Education. *Id.* at *1. While serving as Board President, Dillaplain publicly questioned the Superintendent's budget reductions, made repeated records and information requests of school administrators, and publicly congratulated the Superintendent on applying for other jobs. *Id.* at *1-*2. Eventually, tensions increased on the board and the other board members raised complaints about Mr. Dillaplain which were discussed in closed session. *Id.* at *2. Ultimately, the Board directed its legal counsel to draft a resolution of censure against Dillaplain and later voted to censure him, stating that his conduct and statements had been "demeaning, insulting, abusive, veiled threats, discriminatory and inappropriate for a member of the Board." *Id.* at *2. This was the only public discussion of the concerns about his conduct. *Id.* Dillaplain sued, complaining, among other things, that his First Amendment rights had been violated because he was "retaliated" against for exercising his right to free speech. *Id.*

As in the Ninth Circuit decision, the district court in Ohio observed that "[p]ublic officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views. *Id.* at *4. Accordingly, public officials must tolerate more significant actions taken in response to [their] exercise of First Amendment rights than an average citizen would before the actions are considered adverse." *Id.* (citing *Mattox v. City of Forest Park*, 183 F.3d 515, 522 (6th Cir.1999).

Interestingly, the *Dillaplain* court opined that "the Board's speech may, itself, be protected speech under the First Amendment." *Dillaplain*, 2013 WL 5724512 at *5. The court also observed that even if Dillaplain had adequately alleged a violation of his First Amendment rights, the defendant school board members would be entitled to qualified immunity "because the circumstances alleged could not plausibly compel a conclusion that any reasonable government agent would conclude that the actions alleged violate federal law within the political arena." *Id*.

More recently, in *Willson v. Yerke*, 604 F. App'x 149 (3rd Cir. 2015), the Third Circuit opined that nothing in the U.S. Supreme Court's precedent "suggests the Court intended for the First Amendment to guard against every form of political backlash that might arise out of the everyday squabbles of hardball politics" and "the First Amendment may well prohibit retaliation against elected officials for speech pursuant to their official duties only when the retaliation interferes with their ability to adequately perform their elected duties." *Willson*, 604 F. App'x 149, 151 (affirming summary judgment in favor of Township and board of supervisors on allegations by former member that chairman and other members insulted and threatened him, directed obscene gestures at him and changed locks on township garage. Plaintiff did not allege retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, as required to state a claim for First Amendment retaliation, in an action brought under § 1983).

F. Managing the disruptive or unruly behavior of a member of a governmental body does not violate that individual's member's free speech rights

It is not uncommon for a school board to have a member that is disruptive to the Board's performance of its duties or to its meeting. When the Board or presiding officer attempt to manage that unruly conduct, the board member at issue may claim that his or her free speech rights are being violated. That issue was addressed in the case of a Michigan township board. There, a member of the Comstock Township Board in Michigan, William Shields, sued the Charter Township of Comstock and the individual members of the Comstock Township Board, alleging that they violated his First Amendment rights by preventing him from speaking during the meeting time reserved for citizen comment, and by voting to adjourn the meeting before he had finished everything he wanted to say as a board member. *Shields v. Charter Twp of Comstock*, 617 F. Supp. 2d 606, 609 (W.D. Mich. 2009).

Shields was a Township Trustee when, during a two hour meeting, he spoke for more than thirty minutes. *Id.* Few of his comments directly addressed any specific agenda item, and, by his own admission, he sometimes "emotionally and vehemently expressed his views." He also repeatedly accused his fellow board members or Township employees of various types of misconduct. *Id.* By the time the Board came to the citizen comment agenda item of its meeting, Shields already had spoken for over twenty minutes on a variety of agenda and non-agenda topics. *Id.* at 610. After the Board heard from ten citizens, Shields then attempted to address the Board. *Id.* When the Board President told Shields that he could not speak during the citizen comment period because that time was reserved for citizen communications with the Board, Shields replied, "I'm talking as a citizen.

I get my three minutes like a citizen." *Id.* After an exchange ensued between Shields, the Board President, and the Township attorney, Shields was ultimately told "Bill you are out of line, and I'm going to ask you to sit down." *Id.*

Perhaps unhelpfully, the Township attorney interjected that the agenda could be amended to allow Shields to speak during the comment time, but there was no Board action to amend the agenda. *Id.* Later, during the last agenda item "Any and All Other Business to come before this Board," the Township attorney suggested that Shields be allowed to speak under this agenda item since he was not allowed to speak during the citizen comment period. *Id.* Shields then spoke on a variety of topics, included his repeated criticisms of the Board's hiring practices, the need for a drug-free workplace program, and issues related to accident reports involving the township. *Id.* at 610-11. After Shields had spoken for approximately nine minutes, a motion to adjourn was made and seconded. Though Shields said "I'm not done yet," the motion passed and the meeting was adjourned. *Id.* at 611.

