

City of Austin
Open Government Symposium

Panel 2
Open Government
Litigation Developments
Handouts – Mick McKamie
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The First Amendment Challenge to Texas Open Meetings Act Penalty

On September 25, the Fifth Circuit issued its opinion in *Asgeirsson v. Abbott and the State of Texas*, 11-5044. (the case is often referred to as “TOMA II” or “Alpine II”). The opinion rules against the public official plaintiffs First Amendment challenges, and holds, among other things, that, “TOMA is content-neutral and is not unconstitutionally overbroad.”

This is the second challenge brought by several city councilmembers and other local government officials who claim that the criminal closed meeting provision of the Texas Open Meetings Act (Act) unconstitutionally infringes on their right to freedom of speech. The plaintiffs have received much criticism in the press for pressing their case this hard (there was a first round of opinions that initially appeared promising for the city officials before the case was dismissed as moot and the opinions were vacated. *Rangra v. Brown*, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006), *vacated by* 576 F.3d 531 (5th Cir. 2009) (granted rehearing en banc), *appeal dismissed as moot*, 584 F.3d 206 (5th Cir. 2009) (en banc)). News reporting agencies have falsely characterized the current lawsuit as an attempt to eviscerate the entirety of the Act, only the criminal penalties has been challenged. The pleadings and briefs filed by the Plaintiffs explicitly state that there is no attempt to void any other provision of the Open Meetings Act. It is interesting to note that 19 nineteen states have open meetings acts with such penalties, and 12 have a short term of imprisonment as a penalty. Sunlight’s Glare, 78 Tenn. L. Rev. at 324 n.95.

United States District Judge Rob Junell conducted trial of TOMA II in Austin in November 2010. The testimony presented by [plaintiffs] on their self-censorship to avoid possible prosecution in the future by a prosecutor who might take a technical view of the requirements of [the Texas Open Meetings Act] was totally unchallenged. Self-censorship is often, but not always, considered the equivalent of a chilling effect.

The trial court ruled that the Act is – in legal terms – a valid “time, place, and manner restriction.” In other words, the trial court concluded that the Act does not limit what city officials can say (i.e., the content of their speech), but merely limits when and where they can say it (e.g., at a properly-posted open meeting).

The Fifth Circuit upheld the trial court’s ruling that the Act is a valid “time, place and manner restriction,” but it relied on an unusual body of law to do so. Despite the fact that political speech has been referred to by the U.S. Supreme Court as the “purest form of speech protected by the First Amendment,” the Court analogized the Act to regulations that govern the operation of sexually oriented business. Instead of strict scrutiny review, the TOMA penalty provision was reviewed under intermediate scrutiny, in the manner prescribed in the 1986 United States Supreme Court decision, *Renton v. Playtime Theaters*. In that case, the Court concluded that a regulation is not content-based merely because the applicability of the regulation depends on the content of the speech. A statute that appears content-based on its face may still be deemed content neutral if it is justified without regard to the content of the speech. The Fifth Circuit applied this same review to the Act, holding that even though the Act applies only to speech that relates to public business (i. it is aimed at prohibiting the secondary effects of closed meetings. According to the Court, closed meetings: (1) prevent transparency; (2) encourage fraud and corruption; and (3) foster mistrust in

government. Those justifications are unrelated to the messages or ideas that are likely to be expressed in closed meetings. So if a quorum of a governing body were to meet in secret and discuss anything unrelated to their powers as a governing body, no harm would occur. In *Renton*, adult movie theaters attracted crime and lowered property values, but not because the ideas or messages expressed in adult movies caused crime.

Also of interest is the Fifth Circuit Court's conclusion that the Act operates as a disclosure statute, similar to a portion of the Bipartisan Campaign Reform Act upheld by the U.S. Supreme Court in the *Citizens United* decision. But the penalty provision in TOMA becomes immediately effective upon any inadvertent or technical violation of the Act, with or without the opportunity for "disclosure." The elements of the criminal offense are in place and subject a local government official to prosecution immediately upon the occurrence of the alleged violation. No amount of subsequent public disclosure or apology can cure that. In fact, such a subsequent "disclosure" would be tantamount to a confession. The chilling effect on speech, that is free communication between elected officials and their constituents, could not be more clearly apparent. In fact, the portion of the *Citizens United* decision striking down some regulations in the same Bipartisan Campaign Reform Act are part of plaintiffs' attack to TOMA's penalty provision. "The law before us is an outright ban on speech, backed by criminal sanctions." *Citizens United*, 130 S.Ct. at 882.

The decision was appealed directly to the United States Supreme Court by Petition for Writ of Certiorari filed in December 2012. On March 25, the Petition was denied, leaving the Fifth Circuit opinion in force.

The plaintiff local government officials were represented by Mick McKamie, Dick DeGuerin and Craig Enoch. Counsel for the plaintiffs have volunteered hundreds of hours of professional time to present these important questions to the courts on behalf of cities and local governments and their officials.

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No. 12-763

In the Supreme Court of the United States

DIANA ASGEIRSSON, ET AL.,
Petitioners,

v.

TEXAS ATTORNEY GENERAL, GREG ABBOTT,
AND THE STATE OF TEXAS,
Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

**BRIEF OF AMICI CURIAE
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE

The amici submit this brief in support of Petitioners, Diana Asgeirsson, et al.¹

The Texas Municipal League (TML) is a nonprofit association of more than 1,100 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association, an affiliate of TML, is an organization of more than 400 attorneys who represent Texas cities.

The National League of Cities (NLC) is the country's largest and oldest organization serving municipal government, representing more than 19,000 United States cities and towns. Founded in 1924, NLC strengthens local government through advocacy, research, and information sharing on behalf of hometown America.

The issues raised here are of special importance to amici because they relate to the First Amendment's protection of public officials' speech. Many individuals across this nation volunteer their time and expertise to serve their local communities as elected and appointed officials. In doing so, these individuals come to

¹ Counsel of record for all parties received timely 10-day notice of the amicus curiae's intent to file this brief. S. Ct. Rule 37.2(a). Counsel of record have consented, via e-mail, to the filing of this brief. In accordance with Rule 37.6, amici state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than amici or their members, have made a monetary contribution to the preparation or submission of this brief.

understand the requirements of applicable open government laws. Amici do not take exception to the policies underlying open government laws and, in particular, the Texas Open Meetings Act (Act); our members understand the importance of and support open government. Open government laws should not, however, impinge on the First Amendment speech of public officials made pursuant to their official duties. And such laws should certainly not restrict officials' political expression.

In order to maintain public officials' First Amendment protections, open government laws that restrict and criminalize their speech must be reviewed against the proper standard. In regard to the Texas Open Meetings Act's criminal provisions, that means a court must apply a strict scrutiny standard of review. Because this case could determine the scope of an elected official's First Amendment rights, the standard of review applicable to political speech, and whether criminal provisions like those in the Act are unconstitutional, it is of significant interest to amici.

SUMMARY OF ARGUMENTS

The various courts that have ruled on the substantive issues raised in this case can agree on almost nothing, leaving tens of thousands of Texas officials in a state of confusion. The decisions conflict in regard to the First Amendment rights of local officials, the standard of review applicable to political speech, and the manner in which the Act operates.

Open meetings laws like the Act are content-based restrictions on political speech and are thus subject to

strict scrutiny. The Fifth Circuit incorrectly applies the secondary effects doctrine to the Act. The secondary effects doctrine affords less protection than strict scrutiny and should not be used in regard to political speech, which is at the heart of the First Amendment.

The Fifth Circuit refuses to recognize the reach of the Act and, in doing so, fails to protect the core function of public officers—engaging in political speech. Under the Act, a local official can be held strictly liable for a crime by attending a candidate forum. That fact alone shows that Section 551.144 is unconstitutionally overbroad.

In sum, local officials in Texas and across this country need this Court to clarify the appropriate balance between governmental transparency and the First Amendment rights of local officials.

ARGUMENTS

I. THE CONFLICTING HOLDINGS BY COURTS IN THIS CASE PROVIDE NO CLEAR LEGAL GUIDANCE REGARDING THE IMPORTANT FIRST AMENDMENT ISSUES RAISED HERE

A. PRIMARY STATUTE AT ISSUE

The primary statutory provision at issue in this case is Texas Government Code Section 551.144, a criminal provision of the Texas Open Meetings Act. It provides as follows:

A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:

- (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
- (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
- (3) participates in the closed meeting, whether it is a regular, special, or called meeting.

TEX. GOV'T CODE § 551.144(a).²

An offense under Section 551.144 is a misdemeanor punishable by fine of \$100-\$500, confinement in county jail for 1-6 months, or both fine and confinement. *Id.* § 551.144(b).

B. HISTORY OF THE CASE

1. TOMA I

The substantive legal issues in this case were initially raised in a case styled *Rangra v. Brown*

² The term “meeting” is defined in the Act to include gatherings and deliberations involving the “public business or public policy over which the governmental body has supervision or control.” TEX. GOV'T CODE § 551.001(4)(A)-(B). The term “closed meeting” is defined to mean “a meeting to which the public does not have access.” *Id.* § 551.001(1).

(“TOMA I”). In TOMA I, the District Court concluded that the First Amendment provides no protection to speech by city councilmembers made pursuant to their official duties. The District Court concluded that:

because the speech at issue is uttered entirely in the speaker’s capacity as a member of the city council, and thus is the kind of communication in which he or she is required to engage as part of his or her official duties, it is not protected by the First Amendment

Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634 at *6 (W.D. Tex. Nov. 7, 2006); *see also* U.S. CONST. Amend. I.

A Fifth Circuit Panel reversed and remanded, explaining that “[t]he First Amendment’s protection of elected officials’ speech is full, robust, and analogous to that afforded citizens in general.” *Rangra v. Brown*, 566 F.3d 515, 518 (5th Cir. 2009). The Panel went on to conclude that the criminal provisions of the Act “are content-based regulations of speech that require the state to satisfy the strict-scrutiny test in order to uphold them.” *Id.* at 521.

An en banc rehearing was granted. *Rangra v. Brown*, 576 F.3d 531 (5th Cir. 2009). The Fifth Circuit (sitting en banc) ultimately dismissed TOMA I as moot after being notified that Plaintiff Rangra had left his office as city councilmember. *Rangra v. Brown*, 584 F.3d 206, 207 (5th Cir. 2009).

2. TOMA II

The current challenge to the Act, styled *Asgeirsson v. Abbott* (“TOMA II”), again raises the issue of whether the criminal provisions of the Act are constitutional.

In TOMA II, the District Court reversed course regarding the First Amendment rights of councilmembers, acknowledging that they do not lose their free speech rights once they take public office. *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 694 (W.D. Tex. 2011). Refusing to acknowledge the Fifth Circuit Panel decision in TOMA I, the District Court pronounces that “[n]o court . . . has ever concluded that an open-meetings law is subject to strict scrutiny.” *Id.* Not surprisingly, the District Court went on to conclude that the Act is content-neutral and is therefore subject to an intermediate scrutiny analysis. *Id.* at 698, 701. A fundamental component of the District Court’s intermediate scrutiny analysis is based on the notion that a city council may “cure” a closed meeting violation of the Act by subsequently holding the meeting in public (i.e., a “redo” exception). *Id.* at 701 (“members of a governmental body, that hold a closed meeting in violation of [the Act] can correct their violation with a subsequent open meeting”), *id.* at 703 (“public officials can correct any violation of [the Act] and also avoid [the Act’s] criminal provisions by subsequently holding open meetings”). The District Court ultimately held the Act to be a reasonable time, place, and manner regulation. *Id.* at 695.

In TOMA II, a Fifth Circuit Panel concluded that the Act is content-neutral and should be subjected to

intermediate scrutiny. *Asgeirsson v. Abbott*, 696 F.3d 454, 462 (5th Cir. 2012). In its analysis, the Panel finds that the District Court was mistaken about the “redo” exception. *Id.* at 462-63. The Panel explains “that the [district] court misconstrued the statute and . . . a violation of Section 551.144 could [in fact] result in criminal penalties even if the speech were later disclosed.” *Id.* at 463.

C. CONFUSION IN THE WAKE OF TOMA I AND TOMA II

TOMA I and TOMA II have left much confusion in their wake. As set out above, the courts in TOMA I and TOMA II conveyed to local government officials a dizzying array of conflicting messages about their fundamental rights of speech and the standard of review to which the Act should be subjected. Every court that took up the issue decided something different. One court held that elected officials have no First Amendment rights in regard to their speech about public business, while another concluded that they have robust First Amendment rights equivalent to that of all citizens. Officials have been told by the District Court that they can cure a closed meeting violation under Section 551.144 of the Act by disclosing the speech at a subsequent meeting, and then told by a Fifth Circuit Panel that this is, in fact, not the case. One Fifth Circuit Panel has held the criminal provisions of the Act are subject to strict scrutiny and another that intermediate scrutiny is the proper standard of review.

Having an idea of the number of officials in Texas who are working to comply with the Act’s requirements

is important in understanding the scope of the confusion. TML estimates that over 16,000 mayors, councilmembers, city managers, city attorneys, and department heads are member officials of TML by virtue of their cities' participation. Add to that number the county, school, and special district officials subject to the Act and it is apparent that there are tens of thousands of officials in Texas left grappling with the confused state of the law left by TOMA I and TOMA II.

Texas officials aren't the only ones who need clarity regarding the issues raised here. Every state has open meetings laws. Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 Tenn. L. Rev. 309, 317 (2011) (“[B]y the mid-1970’s, every state had a statute that imposed open meeting requirements on a wide variety of government bodies.”). And various states’ open meetings laws provide for criminal penalties in the form of imprisonment and/or fines. *See, e.g.*, ARK. CODE § 25-19-104; CAL. GOV’T CODE § 54959; FLA. STAT. § 286.011; GA. CODE § 50-14-6; HAW. REV. STAT. § 92-13; 5 ILL. COMP. STAT. 120/4; MICH. COMP. LAWS § 15.272; NEB. REV. STAT. § 84-1414; NEV. REV. STAT. § 241.040; N.M. STAT. § 10-15-4; OKLA. STAT. tit. 25, § 314; S.C. CODE § 30-4-110; S.D. CODIFIED LAWS § 1-25-1; VT. STAT. tit. 1, § 314; W. VA. CODE § 6-9A-7.

Open meetings laws that put governmental transparency above the First Amendment rights of appointed and elected officials come at a price. As one scholar observes, open meetings laws that chill speech: (1) result in a lack of deliberation, collegiality, and compromise among officials; (2) transfer power to

unelected staff and lobbyist; (3) encourage violations of individual privacy; and (4) force conscientious local legislators to become casual lawbreakers. Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 *Tenn. L. Rev.* 309, 360-67 (2011). It is imperative that this Court seize this opportunity to clarify both the scope of an official's First Amendment rights, the standard of review applicable to political speech, and whether criminal provisions like those in the Act are unconstitutional.

