IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0254-18

THE STATE OF TEXAS

v.

CRAIG DOYAL, Appellee

**ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE NINTH COURT OF APPEALS
MONTGOMERY COUNTY**

KELLER, P.J., delivered the opinion of the Court in which KEASLER, HERVEY, RICHARDSON, KEEL, and WALKER, JJ., joined. SLAUGHTER, J., filed a concurring opinion. YEARY, J., filed a dissenting opinion. NEWELL, J., dissented.

A provision of the Texas Open Meetings Act (TOMA) makes it a crime if a member or group of members of a governmental body "knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter."[1] We conclude that this provision is unconstitutionally vague on its face. Consequently, we reverse the

[1] TEX. GOV'T CODE § 551.143(a).

judgment of the court of appeals and affirm the trial court's judgment dismissing the prosecution.

I. BACKGROUND

Appellee was the Montgomery County Judge, and as such, he was a member of the Montgomery County Commissioners Court. He was indicted for violating TOMA's § 551.143, the statute described above. The indictment alleges that Appellee did

> as a member of a governmental body, to wit: the Montgomery County Commissioner's [sic] Court, knowingly conspire to circumvent Title 5 Subtitle A Chapter 551 of the Texas Government Code (hereinafter referred to as the Texas Open Meeting Act), by meeting in a number less than a quorum for the purpose of secret deliberations in violation of the Texas Open Meetings Act, to-wit: by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond.

Appellee filed a motion to dismiss on the basis that § 551.143 was overbroad in violation of the First Amendment and was unconstitutionally vague. The trial court granted the motion and dismissed the indictment.

On appeal, the State contended that the statute did not violate the Constitution. The court of appeals agreed, concluding that the statute did not violate the First Amendment and was not unconstitutionally vague.[2] In response to Appellee's First Amendment claims, the court of appeals held that § 551.143 was a content-neutral law because it was "directed at conduct, *i.e.,* the act of conspiring to circumvent TOMA by meeting in less than a quorum for the purpose of secret deliberations in violation of TOMA."[3] The court further concluded that the strict-scrutiny standard was inapplicable because the prohibition in TOMA "is applicable only to private forums and is

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[2] *State v. Doyal*, 541 S.W.3d 395 (Tex. App.—Beaumont 2018).

[3] *Id.* at 401.

designed to *encourage* public discussion."[4]

With respect to vagueness, the court of appeals concluded that the statutory terms "conspire," "circumvent," and "secret," although undefined, have commonly understood meanings.[5] Relying on an opinion of the Texas Attorney General, the court further concluded that the statute applies to "members of a governmental body who gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body."[6] Under this construction, the court concluded that the statute "describes a criminal offense with sufficient specificity that ordinary people can understand what conduct is prohibited."[7]

Consequently, the court of appeals reversed the trial court's order dismissing the indictment and remanded the case for further proceedings.[8] We granted Appellee's petition for discretionary review, which complained, *inter alia*, that § 551.143 is void for vagueness.[9] We agree that the

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[4] *Id.* (emphasis in *Doyal*).

[5] *Id.* at 402.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Two amicus briefs have been filed in support of Appellee's position that the statute is unconstitutionally vague: (1) on behalf of the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas Council of School Attorneys, and (2) on behalf of the Texas Conference of Urban Counties. A third amicus brief was filed on behalf of the Texas Municipal League, the Texas City Attorneys Association, and the Texas Association of Counties "to inform the Court how city and county officials desperately need guidance as to what they can and cannot do." The Texas Conference of Urban Counties joined in sponsoring that brief and later filed its own brief urging that the statute was unconstitutionally vague. The Texas Attorney General has filed a brief defending the constitutionality of the statute, and the State Prosecuting Attorney has

statute is unconstitutionally vague on its face.

II. ANALYSIS

A. The Statutory Scheme

TOMA generally requires that meetings of a governmental body be open to the public.[10] "Meeting" is defined in two ways, both of which require that a quorum be present:

> (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
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> (B) except as otherwise provided by this subdivision, a gathering:
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> (i) that is conducted by the governmental body or for which the governmental body is responsible;
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> (ii) at which a quorum of members of the governmental body is present;
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> (iii) that has been called by the governmental body; and
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> (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.[11]

A "quorum" is defined as "a majority of a governmental body, unless defined differently by

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filed a brief defending the constitutionality of the statute with respect to Appellee's overbreadth claim. We have also granted review of vagueness challenges to this statute in *State v. Davenport*, PD-0265-18, and *State v. Riley*, PD-0255-18. *See also State v. Davenport*, No. 09-17-00125-CR, 2018 Tex. App. LEXIS 1044 (Tex. App.—Beaumont February 7, 2018) (not designated for publication) and *State v. Riley*, No. 09-17-00124-CR, 2018 Tex. App. LEXIS 1042 (Tex. App.—Beaumont February 7, 2018) (not designated for publication).

[10] TEX. GOV'T CODE § 551.002 ("Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.").

[11] *Id.* § 551.001(4). The definition also contains some qualifications that we need not detail here. *See id.* (below paragraph (iv)).

applicable law or rule or the charter of the governmental body."[12] "Deliberation" is defined as "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."[13]

The main TOMA provision, § 551.144, makes it a crime to engage in conduct that calls, facilitates, or participates in a closed meeting.[14] A "closed meeting" is "a meeting to which the public does not have access."[15]

Appellee was not charged under the main provision though. Instead, he has been prosecuted under, § 551.143, which provides:

> A member or a group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.[16]

B. Implicating the First Amendment

As we shall explain more fully below, more clarity is required of a criminal law when that law implicates First Amendment freedoms.[17] Consequently, we first address whether § 551.143

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[12] *Id.* § 551.002(6).

[13] *Id.* § 551.001(2).

[14] *Id.* § 551.144.

[15] *Id.* § 551.001(1).

[16] *Id.* § 551.143(a).