In considering Shields' claim that his free speech rights had been violated, the court observed that Shields was a "co-equal member of the body that he seeks to hold liable, and his suit alleges that his fellow board members injured him by doing precisely what elected board members are supposed to do: namely, argue with each other over policy issues, form majority coalitions, vote on substantive and procedural issues, and be held politically—not judicially—accountable by the voters." *Id.* at 612-13. Adding that a private citizen sometimes needs to hold a public body judicially accountable to ensure that government hears the voice of its citizens, the court opined that the predominant method of accountability for elected officials is political, not judicial, and the "federal courts are not the forum for redressing political injuries." *Id.* at 613.

The court also observed that a governmental body has "significant discretion to regulate its own meetings in the manner it sees fit" and confine meetings to specified subject matter and the transaction of business. *Id.* The court indicated that to the extent he challenged the Board's authority to regulate the citizen comment period or adjourn the meeting, Shields' challenge fails because the Board's actions "fit comfortably within the scope of the reasonable time, place, and manner restrictions routinely upheld as part of a public body's authority to regulate its own meetings." *Id.*

In short, the court concluded that while the First Amendment provides private citizens "with an important bulwark against government power…it does not immunize an elected official from the ire of his political adversaries." *Id.* at 614. "Ultimately, Plaintiff failed to persuade his colleagues that his extended comments were worthy of further discussion, and he was outvoted on two properly raised procedural motions. The First Amendment does not allow Plaintiff to transform this political defeat into a civil damages action merely because some members of the Board may have disagreed with the substance of his allegations." *Id.* at 616.

In a somewhat similar case, the Ninth Circuit also held that a city council, and its legal counsel, did not violate a member's First Amendment rights by excluding her from closed session

deliberations regarding her pending litigation against the city. *See DeGrassi v. City of Glendora*, 207 F.3d 636, 646 (9th Cir. 2000) (writing that DeGrassi was excluded from the October meetings because of her status as a party, not because of her viewpoint and the potential conflict between DeGrassi's role as a Council member and her personal interest, made it "reasonable for the Council to exclude her from its discussions concerning her request for a defense.") As to DeGrassi's claim that as a city councilor she had a unique First Amendment right that was independent of those of a citizen, the Ninth Circuit observed that "the free speech rights of elected officials may well be entitled to broader protection than those of public employees generally." *Id.* at 647. However, though legislators are given the widest latitude to express their views on issues of policy, "DeGrassi's exclusion from the closed meetings did not interfere with [her] ability to speak out in public or to represent her constituents, [so] it did not offend the First Amendment." *Id.*

III. Elected Officials and the Free Exercise of Religion

The federal courts have concluded that an elected official's religious expression, at least in the performance of his or her official duties, is "government speech" and not private speech protected by the First Amendment. Most recently this issue arose in the heavily publicized claim by elected Rowan County (KY) Clerk, Kim Davis, that her religious objection to same-sex marriage should excuse her from performing one of her statutory duties, *i.e.,* issuing a marriage license to same-sex couples. Davis argued that it would be an endorsement of same-sex marriage for her to sign and issue the license, as required under state law. According to the court that heard Davis' arguments, at issue was the conflict between the fundamental right to marry and the First Amendment's guarantee to free exercise of religion.

The U.S. District Court for the Eastern District of Kentucky concluded that the Free Exercise Clause did not excuse Davis from issuing the marriage licenses. *Miller v. Davis*, No. CIV.A. 15-44-DLB, 2015 WL 4866729, at *2 (E.D. Ky. Aug. 12, 2015) noting that Davis is a public employee, the court cited to *Garcetti* for the proposition that her free speech rights are different from those of a private citizen because when a "citizen enters government service, the citizen by necessity must accept certain limitations on his or her speech." *Id.* at *12. Concluding that the speech she sought to protect was a "product of her official duties" the court held that it was not entitled to First Amendment protection. *Id.* at *13. With respect to Davis' argument that she was being unconstitutionally compelled to demonstrate religious approval of same-sex marriage, the court disagreed noting that she was only being directed to signify that the couple seeking a marriage license met the legal requirements to do so. *Id.* at *15. Furthermore, said the court, she remained free to engage in and express her religious beliefs, *e.g.,* going to church, participating in Bible study, ministering to female inmates at the county jail, and believing that marriage is a union between one man and one woman. *Id.*

In short, the court observed that, when elected, Davis took an oath to defend and uphold the U.S. Constitution and by refusing to "comply with binding legal jurisprudence" she was "likely"

violating the constitutional rights of her constituents, something her sincere personal beliefs did not entitle her to do. *Id.* at *14.