II. THE SECONDARY EFFECTS DOCTRINE SHOULD NOT BE USED IN REGARD TO SPEECH THAT LIES AT THE HEART OF THE FIRST AMENDMENT

Perhaps most confounding to those working to understand TOMA I and II is the use by some courts of the secondary effects doctrine to determine that the Act is content-neutral and, thus, subject to intermediate scrutiny. As Petitioners explain, in order to determine there is a violation of Section 551.144 of the Act, one must examine the content of the speech. Specifically, one must examine whether the speech is about public business or policy over which the governmental body supervises or controls. TEX. GOV'T CODE §§ 551.001, 551.144. Because the speech prohibited by the Act relates to public business or policy, it is political speech (i.e., core First Amendment speech). The Fifth Circuit Panel in TOMA II, like the District Court in TOMA II, applied the secondary effects doctrine to conclude that the criminal provision of the Act addresses secondary purposes, such as preventing the appearance of fraud and corruption and mistrust in government. Based on

that flawed application, those courts conclude that the Act is content-neutral. *Asgeirsson v. Abbott*, 696 F.3d 454, 460-61 (5th Cir. 2012).

Judges in various state and federal courts have both questioned and rejected the application of the secondary effects doctrine to political speech. *See, e.g., Boos v. Barry*, 485 U.S. 312, 335 (1988) (Brennan, J., concurring) (warning that there are “dangers and difficulties posed by the *Renton* analysis . . . secondary effects offer countless excuses for content-based suppression of political speech”); *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1069 (3rd Cir. 1994) (“We have some doubts . . . that political speech is subject to secondary effects analysis”); *Collier v. City of Tacoma*, 854 P.2d 1046, 1053-54 (Wash. 1993) (finding that secondary effects were not applicable to restriction on political speech in a public forum); *Freeman v. Burson*, 802 S.W.2d 210, 212 (Tenn. 1990) (finding the secondary effects doctrine of *Renton* does not apply to political speech), *rev’d on other grounds*, 504 U.S. 191 (1992). Such doubt and rejection is well-founded. This Court—in the very cases that developed the secondary effects doctrine—indicates that political speech is exempt from this type of analysis. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion) (“[I]t is manifest that society’s interest in protecting this type of [erotic] expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate”).

The secondary effects doctrine, because it affords less protection than strict scrutiny, should only be used in regard to speech that is not at the core of the First

Amendment. The secondary effects doctrine has generally only been applied to sexually explicit speech. *See generally, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). That is the case because sexually explicit speech has diminished First Amendment protection; it is at the “outer ambit” of First Amendment protection. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (nude dancing is “within the outer perimeters of the First Amendment, though we view it only marginally so”); *see also Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 742 (Va. 2010) (explaining that while “it is a far cry from political speech, ‘nude dancing is not without its First Amendment protections.’”) (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981)).

Political speech should be afforded heightened protection. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (“a facially content-based restriction on political speech in a public forum . . . must be subjected to exacting scrutiny”); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (“a content-based restriction on political speech in a public forum, . . . must be subjected to the most exacting scrutiny”); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). In that regard, the Fifth Circuit Panel in TOMA I was correct in its conclusion that the Act imposes a content-based regulation and must be reviewed under the strict-scrutiny test. *Rangra v.*

Brown, 566 F.3d 515, 521 (5th Cir. 2009) (“[T]he criminal provisions of [the Act] are content-based regulations of speech that require the state to satisfy the strict-scrutiny test . . .”), *dism’d as moot on reh’g*, 584 F.3d 206 (5th Cir. 2009).

The secondary effects doctrine should not be allowed to spill into core First Amendment speech areas. For that reason, this Court should clarify that strict scrutiny review applies to open meetings laws that suppress core political speech.

III. THE FIFTH CIRCUIT FAILS TO RECOGNIZE THE TRUE REACH OF THE TEXAS OPEN MEETINGS ACT

In TML’s amicus brief to the Fifth Circuit Panel in TOMA II, we explained that the Act works to prohibit public officials from engaging others in conversation concerning the issues of the day, expressing political ideas, and discussing political change. In other words, the Act limits speech in which elected officials have a constitutional right to engage. We provided the following scenario as an example:

A local civic group is hosting a candidate forum for their members. A city councilmember would like to attend. However, one of the candidates that will be speaking is running for reelection for city council and will presumably discuss city business. All other members of the council are members of this civic group and are planning to attend. The host of the event has indicated there will be time for attendees to ask questions of the candidates.

TML's brief explained that if the city councilmember asks if he/she should attend the candidate forum, the answer is an unequivocal "no" because the event violates the Act. How? A gathering of members of the city council is subject to the requirements of the Act if: (1) a quorum is present; and (2) a deliberation occurs between a quorum of the city council or between the council and another person involving the public business or policy over which the city council has supervision or control. See TEX. GOV'T CODE § 551.001(4)(A). In our example, a quorum is going to be present, public business or policy over which the council has supervision or control will be discussed, and the event is not one to which the general public has access. *Id.* § 551.001 (defining "closed meeting" to mean "a meeting to which the public does not have access"). Attendance at this event violates Section 551.144 of the Act and subjects the council members to potential criminal liability.

The Fifth Circuit dismissed this scenario saying "[t]he potential situations listed, however, are not from actual cases . . ." *Asgeirsson v. Abbott*, 696 F.3d 454, n. 13 (5th Cir. 2012). The scenario set out above was, in fact, taken from an actual case in which one of the Petitioners was involved. Around April of 2009, members of the City of Pflugerville, Texas, city council attended a reelection fundraiser for a sitting councilmember, Victor Gonzalez. Mr. Gonzalez answered questions from constituents at the event. As a result of the fundraiser, Gonzalez's opponent filed a criminal complaint claiming the fundraising event was a violation of the Act. The charges were ultimately dismissed. Rob Heidrick, *Pflugerville sues state*,

challenges Open Meetings Act, COMMUNITY IMPACT NEWS, Dec. 17, 2009.

The Fifth Circuit also suggests that the candidate forum scenario is excepted from the Act's definition of a "meeting" because it is a social function. *Asgeirsson v. Abbott*, 696 F.3d 454, n. 13 (5th Cir. 2012). The Act provides that the term "meeting" "does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body . . . if formal action is not taken and any discussion of public business is incidental to the social function." TEX. GOV'T CODE § 551.001(4)(B). This conclusion by the Fifth Circuit does not comport with the plain language of the Act. A candidate forum for city councilmembers is related to city business and discussion of the city business is central, not incidental, to the event. A candidate forum does not fit within the plain language of the social function exception. *See Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

The Fifth Circuit was wrong to dismiss the candidate forum scenario. That scenario, like others described by Petitioners, exemplifies that Section 551.144 operates unconstitutionally under some circumstances and is, therefore, overbroad.

It is vital that this Court accept this case and protect the core function of political officers—to engage in political speech. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 195 (1992) ("[t]here is practically universal agreement that a major purpose of [the First]

Amendment was to protect the free discussion of governmental affairs”) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

CONCLUSION

For the above reasons, amici respectfully request this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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The Texas City Attorneys
Association, and The National
League of Cities

JANUARY 2013

No. _____

In the Supreme Court of the United States

DIANA ASGEIRSSON, et al., *Petitioners*

v.

TEXAS ATTORNEY GENERAL, GREG ABBOT, and
THE STATE OF TEXAS, *Respondents*.

*On Petition for Writ of Certiorari From the
United States Court of Appeals for the Fifth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Texas Open Meetings Act (“TOMA”) imposes criminal sanctions, including possible jail time, for discussion by certain public officials of “public business or public policy” outside of an open meeting. Applying the secondary effects analysis from *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the United States Court of Appeals for the Fifth Circuit held that TOMA’s suppression of political speech was content neutral and satisfied intermediate scrutiny. Does the secondary effects analysis apply to political speech, or are statutes suppressing such speech subject to strict scrutiny? Does the First Amendment protect public officials from criminal liability for speaking privately on issues of public business or public policy?

LIST OF PARTIES TO PROCEEDING BELOW

Petitioners: Diana Asgeirsson, Alpine Texas Council Member; Angie Bermudez, Alpine Texas Council Member; James Fitzgerald, Alpine Texas Council Member; Jim Ginnings, Wichita Falls Texas Council Member; Victor Gonzalez, Pflugerville Texas Council Member; Russell C. Jones, Sugar Land Texas Council Member; Lorne Liechty, Heath Texas Council Member; Mel LeBlanc, Arlington Texas Council Member; A.J. Mathieu, Joshua Texas Council Member; Johanna Nelson, Alpine Texas Council Member; Cindy O’Bryan; Todd Pearson, Rockport Texas Mayor; Arthur Reyna, Leon Valley Texas Council Member; Charles Whitecotton, Whiteboro Texas Alderman; Henry Wilson, Hurst Texas Council Member; and Kevin Wilson, Bellmead Texas Council Member (collectively “Public Servants”)

Respondents: Texas Attorney General, Greg Abbott; and The State of Texas

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The United States District Court for the Western District of Texas issued Findings of Facts and Conclusions of Law and entered a Final Judgment denying the Public Servants' request for declaratory judgment and injunctive relief regarding the constitutionality of the criminal sanctions in the Texas Open Meeting Act ("TOMA"). (App. 26-74). Its opinion is reported at 773 F.Supp.2d 684 (W.D. Tex. 2011). The United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment. (App. 1-25). Its opinion is reported at 696 F.3d 454 (5th Cir. 2012).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued an order on September 25, 2012, affirming the Western District of Texas Court's judgment that section 551.144 of the Texas Government Code is constitutional under the First Amendment of the United States Constitution. (App. 1-25). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the First Amendment of the United States Constitution. The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. Amend. I.

This case also involves the Fourteenth Amendment of the United States Constitution, which makes the First Amendment applicable to the States and says in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. Amend. XIV.

This case also involves TEX GOV'T CODE § 551.144, which states:

(a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:

(1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;

(2) closes or aids in closing the meeting to the public, if it is a regular meeting; or

(3) participates in the closed meeting, whether it is a regular, special, or called meeting.

(b) An offense under Subsection (a) is a misdemeanor punishable by:

(1) a fine of not less than \$100 or more than \$500;

(2) confinement in the county jail for not less than one month or more than six months; or

(3) both the fine and confinement.

(c) It is an affirmative defense to prosecution under Subsection (a) that the member of the governmental body acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body.

This case also involves TEX. GOV'T CODE § 551.001, which states, in relevant part:

(1) "Closed meeting" means a meeting to which the public does not have access.

(2) "Deliberation" means a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.

...

(4) "Meeting" means:

(A) a deliberation between a quorum of a governmental body, or between a quorum of a

governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action; or

(B) except as otherwise provided by this subdivision, a gathering:

(i) that is conducted by the governmental body or for which the governmental body is responsible;

(ii) at which a quorum of members of the governmental body is present;

(iii) that has been called by the governmental body; and

(iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.

The term does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, or the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention,

workshop, ceremonial event, or press conference.

The term includes a session of a governmental body.

(5) “Open” means open to the public.

(6) “Quorum” means a majority of a governmental body, unless defined differently by applicable law or rule or the charter of the governmental body

This case also involves TEX. GOV'T CODE § 551.141, which states:

An action taken by a governmental body in violation of this chapter is voidable.

Sections 551.001, 551.141, and 551.144 of the Texas Government Code are set forth in full in the Appendix (App. 76-80).

STATEMENT OF THE CASE

A. The Statutory Challenge

Diana Asgeirsson, Angie Bermudez, James Fitzgerald, Jim Ginnings, Victor Gonzalez, Russell C. Jones, Mel LeBlanc, Lorne Liechty, A.J. Mathieu, Johanna Nelson, Cindy O'Bryan,¹ Todd Pearson, Charles Whitecotton, Henry Wilson, and Kevin Wilson (collectively, the “Public Servants”) are public officials, subject to the Texas Open Meetings Act (“TOMA” or the “Act”). *See* TEX. GOV'T CODE §§ 551.001 *et seq.* Fearing prosecution under the Act

¹ The Fifth Circuit's opinion inexplicably omits Cindy O'Bryan, though she was included in the appeal and all briefing. App. 1.

and failing to understand exactly what is prohibited under the Act, the Public Servants restrain their speech about issues of public business and policy.² The Public Servants filed a declaratory judgment action in the United States District Court for the Western District of Texas, seeking a declaration that section 551.144 of the Texas Government Code is unconstitutional, on its face and as applied, under the First Amendment of the United States Constitution. Jurisdiction in the District Court was based on 28 U.S.C. § 1331, which confers jurisdiction on federal district courts over cases arising under the Constitution, laws, or treaties of the United States.

Section 551.144 of the Texas Government Code prohibits speech about public business or policy over which a governmental body has supervision or control that is made, outside of an open meeting, between a quorum of a governmental body or between a quorum of a governmental body and another person. The statute provides for fines of up to \$500 and for imprisonment of up to six months for violations of this prohibition. The Public Servants argued that this prohibition is a suppression of political speech, which is content based and thus subject to strict scrutiny, and that it cannot survive strict scrutiny review. The Public Servants and the State filed cross motions for summary judgment regarding the constitutionality of the statute.

B. The District Court's Judgment

The United States District Court for the Western District of Texas ruled in favor of the State and

² *See, e.g.*, Reporters Record (“RR”), at pp. 754, 763.

denied all relief sought by the Public Servants. (App. 26-75). Applying the “secondary effects” analysis from this Court’s opinion in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the District Court concluded that section 551.144 was content neutral and therefore subject to intermediate scrutiny or, alternatively, was a disclosure statute subject to exacting scrutiny. The District Court held that the statute was a permissible time, place, and manner restriction.

C. The Fifth Circuit’s Opinion

The Public Servants timely appealed to the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. § 1291, and a three-judge panel affirmed the District Court’s judgment on September 25, 2012. (App. 1-25). The Fifth Circuit agreed with the District Court that the challenged TOMA provision is content neutral and subject to intermediate scrutiny, which the statute satisfied. In concluding that the statute is content neutral, the Fifth Circuit, like the District Court, applied the *Renton* “secondary effects” analysis and agreed with the District Court that the challenged TOMA provision addresses secondary purposes, such as preventing the appearance of fraud and corruption and mistrust in government, which are unrelated to the content of the speech. The Fifth Circuit further opined that, if the statute was not content neutral, then it would be a disclosure statute subject to exacting scrutiny. The Fifth Circuit thus affirmed the District Court’s judgment and upheld the challenged TOMA provision.

REASONS FOR GRANTING THE WRIT

This case presents an opportunity for this Court to decide whether the *Renton* secondary effects analysis should be applied to core political speech, whenever a statute suppressing such speech can be justified by a secondary purpose. The *Renton* case involved an ordinance regulating the location of adult-oriented businesses—speech that this Court has treated as barely deserving of protection under the First Amendment. Core political speech, on the other hand, is at the heart of the First Amendment, and statutes suppressing such speech have always been reviewed under strict scrutiny.

Public Servants respectfully request that this Court clarify that strict scrutiny review applies to statutes suppressing core political speech, rather than the secondary effects analysis. Otherwise, the secondary effects analysis may swallow the First Amendment jurisprudence and allow any statute to be upheld—even one suppressing core political speech at the heart of the First Amendment—so long as the government can point to an alleged secondary evil that the statute is designed to address.