[17] *Long v. State*, 931 S.W.2d 285, 287-88 (Tex. Crim. App. 1986).

implicates the First Amendment's freedom of speech.[18]

We have recognized that the First Amendment is implicated when the government seeks to impose criminal sanctions on an elected official for communications made in his official capacity.[19] As a Fifth Circuit panel once stated, "[T]he Supreme Court's decisions demonstrate that the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general."[20] The Fifth Circuit decision of *Asgeirsson v. Abbott*, relied upon by the State in the present case, held that TOMA's § 551.144 was "a content-neutral time, place, or manner restriction."[21] Calling a statute a reasonable time, place, or manner restriction is an implicit acknowledgment that some of the activity regulated by the statute is protected speech.[22]

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[18] *See* U.S. CONST. Amend 1 ("Congress shall make no law . . . abridging the freedom of speech"). The First Amendment applies to the states by virtue of the Fourteenth Amendment. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638-39 (1943). Because the mere implication of First Amendment freedoms is what triggers a stricter clarity requirement for due process purposes, *see supra* at n. 17, and we ultimately conclude that the statute is unconstitutionally vague, *see infra*, we need not address whether the statute is a content-based restriction or what level of scrutiny might apply in a First Amendment analysis.

[19] *Ex parte Perry*, 483 S.W.3d 884, 911-12 (Tex. Crim. App. 2016).

[20] *Rangra v. Brown*, 566 F.3d 515, 524 (5th Cir.), *vacated as moot en banc*, 584 F.3d 206, 207 (5th Cir. 2009) (discussing *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), *Bond v. Floyd*, 385 U.S. 116 (1966), and *Wood v. Georgia*, 370 U.S. 375 (1962)). *See also Jenevein v. Willing*, 493 F.3d 551, 557-58 (5th Cir. 2007); *Alsworth v. Seybert*, 323 P.3d 47, 57-58 (Alaska 2014).

[21] 696 F.3d 454, 458 (5th Cir. 2012). *See also St. Cloud Newspapers v. District 742 Community Schools*, 332 N.W.2d 1, 7 (Minn. 1983) (upholding Minnesota's Open Meeting Law as "a reasonable regulation of public officials' rights of free speech and association.").

[22] *See McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"). There are situations that are

The State contends that § 551.143 reaches only conduct rather than speech. At oral argument, the State's attorney maintained that the statute punishes the conduct of "meeting" rather than what might be said during that meeting.[23] But both of TOMA's definitions of "meeting" incorporate communications, either through "deliberations," the passing of "information" from one person to another, or the asking of questions. The State contends that these definitions do not control because they define "meeting" as a noun and § 551.143 uses "meeting" as a verb.[24] Even if the State is correct that the definitions are not controlling,[25] the statute does not proscribe "meeting" in the abstract but proscribes a particular kind of meeting—one that is for the purpose of "deliberations." This purpose makes the statutory act of "meeting" communicative, even if the bare fact of meeting would not be so. The Supreme Court has observed that a parade could be non-communicative "[i]f there were no reason for a group of people to march from here to there except to reach a destination"

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covered by the statute that do not implicate the First Amendment, namely the act of voting. *Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-27 (2011). But in allowing a restriction if it is a "reasonable time, place, and manner limitation," the Supreme Court has indicated that official advocacy is protected speech. *Id.* at 121-22 (If Carrigan was constitutionally excluded from voting, his exclusion from "'advocat[ing]' at the legislative session was a reasonable time, place, and manner limitation.") (bracketed material in *Carrigan*).

[23] Specifically, the State's attorney argued, "It's actually conduct; it's the meeting that is being addressed by the statute." Seeking clarification of the State's position, Judge Newell asked, "Are you saying the statute criminalizes the act of meeting or what's discussed at the meeting?" The State's attorney responded, "It's the act of meeting; it doesn't criminalize what's discussed in the meeting." Arguably, however, the only act proscribed by the statute is the act of "conspiring," and the language that follows the word "conspires" is simply part of the object of the conspiracy. Under that reading, a meeting must at least be contemplated but need not actually take place. Regardless, the purpose of the contemplated meeting is communicative, as we explain below.

[24] An opinion of the Attorney General agrees with this contention. *See* Tex. Atty Gen. Op. no. GA-0326, heading A, 2005 Tex. AG LEXIS 3737, *5 (May 18, 2005).

[25] It could be argued that the verb "meeting" would be the act of holding a "meeting"— so that the noun definition would inform the meaning of the verb.

but that "[r]eal" parades are in fact "public dramas of social relations" and, as such, are "a form of expression."[26] For the same reason, TOMA's punishment of meeting for the purpose of deliberations reaches speech, and not just conduct.

The State also contends that any speech that is implicated by the statute is unprotected because it constitutes "speech integral to criminal conduct." But the cases that involve this form of unprotected speech involve speech that furthers some other activity that is a crime.[27] Examples of this include picketing designed to coerce a company to sign an illegal contract or solicitation to facilitate a sex crime.[28] The statute before us proscribes activity designed to "circumvent" TOMA, but circumventing TOMA is not a crime apart from § 551.143.[29]

C. Nature of a Facial Vagueness Challenge

We next turn to whether the facial vagueness challenge advanced here requires a showing that there are no possible instances of conduct that it is clear would fall within the statute's

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[26] *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 568 (1995).

[27] *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 492-93, 497-98 (1949) (picketing to force company to sign an illegal contract); *Ex parte Ingram*, 533 S.W.3d 887, 888-89 (Tex. Crim. App. 2017) (solicitation to facilitate a sex crime).

[28] *See Giboney* and *Ingram*, *supra*.