The Fourth Circuit reached a similar conclusion in *Turner v. City Council of Fredericksburg, VA*, 534 F.3d 352 (4th Cir. 2008). There, in a decision written by former U.S. Supreme Court Justice O'Connor, the Court held that the legislative prayers at issue were government speech rather than private or individual speech. *Id.* at 353. Therefore, a city council member's constitutional rights were not violated by the council's decision to open its meetings with nondenominational prayers that did not violate the Establishment Clause. *Id.*

The case involved a City Council of Fredericksburg policy that all legislative prayers were to be nondenominational. *Id.* at 354. On a rotating basis, the city councilors were allowed to offer the prayers that opened the council meetings. *Id.* at 353. Hashmel Turner, a council member who was also an ordained minister and part-time pastor, refused to follow the policy of nondenominational prayers, stating that his religious beliefs required him to close prayers in the name of Jesus Christ. *Id.* at 354. When the city council then refused to allow Turner to offer the council's prayer after he said he intended to close his prayer in Jesus' name, he sued, claiming that the city council's prayer policy violated his Free Exercise and Free Speech rights. *Id.* In reaching its opinion, the Fourth Circuit observed that "Turner was not forced to offer a prayer that violated his deeply-held religious beliefs. Instead, he was given the chance to pray on behalf of the government." *Id.* at 356. Being unwilling to do so in the manner that the government had prescribed, the court said that Turner remained "free to pray on his own behalf, in nongovernmental endeavors, in the manner dictated by his conscience." *Id.* He simply did not have that right when his prayers expressed government speech. *Id.*

IV. Related Issues

A. Board Members on Social Media

Example 1: A Keller, Texas school board member commented on Facebook about a recent city council election: "SOUTH LAKE – Do you realize because SO FEW voters took the time and responsibility to VOTE in the municipal elections – YOU NOW HAVE A 'MUSLIM' on the City Council!!! What a SHAME!!!!" She was censured by the Board for those remarks after being asked, but refusing, to resign. In passing the censure action, the other board members noted that there was no legal mechanism for recalling her or terminating her as they would have done for an employee.

Takeaway: Censure of a school board member for unacceptable online conduct or speech will rarely run afoul of the First Amendment. The Board members should also be aware that such comments may not only be public, they may also be subject to a state's open records laws and could run afoul of open meetings laws depending on the audience and topics under discussion.

B. Limiting Board Member Comments to the Media

Example 1: A Norfolk, Virginia school board member used the term "separate, but equal" in a discussion about a school reorganization plan. When a reporter asked him why he used this particular phrase, the board member directed her to the board chairman, according to board policy. The Norfolk School Board's policy states, "The Chair (or designee) will speak as the official voice of the board." The Board considers the policy a "best practice" to allow the school board to communicate its message once a matter is voted on.

Example 2: A board in New Hampshire with a similar policy received public pushback and a letter from the local Civil Liberties Union chapter. Consequently, the board revised its policy to balance both the desire to ensure consistency and accuracy of information to the press and to protect the board members' speech rights. The new policy encourages members to direct questions to the board chairperson, but clearly states that they are not prohibited from voicing their own opinions to the press and public.

Takeaway: Board procedures may violate the First Amendment if they chill board members' speech. Prohibiting board members from speaking with the public or media, outside of the political arena, violates their freedom of speech. But prohibiting them from speaking on behalf of the Board likely does not.

V. Lessons from the Case Law and Advising Clients

A. Candidates and elected officials have a free speech right to express their beliefs and opinions, but their unruly expression of opinion can be properly managed by the entire governmental body so long as the restriction is not content-based.

B. An elected official's legislative power is not a "personal power;" it "belongs to the people [and] the legislator has no personal right to it." Though trustees can "vote their conscience," there is no First Amendment "right to use governmental mechanics to convey a message."

C. State laws on conflict of interest disclosures/recusal and open meetings restrictions do not violate the free speech rights of school board members because those laws promote important governmental interests.

D. Strict scrutiny will be applied to governmental censure of or limits on an elected official's speech, requiring the government to show that the law/rule at issue is necessary to achieve a compelling governmental interest, and that the law/rule is narrowly tailored to achieve that interest.

E. As a trustee, speaking from the dais, the Board member's religious speech may be subject to limitations imposed by the Establishment Clause if it can be construed as government speech.

F. The *Pickering-Garcetti* analysis used for employee speech may be inapplicable to an elected board member's speech. But speech that is a product of an official's official duties have First Amendment protection.

G. The courts will generally let the political process mete out consequences for officials' speech and so will tolerate adverse political actions or sanctions (censure, removal from an honorary positon) by the board members' elected peers that could be considered part of the "political arena," requiring elected officials to have "thicker skin."

i. Exception: If the action taken by political peers reaches "a level that would deter a person of ordinary firmness from continuing to engage protected speech, at least with regard to a public official engaged in the political process."