In considering this question, Public Servants believe it is important to note that the genesis of this lawsuit was an indictment for an exchange of emails among a quorum of a governmental body (some of whom only passively received the email). *See Rangra v. Brown*, Cause No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006), *rev'd* 566 F.3d 515, 518 (5th Cir. 2009), *vacated and dismissed as moot* by 584 F.3d 206 (5th Cir. 2009) (en banc). Specifically, in a predecessor lawsuit that was ultimately dismissed as moot by the Fifth Circuit en banc, Texas city council

members challenged the TOMA provision at issue in this lawsuit, after having been indicted for exchanging emails discussing whether to call a council meeting to consider a public contract matter. *Rangra*, 566 F.3d at 518. As demonstrated by the predecessor lawsuit, the challenged TOMA provision is so broad that it can be implicated merely by the receipt of information, through a chain of communications received ultimately by a quorum of the governmental body,³ if such information relates to business or policy over which the governmental body has supervision or control. *See* TEX. GOV'T CODE §§ 551.001(4)(B), 551.144.

Public Servants respectfully urge this Court to hold that strict scrutiny review applies to the challenged TOMA provision, because it is a statute that suppresses core political speech. Applying that review, Public Servants submit that the challenged TOMA provision—Texas Government Code, Section 551.144—cannot withstand scrutiny under the First Amendment.

A.

Statutes suppressing core political speech have always been subject to strict scrutiny, not to the *Renton* secondary effects analysis or intermediate scrutiny.

Core political speech is at the center of the First Amendment, and statutes suppressing such speech have always been reviewed under strict scrutiny.

³ *See infra* discussion in Part E regarding the possibility of violating the statute through a “walking quorum,” which could be created even if an individual recipient had no awareness that the communication would ultimately reach a quorum.

See, e.g., Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011); *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 898 (2010); *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007); *see also Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring) (noting “restrictions on core political speech so plainly impose a ‘severe burden’”). The *Renton* secondary effects analysis, on the other hand, is a test that has primarily been applied in the context of adult-oriented businesses—in other words, to speech that is barely subject to protection under the First Amendment. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443-44 (2002) (Scalia, J., concurring) (“The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex.”).

Specifically, in the *Renton* case, the challenged law was a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school. *See Renton*, 475 U.S. at 43. In upholding the ordinance, this Court held that the ordinance was content neutral because it was justified based on the secondary effects of adult theaters on the community (such as an increase in crime) rather than on the content of the speech. *Id.* at 47-49. Thus, the city could constitutionally push such speech to the outskirts of town.

This Court has subsequently primarily applied the *Renton* analysis to the sort of “fringe” speech at

issue in *Renton*. See, e.g., *Alameda Books, Inc.*, 535 U.S. 425; *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583-85 (1991) (Souter, J., concurring). In *Ward v. Rock Against Racism*, this Court applied the secondary effects analysis to find that an ordinance regulating loud music was content neutral, but again, the speech at issue was arguably “fringe” speech, rather than the type of speech that is at the core of the First Amendment. 491 U.S. 781 (1989). In fact, this Court has referred to *Renton* as a part of a line of “zoning cases” and has said that “the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000).

Core political speech, unlike pornography or loud music, is not the sort of speech that can constitutionally be pushed to the “outskirts of town” or suppressed altogether on the grounds that the statute addresses some secondary purpose. Rather, this Court has consistently applied strict scrutiny to statutes suppressing political speech. See, e.g., *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Citizens United*, 130 S. Ct. 876 (2010); *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

This Court has also treated criminal sanctions as the equivalence of speech suppression. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (emphasis added). The threat of criminal penalties is an “onerous restriction” that functions “as the

equivalent of prior restraint” and necessarily operates to suppress speech. *Citizens United*, 130 S. Ct. at 895-96.

Section 551.144 of the Texas Government Code imposes criminal sanctions—including jail time—for making core political speech outside of an open meeting and thus suppresses such speech and is subject to strict scrutiny. Specifically, section 551.144 imposes up to a \$500 fine and up to six months imprisonment if a closed meeting is not otherwise permitted and a member of a governmental body knowingly:

- (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
- (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
- (3) participates in the closed meeting, whether it is a regular, special, or called meeting.

Section 551.001 of the Texas Government Code defines “closed meeting” as a meeting to which the public does not have access and “meeting” as:

- (A) a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action; or

(B) except as otherwise provided by this subdivision, a gathering:

(i) that is conducted by the governmental body or for which the governmental body is responsible;

(ii) at which a quorum of members of the governmental body is present;

(iii) that has been called by the governmental body; and

(iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.

See TEX. GOV'T CODE § 551.001(4) (emphasis added).

Thus, what is critical for determining whether speech by a member of a governmental body is prohibited and subject to criminal sanctions is whether the speech was “about the public business or public policy over which the governmental body has supervision or control.” In other words, the content of the speech must be examined to determine whether it is prohibited, and the prohibited speech, by definition, must relate to public business or policy, thereby falling within the sphere of core political speech. *See, e.g., Connick v. Myers*, 461 U.S. 138, 145 (1983).

Further, “[i]n the realm of protected speech, the legislature is constitutionally disqualified from

dictating the subjects about which persons may speak and the speakers who may address a public issue.” *First National Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978). By subjecting certain public officials to criminal penalties for engaging in political speech, while allowing other officials (such as legislators⁴) and members of the citizenry at large an unencumbered right to engage in identical discourse, section 551.144 offends this constitutional prohibition. And this Court must not overlook the importance of the views that are suppressed under section 551.144. As the Supreme Court has recognized, “[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.” *Republican Party v. White*, 536 U.S. 765, 781-82 (2002) (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)). Indeed:

Speech concerning public affairs is more than self-expression; it is the essence of self-government. . . . Accordingly, the [Supreme] Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Connick v. Myers, 461 U.S. 138, 145 (1983). Because section 551.144 excludes a class of persons from the right to engage in free and open discussion of governmental affairs, it is antithetical to the rights enshrined in the First Amendment and must

⁴ As recognized in the Fifth Circuit’s opinion in this case, legislators and certain executives are exempted from TOMA’s requirements. *See* App. 2-3.

be evaluated under the standard of strict scrutiny. *See Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

B.

The challenged Texas Open Meetings Act provision punishes the speech itself, not the failure to disclose the speech, and thus is not a disclosure statute subject to exacting scrutiny.

The challenged TOMA provision criminalizes speech as soon as it is uttered, not the failure to subsequently disclose the speech or the fact of such speech, and thus is not a disclosure statute, subject to the lower “exacting scrutiny” standard.

Both the Fifth Circuit and the District Court likened the challenged TOMA provision to a disclosure statute,⁵ which this Court has held is subject to exacting scrutiny. The District Court’s reasoning was based on its (mis)perception that a TOMA violation could be “cured” by subsequent disclosure, based on the provision in section 551.141 of the Texas Government Code that says actions taken in violation of the Act are voidable.⁶ The Fifth Circuit, on the other hand, recognized that violations cannot be cured, in the sense that, once impermissible speech has been uttered, a crime has

⁵ *See* App. 13-17, 51-55.

⁶ *See* App. 54-55. Section 551.141 allows a governmental body to “redo” a voidable action taken in a closed meeting by holding a subsequent open meeting; if the act was “void” rather than “voidable,” an action taken in a closed meeting could never be rectified. *See Fielding v. Anderson*, 911 S.W.2d 858, 864-65 (Tex. App.—Eastland 1995, writ denied). No Texas court has applied the “redo” exception to the criminal sanction provision.

been committed, but nonetheless viewed the statute as a disclosure statute.⁷

The Fifth Circuit was correct in noting that there is no ability to “cure” a violation committed under section 551.144, but incorrect in holding that the statute is nonetheless a disclosure statute. In cases involving disclosure statutes, such as *Doe v. Reed* and *Citizens United*, this Court has imposed a lesser degree of scrutiny (exacting scrutiny) on statutes that do not prohibit speech, but instead require that speech be disclosed. *Reed*, 130 S. Ct. 2811 (2010); *Citizens United*, 130 S. Ct. 876 (2010). However, in those cases, the statutes at issue required disclosure of the fact that certain speech had been made (e.g., signatory information on petitions) and did not prohibit, altogether and through criminal sanctions, speaking on particular subjects in private.

As noted above, this Court has treated criminal sanctions as the epitome of speech *suppression*. *Free Speech Coalition*, 535 U.S. at 244. Requiring all discussions to be disclosed, which can impose economic burdens that, in turn, may pose a disincentive to engage in political speech, is a far cry from the threat of imprisonment, which historically has been used to suppress speech altogether. *See id.*

Additionally, this Court has recognized that the First Amendment protects the right to speak privately just as it protects the right to speak publicly. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979) (“Neither the [First] Amendment itself nor our decisions

⁷ See App. 13-16.

indicate that this freedom is lost to the public employee who arranges to communicate privately ... rather than to spread his views before the public.”).

The Texas Legislature has additionally recognized the importance of private conversation. Specifically, the Texas Legislature has generally prohibited, subject to a few exceptions, the public disclosure of all or part of a written or otherwise recorded communication from a Texas citizen to a Texas legislative member or the Texas Lieutenant Governor in his official capacity. *See* TEX. GOV'T CODE § 306.004. The stated purpose of this statute is to “ensure the right of the citizens of this state to petition state government.” In adopting this statute, the Texas Legislature recognized the importance of protecting private conversations between Legislators and Texas citizens to assure full, unfettered discussion about matters of public concern.

Because section 551.144 imposes criminal penalties on political speech made in private, the instant the speech is uttered, and does not allow for a defense or “cure” if such speech (or the fact of it) is later disclosed at an open meeting, section 551.144 is not a disclosure statute.

C.

The challenged Texas Open Meetings Act fails to satisfy strict scrutiny.

Under strict scrutiny analysis, it is the State's burden to prove both that applying section 551.144 furthers a compelling governmental interest and it is narrowly tailored to achieve that interest. *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2738 (2011). “If a less restrictive alternative

would serve the Government's purpose, the legislature must use that alternative." *Playboy Entertainment Group*, 529 U.S. at 813. The State has not met, and cannot meet, this burden.

The Fifth Circuit affirmed the District Court's conclusion that TOMA is designed to control the alleged "secondary effects" of closed meetings: less transparency, increased fraud and corruption, and heightened mistrust in government. Even assuming that section 551.144 promotes the State's laudable goal of bolstering public confidence in government, the record is devoid of any evidence that criminalizing political speech by public officials is a "necessary" part of its solution. *First National Bank*, 435 U.S. at 787. In fact, the wealth of other protections that are available and have been put in place by lawmakers in Texas to promote honesty in governance demonstrates how *unnecessary* section 551.144 of TOMA is, and why it fails strict scrutiny review.

Texas law is replete with provisions that assure the honesty of and increase transparency in the political process without sacrificing the First Amendment rights of political participants. The Texas Public Information Act, for example, is a comprehensive regulatory scheme that enables the public to have complete information about the affairs of government and the official acts of public officials and employees through requirements of openness and disclosure. TEX. GOV'T CODE §§ 552.001-.353. Honesty in government is also promoted by other provisions, such as requiring that appellate court decisions be published, *id.* §22.008(a), activities and identities of lobbyists be publicly disclosed, *id.*

§ 305.001, and agencies' invitations for public comment on proposed administrative rulemakings be sent and honored, *id.* § 2001.029. These provisions are only just a few of the myriad protections that affirmatively promote transparency without resort to the threat of criminal sanction and imprisonment.

A hallmark of these provisions is that they do not prohibit communication by or between public officials in reaching decisions regarding public affairs; instead, they require that the public be granted access to a record of that communication. Democracy is not undermined by allowing members of the appellate judiciary, for example, to deliberate in closed sessions when deciding cases. The safeguard against impropriety comes from requiring them to produce a reasoned explanation of their decisions that can be scrutinized by the public.

Section 551.144 of TOMA, on the other hand, takes a dangerous turn. It does not require that public officials' communications made outside of the context of an open meeting be "disclosed"; rather, it criminalizes the speech as it is uttered. As a result of section 551.144, the Public Servants are subject to criminal prosecution without regard to whether the substance of their communication is disclosed. Notably, section 551.144 permits no cure through subsequent disclosure. By criminalizing political speech at the moment it is uttered, section 551.144 chills, unreasonably, constitutionally protected core political speech.

Given its overbreadth, section 551.144 also infects the legitimate and necessary exchange of information between public officials with the taint of corruption. Its reach extends to "participation" in the

exchange of the sorts of e-mails at issue in this case's predecessor—which implicates the conduct not only of the sender, who knowingly drafts and transmits the communication, but also the recipient who reads it. *See generally Rangra*, 2006 WL 3327634. Because TOMA leaves the decision to prosecute to the discretion of local district and county attorneys, the level of “affirmative” participation required to invite prosecution is subject to varying interpretations and could fluctuate widely based on the particular jurisdiction in which the official resides. Faced with such dramatic uncertainty, the Public Servants urge that the chilling effect of section 551.144 should not be casually dismissed in determining whether the statute is narrowly tailored to achieving its objectives.

As well, the State has made no attempt to demonstrate why TOMA must be enforced through imprisonment and other *criminal* sanctions, when many states' statutes call only for civil penalties,⁸ or why section 551.141 (providing that actions taken in

⁸ In fact, aside from Texas, only 14 states' open meetings laws provide for jail time as a punishment: Arkansas (ARK. CODE ANN. §§ 25-19-101 *et seq.*); California (CAL. GOV'T CODE § 54959; CAL. PENAL CODE § 19); Florida (FLA. STAT. ANN. §§ 286.011-.012); Hawaii (HAW. REV. STAT. §§ 92-1 *et seq.*); Illinois (5 ILL. COMP. STAT. ANN. § 120/1 *et seq.*); Michigan (MICH. COMP. LAWS §§ 15.261 *et seq.*); Montana (MONT. CODE ANN. §§ 2-3-201 *et seq.*); Nebraska (NEB. REV. STAT. §§ 84-1407 *et seq.*); Nevada (NEV. REV. STAT. ANN. §§ 241.010 *et seq.*); North Dakota (N.D. CENT. CODE §§ 44-04-17.1, 44-04-19 *et seq.*); Oklahoma (OKLA. STAT. ANN. tit. 25, §§ 301 *et seq.*); South Carolina (S.C. CODE ANN. §§ 30-4-10 *et seq.*); South Dakota (S.D. CODIFIED LAWS §§ 1-25-1 *et seq.*); and Utah (UTAH CODE ANN. §§ 52-4-101 *et seq.*).

violation of TOMA are voidable), coupled with requirements of disclosure and other civil remedies, is not sufficient to fully protect the public interest in honest government.

D.

The challenged Texas Open Meetings Act provision goes too far in its prohibition against private speech and is therefore unconstitutionally overbroad.