[29] *See United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (listing "speech integral to criminal conduct" as a category of unprotected speech and observing a long history of prohibiting animal cruelty but not observing any similar tradition with respect to *depictions* of animal cruelty); *Ex parte Perry*, 471 S.W.3d 63, 113-17 (Tex. App.—Austin 2015), *aff'd in part, rev'd in part*, 483 S.W.3d 884 (Tex. Crim. App. 2016) (rejecting contention that certain types of threats proscribed by coercion-of-a-public-servant statute constitute speech integral to criminal conduct —finding that they would be "only if the basic workings of government are considered criminal conduct"); *Gerhart v. State*, 360 P.3d 1194, 1197 (Okla. Crim. 2015) (holding that the defendant's "email did not urge or compel the Senator to violate the law or commit an unlawful act").

prohibitions. If such a showing is required, and if at least one such instance of conduct can be imagined, then we would have to address whether a trial would be needed to develop a record to substantiate an as-applied challenge.[30] In *Long v. State*, we concluded, "[W]hen a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct."[31] The Supreme Court more recently suggested that such a conclusion might be incorrect: "Even assuming that a heightened standard applies because the . . . statute potentially implicates speech, the statutory terms are not vague as applied to plaintiffs."[32] But in an even more recent case, *Johnson v. United States*, the Supreme Court stated, "[A]lthough statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."[33] The Court's

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[30] *See London v. State*, 490 S.W.3d 503, 507-08 (Tex. Crim. App. 2016) ("as applied" challenges generally require fully developed record from a trial). *But see Perry*, 483 S.W.3d at 895-900 (plurality op.) (some types of "as applied" claims are cognizable even on pretrial habeas, including a Separation of Powers claim that involves an infringement on government official's own power).

[31] 931 S.W.2d at 288 (citing *Gooding v. Wilson*, 405 U.S. 518, 521 (1972)).

[32] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010).

[33] 135 S. Ct. 2551, 2560-61 (2015) (emphasis in original). *See also Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 n.3 (2018) ("And still more fundamentally, *Johnson* made clear that our decisions 'squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'"). *See also Johnson*, 135 S. Ct. at 2561 ("If the existence of some clearly unreasonable rates would not save the law in *L. Cohen Grocery*, why should the existence of some clearly risky crimes save the residual clause?"). To follow the reasoning in the immediately preceding *Johnson* parenthetical, we could ask, "Why should the existence of some clearly circumventing behavior save § 551.143?"

At least one lower court has declined to rely on *Humanitarian Law Project* in light of *Johnson*, suggesting that the former has been superseded or is distinguishable in light of the latter. *See Henry v. Spearman*, 899 F.3d 703, 708-09 (9th Cir. 2018). Another lower court has

statements in *Johnson* do not appear to be limited to vagueness challenges that implicate First Amendment freedoms, but to the extent that more clarity is required in the law, those statements would seem to apply with even greater force when First Amendment freedoms are implicated.[34] We

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distinguished *Humanitarian Law Project* on the basis that the case addressed "only whether the statute provide[s] a person of ordinary intelligence fair notice of what is prohibited" and did not address a vagueness challenge under a "standardless enforcement discretion" theory. *Act Now to Stop War & Racism Coal. v. District of Columbia*, 846 F.3d 391, 409-10 (D.C. Cir. 2017) (quoting *Humanitarian Law Project*, 561 U.S. at 20). Consistent with the D.C. Circuit's holding, Justice Gorsuch emphasized, in his concurrence in *Dimaya*, the danger of the legislature using a vague law to delegate responsibility for prescribing criminal law standards to the courts, the prosecutors, and the police: "[I]t comes clear that legislators may not abdicate their responsibilities for setting the standards of the criminal law by leaving to judges the power to decide the various crimes includable in a vague phrase. . . .Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions. . . . Under the Constitution, the adoption of new laws restricting liberty is supposed be a hard business, the product of an open and public debate among a large and diverse number of elected representatives." 138 S. Ct. at 1227-28 (Gorsuch, J., concurring) (citations and internal quotation marks omitted).

The present case implicates the "insufficient guidelines for law enforcement" theory of vagueness that the D.C. Circuit concluded was exempt from the pronouncements in *Humanitarian Law Project* because the "circumvents" language of the statute leaves the job of shaping the meaning of the statute to entities such as the Attorney General's office, individual prosecutors, and police officers. Relevant to the law-enforcement theory of vagueness may be the fact that this case is like *Johnson* and *Dimaya* in that it involves abstract elements within a catch-all provision. *See Johnson*, 135 S. Ct. at 2555-56 (residual nature of provision in *Johnson*); *infra* at nn.46-48 and accompanying text (abstract nature of statutes in *Johnson* and *Dimaya*). To the extent that the pronouncements in *Humanitarian Law Project* can be construed to apply only to the "lacking fair notice to a person of ordinary intelligence" theory of vagueness, being "insufficiently definite to avoid chilling protected expression" may constitute another theory of vagueness exempt from those pronouncements. In any event, *Johnson* and *Dimaya* are more recent than *Humanitarian Law Project*, and while these more recent cases did not explicitly mention *Humanitarian Law Project*, *Johnson* did refer to and disavow "statements in some of our opinions"—without naming those opinions—and so appears to have disavowed all prior conflicting opinions to the extent of any conflict.

[34] *See supra* at n.33 (discussing implications of D.C. Circuit's view in *Act Now to Stop War & Racism Coal.*). *See also Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494-95 (1982) ("The court should then examine the facial vagueness challenge and, *assuming the enactment implicates no constitutionally protected conduct*, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.")

conclude that a facial vagueness challenge to a statute that implicates First Amendment freedoms does not require a showing that there are no possible instances of conduct clearly falling within the statute's prohibitions.[35] What is required to establish a facial vagueness violation is addressed below.

D. Vagueness

1. *Standard*

To pass constitutional muster, a law that imposes criminal liability must be sufficiently clear (1) to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) to establish determinate guidelines for law enforcement.[36] When the law also implicates First Amendment freedoms, it must also be sufficiently definite to avoid chilling protected expression.[37]

(emphasis added). There is at least some tension between the dissent's conclusion that *Johnson* did not supersede certain pronouncements in *Holder* and its assumption that *Holder* superseded the above-emphasized language in *Hoffman*.

[35] The dissent contends that a defendant ought to still be required to show that a statute is vague as to him, after a trial of the case, even if the statute is facially unconstitutional for vagueness under the principles articulated in *Johnson*. But the whole point of the concept of a statute being unconstitutional on its "face" is that the facts of a litigant's particular case are immaterial; the statute is invalid as to everyone. We have explicitly recognized that a facially unconstitutional statute is "void from its inception" and "considered no statute at all." *Smith v. State*, 463 S.W.3d 890, 895 (Tex. Crim. App. 2015). Although we have held that untimely facial challenges can be forfeited, once a statute is declared facially unconstitutional, "it is as if it had never been," *id.*, and can be challenged even by way of post-conviction habeas corpus. *Ex parte Lea*, 505 S.W.3d 913, 914-15 (Tex. Crim. App. 2016). So even a person who fails to raise a facial challenge in a timely fashion could obtain relief once a facial challenge raised by someone else is successful. *See Smith*, 464 S.W.3d at 893. The position taken by the dissent would result in denying a *timely* raised facial challenge even though, under our precedent, the defendant could eventually obtain relief if the law were declared facially unconstitutional in someone else's case. Such a result is illogical.

[36] *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972); *Long*, 931 S.W.2d at 287.

[37] *Grayned*, *supra* at 109; *Long*, *supra*.

Greater specificity is required when First Amendment freedoms are implicated because "uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas are clearly marked."[38] Nevertheless, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[39] A scienter requirement in the statute may sometimes alleviate vagueness concerns[40] but does not always do so.[41]

What renders a statute vague is the "indeterminacy of precisely what" the prohibited conduct is.[42] Statutes have been struck down as vague when they tied the defendant's criminal culpability to conduct that was "annoying" or "indecent" because those terms encompassed "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."[43] The Supreme Court has also found a statute to be void for vagueness when it prohibited the charging of an "unjust or unreasonable rate," without further defining what "unjust or unreasonable" in this context meant.[44] And in a First Amendment case involving concerns about the indeterminacy of a law, the Court has struck down a statute that prohibited the wearing of a "political badge, political

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[38] *Grayned*, *supra*; *Long*, *supra* at 288.

[39] *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

[40] *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015); *Humanitarian Law Project*, 561 U.S. at 21.

[41] *Long*, 931 S.W.2d at 288, 289, 293. *See also Perry v. S.N.*, 973 S.W.2d 301, 308 n.8 (Tex. 1998) ("a statute may require scienter and yet fail to define clearly the prohibited conduct").

[42] *United States v. Williams*, 553 U.S. 285, 306 (2008).

[43] *Id.* (citing *Coates v. Cincinnati*, 402 U.S. 611 (1971) and *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)).

[44] *Johnson*,135 S. Ct. at 2561 (citing *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921)).

button, or other political insignia" when "political" was not defined and had been haphazardly construed by the state courts.[45]

In *Johnson*, and in the subsequent case of *Dimaya*, the Supreme Court found "hopeless indeterminacy" in statutes that required a judge to determine whether the "ordinary case" of a particular statutory offense posed a "serious potential risk" of physical injury or "substantial risk" of physical force.[46] The Court characterized this as the application of a"qualitative standard" of risk assessment to the "judge-imagined abstraction" of an "idealized ordinary case of the crime."[47] The Court criticized this sort of assessment for not being tied to "real-world facts or statutory elements."[48]

2. *Application*

We conclude that the statute before us is vague in much the same way as the statutes in *Johnson* and *Dimaya*. Like those statutes, the statute before us is hopelessly indeterminate by being too abstract. As we shall see, the statute has little in the way of limiting language and notably lacks language to clarify its scope.

An offense is committed under § 551.143 if a member or group of members of a governmental body "knowingly conspires to circumvent this chapter by meeting in numbers less

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[45] *Mansky*, 138 S. Ct. at 1888. Although the issue ostensibly before the Supreme Court in *Mansky* was whether the Minnesota law violated the Free Speech Clause of the First Amendment, *id.* at 1882, the Court based its holding on the "indeterminate scope of the political apparel provision," *id.* at 1889, and the fact that the Minnesota law was not "capable of reasoned application," *id.* at 1892, which makes it sound like a vagueness holding.

[46] *Dimaya*, 138 S. Ct. at 1211, 1213-14, 1215-16; *Johnson*, 135 S. Ct. at 2555-56, 2557-58, 2561.

[47] *Dimaya*, *supra* at 1215-16; *Johnson*, *supra* at 2558, 2561.

[48] *Johnson*, *supra* at 2257. *See also Dimaya*, *supra* at 1213-14, 1215.

than a quorum for the purpose of secret deliberations in violation of this chapter."[49] Viewed in isolation, the phrase "less than a quorum" could seem to serve a limiting function by carving out a subset of fact situations to which the statute applies, but an examination of this language in light of TOMA as a whole shows otherwise. Aside from the statute at issue here, TOMA's public-meeting provisions apply only when a governmental body meets as a "quorum."[50] In specifying that an offense is committed when members meet in "less than a quorum," § 551.143 signifies a residual or catch-all provision, designed to enlarge TOMA's reach.[51] Because the phrase "numbers less than a quorum" is catch-all language that expands the reach of TOMA, it does not serve a limiting function in the statute.

The words "meeting" and "deliberation" are defined in TOMA, but both definitions require a quorum,[52] which seems to contradict § 551.143's use of these words in connection with the phrase "less than a quorum." As we explained earlier, the State claims that the definition of "meeting" is inapplicable because the definition is of "meeting" as a noun while § 551.143 uses the word as a verb. Even if we accept the State's contention in that regard, "deliberation" is used in § 541.143 as

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[49] TEX. GOV'T CODE § 551.143(a).

[50] *See e.g. id.* §§ 551.001, 551.144.

[51] *See Ex parte Thompson*, 442 S.W.3d 325, 348-49 (Tex. Crim. App. 2014) (construing phrase "not a bathroom or private dressing room" in § 21.15(b)(1) of the then-existing improper-photography statute and contrasting it with § 21.15(b)(2), which proscribed visual recording "at a location that is a bathroom or private dressing room"—"By its very wording negating the 'bathroom or private dressing room' element, the provision before us, § 21.15(b)(1), was designed as a catch-all, to reach other situations in which photography and visual recordings ought to be prohibited.").