Section 551.144 is unconstitutionally overbroad because it adversely affects a substantial amount of protected speech activity. “In a facial challenge to the overbreadth and vagueness of a law, a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.” *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). “Criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.” *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

An accepted and often necessary part of overbreadth analysis involves studying the ways in which the challenged statute may chill speech. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 877 (1977) (finding overbreadth when the challenged statute would have allowed prosecutions of parents for providing birth control information to or permitting the viewing of “indecent” material by 17-year old children). In a facial First Amendment challenge, the challenger need only show that a statute or regulation “might operate unconstitutionally under some conceivable

set of circumstances.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Both the predecessor to this case and the instant case amply demonstrate the overbreadth of the challenged TOMA provision. As noted above, the predecessor to this lawsuit involved an indictment based on an exchange of emails, where certain of the public officials merely received an email. *See Rangra*, 2006 WL 3327634. While the passive recipients of the emails were not ultimately indicted in that case, their conduct was called into question. *Id.* Additionally, prosecutorial discretion could allow such recipients to be indicted in a future case, based on the statute’s definition of meeting to include the receipt of information regarding public business or policy. *See* TEX. GOV’T CODE § 551.001(4)(B).

In the instant case, one of the Petitioners, Henry Wilson, testified at trial regarding his and his colleagues’ inability to learn crucial information about a drug they were thinking about controlling, but certain details of which they did not want to discuss in public:

We didn’t want to talk about it in a public forum because it would disclose the locations in town that [it] was being sold, who was buying it, how it was being used, and what we felt like [were] the public dangers. And we just didn’t feel comfortable exposing those areas to the public.⁹

Far from wanting to engage in corrupt decision-making, Mr. Wilson was looking out for the best

⁹ RR at pp. 802-03.

interests of his constituents. This is not the “evil” TOMA targets.

When a person can be held strictly liable for a crime by receiving an email or gathering information on an important public issue, the First Amendment is endangered. “Far from providing the breathing space that First Amendment freedoms need to survive, the [statute] is susceptible of regular application to protected expression. ... [T]he [statute] is substantially overbroad.” *City of Houston v. Hill*, 482 U.S. 451, 466-67 (1982) (citations omitted).

E.

The challenged Texas Open Meetings Act provision is unconstitutionally vague.

In the First Amendment arena, overbreadth and vagueness are twin doctrines designed to prevent government impositions on free speech. Vagueness is a doctrine that applies to all criminal laws. The standard of certainty in criminal statutes is higher than in those depending primarily on civil sanctions for enforcement. *Winters v. New York*, 333 U.S. 507, 515 (1948). The vagueness doctrine also applies with greater vitality when free speech is affected by the vague criminal law.

Under the applicable vagueness standard, section 551.144 fails because it does not provide notice of what it prohibits and it encourages arbitrary enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Part of the problem with understanding what conduct is prohibited by TOMA is that TOMA can technically apply to the passive receipt of information, as noted above; TOMA has been held to require only knowledge of the fact of the

conduct and not knowledge that the conduct violates the law, *see Tovar v. State*, 978 S.W.2d 584 (Tex. Ct. Crim. App. 1998); and TOMA has been interpreted as applying to “walking quorums,” meaning quorums created through serial conversations between members of a governmental body or between such members and a third person, *see Tex. Atty. Gen. Op. GA-0326* (2005). In application, it can be difficult for public officials to determine whether particular conduct will be deemed to fall within the scope of TOMA, and, if it is later so deemed, the fact that they reasonably thought otherwise is no defense.

TOMA’s vagueness is well chronicled in an article by Scott Houston, an attorney who advises Texas public officials on TOMA. *See Houston, Scott. Texas Open Meetings Act: Constitutional?*, 13 TEX. TECH. ADMIN. L.J. 79 (Fall 2011). Houston calls advising city officials about TOMA “almost comical.” *Id.* at 79. He considers TOMA’s language “deceptive” and states that the only safe answer he can give to a public official seeking advice on whether they can speak is “No.” *Id.* at 79-80, 82. When an attorney whose job it is to interpret a law cannot predict that law’s application, that law is not defined “with sufficient definiteness that ordinary people can understand what conduct is prohibited.” *Kolender*, 461 U.S. at 357. And, in fact, numerous of the Petitioners (i.e., “ordinary people”) testified at trial that they do not understand what conduct is prohibited by the Act.¹⁰

In short, section 551.144 of TOMA is unconstitutionally vague.

¹⁰ RR at pp. 755-58, 759-63, 786, 808-11.

PRAYER

Petitioners Diana Asgeirsson, Angie Bermudez, James Fitzgerald, Jim Ginnings, Victor Gonzalez, Russell C. Jones, Lorne Liechty, Mel LeBlanc, A.J. Mathieu, Johanna Nelson, Cindy O'Bryan, Todd Pearson, Arthur Reyna, Charles Whitecotton, Henry Wilson, and Kevin Wilson request that their petition for writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 21, 2012, this Petition for Writ of Certiorari was served on the following counsel of record:

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

September 25, 2012

No. 11-50441

Lyle W. Cayce
Clerk

DIANA ASGEIRSSON, Alpine Council Member;
ANGIE BERMUDEZ, Alpine Council Member;
JAMES FITZGERALD, Alpine Council Member;
JIM GINNINGS, Wichita Falls Council Member;
VICTOR GONZALEZ, Pflugerville Council Member;
RUSSELL C. JONES, Sugar Land Council Member;
LORNE LIECHTY, Heath Texas Council Member;
MEL LEBLANC, Arlington Texas Council Member;
A.J. MATHIEU, Joshua Texas Council Member;
JOHANNA NELSON, Alpine Texas Council Member;
TODD PEARSON, Mayor of Rockport Texas;
ARTHUR REYNA, Leon Valley Council Member;
CHARLES WHITECOTTON, Alderman, Whiteboro Texas;
HENRY WILSON, Hurst Texas Council Member;
KEVIN WILSON, Bellmead Texas Council Member,

Plaintiffs-Appellants

versus

TEXAS ATTORNEY GENERAL, GREG ABBOTT; STATE OF TEXAS,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

No. 11-50441

Before SMITH, GARZA, and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Plaintiffs, who are local government officials, sued seeking a declaration that a provision of the Texas Open Meetings Act (“TOMA”) violates the First Amendment. Specifically, they contend that Texas Government Code § 551.144 is a content-based restriction on political speech, is unconstitutionally vague, and is overbroad. They seek declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983, that Section 551.144 may not be enforced.

After a bench trial, the district court held that Section 551.144 is constitutional because it is not vague or overbroad, it does not restrict speech based on its content, it requires disclosure rather than restricts speech, and it satisfies the intermediate-scrutiny standard. *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684 (W.D. Tex. 2011). The court held in the alternative that the statute survives strict scrutiny. Plaintiffs appeal each of those rulings except the ruling that the statute meets intermediate scrutiny; they argue that strict scrutiny applies instead.

I.

TOMA requires the meetings of governmental bodies to be open to the public. It applies to most state and local governing bodies but excludes the Legislature, the Governor, mayors, and other executive policymakers. As part of the mechanism to enforce the open-meetings requirement, Section 551.144 prohibits members of covered governing bodies from knowingly participating in a closed meeting, to organize a closed meeting, or to close a meeting to the public. A violation is a misdemeanor punishable by a fine of \$100-500, confinement in jail for one to six months, or both.

Most significant for First Amendment purposes is that TOMA defines a “meeting” as “a deliberation between a quorum of a governmental body . . . dur-

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ing which public business or public policy over which the governmental body has supervision or control is discussed” TEX. GOV’T CODE ANN. § 551.001. Incidental discussion of public business at ceremonial events, conventions, or social functions is then carved from the definition. Plaintiffs contend that that definition has the effect of criminalizing political speech based on content. We agree with the district court, however, that TOMA is a content-neutral time, place, or manner restriction, so we affirm.¹

II.

Plaintiffs argue that the issue of whether strict scrutiny applies to TOMA was foreclosed by a 2009 Fifth Circuit opinion that concludes that the statute is a content-based restriction on speech and must be subjected to strict scrutiny. In 2006, two members of the Alpine City Council sued, alleging TOMA’s unconstitutionality. The district court upheld the statute, but a panel of this court reversed, concluding that strict scrutiny applied. We granted rehearing en banc, vacating the panel opinion, then dismissed the appeal as moot.² The district court *a quo* concluded that the panel opinion in *Rangra* is not controlling precedent. Plaintiffs maintain, however, that it is still controlling, because the en banc court never reached the merits. They claim that the grant of rehearing en banc merely stays the mandate.

Fifth Circuit Rule 41.3 states, “Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate.” Although we need not go beyond that plain

¹ Because the issues are questions of law, we review them *de novo*. See *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006).

² *Rangra v. Brown*, 566 F.3d 515, 526-27 (5th Cir.), *vacated by* 576 F.3d 531 (5th Cir.) (per curiam) (granting rehearing en banc), *appeal dismissed as moot*, 584 F.3d 206 (5th Cir. 2009) (en banc) (per curiam).

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language, this court has consistently held that vacated opinions are not precedent,³ and it has done so even where the court granting en banc review later loses its quorum.⁴ Thus, *Rangra* is not binding precedent.

III.

Plaintiffs claim that Section 551.144 is content-based because it applies only to speech regarding “public policy over which the governmental body has supervision or control.”⁵ A regulation is not content-based, however, merely

³ See *Asociacion Nacional de Pescadores a Pequena Escala o Artesanales v. Dow Quimica de Colombia S.A.*, 988 F.2d 559, 565 (5th Cir. 1993) (stating that a particular panel opinion “was vacated for rehearing *en banc* and then settled [and] [a]ccordingly . . . is not precedent”).

⁴ See *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1055 (5th Cir. 2010) (en banc) (per curiam), *petition for writ of mandamus denied sub nom. In re Comer*, 131 S. Ct. 902 (2011); see also *United States ex rel. Marcy v. Rowan Cos.*, 520 F.3d 384, 389 (5th Cir. 2008) (stating that Fifth Circuit Rule 41.3 operates “automatically [to] vacate[]” panel opinions and render them non-precedential); *Freeman v. Tex. Dep’t of Criminal Justice*, 369 F.3d 854, 864 n.12 (5th Cir. 2004) (“[T]he panel opinion was vacated by the grant of en banc rehearing and is not precedential.”).

⁵ The alleged content-based portion of the statute is in the definition of “meeting,” which Section 551.001 defines as

(A) a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action; or

(B) except as otherwise provided by this subdivision, a gathering:

(i) that is conducted by the governmental body or for which the governmental body is responsible;

(ii) at which a quorum of members of the governmental body is present;

(iii) that has been called by the governmental body;

(continued...)

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because the applicability of the regulation depends on the content of the speech. A statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech. *See Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-78 (1986).

A.

In *Playtime Theaters*, the Court upheld a zoning ordinance that was facially content-based because it applied only to theaters showing sexually-explicit material. The Court reasoned that the regulation was content-neutral because it was not aimed at suppressing the erotic message of the speech but instead at the “secondary effects”—such as crime and lowered property values—that tended to accompany such theaters. *Id.* at 48. The Court concluded that the “ordinance is completely consistent with [the] definition of ‘content-neutral’ speech regulations as those that ‘are *justified* without reference to the content of the regulated speech.’” *Id.* Content-neutrality has continued to be defined by the justification

(...continued)

and

(iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.

The term does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, or the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.

The term includes a session of a governmental body.

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of the law or regulation,⁸ and this court has consistently employed that test.⁹

Plaintiffs propose a different test: “A regulatory scheme that requires the government to ‘examine the content of the message that is conveyed’ is content-based regardless of its motivating purpose.” *Serv. Employees Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010) (quoting *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987)). That formulation, however, does not accurately state the law.

First, it is *dictum* and conflicts with the analysis the panel ultimately used. The panel went on to determine content-neutrality according to the purpose of the regulations in question, ultimately finding them to be content-neutral. *Id.* at 600, 602. Second, the opinion cites no authority supporting the last clause of the test, “regardless of its motivating purpose.” *Arkansas Writers’ Project*, the case cited at the end of the test, does not hold that motivating purpose is irrelevant to content-neutrality; that case is cited because it contains the language in the quotation, “examine the content of the message that is conveyed.” Finally, the test contradicts Supreme Court precedent and other Fifth Circuit opinions that determine content-neutrality according to the purpose of the regulation, as described above.

⁸ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that “[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys The government’s purpose is the controlling consideration.”); *Colorado v. Hill*, 530 U.S. 703, 719 (2000); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 (1991).

⁹ See, e.g., *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 510 (5th Cir. 2009); *Pruett v. Harris Cnty. Bail Bond Bd.*, 499 F.3d 403, 409 n.5 (5th Cir. 2007); *Illusions-Dall. Private Club, Inc. v. Steen*, 482 F.3d 299, 308 (5th Cir. 2007); *Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546, 554-56 (5th Cir. 2006); *Brazos Valley Coal. for Life, Inc. v. City of Bryan, Tex.*, 421 F.3d 314, 326-27 (5th Cir. 2005); *de la O v. Hous. Auth. of City of El Paso, Tex.*, 417 F.3d 495, 503 (5th Cir. 2005); *N.W. Enters. Inc. v. City of Hous.*, 352 F.3d 162, 174 (5th Cir. 2003); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 292 (5th Cir. 2003); *Horton v. City of Hous.*, 179 F.3d 188, 193 (5th Cir. 1999).

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The best support plaintiffs offer for their contention that content-neutrality is determined without examining the purpose of the regulation is *Burson v. Freeman*, 504 U.S. 191 (1992), which upheld a statute that prohibited the solicitation of votes within one hundred feet of a polling place. The plurality sustained the statute after finding that it satisfied strict scrutiny, but it so decided without discussing the purpose of the speech; the plurality merely stated that the regulation was *facially* content-based.¹⁰ Because the plurality ultimately found that the statute satisfied strict scrutiny, however, it may have considered an in-depth purpose analysis to be unnecessary.

Moreover, part of the reason the Court applied exacting scrutiny in *Freeman* is that the statute's prohibition applied to speech in a public, not private, forum.¹¹ The prohibition in TOMA is applicable only to private forums and is designed to *encourage* public discussion, whereas the prohibition in the statute in *Freeman* operated to *discourage* public discussion. Therefore, *Freeman* does not stand for the proposition that the regulation's justification is not the controlling factor in determining content-neutrality.

B.

Regarding content-neutral justification, the district court found that Section 551.144's purpose is to control the secondary effects of closed meetings. The court opined that closed meetings (1) prevent transparency; (2) encourage fraud

¹⁰ *Freeman*, 504 U.S. at 197 (“The Tennessee restriction under consideration, however, is not a facially content-neutral time, place, or manner restriction. Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign.”).

¹¹ *See id.* (“[T]he First Amendment’s hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of *public* discussion of an entire topic.” (emphasis added); *id.* at 198 (“As a facially content-based restriction on political speech in a *public* forum, [the state statute] must be subjected to exacting scrutiny[.]”) (emphasis added).