[52] *See id.* § 551.001(2), (4).

the same part of speech—a noun—for which it is defined.[53] In any event, applying the statutory definitions literally to these words as they appear in § 551.143 would result in an internally inconsistent statute, so the definitions cannot serve to limit or clarify that provision.

Likewise, the words "in violation of this chapter" cannot also be construed literally because, aside from § 551.143, TOMA applies only when there is a quorum. If the requisite violation of TOMA requires meeting in a quorum and the person does not contemplate meeting in a quorum, then the person cannot literally have the purpose of violating TOMA.

The word "secret" indicates that § 551.143, like other parts of TOMA, is aimed at preventing meetings that are not open to the public. As such, the word serves a limiting function but, given the wide array of possible interactions between public officials, is not sufficient by itself to supply the requisite clarity to the statute.

What remains is probably the crucial part of the statute: "knowingly conspires to circumvent this chapter." In the past, the Supreme Court has warned against the potential breadth and vagueness of the doctrine of conspiracy and of the need to restrict its application.[54] A conspiracy to violate a

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[53] Moreover, because "deliberation" is defined as occurring during "a meeting," and uses "meeting" as a noun, it would seem to incorporate the statutory definition of "meeting." *See id.* § 551.001(2).

[54] *Grunewald v. United States*, 353 U.S. 391, 402 (1957) ("Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed.") (citing *Krulewitch v. United States*, 336 U.S. 440 (1949) (Jackson, J., concurring)). *See also Krulewitch*, *supra* at 446-48 (Jackson, J., concurring) ("The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent.").

law[55] would not ordinarily present a vagueness problem. But a conspiracy to "circumvent" a law is another matter.

What does it mean to "circumvent" a law? The court of appeals concluded that "circumvent" means "to overcome or avoid the intent, effect, or force of: anticipate and escape, check, or defeat by ingenuity or stratagem: make inoperative or nullify the purpose or power of esp. by craft or scheme."[56] We accept that definition, but it does not really answer the question. What constitutes "avoiding or overcoming" the effect of the law or "nullifying the purpose" of the law? Consistent with our observation regarding other portions of § 551.143, the "circumvent" language necessarily requires something other than a literal violation of some other provision of TOMA. But proscribing a non-literal violation of TOMA does not set forth a clear standard. That is true even with the culpable mental state of "knowing." If it is unclear what it means to circumvent a law, one cannot "know" that he is circumventing the law.

And that is what makes this case like *Johnson* and *Dimaya*. Like the statutes in those cases, the statute in this case is hopelessly abstract. The present statute does not focus on real-world conduct other than catch-all conduct that expands the scope of TOMA. And § 551.143 does not focus on the elements of some other offense in TOMA. Rather, § 551.143 imposes criminal punishment for doing something that conflicts with the purpose of TOMA. It requires a person to envision actions that are like a violation of TOMA without actually being a violation of TOMA and refrain from engaging in them.

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[55] *See e.g.* TEX. PENAL CODE § 15.02.

[56] *Doyal*, 541 S.W.3d at 402 (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY 410 (2002)).

The statutory language here requires a sort of extratextual-factor inquiry that is unmoored to any statutory text. Ordinarily, we are limited to the text in construing a statute, but we have latitude to address extratextual factors when a statute is ambiguous or the literal text would lead to absurd results.[57] Extratextual factors can include the object of the legislation and the consequences of a particular construction.[58] Language that appears vague on its face "may derive much meaningful content from the purpose of the Act, its factual background, and the statutory context."[59] However, even when a statute is ambiguous, it is ordinarily because the actual text is reasonably susceptible to more than one interpretation.[60] It is one thing to use extratextual factors to help determine which of two or more competing interpretations of the text is probably the right one. It is quite another to engage in a free-floating extratextual inquiry to determine what a statute probably means. Even assuming that we could engage in the latter sort of inquiry under some circumstances, we could not do so for a statute that proscribes a criminal offense and that implicates protected expression under the First Amendment.

The State contends, however, that there is only one possible interpretation of the statute, and that it is the interpretation found in a 2005 attorney general opinion. That attorney general opinion concluded that § 551.143 applied to "members of a governmental body who gather in numbers that

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[57] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

[58] *Oliva v. State*, 548 S.W.3d 518, 521-22 (Tex. Crim. App. 2018).

[59] *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 593 (1985).

[60] *See Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018) (Doctrine of constitutional avoidance "permits a court to "choos[e] between competing *plausible* interpretations of a statutory text.") (emphasis in *Jennings*); *Baird v. State*, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013) ("A statute is ambiguous when the language it employs is reasonably susceptible to more than one understanding.").

do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body."[61] The attorney general opinion referred to this as "a daisy chain of members the sum of whom constitute a quorum" or a "walking quorum."[62]

Even if the statute could be limited to a "daisy chain" of meetings or a "walking quorum," there are a number of different ways in which those concepts could be defined, and there is disagreement on whether certain situations qualify. A Louisiana court of appeals has described a "walking quorum" as a meeting "where different members leave the meeting and different members enter the meeting so that while an actual quorum is never physically present an actual quorum during the course of the meeting participates in the discussion."[63] The Wisconsin Court of Appeals described a "walking quorum" as "a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum."[64] The Supreme Court of Ohio found an improper game of "legislative musical chairs" when a city manager called three series of back-to-back non-quorum meetings with groups of council members."[65] A California appellate court concluded that one-on-one telephone calls with members of the governing body would suffice if the calls were essentially

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[61] Tex. Atty Gen. Op. no. GA-0326, 2005 Tex. AG LEXIS 3737, at *6.

[62] *Id.* at *6, 12.

[63] *Mabry v. Union Parish School Board.*, 974 So. 2d 787, 789 (La. App. 2 Cir. 2008).

[64] *State ex rel. Zecchino v. Dane County*, 380 Wis. 2d 453, 460-61, 909 N.W.2d 203, 207 (Wis. App. 2018).

[65] *State ex rel. Post v. City of Cincinnati*, 76 Ohio St. 3d 540, 541, 543-44, 668 N.E.2d 903, 904, 906 (1996).

a poll to arrive at the collective agreement of the governing body.[66] Hawaii's intermediate appellate court has held that "a series of one-on-one conversations relating to a particular item of Council business" circumvented the spirit of the state's open meeting law.[67]

Nevada's Supreme Court has held, however, that a "constructive quorum" is not necessarily established by back-to-back briefings conducted with agency members, that, taken as a whole, would add up to a quorum.[68] That court further concluded that, in the absence of a quorum, it was not improper for members of a public body to "privately discuss issues or even lobby for votes."[69] And Montana's Supreme Court declined to adopt a "constructive quorum" rule that would encompass "serial one-on-one discussions."[70]

Although these cases involve a variety of statutory schemes,[71] their various conclusions point to the fact that there can be different ideas about what constitutes a "walking" or "constructive" quorum. Those ideas range from the narrow conception articulated by the Louisiana court of appeals—a single meeting at which a quorum is defeated by the mere expediency of different

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[66] *Stockton Newspapers v. Redevelopment Agency*, 171 Cal. App. 3d 95, 103, 214 Cal. Rptr. 561, 565 (1985).

[67] *Right to Know Comm. v. City Council*, 117 Haw. 1, 12, 175 P.3d 111, 122 (Haw. App. 2008).

[68] *See Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 98-99, 64 P.3d 1070, 1077-78 (2003) (more would be required, "such as polling or collective discussions designed to reach a decision").

[69] *Id.* at 96 (quoting *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998)).

[70] *Willems v. State*, 374 Mont. 343, 350, 325 P.3d 1204, 1209 (2014).

[71] *See supra* at nn.63-70.

members stepping out of the room for a period of time—to the broad conception articulated by Hawaii's intermediate court—to include serial one-on-one communications with enough members to reach a quorum.

A broad view of what constitutes a "walking quorum" would constrain one-on-one lobbying for votes or even one-on-one discussions. Suppose a person is a member of a nine-member board, and he wishes a certain rule to be adopted, and he approaches another board member one-on-one to lobby that member to vote for his preferred rule. A discussion between two board members is not enough to make a quorum. But if the person then repeats that procedure with three other board members, individually approaching each one at different times, he has now approached a total of four members, which, with himself, constitutes a majority of the board. Whether that constitutes a "walking quorum" depends on how broad the concept really is. Under the "circumvents" language of § 551.143, this could be illegal, but it's not certain that it is.

But the "circumvents" language potentially sweeps even more broadly. If lobbying other members to achieve a majority vote is a "circumvention" under § 551.143, it may not even be necessary for a member to actually communicate with a majority-forming number[72] of the members. Suppose, in the nine-member-board hypothetical, that the member who wants a certain rule passed knows that one of the other members already intends to vote for the rule. To get a majority vote for his preferred rule, the first member need only persuade three other members. If he lobbies those three members, he has not communicated with a quorum, but his purpose is to ensure that a majority—which is a quorum—votes his way.

Suppose, instead, that the member who wants a certain rule passed knows that three other

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[72] A majority if the lobbying member is included.

members already intend to vote for the rule. To get a majority, he need persuade only one other member. He communicates with only that one member in an attempt to sway that person's vote. The purpose of his communication is still to ensure that a majority—again a quorum—votes his way. To the protest that this scenario strays beyond any recognized concept of "walking quorum," the answer is that, contrary to the State's contention and the Attorney General's opinion, the "circumvents" language in § 551.143 is not necessarily limited by the concept of a "walking quorum." If lobbying other members to get a majority vote circumvents TOMA, then lobbying even a single member of a more-than-three-member board could do so.[73]

But it gets worse, because the "circumvents" language can conceivably reach even further. Suppose, in the nine-member board hypothetical, that seven of the members have decided how they will vote on the rule at issue, with the vote split four to three. The two remaining undecided members discuss the issue between themselves to decide how they stand on it. That discussion could be viewed as a circumvention because the two undecided members hold the votes that would resolve the issue one way or another.

What if one member knows enough about other members to be reasonably sure how they will vote on a given issue, even if they have not yet expressed their thoughts? How sure does one have to be that communicating with another member will ultimately be decisive on a matter of official business before one runs afoul of the law? And the net that the word "circumvents" casts may be even wider. If part of the purpose of having an open meeting is for the public to see all of the information received by the public officials, then receiving information in a one-on-one session

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[73] Obviously, for a three member board, any conversation between two members would be in a quorum.

might itself be viewed as a "circumvention" of TOMA. All of this discussion reinforces our conclusion that the language in § 551.143 is potentially very broad and lacks any reasonable degree of clarity on what it covers. We also conclude that protected speech is likely to be chilled because of the great degree of uncertainty about what communications government officials may engage in.

E. Narrowing Construction

We have a duty to employ a reasonable narrowing construction to avoid a constitutional violation, but we can employ such a construction only if the statute is readily susceptible to one.[74] We may not rewrite a statute that is not subject to a narrowing construction, because such a rewriting "constitutes a serious invasion of the legislative domain."[75] A statute is readily subject to a narrowing construction only "if the language already in the statute can be construed in a narrow manner. Adding language to a statute is legislating from the bench."[76] Even when faced with a vague statute, we will not impose a narrowing construction when one "would add significant content not now present in the statute and could be fashioned in a number of different ways."[77] In considering a narrowing construction, we should take into account that vague laws, even when not overtly invidious, "invite the exercise of arbitrary power . . . by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up."[78]

We do not doubt the legislature's power to prevent government officials from using clever

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[74] *Perry*, 483 S.W.3d at 903.

[75] *State v. Johnson*, 475 S.W.3d 860, 872 (Tex. Crim. App. 2015).

[76] *State v. Markovich*, 77 S.W.3d 274, 285 (Tex. Crim. App. 2002) (Keasler, J., dissenting).

[77] *Long*, 931 S.W.2d at 296.

[78] *Dimaya*, 138 S. Ct. at 1223-24 (Gorsuch, J., concurring).

tactics to circumvent the purpose and effect of the Texas Open Meetings Act. But the statute before us wholly lacks any specificity, and any narrowing construction we could impose would be just a guess, an imposition of our own judicial views. This we decline to do.