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and corruption; and (3) foster mistrust in government. Those justifications are unrelated to the messages or ideas that are likely to be expressed in closed meetings. The allegedly content-based requirement—that the speech concern public policy—is relevant, because only that speech would have the effects listed above. If a quorum of a governing body were to meet in secret and discuss knitting or other topics unrelated to their powers as a governing body, no harm would occur. This situation is analogous to *Playtime Theaters*, in which only adult movie theaters attracted crime and lowered property values—but not because the ideas or messages expressed in adult movies caused crime.

The instant case is unlike *Boos v. Berry*, 485 U.S. 312 (1988), in which the Court struck down an ordinance that restricted criticism of foreign governments near their embassies. The government argued that the ordinance was justified by the need to protect the dignity of foreign diplomatic personnel. *Id.* at 321 (plurality opinion). Justice O'Connor distinguished the case from *Playtime Theaters* because the “secondary effect” was a direct result of the message or idea in the speech. *Id.* Foreign diplomats were offended because of the criticism’s message.

Here, government is not made less transparent because of the message of private speech about public policy: Transparency is furthered by allowing the public to have access to government decisionmaking. This is true whether those decisions are made by cogent empirical arguments or coin-flips. The private speech itself makes the government less transparent regardless of its message. The statute is therefore content-neutral.

Plaintiffs cite *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), to support their argument that TOMA is too underinclusive to be content-neutral because it does not cover the Legislature, Governor, mayors, or other executive policymakers. The Court rejected the state’s arguments that a statute restricting the sale of violent video games to minors was justified by a

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content-neutral purpose. In doing so, the Court used the statute's underinclusiveness to reject the state's asserted content-neutral justification for the law. *Id.* at 2740. Thus, the underinclusiveness was merely evidence of the justification rather than an independent cause of unconstitutionality. Here, there is little reason to think the state is suppressing private speech for any reason other than the content-neutral goals listed above. Accordingly, *Entertainment Merchants* does not counsel in favor of unconstitutionality.

Plaintiffs also argue that TOMA is content-based because it is identity-based—it applies only to speakers who are members of governmental bodies. This contention is based on a misreading of *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), in which the Court struck down a statute restricting the political donations of corporations and labor unions. The Court found that the statute's restriction to particular speakers was meant to disfavor the views of those speakers, evidencing a content-based purpose. *Id.* at 888-89. Here, the statute does not apply to government officials because of any hostility to their views. Rather, only private speech by government officials lessens government transparency, facilitates corruption, and reduces confidence in government. Therefore, the identity-based application of the statute is not evidence of a content-based purpose.

A separate harm arising from the use of identity concerned the Court in *Citizens United*:

By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.

Id. at 899. This is a concern about public attitudes toward particular ideas and speakers. It is aimed at regulations that keep speech from reaching the mar-

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marketplace of ideas, and it is therefore inapplicable to statutes that restrict only private speech. Thus, TOMA's application to only members of public bodies does not raise either of the concerns expressed in *Citizens United*.

Accordingly, TOMA is a content-neutral time, place, or manner restriction, and as such, it should be subjected to intermediate scrutiny. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Plaintiffs do not challenge the district court's conclusion that TOMA meets intermediate scrutiny, so we do not reach that issue. *See United States v. Thibodeaux*, 211 F.3d 910, 912 (5th Cir. 2000).

IV.

The district court concluded that TOMA, like the disclosure statute upheld in *Citizens United*, requires disclosure of speech but does not suppress it. To reach the conclusion that the statute does not suppress speech, the court construed TOMA to allow violations to be cured by later disclosure. It appears that the court misconstrued the statute and that a violation of Section 551.144 could result in criminal penalties even if the speech were later disclosed. Nevertheless, the court's ultimate conclusion was correct: TOMA is a disclosure statute and should be upheld in accordance with *Citizens United*.

For First Amendment purposes, the requirement to make information public is treated more leniently than are other speech regulations. The Court has often upheld disclosure provisions even where it has struck down other regulations of speech in the same statutes. *See, e.g., Citizens United*, 130 S. Ct. at 914; *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). And the Court has generally upheld disclosure requirements that are unlikely to subject the speaker to harassment or persecution. *See e.g., United States v. Harriss*, 347 U.S. 612, 625 (1954); *Doe #1 v. Reed*, 130 S. Ct. 2811, 2818-21 (2010). The justification is that disclosure requirements are less effective in suppressing the underlying ideas of the speech

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that is burdened.¹²

In *Citizens United*, the Court upheld the portions of the Bipartisan Campaign Reform Act (“BCRA”) that required political advertisements to contain disclaimers indicating who paid for them. *Id.* Because the Court classified the statute as a disclosure requirement, it subjected it to exacting rather than strict scrutiny. *Id.* The Court reasoned that disclosure requirements do not prevent individuals from speaking even if they burden the ability to speak. *Id.* As with the BCRA, TOMA burdens the ability to speak by requiring disclosure. TOMA’s disclosure requirement burdens private political speech among a quorum of a governing body, but it does so in the same way that the BCRA’s disclosure requirement burdened anonymous political speech in political advertisements. Neither statute aims to suppress the underlying ideas or messages, and they arguably magnify the ideas and messages by requiring their disclosure.

Plaintiffs contend that because TOMA punishes private speech, it does not merely require disclosure. That is a distinction without a difference: To enforce a disclosure requirement of certain speech, the government must have the ability to punish its nondisclosure. If there were no punishment for nondisclosure, the speaker would have no incentive to disclose until the enforcer of the statute prosecuted him or obtained an injunction. That would render any disclosure requirement so arduous to enforce that it would be ineffective.

The district court did not address this issue, because it construed Section 551.144 to allow public officials to avoid punishment by later disclosing their private speech. To support that construction, the court cited *Burks v. Yarbrough*, 157 S.W. 3d 876, 883 (Tex. App.—Houston [14th Dist.] 2005, no pet.), but that case dealt not with Section 551.144 but with Section 551.141, which makes acts

¹² See *Citizens United*, 130 S. Ct. at 914 (“[D]isclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking.”) (internal quotation marks and citations omitted).

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of governmental bodies voidable when they violate TOMA. Furthermore, the justification for allowing public officials to cure voidable acts does not apply to criminal sanctions. If government officials were not able to cure voidable acts by later disclosure, the body could never again make the same decision once having taken that action in private. Because this problem does not arise with criminal sanctions, there is no reason to think the “redo” exception applies to criminal sanctions.

The absence of such a “redo” exception, however, does not prevent TOMA from being upheld under *Citizens United* and *Buckley*. The statute upheld in *Citizens United* was violated as soon as a political advertisement was televised without the required disclaimer. *See Citizens United*, 130 S. Ct. at 914. In *Buckley*, there is no indication that violations of the disclosure requirements were curable by later disclosure. Furthermore, violations of that disclosure statute were punishable by a fine of up to \$1,000, a year in prison, or both—twice the maximum prison term and fine as in Section 551.144. *See Buckley*, 424 U.S. at 64. Therefore, the fact that TOMA is enforced with penalties other than requiring disclosure does not prevent it from being treated as a disclosure requirement for First Amendment purposes.

Finally, the plaintiffs contend that, even if Section 551.144 is treated as a disclosure requirement, it is unconstitutional because it subjects them to harassment and persecution by the authorities in the form of criminal prosecution. “[T]hose resisting disclosure can prevail under the First Amendment if they can show ‘a reasonable probability that the compelled disclosure will subject them to threats, harassment, or reprisals from either Government officials or private parties.’” *Doe #1*, 130 S. Ct. at 2821 (quoting *Buckley*, 424 U.S. at 74). Plaintiffs’ argument fails, however, because the harassment they are alleging is the enforcement of the statute itself. If the enforcement of a disclosure statute constituted harassment, then all disclosure requirements enforced by penalties

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would be unconstitutional. As noted above, the Court has upheld disclosure requirements that are enforced by penalties more severe than TOMA's. *See, e.g., Buckley*, 424 U.S. at 64.

Because Section 551.144 punishes private speech in order to enforce a disclosure requirement, it is no less a disclosure requirement than are the statutes upheld in *Citizens United* and *Buckley*. If it were not a content-neutral time, place, or manner restriction, it would be subject to exacting scrutiny.¹³ Because it is content-neutral, however, intermediate scrutiny is the appropriate standard. *Turner Broad.*, 512 U.S. at 642.

V.

Plaintiffs contend that Section 551.144 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. The plaintiffs' argument fails, 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. With respect to these other goals, TOMA is not overbroad.

For a statute to be overbroad, it must "reach[] a substantial amount of constitutionally protected conduct." *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). "The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). It is not evident that Section 551.144 is reaching "a substantial amount of constitu-

¹³ *Citizens United*, 130 S. Ct. at 914, defines exacting scrutiny as requiring "a substantial relation between the disclosure requirement and a sufficiently important government interest." To withstand such scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe #1*, 130 S. Ct. 2811 (2010) (citing *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 128 S. Ct. 2759, 2775 (2008)).

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tionally protected speech,” because plaintiffs offer no support for the proposition that government officials have a constitutional right to discuss public policy among a quorum of their governing body in private. Furthermore, the speech the statute does reach is within its “plainly legitimate sweep” in fostering government transparency, trust in government, and participation by all elected officials.

Because Section 551.144 reaches only private discussion of public business among a quorum of a governing body, plaintiffs—to show overbreadth—must demonstrate that they have a constitutional right to such speech. They offer no support for that proposition, and 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.

The public’s right of access extends at least to criminal proceedings.¹⁴ The justification for this right of access, however, extends to government affairs generally: “[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs” and “to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” *Globe*, 457 U.S. at 604 (quotations omitted). It makes little sense for the First Amendment to require states to open their criminal proceedings while prohibiting them from doing so with their policymaking proceedings. Therefore, Section 551.144 does not prohibit constitutionally protected speech.

Even if the plaintiffs were able to show that TOMA reaches a substantial amount of protected speech, they have not established that its overbreadth is “substantial as well, judged in relation to the statute’s plainly legitimate sweep.”

¹⁴ See *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 509-11 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-05 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980).

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Broadrick, 413 U.S. at 615. They offer only one example¹⁵ of a situation in which local government officials have a legitimate reason to discuss public business privately: when the City of Hurst was considering the prohibition of a then-legal drug and did not want to disclose where it was being sold. The plaintiffs point out that this speech does not lead to corruption, and they conclude that it is thus outside TOMA's legitimate sweep.

That notion fails, because it ignores TOMA's other goals apart from reducing corruption. Having that discussion privately would decrease government transparency, and the state has determined that the benefits of making these discussions public outweigh any harm done by the disclosure of information. Thus, the plaintiffs have not shown that TOMA reaches outside its plainly legitimate sweep.

¹⁵ In its brief as *amicus curiae*, the Texas Municipal League offers other situations in which TOMA arguably could prohibit constitutionally-protected speech. For example, *amicus* mentions a situation in which a city council member is prohibited from attending a civic event at which a fellow member who is running for re-election will be speaking about public-policy issues. *Amicus* argues that that is prohibited, because it is a quorum discussing government policy at an event not open to the general public.

The potential situations listed, however, are not from actual cases but are only examples of advice attorneys have given to local government officials. Furthermore, such broad interpretations of the law are suspect, given that TOMA appears to exclude such gatherings from its definition of "meeting":

["Meeting"] does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, or the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.

TEX. GOV'T CODE § 551.001. Furthermore, narrower constructions of statutes are preferable in overbreadth cases, because speech burdened by broader interpretations can be protected by as-applied challenges. See *New York v. Ferber*, 458 U.S. 747, 773-74 (1982).

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VI.

Plaintiffs claim that TOMA is unconstitutionally vague because it is so unclear that public officials need an educational course to comply with it, and even lawyers that specialize in TOMA often cannot predict its interpretation. Vagueness is necessarily a matter of degree, and plaintiffs have not shown that TOMA is as vague as the statutes that have been found unconstitutional. Furthermore, neither of the issues plaintiffs point to implicates the underlying purpose of the vagueness doctrine: preventing government from chilling substantial amounts of speech and facilitating discriminatory and arbitrary enforcement.

The concern underlying the vagueness doctrine is that citizens will not be able to predict which actions fall within the statute, leading to arbitrary and discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Where there are few guidelines for the application of a statute, a “standardless sweep” could allow “policemen, prosecutors, and juries to pursue their personal predilections.” *Id.* The speech-restricting laws that the Court has found unconstitutionally vague are indeed standardless.¹⁶

In contrast, plaintiffs point to no section of TOMA that is vague on its face. Plaintiffs’ complaints arise from TOMA’s complexity rather than its vagueness or lack of standards. A great deal of training may be required to predict the interpretation of the tax code, for example, but that is not because it is standardless or arbitrary. In fact, the vast body of law that causes TOMA to be so complex arguably makes it less vague by providing the necessary standards. Plaintiffs do not argue that any of the cases interpreting TOMA conflicts or add ambi-

¹⁶ *See, e.g., Smith v. Goguen*, 415 U.S. 566 (1974) (striking down a statute that prohibited treating the flag “contemptuously”); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (striking down a statute that prohibited employment by the state of any “subversive person”); *City of Hous., Tex. v. Hill*, 482 U.S. 451 (1987) (striking down a statute that made it unlawful to “interrupt any policeman in the execution of his duty”).

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guity.¹⁷ The fact that plaintiffs point to TOMA as a whole rather than to a particular ambiguous portion distinguishes their argument from reasoning expressed by the Supreme Court when striking down statutes for vagueness. Some ambiguity is unavoidable, and “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (citation and internal quotation marks omitted). TOMA is not unconstitutionally vague.

VII.

In summary, TOMA is content-neutral and is not unconstitutionally overbroad or vague. It is also a disclosure statute, though that does not change the level of scrutiny, because the statute is content-neutral. The district court properly applied intermediate scrutiny, and the judgment is AFFIRMED.

¹⁷ There are seventy-four sections of TOMA and countless cases interpreting it.

File: 071736F - From documents transmitted: 04/14/2009

AFFIRM in part; REVERSE and REMAND in part; Opinion Filed April 9, 2009

In The
Court of Appeals
Fifth District of Texas at Dallas

.....
No. 05-07-01736-CV
.....

CITY OF DALLAS, Appellant

V.

THE DALLAS MORNING NEWS, LP, Appellee

.....
On Appeal from the 191st Judicial District Court

Dallas County, Texas

Trial Court Cause No. 06-06607-J
.....

OPINION

Before Justices Morris, Francis, and Murphy

Opinion By Justice Murphy

This case involves open records requests for e-mails of the mayor and various employees of the City of Dallas under the Texas Public Information Act. The City appeals the judgment granted in favor of The Dallas Morning News, LP. In three points of error, the City contends the trial court erred in granting the News's motion for partial summary judgment and in denying the City's motion for summary judgment. In two additional points of error, the City complains that the trial court erred in rendering a declaratory judgment and in awarding attorney's fees to the News under section 552.323 of the Act. We affirm the trial court's denial of the City's summary judgment motion. We reverse the judgment in favor of the News and remand the case to the trial court for further proceedings.