F. Conclusion

In light of the above discussion, we conclude that § 551.143 is unconstitutionally vague on its face. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Delivered: February 27, 2019

Publish

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0254-18

THE STATE OF TEXAS

v.

CRAIG DOYAL, Appellee

**ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE NINTH COURT OF APPEALS
MONTGOMERY COUNTY**

SLAUGHTER, J., filed a concurring opinion.

CONCURRING OPINION

I agree with the Court's conclusion that the indictment against Craig Doyal, Appellee, must be dismissed because Government Code Section 551.143 is unconstitutional. But I disagree with the Court's reasoning in reaching that decision. I do not believe that the statute is impermissibly vague. Rather, I believe that the statute "abridg[es] the freedom of speech" in violation of the First Amendment of the United States Constitution. As such, I respectfully concur in this Court's decision to reverse the judgment of the court of appeals

and uphold the trial court's order dismissing the indictment against Appellee, but I do not join the Court's opinion.

I. Section 551.143 is not impermissibly vague.

This Court's opinion holds that Government Code Section 551.143 is unconstitutionally vague on its face, in that it fails to provide adequate notice of the prohibited conduct and/or fails to provide sufficiently definite guidelines for law enforcement. I disagree. The statutory language, viewed as a whole and in the context of the remaining provisions in the Open Meetings Act, is adequate to place an ordinary officeholder on notice of the prohibited conduct and to prevent arbitrary enforcement. Further, the requirement of mandatory training for public officials on the provisions of the Open Meetings Act and the resources provided by the Attorney General's Office substantially reduce the likelihood that officials will be deprived of a reasonable opportunity to know what the law prohibits.

The statute at issue here, Government Code Section 551.143, provides:

> A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

TEX. GOV'T CODE § 551.143(a).

As shown below, this statute is not vague because it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and establishes definite guidelines for law enforcement. *See Scott v. State*, 322 S.W.3d 662, 665 n. 2 (Tex. Crim.

App. 2010).

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness doctrine prohibits the government from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)).[1] Thus, "[a] statute may be challenged as unduly vague, in violation of the Due Process Clause of the Fourteenth Amendment, if it does not: (1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and (2) establish definite guidelines for law enforcement." *Scott*, 322 S.W.3d at 665 n.2.

A. By including the culpable mental state of "knowingly conspiring to circumvent" TOMA, the statute provides fair notice of what is prohibited.

As held by the United States Supreme Court, a statute that may otherwise be found impermissibly vague may be saved by including a culpable mental state. *See McFadden v. United States,* 135 S. Ct. 2298, 2307 (2015) ("Under our precedents, a scienter requirement

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[1] *See also United States v. Williams*, 553 U.S. 285, 304 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."); *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").

in a statute 'alleviate[s] vagueness concerns,' 'narrow[s] the scope of the [its] prohibition[,] and limit[s] prosecutorial discretion.'") (quoting *Gonzales v. Carhart*, 550 U.S. 124, 149, 150 (2007) (modifications in original)).[2] Here, the statute conditions criminal liability on proof of the actor's guilty mind. That is, an actor is subject to prosecution only if he "knowingly conspires to circumvent" the Open Meetings Act by engaging in the specified conduct. *See* § 551.143(a).

As noted in the Court's opinion, a statute's inclusion of a culpable mental state does not invariably alleviate vagueness concerns. But this particular statute's wording—requiring proof of the actor's awareness that he is making a secret agreement with others to overcome or avoid the requirements of the Open Meetings Act[3]—makes it highly unlikely that the statute will be applied to individuals who genuinely believe their conduct to be lawful or who are utterly unaware that their conduct is prohibited. If one of the principal concerns underlying the vagueness doctrine is that vague laws will "trap the innocent by not providing fair warning," *see Grayned,* 408 U.S. at 108, then that concern is substantially mitigated by

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[2] *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010) (holding federal material-support-for-terrorism statute was not unconstitutionally vague, and noting that "the knowledge requirement of the statute further reduces any potential for vagueness, as we have held with respect to other statutes containing a similar requirement"); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice . . . that [the] conduct is proscribed.").

[3] *See* TEX. PENAL CODE § 6.03(b) (defining culpable mental state of knowing as awareness of the nature of one's conduct); WEBSTER'S NEW INTERNATIONAL DICTIONARY 410, 485 (3d ed. 2002) (defining conspire as "to make an agreement with a group and in secret to do some act," "plot together;" and defining "circumvent" as "to overcome or avoid the intent, effect, or force of," "make inoperative or nullify the purpose or power of esp. by craft or scheme").

the statute's inclusion of this language requiring proof of the actor's guilty mind in knowingly conspiring to circumvent the Open Meetings Act.[4]

B. The language at issue, when viewed in context of the other Chapter 551 provisions, provides clarity for what is prohibited.

The Court concludes that, in spite of Section 551.143's culpable mental state requirement, the statute is nevertheless vague on its face because the conduct for which the actor must possess the requisite culpability—"conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter"—is hopelessly abstract. This language may appear vague when each term is viewed in isolation, but its meaning becomes sufficiently clear when it is considered holistically and in the broader context of the other provisions in Chapter 551.