BACKGROUND

The Levinthal and Dunklin Requests

News reporters Dave Levinthal and Reese Dunklin each submitted an open records request to the City seeking copies of e-mail messages sent and received by then-Mayor Laura Miller and various employees of the City. The Levinthal request was limited to e-mails sent to or received from official City Hall e-mail addresses, including e-mails from the personal Blackberry e-mail address of Mayor Miller, for the period October 8 to October 24, 2005. The Dunklin request included e-mails sent to and received from Mayor Miller and certain City employees on their official City Hall e-mail addresses, as well as e-mails from "accounts other than their city address to conduct city business," and covered the period June 5 to December 5, 2005. The Dunklin request therefore covered e-mails that never passed through the City server.

As provided for in the Texas Government Code, the City sought a decision from the Attorney General for multiple items in the Levinthal request. *See* Tex. Gov't Code Ann. § 552.301(a) (Vernon Supp. 2008). Exhibit E to the letter from the City to the Attorney General specifically addressed e-mails received by various City employees on their official e-mail addresses from Mayor Miller's personal e-mail address. The City asserted e-mails sent solely to and from personal e-mail accounts are not public information subject to the Act because the City does not own or have a right of access to "most of this information." The City subsequently withdrew its request to withhold the items in Exhibit E, stating it had decided to withdraw its argument and release the information. In response, the Attorney General allowed and disallowed certain exceptions and stated expressly that it was not addressing the withdrawn request.

The City also sought a decision from the Attorney General for items in the Dunklin request. The

City claimed two exceptions allowed under the Act, but did not request a decision regarding Dunklin's request for personal e-mails. The Attorney General issued a letter ruling on the Dunklin request, allowing withholding under the two exceptions.

The City and the News unsuccessfully attempted to resolve issues related to the Levinthal and Dunklin requests. The News filed this lawsuit before any records were produced.

Trial Court Proceedings

In its original petition, the News sought a writ of mandamus requiring release of the requested information. *See* Tex. Gov't Code Ann. § 552.321(a) (Vernon 2004). The City produced to the News nine boxes containing what the City claimed to be all responsive, non- excepted public information. The News then filed an amended petition, alleging there had been release of some, but not all of the requested e-mails. The amended petition included a request for a declaratory judgment under the Uniform Declaratory Judgments Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.003 (Vernon 2008).

Thereafter the News served the City with a subpoena to produce documents, including e- mails and documents relating to billing and payment of Mayor Miller's wireless service. The City filed motions for protective order and to quash the subpoena. The trial court granted the motions, protecting the City and Mayor Miller from producing any documents from personal e-mail accounts of the individuals identified in the Levinthal and Dunklin requests. The News did not seek relief from the trial court's order.

After the trial court quashed the subpoena, the News filed an amended traditional motion for partial summary judgment, requesting a writ of mandamus for release of e-mails accessible through the personal e-mail accounts of City employees, including the mayor. *See* Tex. R. Civ. P. 166a(c). It also filed a supplemental motion for summary judgment seeking a declaration that the "e-mail of Mayor Miller and other city officials and employees to or from Blackberries or similar devices, or to or from e-mail accounts other than those with City Hall addresses, made in connection with the transaction of official business, is public information under the Texas Public Information Act."

The City filed its own traditional motion for summary judgment. The City claimed the News was not entitled to any relief because the City had not refused to perform a ministerial, nondiscretionary act demanded by the News. The City argued it had shown conclusively that it had produced all public information requested and asserted that the personal account e-mails were not public information as a matter of law.

The trial court granted the News's motion for partial summary judgment and supplemental motion for partial summary judgment, requiring the City to produce all non-excepted e-mails and declaring that the information responsive to the Levinthal and Dunklin requests is public information under the Act, "including but not limited to e-mail of Mayor Miller and other city officials and employees to or from Blackberry or similar devices, or to or from e-mail accounts other than those with City Hall addresses, made in connection with the transaction of official business, regardless of whether such e-mails passed through or were processed by City e-mail servers." The trial court denied the City's motion for summary judgment. Following a non-jury trial, the trial court awarded attorney's fees to the News. The City then filed this appeal.

In its first three points of error, the City contends the trial court erred in granting partial summary judgment for the News and in denying the City's motion for summary judgment. We address these points of error together.

STANDARD OF REVIEW

We review a summary judgment using the well-established standard. The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Sysco Food Servs. v. Trapnell*, 890 S.W.2d 796, 800 (Tex. 1994). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Id.* Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.* We review a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.-

Dallas 2000, pet. denied).

When, as here, both parties move for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *Guynes v. Galveston County*, 861 S.W.2d 861, 862 (Tex. 1993); *Howard v. INA County Mut. Ins. Co.*, 933 S.W.2d 212, 216 (Tex. App.-Dallas 1996, writ denied). Neither party can prevail because of the other's failure to discharge its burden. *Guynes*, 861 S.W.2d at 862; *Howard*, 933 S.W.2d at 216. When both parties move for summary judgment, we consider all the evidence accompanying both motions in determining whether to grant either party's motion. *Howard*, 933 S.W.2d at 216; *Benchmark Bank v. State Farm Lloyds*, 893 S.W.2d 649, 650 (Tex. App.-Dallas 1994, no writ). When the trial court grants one motion and denies the other, the reviewing court should determine all questions presented. *See Comm'rs Court of Titus County v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). The reviewing court should render the judgment that the trial court should have rendered. *Id.*

ANALYSIS

The Texas Public Information Act is founded on the policy of this State that each person is entitled to complete information about the affairs of government and the official acts of public officials and employees, unless otherwise expressly provided by law. *See* Tex. Gov't Code Ann. § 552.001(a) (Vernon 2004). "Public information," as defined by the Act, means "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Tex. Gov't Code Ann. § 552.002(a) (Vernon 2004). A municipal governing body is a "governmental body" for purposes of the Act. Tex. Gov't Code Ann. § 552.003(1)(A)(iii) (Vernon 2004). An individual is not a "governmental body" for purposes of the Act. *See Keever v. Finlan*, 988 S.W.2d 300, 305 (Tex. App.-Dallas 1999, pet. dismiss'd) (while governmental body includes school district board of trustees, trustee is not governmental body subject to Act).

Upon a request for public information, a governmental body's officer for public records must promptly produce public information for inspection, duplication, or both. Tex. Gov't Code Ann. § 552.221(a) (Vernon 2004). Information excepted under the Act is not subject to required disclosure. *See* Tex. Gov't Code Ann. § 552.101-.1425 (Vernon 2004 & Supp. 2008). If a governmental body considers the requested information excepted from disclosure, and there has been no previous determination on the subject, the Act requires the governmental body to request a decision from the attorney general about whether the information is within an exception. Tex. Gov't Code Ann. § 552.301(a). If the governmental body fails to request an attorney general decision under section 552.301, the information requested in writing "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Tex. Gov't Code Ann. § 552.302 (Vernon Supp. 2008); *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) (where city failed to prove memorandum was not subject to Act or fell within exception, court was not required to look at whether compelling demonstration had been made for nondisclosure). The governmental body bears the burden of proving that an exception to disclosure applies. *See Thomas v. Cornyn*, 71 S.W.3d 473, 488 (Tex. App.-Austin 2002, no pet.). A requestor may file suit for a writ of mandamus compelling a governmental body to release requested information if the governmental body refuses to request an attorney general's decision or refuses to supply public information. Tex. Gov't Code Ann. § 552.321(a).

The heart of the parties' dispute is whether Mayor Miller's Blackberry e-mails that never go through the City server are public information under the Act. In granting summary judgment in favor of the News, the trial court ruled that such e-mails, made in connection with the transaction of official business, are public information the City must produce. The News argues that when the mayor engages in authorized communication by personal e-mail relating to her authority under the City charter, the e-mail becomes "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by . . . or for a governmental body." *See* Tex. Gov't Code Ann. § 552.002(a). The City claims the e-mails do not meet the statutory definition of public information, regardless of whether the e-mails relate to the transaction of official business, because they are not collected, assembled, or maintained by or for the City, and the City does not own or have the

right of access to them. On the record before us, neither the News nor the City has established its right to summary judgment as a matter of law.

Citing section 552.302 of the Act, the News first argues that the City, by not requesting an attorney general decision, waived its argument that personal account e-mails not captured on the official server are not public information. Section 552.302 provides only that information requested in writing is presumed to be subject to disclosure when the governmental body does not request an attorney general decision under section 552.301. Tex. Gov't Code Ann. § 552.302. By its express language, section 552.301 applies only to exceptions to disclosure:

A governmental body that receives a written request for information that it wishes to withhold from public disclosure *and that it considers to be within one of the exceptions under Subchapter C* [sections 552.101-.1425] must ask for a decision from the attorney general about whether the information *is within that exception* if there has not been a previous determination about whether the information falls within one of the exceptions.

Tex. Gov't Code Ann. § 552.301(a) (emphasis added). The City was required to seek an attorney general decision only as to information it believed to be an "exception." Tex. Gov't Code Ann. § 552.301(a). The City does not claim an exception. Rather, it argues that personal account e-mails are not public information subject to the Act. The News cites no authority that would extend its waiver argument, if valid, beyond the express language of the statute requiring requests for attorney general decisions only for claimed exceptions for what otherwise would be public information. No waiver exists here.

We next turn to both the News's and the City's summary judgment burdens relating to the Levinthal and Dunklin requests. The requested e-mails are not "public information" unless they are collected, assembled, or maintained in connection with the transaction of official business (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it. Tex. Gov't Code Ann. § 552.002(a). The City is a governmental body as defined under the Act. Tex. Gov't Code Ann. § 552.003(1)(A)(iii). A governmental body does not include Mayor Miller or any City employee. *See Keever*, 988 S.W.2d at 305. Accordingly, the News had the burden to show the City had refused to produce existing e-mails collected, assembled, or maintained in connection with the transaction of official City business, which e-mails are owned by the City or to which it has a right of access. The City had the burden to show it had produced all such existing e-mails.

The City's Summary Judgment Motion

To support its motion for summary judgment that it had produced all e-mails constituting public information, the City offered testimony from its administrative assistant attorney, its public information officer, and its information technology manager. In his affidavit, Jesus Toscano, Jr., administrative assistant attorney, detailed the chain of events relating to the search for requested information and production of "nine banker's boxes containing all the responsive nonexcepted public information - comprising thousands of pages . . ." The affidavit did not address access to the Mayor's Blackberry e-mails.

As to the Mayor's personal Blackberry account, Celso Martinez, the City's director of public information and designated public information officer, testified twice that he was told by Stephen Hin King Wong of the City's Communication and Information Services department that the mayor's personal e-mails are on a separate server, and the City does not have *direct* access to them. Martinez testified that e-mails emanating from the Mayor's Blackberry go through a separate server and the City is "unable to obtain those *in the same fashion* that we could those e-mails that emanated or were processed through [the] city servers. Clearly a much easier process that way." (Emphasis added.) The Act does not qualify or narrow the definition of "access" to direct, or easy, access only. The issue is "right of access." Martinez's testimony does not answer the question of whether the City has the right of access to e-mails emanating from Mayor Miller's Blackberry.

The City's first letter to the Attorney General regarding the Levinthal request also raises questions regarding access. Prior to withdrawing its request for a decision on personal e-mail accounts, the City

stated, “[W]e believe that information sent from the personal e-mail accounts of the mayor to the personal e-mail accounts of other City officials is not public information subject to the Act because the City does not have custody of or a right of access to *most* of this information.” (Emphasis added.) We are left with the question of what access the City has to the rest “of this information.”

The remaining evidence raises more questions. The evidence includes the City's affidavit of its Senior IT Manager, Rowland Uzu. Uzu states:

Whenever City Personnel utilize an e-mail account other than the City's e-mail accounts with the form of john.doe@dallascityhall.com or jane.doe@ci.dallas.tx.us, those e-mail messages are not sent to or received from a City e-mail account with the form of john.doe@dallascityhall.com or jane.doe@ci.dallas.tx.us, then those e-mail messages will not go through the City's servers or computers and will not, therefore, be stored with the City. For example, if Mayor Miller uses her private e-mail account lauramiller@mycingular.blackberry.net, and sends a message to John.Smith@aol.com, Dallas will not have a copy of that e-mail message. This Non- Dallas E-Mail is not collected, assembled or maintained by Dallas.

This affidavit suggests the City has no access to personal e-mail accounts. Yet, in its November 23, 2005 letter request to the Attorney General, the City submitted e-mails from officials' personal e-mail accounts. Specifically, the City produced e-mails between Mayor Miller and City Manager Mary Suhm sent from or received by their respective Blackberry Cingular e-mail addresses. The record is silent as to how these e-mails were obtained by the City. Considering this record alone, we conclude a genuine issue of material fact exists precluding summary judgment as to whether the personal account e-mails are collected, assembled, or maintained by or for the City, and whether the City has the right of access to them. Because a fact issue exists, the trial judge did not err in denying the City's motion for summary judgment. We overrule the first three points of error to the extent the City complains the trial court erred in denying its motion for summary judgment.

The News's Summary Judgment

The News, in its motion for partial summary judgment for writ of mandamus, had the burden to show that the City refused to produce existing e-mails constituting public information. *See* Tex. Gov't Code Ann. § 552.321(a). For proof, it attached the affidavits of reporters Levinthal and Dunklin. It also relied on testimony from Michael Bostic, an assistant City attorney, for summary judgment evidence regarding Mayor Miller's personal e-mail.

The News argues in support of its summary judgment that testimony from the City's employees “conclusively demonstrates that the Mayor transacts official city business on her Blackberry.” Yet the only testimony offered was Bostic's deposition response to questioning, that he “would think” Mayor Miller used her Blackberry to conduct official city business “from time to time.” This testimony does not rise to the level of conclusive proof claimed by the News or that which is required to show it is entitled to summary judgment as a matter of law.

For summary judgment proof that the City has refused to produce e-mails constituting public information, Levinthal testified in his affidavit:

The City has produced some, but not all, of the responsive e-mails. In particular, the City did not produce responsive e-mails from Mayor Laura Miller's Blackberry. Some of those that were produced were redacted. Some of the redactions were erroneously made with the City thereby withholding information that should be released. The City has failed to produce other responsive e-mails, despite the Attorney General's ruling.

Nowhere does Levinthal state facts supporting his opinion that the City has erroneously made redactions or failed to produce responsive e-mails, and his conclusions assume the existence of responsive e-mails. As a result, the affidavit is legally insufficient evidence. *See Gen. Motors Corp. v. Iracheta*, 161 S.W.3d 462, 471 (Tex. 2005) (“It is well settled that the naked and unsupported opinion or conclusion of a

witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection.”) (quoting *Dallas Ry. & Terminal Co. v. Gossett*, 156 Tex. 252, 256, 294 S.W.2d 377, 380 (1956)). Even though the City's objection to the Levinthal affidavit could be raised for the first time on appeal, the City objected and the trial court overruled the objection. *See Footnote 1* *See Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App.-Dallas 2005, no pet.) (substantive defects, such as affidavits which are nothing more than legal or factual conclusions, may be raised for first time on appeal).

Turning to the Dunklin affidavit, he testified that the City produced only a portion of the documents requested. Dunklin's testimony included a chart claiming to demonstrate omissions in “documents requested versus documents actually received” and purported to show that no e-mails were produced showing transmissions to or from Mayor Miller's Blackberry address. *See Footnote 2* The News asserts the gaps in the dates of documents produced by the City lead to a reasonable inference that the City failed or refused to disclose public information. The summary judgment record described above shows that e-mails from Mayor Miller's Blackberry address were, in fact, produced. The City does not contest production of e-mails from personal accounts if they passed through the City server. Additionally, the City testified through the Toscano affidavit that the nine boxes of documents produced constituted all non-excepted public information. Based on apparent errors in the Dunklin chart as well as conflicts raised by the City's evidence, we are left with unresolved fact questions about the existence of e-mails as well as access.

The News cannot meet its summary judgment burden of showing public information exists that the City has refused to produce by relying on unsupported conclusions and conflicting evidence. Even assuming Mayor Miller used her personal Blackberry from time to time for official business, this record does not show conclusively that public information exists here, responsive to the Levinthal and Dunklin requests, which has not been produced. We do not know what the terms of the personal account are; who has a right of access to the device or account; what type of access, if any, exists; who pays for the account; whether the City has any policies or contracts relating to personal e-mails or accounts; whether any e-mails exist falling within the News's requests; or other information relevant to the inquiries explored in addressing the public's open records rights. *See, e.g., Flagg v. City of Detroit*, 252 F.R.D. 346, 348 (E.D. Mich. 2008) (City of Detroit entered into contract for text messaging services with non-party service provider for text messaging devices and corresponding services to various city officials and employees); Tex. Att'y Gen. ORD-3778 (1999) (factors relevant in deciding whether document is governmental or personal include: who prepared document; nature of document contents; purpose or use for document; who possessed document; who had access; whether governmental body required its preparation; whether its existence was necessary to or in furtherance of official business). The News argues alternatively that if it failed to prove as a matter of law that the City is withholding information subject to disclosure, the failure was due to the City's “evasive discovery tactics.” The News asserts the trial court's protective order with regard to the News's subpoena of documents left the News “in a position where it could not effectively investigate or prove its claim.” The News's complaint relating to discovery does not entitle it to summary judgment. Nor does the News show that it pursued any remedy following the adverse ruling on the City's motions for protective order and to quash. It did not move for reconsideration of the order in the trial court, nor did the News appeal the trial court's discovery order. The trial court's protective order was rendered November 16, 2006, and the News's amended and supplemental motions for partial summary judgment were filed January 11, 2007 and September 24, 2007, respectively, in advance of the October 26, 2007 hearing on the News's motion for partial summary judgment. The News did not seek to continue the hearing based on an alleged inability to conduct discovery or investigate or prove its claim. *See Tex. R. Civ. P. 166a(g)*, 251, 252.

Under well-established summary judgment standards, the News cannot prevail simply because of the City's failure to discharge its burden. *See Guynes*, 861 S.W.2d at 862. Where, as here, both parties move for summary judgment, we consider all the evidence accompanying both motions in determining whether to grant either party's motion. *Howard*, 933 S.W.2d at 216. We conclude on this record, the News failed to meet its summary judgment burden. We sustain the first three points of error to the extent

that the City complains the trial court erred in granting the News's partial summary judgment for writ of mandamus.

Declaratory Relief

In its fourth point of error, the City contends the trial court erred in rendering a declaratory judgment under the Uniform Declaratory Judgments Act in favor of the News. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.003. The trial court's declaratory judgment was rendered pursuant to the trial court's ruling on the supplemental motion for summary judgment and was premised on the summary judgment record. For the reasons set forth above, the trial court erroneously rendered the declaratory judgment.

Attorney's Fees

The City contends in its fifth point of error that the trial court erred in awarding attorney's fees to the News because the News is not the prevailing or substantially prevailing party pursuant to section 552.323 of the Act. *See* Tex. Gov't Code Ann. § 552.323 (Vernon 2004). The News non-suited its claim for attorney's fees under the Uniform Declaratory Judgments Act, and we therefore are asked to address only application of section 552.323(a) of the Act. In a suit for writ of mandamus under section 552.321 of the Act, "the court shall assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails." Tex. Gov't Code Ann. § 552.323(a). Based on our reversal of the News's summary judgment, there is no longer a final judgment in this matter and therefore no prevailing or substantially prevailing party. *See Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 749 (Tex. App.-Fort Worth 2005, no pet.). We sustain the City's fifth point of error.

CONCLUSION

We affirm the trial court's denial of the City of Dallas's motion for summary judgment. We reverse the judgment in favor of The Dallas Morning News and remand the case to the trial court for further proceedings.

MARY MURPHY
JUSTICE

071736F.P05

Footnote 1 We do not reach the question of whether the trial court abused its discretion in overruling the objection for the reasons discussed in this opinion.

Footnote 2 The City objected to the lack of personal knowledge and foundation sufficient for Dunklin to testify as to alleged unsupported conclusions, and the trial court overruled those objections. We also do not reach the question of whether the trial court abused its discretion in overruling the objections to the Dunklin affidavit for the reasons discussed in this opinion.

File Date[04/14/2009]

File Name[071736F]

File Locator[04/14/2009-071736F]

NO. 05-07-01736-CV

IN THE COURT OF APPEALS
FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS
AT DALLAS

CITY OF DALLAS,

Appellant,

v.

THE DALLAS MORNING NEWS, LP,

Appellee

Appeal from the 191st Judicial District Court of Dallas County, Texas
Cause No. 06-06607-J

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STATEMENT OF THE CASE

Reporters for *The Dallas Morning News* made public information requests for emails sent and received by former Dallas Mayor Laura Miller and various employees of the City of Dallas. (CR 2:320, 332-33) Despite the City's assurances that it was working to gather responsive public information for release to the reporters (CR 2:496-97, 3:740-41), *The Dallas Morning News, LP*, Plaintiff, sued the City seeking a writ of mandamus to require the City to release the requested information, plus declaratory relief and attorney fees. (CR 3:710-17)

Plaintiff moved for partial summary judgment on all issues except attorney fees. (CR 2:300-458, 6:1270-77) A visiting judge, the Honorable M. Kent Sims, signed an order (CR 1:299) quashing Plaintiff's subpoena requiring Dallas Mayor Laura Miller to produce documents (CR 1:114-21), including the Blackberry e-mails at issue in this case. The City filed a cross-motion for summary judgment on all issues. (CR 5:927-1104) The City responded to Plaintiff's motion. (CR 3:512-671, 6:1284-90) Plaintiff responded to the City's motion (CR 6:1133-1269, 1282-83) and replied in support of its motion (CR 6:1302-07). The City filed a letter brief (CR 5:1111-23), to which Plaintiff responded (CR 5:1127-32). Plaintiff's motion was heard on February 16, 2007 (CR 6:1410; RR 2:1-39), and both parties' motions were heard on September 26, 2007 (CR 6:1411). Plaintiff's request for attorney fees was tried before the court without a jury on November 1, 2007. (RR 3:1-50)

The Honorable Gena Slaughter, Presiding Judge of the 191st District Court of Dallas County, granted Plaintiff's motion and denied the City's motion (CR 6:1327-31,

1369), and signed a judgment (1) granting a writ of mandamus requiring the City to release all previously unreleased responsive e-mails except as provided in the Texas Attorney General's letter rulings on the reporter's public information request, including "all e-mails from the Blackberries, personal computers, and any other devices of the Mayor of Dallas, Laura Miller, and other City officials named in the Dunklin and Levinthal Requests, regardless of whether such e-mails passed through or were processed by City e-mail servers"; (2) declaring that the information ordered to be released is nonexcepted public information under the Texas Public Information Act; and (3) awarding attorney fees to Plaintiff under Texas Government Code section 552.323 (CR 6:1368-74).

ISSUE PRESENTED

Amici Curiae cities and officials (hereinafter “*Amici*”) raise a single point for the court to consider in reaching its decision – that is, Plaintiff’s contention that a mayor’s personal account emails are public information when they relate to public business. (Br. Appellee at 10-23). *Amici* would show that the plain language of the Texas Public Information Act, and well-established constitutional guarantees of privacy lead to but one conclusion – that personal emails never collected, assembled or maintained by or for a governmental body are not, by definition, public information.

IN THE COURT OF APPEALS
FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS
AT DALLAS

CITY OF DALLAS,

Appellant,

v.

THE DALLAS MORNING NEWS, LP,

Appellee

AMICI CURIAE BRIEF

TO THE HONORABLE COURT OF APPEALS:

Introduction

The Texas Public Information Act ("PIA" or the "Act") requires that public information be made available to the public unless it is excepted from required disclosure. The Act defines "public information" as

Information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Tex. Gov't Code §552.002(a) (emphasis added). From *Amici's* perspective, this case presents, among other issues, the vitally important question of whether the Act's definition of "public information" extends to e-mails¹ that are sent or received by an officer or employee of a governmental body on that officer or employee's personal Blackberry or other device using a private e-mail account, and which are **never** collected, assembled or maintained **by or for** a governmental body.

Statement of Facts

As it pertains to the single issue raised by *Amici*, the pertinent facts are as follows. Reese Dunklin, a reporter for The Dallas Morning News, submitted an open records request to the City of Dallas seeking not only emails that Mayor Laura Miller and certain city employees sent and received on their official city hall email accounts, but also emails sent and received on accounts "other than their city address to conduct city business." (CR 2:333.) In other words, the Dunklin request is so broad that it seeks not only emails that might never have been captured on a city computer or server, but also emails that the City may not have a right to obtain.

It was established in the trial court that the City's Communication and Information Services ("CIS") department could not retrieve emails Mayor Miller sent or received on her personal Cingular Blackberry.² (CR 3:595.) It was also established that Blackberry is a company set up by Research in Motion, or RIM, (CR 3:597) and that emails and

¹ Throughout this brief, the term "email" will be used, although *Amici* intend it to mean any number of other electronic communications in use today (e.g. instant message - "IM," text message - "txt," etc.).

² Implicit in this is the fact that the City has no legal right to obtain email or other correspondence from an individual's private email accounts if the City is not the owner of the account or device on which the email or other correspondence is created.

other electronic information transmitted by or with a Blackberry device do not pass through City systems. (CR 2:597.) Nor can the City compel RIM to turn over the information. (CR 3:597.) Unless an email from a personal email account (Blackberry, Yahoo, Gmail, AOL, etc.) is sent to a City account (“[name]@dallascityhall.com,” for example), the City does not have access to or control over an email or other electronic communication. (CR 3:597.)

Although the case is substantially more complex than this, *Amici* focus only on the following additional facts. On November 20, 2007, the trial court signed a final judgment declaring that (1) the *Mayor*’s and city employees’ emails sent and received on their Blackberry or other devices in connection with the transaction of official business, using email accounts other than those with city hall addresses, are public information. (CR 6:1368-74)

Summary of Argument

The trial court erroneously ruled that emails sent or received on personal devices using non-City email accounts are “public information,” as defined by the PIA. This is so regardless of whether they relate to “city business” because (1) they do not meet the definition of “public information,” (2) the City has no power to compel their production, (3) public officials have a reasonable expectation of privacy in their personal email communications, and (4) requiring their disclosure under the facts presented herein violates the Stored Communications Act of 1986, 18 U.S.C. § 2702(a)(1)-(2).

Argument

I. Emails neither collected, assembled nor maintained by or for a governmental body, regardless of content, do not meet the definition of “public information.”

Although the City of Dallas asserts that no evidence exists in support of this proposition³, let us assume that there exist numerous emails created by Mayor Laura Miller using her personal Blackberry device and that these emails contain a mix of personal information (e.g. doctor’s appointments, financial information such as a credit card number, and an intimate communication with her spouse) and “public” information (e.g. her thoughts about an ordinance coming up for a vote and comments about a particularly irksome constituent who will cause her no end of grief if the ordinance passes). Let us further assume that none of these emails were ever sent to or received by a City of Dallas computer and that the City of Dallas neither owns the Blackberry device, nor is it the subscriber on Mayor Miller’s Blackberry account.

Perhaps Mayor Miller uses some salty language in the emails. Perhaps she writes an epithet or two. Or perhaps the emails are as bland and unremarkable as a regular weekly grocery list. Perhaps so-called “city business” writings and “personal” writings are all intermingled in a single email, or perhaps there is a specific email detailing nothing but “city business,” such as her thoughts regarding a recent budget submission by an underperforming department that she sent to her spouse.

The point is that **none** of these writings are collected, assembled or maintained by or for a governmental body for any purpose. The governmental body does not own the

³ *Amici* do not dispute this assertion, but merely posit a hypothetical for purposes of argument.

device on which these hypothetical emails were created. It is not the subscriber on the email account. It has no more authority to order a mayor to turn over his or her personal property to the governmental body for inspection and copying of writings than it has to order a private citizen to do the same thing.

Under no set of facts before this court, either real or imagined, has the City (or a third party on the City's behalf) collected, assembled or maintained the emails.⁴ It has never seen them. It has never possessed them in any form. And it has no right to obtain them.⁵ The Attorney General's interpretation of the PIA notwithstanding, the issue before this court is really that simple and *Amici* cities need not re-cite the cases governing statutory construction already ably cited by the City in its brief.

The problem, naturally, in deciding the issue this simply and cleanly is the fear that it would encourage public officials to create shadow governments – substantive (or at least controversial) business would be conducted on privately owned Blackberries and computers and open meetings would be little more than rubber-stamping charades.

This is a legitimate fear. And because it is a legitimate fear, the Legislature has seen fit to criminalize this conduct. Conducting illegal closed meetings is a crime. Tex. Gov't Code Ann. §551.144; *Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App. 1998) (en banc). Rolling quorums are a crime. Tex. Gov't Code Ann. §551.143(a); *Willmann v. City of San Antonio*, 123 S.W.3d 469 (Tex. App.-San Antonio 2003, pet. denied).

⁴ The City of Dallas asserts that there are no such emails in the first place. For purposes of argument only, *Amici* will ask the court to assume that emails do exist. Even if they exist though, under the plain language of the PIA they cannot be considered "public information."

⁵ *Amici* readily concede that if the city owns the device that created the email or is the subscriber on the email account, the city would either own the information or have a right of access to it, although the information itself may still not be "public information." That, however, is not the situation before the court since the trial court ordered the City to turn over emails it neither owns nor has a right to obtain.

Refusing to disclose public information is a crime. Tex. Gov't Code Ann. §552.353; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000). And not only is the conduct criminal, but legislation arising out of it is invalid. Ordinances passed with less than a quorum of a legislative body are void *ab initio*. See *Town of Fairview v. City of McKinney*, 2008 Tex. App. LEXIS 9070, citing *Alexander Oil Co. v. City of Seguin*, 825 S.W.2d 434, 436 (Tex. 1991). Ordinances passed in a properly called open meeting, but which were previously discussed in an illegal closed meeting are subject to direct attack. See *San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 764 (Tex. 1991) ("Any interested person may commence a mandamus action to stop, prevent, or reverse violations of the Texas Open Meetings Act."). Taxpayers have general standing to enjoin the illegal expenditure of public funds. See *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 557-58 (Tex. 2000).

But when it comes to the definition of what constitutes "public information," the Legislature did not see fit to broaden it to the point of absurdity. It recognized that there needs to be a nexus between the record itself and the governmental body. And although that nexus alone is not sufficient to make every record that might be found on a governmental body's computer system "public information," it is, at a minimum, the starting point of the inquiry.

Simply put, if the Plaintiff and the Attorney General believe that the definition of "public information" should include documents that are not collected, assembled or maintained by or for a governmental body, they need to convince the Legislature to change the definition. Until then, the PIA should be construed as it is written. Emails

created on private computers or other devices where the governmental body is not the subscriber to the email account are, by definition, not "public information."

II. The City has no power to compel the production of a privately owned telecommunications device in response to a PIA request.

The PIA contemplates that although a governmental body may not physically possess a record, the record may still be "public information" if it concerns official business, is maintained for the governmental body **and** the governmental body owns the information or has a right of access to it. Tex. Gov't Code Ann. §552.002. The PIA does not, however, provide governmental bodies with the authority to compel the production of a privately owned telecommunications device or the information stored on it where the governmental body is not the subscriber.⁶ The trial court's ruling would be explainable if the City were the subscriber on the Blackberry account, or owned the Blackberry and issued it to a city official. In that case, although it would not own the information, if an email related to official business, the City would at least have a right to access the information as the subscriber and it would thus have the power to compel a third party to turn over that information.

In the absence of a subscription agreement between the City and RIM (or any other provider), the Plaintiff fails to point to any authority under which the City could compel the production of information that it neither owns nor has the right to access.

⁶ The Federal Rules of Evidence provide an applicable corollary. Under FRCP 34, a party may discover documents in the possession, custody or control of another party. The test is whether the party has the legal right to control the items being sought in discovery. *In re Domestic Air Transp. Antitrust Litigation*, 142 F.R.D. 354, 355 (N.D. Ga. 1992). The Texas Rules of Civil Procedure, Rule 192.3(b) provides for the same inquiry – that is, is the document in the possession, custody or control of the party? The Texas Supreme Court has concluded that "possession, custody and control" includes not only actual physical possession, but constructive possession and the right to obtain possession from a third party, such as an agent or representative. *GTE Comm. Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993).

Indeed, not only are *Amici* aware of no such authority, but they would anticipate being sued by the official for a Fourteenth Amendment violation if they tried to compel them to turn over the official's private property. The Fourteenth Amendment of the United States Constitution provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property without due process of law." U. S. CONST. amend. XIV. To invoke Fourteenth Amendment protections, a plaintiff must show deprivation of a property, life, or liberty interest. *Wells v. Hico Indep. Sch. Dist.*, 736 F.2d 243, 251 (5th Cir. 1984). It cannot be seriously argued that merely because one is a public official, they somehow waive property and privacy interests in electronic communication devices and their contents merely because the device might contain emails where public business is discussed.

In fact, the trial court's ruling raises an interesting dilemma for local governments. Let us assume an *Amicus* city receives an identical PIA request tomorrow that seeks the production of emails out of a private email account held by an *Amicus* official. In order to comply with the PIA, according to the trial court (and the Attorney General), the *Amicus* city would be obligated to ask the *Amicus* official to turn over, if not the device itself, then at least any emails that ostensibly deal with "official business." Let us further assume that the *Amicus* official tells the *Amicus* city to take a hike – it is the official's private email account on the official's privately owned Blackberry device or home computer.

How can the city make a determination whether or not any emails on the Blackberry device or home computer are potentially exempt from disclosure? How can

the city assert an applicable privilege (e.g. attorney-client, deliberative process)? How can the city comply with the PIA deadlines to obtain a ruling by the Attorney General regarding disclosure? Moreover, who is civilly liable for the failure to turn over records – the taxpayers; the custodian for the city; the official who refuses to turn over her home computer? Most importantly, how can the city secure the documents in the first place? Must it institute litigation against the official who refuses to turn over her personal computer, and if so, under what authority? Or would the Attorney General institute litigation?

Clearly, the Texas Legislature considered these questions when it defined “public information” as information collected, assembled or maintained **by or for** the governmental body, to which it at least has a right of access. If the governmental body does not, at a minimum, have the right to access information maintained by a third party, then the Legislature has spoken plainly – the information is simply not available for public review, regardless of its contents. And since there exists no avenue for the governmental body to make it public, private it must remain.

If government officials are intentionally circumventing the PIA by using personal computers and Blackberries, the Legislature provided a solution - the local district attorney gathers enough evidence and indicts accordingly.

III. Public officials have a reasonable expectation of privacy in their personal email communications.

The central question before the court is really one of constitutional magnitude. That is because the Fourth Amendment protects the right of the people to be secure in

their persons, houses, papers, and effects, against unreasonable searches and seizures. *U.S. Const. amend. IV*. Importantly, when a person runs for political office or otherwise goes to work in the public sector, it is understood that their reasonable expectation of privacy in a variety of areas diminishes. But it does not disappear entirely. See *O'Connor v. Ortega*, 480 U.S. 709, 716 (1987).

A person's Fourth Amendments rights are implicated if the conduct at issue infringes on an expectation of privacy that society is prepared to consider reasonable. *Id.* at 714. In the workplace context, it is essential to first delineate the boundaries of that workplace in order to begin to assess the reasonableness of the expectation of privacy. *Id.* at 715. For example, the Court found that the workplace generally includes those areas and items that are related to work and are generally within the employer's control. *Id.* Indeed, the Court flatly rejected the contention that a public employee can never have a reasonable expectation of privacy in their place of work. *Id.* at 716. "Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Id.*

Because context matters, however, an individual may or may not have a reasonable expectation of privacy in their office, for example. If it is open to the public and has frequent visitors, it is probably not be reasonable to expect that the contents of a filing cabinet to which many individuals have access will remain private. On the other hand, if an employee brings private property (luggage, for example) to work, while there may be no reasonable expectation of privacy related to its size and outward appearance,

“the employee’s expectation of privacy in the **contents** of the luggage is not affected in the same way.” *Id.* at 715 [emphasis in original].

Just as a person likely has a reasonable expectation of privacy in the contents of their personal brief case that they bring to work, so too can a person have a reasonable expectation of privacy in the contents of communications. *See Katz v. United States*, 389 U.S. 347, 348 (1967). In *Katz*, the government put a listening device in a public telephone booth. *Id.* In finding that this invaded the caller’s privacy, the Court reasoned that a person occupying a telephone booth reasonably assumes that the contents of their communication are private, even if the telephone number that they are dialing is not. *Id.* This distinction also applies to written communications, including emails. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008).

In *Quon*, the Ninth Circuit considered a factually similar situation to the one before this court. There, Quon, a public employee, asserted that he had a privacy interest in the contents of text messages he sent using a government owned telecommunications device. *Id.* In arguing that Quon had no reasonable expectation of privacy in the contents of the text messages that it released without Quon’s (or the recipient’s) consent, the wireless company argued that the California Public Records Act⁷ applied, which made all the text messages public records subject to release. *Id.* at 907. The Ninth Circuit rejected this argument, holding that California’s open records act does not diminish a public employee’s reasonable expectation of privacy. *Id.*

⁷ The Act defines “public records” as “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” CAL GOV’T CODE § 6252(e).

In determining whether a person has a reasonable expectation of privacy in the contents of emails or other communications contained in a cell phone, in *United States v. Finley*, 477 F.3d 250, 258-259 (5th Cir. 2007) the Fifth Circuit announced the following factors:

whether the defendant has a [property or] possessory interest in the thing seized or the place searched, whether he has a right to exclude others from that place, whether he has exhibited a subjective expectation of privacy that it would remain free from governmental intrusion, whether he took normal precautions to maintain privacy[,] and whether he was legitimately on the premises.

Applying those factors to a privately owned cell phone or Blackberry type of device, it is clear that a public official, even a mayor, who owns the device in question, and is the sole subscriber on any email accounts accessible through the device has the same reasonable expectation of privacy that a private individual would have who comes to city hall to attend an open meeting.⁸

Neither the Plaintiff nor the Attorney General adequately explains exactly how a governmental entity should go about acquiring a mayor's personal computer, Blackberry or other property. And neither adequately explains how a governmental entity would avoid a Fourth Amendment claim by "demanding" an official produce her private property for inspection and copying. Indeed, any governmental bodies doing so would proceed at their own risk and should expect to be involved in expensive litigation.

⁸ *Amici* concede that the cases cited herein stand for the proposition that just as a person likely has no reasonable expectation of privacy in the number they dial on a traditional telephone, so too is there likely no reasonable expectation of privacy in the "to" and "from" lines on an email. *See Quon* at 905. Nevertheless, this factor alone is not dispositive. Even if there is no reasonable expectation of privacy in the identity of the addressee, a governmental body would still have no right of access to this information if it is created on a privately owned computer or telecommunications device and the governmental body is not the subscriber of the email account.

Likewise, it is equally unavailing to assume that the governmental body could acquire emails from a third party service provider like RIM if the governmental body is not the subscriber or owner of the device. *See Quon* at 906 (“For, just as in *Heckencamp*, where we found persuasive that there was ‘no policy allowing the university actively to monitor or audit [the student’s] computer usage,’ Appellants did not expect that Arch Wireless would monitor their text messages, much less turn over the messages to third parties without Appellants’ consent.”) [internal citations omitted].

If a computer or telecommunications device is owned by an individual and that individual, and not the governmental body, is the sole subscriber to the email account, Plaintiff advances absolutely no cogent, let alone legally accepted, theory under which the governmental body can lawfully obtain correspondence created or saved on the device, absent litigation and a subpoena. And if it takes litigation and a subpoena to obtain the information, it simply cannot be under the governmental body’s control.

Even politicians have a reasonable expectation of privacy in the contents of communications that they create using their personal property. And the PIA cannot abrogate that Fourth Amendment protection.

IV. The trial court’s order requiring the disclosure of Mayor Miller’s emails without Mayor Miller’s (or the recipient’s) consent violates the Stored Communications Act of 1986, 18 U.S.C. § 2702(a)(1)-(2).

The Stored Communications Act of 1986 (“SCA”) was enacted to address potential breaches of privacy in the Internet age. *See Quon* at 900. The SCA divides providers into two categories – remote computing services (“RCS”), and electronic communication services (“ECS”). *Id.* In short, an RCS provides computer storage by

means of an electronic communication system (e.g. email) and an ECS provides the ability to send and receive electronic communications (e.g. text messages). *Id.*

This distinction is important because “both an ECS and RCS can release private information to, or with the lawful consent of, ‘an addressee or intended recipient of such communication,’ whereas only an RCS can release such information ‘with the lawful consent of . . . the subscriber.’” *Id.* If, as in *Quon*, a provider releases emails or texts in without the proper authorization, it potentially runs afoul of the SCA. *Id.* Given that Blackberry devices are capable of sending and receiving both emails and text messages, a single provider can act as both an ECS and an RCS, depending on the nature of the service it is providing at any given time.

Coming back to the trial court’s order then, it requires the City to somehow obtain and disclose emails (it is unclear whether the order would also apply to text messages) contained on RIM servers. (CR 6:1368-74) It also orders the City to obtain and disclose emails where it was neither the sender, nor the recipient. (CR 6:1368-74) And it orders the City to obtain and disclose emails where it was not the subscriber on the email account. (CR 6:1368-74)

In other words, regardless of whether RIM was acting as an ECS or an RCS, the trial court essentially ordered a non-party over whom it may or may not even have jurisdiction (Mayor Miller and/or RIM) to provide to the City (a non-recipient, non-sender, non-subscriber) with the contents of emails and/or text messages contained in Mayor Miller’s personal account, which the City, in turn, was ordered to provide to third parties.

In *Quon*, it was undisputed that the city was not an addressee or an intended recipient; however, it was the subscriber since the telecommunications devices and the service provided by the wireless company was provided to the City. *Quon* at 900. In this case, the City is not even the subscriber – Mayor Miller is. And Mayor Miller cannot be considered “the City” because the PIA applies only to information collected, assembled or maintained by or for a “governmental body,” which is defined not as an individual legislator, but rather as the entire body. TEX. GOV’T CODE §552.003(1)(A), *see also Kever v. Finlan*, 988 S.W.2d 300 (Tex.App.- Dallas 1999, pet. dism’d).

Conclusion.

Amici do not dispute the value of Texas’ sunshine laws. They were crafted to combat back room deals, graft and corruption – a laudable and necessary goal. Nor do *Amici* ask this court to dilute these sunshine laws – a bright light is the best disinfectant. *Amici* do, however, ask this court to interpret the plain language of the PIA in a coherent and rational manner – a manner that does not run afoul of basic constitutional protections. Unfortunately, the interpretation urged by the Plaintiff, enforced by the Attorney General and ordered by the trial court does just that.

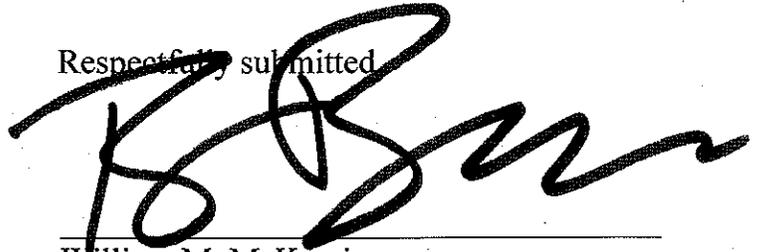
Public information should undoubtedly be shared with the public. But information that is not collected, assembled or maintained by or for a governmental body simply cannot be public information within the meaning of the PIA, particularly when the undisputed evidence shows that the governmental body does not even have a legal right of access to the alleged information.

The trial court's ruling, at least in this regard, must be overturned. The U.S. Constitution and common sense demand no less.

Disclosure

Counsel for *Amici Curiae* is not receiving any fee or being paid to prepare the *Amici Curiae* brief.

Respectfully submitted



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RETIREMENT SYSTEM

CERTIFICATE OF SERVICE

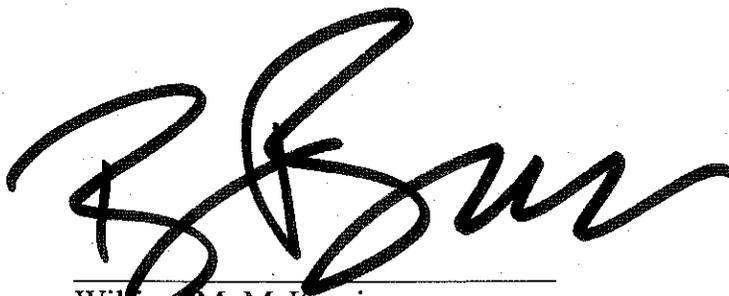
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