Section 551.002, entitled "Open Meetings Requirement," broadly provides that,

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[4] In contrast to the instant case, the two vagueness cases on which the Court's opinion primarily relies, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson v. United States*, 135 S. Ct. 2551 (2015), both involved statutes containing no culpable mental state requirement. The statutes at issue in those cases are further distinguishable from Section 551.143 due to their incorporation of wholly subjective standards; for example, in *Johnson*, in order to determine whether a federal statutory sentencing enhancement applied, courts had to examine a defendant's criminal history and decide whether his prior offenses could be classified as "violent" felonies. To do so, the statute effectively required courts to "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Johnson*, 135 S. Ct. at 2557. In striking the statute for vagueness, the Court reasoned that such a determination was too abstract because it was based on a "judicially imagined ordinary case of a crime," rather than a defendant's actual conduct, and was too divorced from "real-world facts or statutory elements." *Id.* By contrast, as will be shown below, nothing about the statutory language in Section 551.143 requires a fact-finder to engage in this type of guesswork or posing of hypotheticals. Liability under the statute is firmly rooted in the statutory elements as they apply to the particular actor's conduct.

subject to limited exceptions, all governmental meetings must be open to the public. TEX. GOV'T CODE § 551.002 ("Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter."). The governmental body must give written notice of the date, hour, place, and subject of each meeting held by the governmental body. *Id.* § 551.041. The noun form of "meeting" is statutorily defined, and its meaning is quite sweeping as it encompasses all deliberations by a quorum of a governmental body, or between a quorum of a governmental body and a third person, during which public business is discussed, considered, or the subject of formal action. *Id.* § 551.001(4)(A).[5] The word "deliberation" is also broadly defined as "a verbal exchange

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[5] The complete statutory definition of "meeting" is as follows:

(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, the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, or the attendance by a quorum of a governmental body at a candidate forum, appearance, or debate to inform the electorate, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, press conference, forum, appearance, or debate.

The term includes a session of a governmental body.

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." *Id.* § 551.001(2). Quorum is separately defined as "a majority of a governmental body, unless defined differently by applicable law or rule or the charter of the governmental body." *Id.* § 551.001(6).

Viewing these provisions in conjunction, it becomes apparent that Chapter 551's overarching purpose is to broadly require that all deliberations by a quorum of a governmental body be conducted in a manner that is accessible to the public through an open meeting; in other words, a quorum may not discuss any issue over which it has jurisdiction without holding a properly-called meeting that is open to the public. Interpreting the language of Section 551.143 in this particularized context, the statute's meaning becomes sufficiently clear such that an ordinary person would be fairly placed on notice of the prohibited conduct: a member or members of a governmental body may not knowingly conspire to circumvent Chapter 551's clear requirement of open deliberations by meeting in numbers less than a quorum under circumstances that reflect a purpose to secretly discuss

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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.

TEX. GOV'T CODE § 551.001(4).

public business with a quorum of that body without holding a properly-called meeting. A similar interpretation of the statute was embraced more than ten years ago in an advisory opinion by former Attorney General Greg Abbott, which stated:

> [W]e construe section 551.143 to apply to members of a governmental body who gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body. In essence, it means a "daisy chain of members the sum of whom constitute a quorum" that meets for secret deliberations. Under this construction, "deliberations" as used in section 551.143 is consistent with its definition in section 551.001 because "meeting in numbers less than a quorum" describes a method of forming a quorum, and a quorum formed this way may hold deliberations like any other quorum.

Tex. Att'y Gen. GA-0326 (2005), at 3-4 (citations omitted).[6] This manner of forming a quorum has become commonly known as a "walking quorum."

Appellee rejects this interpretation and instead suggests that the statutory language is self-contradictory and thus defective on its face. Specifically, Appellee contends that the statutory definitions of "meeting" and "deliberations" expressly refer to conduct by a quorum, but Section 551.143 refers to "meeting in numbers less than a quorum." TEX. GOV'T CODE §§ 551.001(2), (4); 551.143. Appellee asserts that this apparent contradiction renders the statute fatally flawed because, in light of the statutory definitions, it is impossible

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[6] *See also* Tex. Att'y Gen. GA-0326 (2005), at 8 ("Members of a governmental body who knowingly conspire to gather in numbers that do not physically constitute a quorum at any one time but who through successive gatherings secretly discuss a public matter with a quorum of that body violate section 551.143 of the Open Meetings Act. This section is not on its face void for vagueness.").

for a governmental body to "meet" or "deliberate" in numbers less than a quorum.[7]

In analyzing the word "meeting" in the statute, Appellee ignores the fact that only the noun form of that word is statutorily defined, whereas Section 551.143 uses "meeting" as a verb. As such, the technical definition of "meeting" as a noun is not implicated by Section 551.143. *See* Tex. Att'y Gen. GA-0326 (2005), at 3 ("[T]he section 551.001 definition of 'meeting' as a noun does not apply here because section 551.143 employs the word as a verb."). "Thus, the phrase 'meeting in numbers less than a quorum' does not present a legal dilemma because the plain meaning of 'meeting' as a verb does not require a quorum." *Id.* ("Furthermore, we read 'meeting in numbers less than a quorum' to have a particular meaning that does not render the provision circular.").

The word "deliberations," however, is used as a noun in both the statutory definition and in Section 551.143. The statutory definition does refer to a verbal exchange during "a meeting *between a quorum* of a governmental body," whereas Section 551.143 expressly refers to "meeting in numbers *less than a quorum* for the purpose of secret deliberations in violation of this chapter." *See* TEX. GOV'T CODE §§ 551.001(2), 551.143 (emphasis added). Given this, it appears that a literal application of the statutory definition of "deliberations" in the context of Section 551.143 would create an absurdity by rendering the statutory

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[7] To this end, Appellee asks, "How can less than a quorum form a quorum? And if it takes a quorum to deliberate, how can less than a quorum deliberate in violation of TOMA?" Appellee's Brief on Discretionary Review, at 43.

language internally self-contradictory.[8] But this Court is not bound to adopt an interpretation of the statute that would render its language illogical or absurd. Instead, this Court is obligated to seek out any reasonable construction that upholds the statute while giving effect to the Legislature's intent. *Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991) (in construing statutes, we must "seek to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation"; if a statute's plain language leads to an absurd result, this Court "should not apply the language literally," but should seek to arrive at a "sensible interpretation" consistent with the Legislature's purpose); *see also Skilling v. United States*, 561 U.S. 358, 406 (2010) ("'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'") (quoting *Hooper v. California,* 155 U.S. 648, 657 (1895)).

If one considers the entire statutory phrase, "meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter," it becomes apparent that the Legislature could not have intended for the statutory definition of "deliberations" to apply literally here. Deliberations "between a quorum" that take place "during a meeting" that is open to the public are not "secret," and thus they are not in violation of Chapter 551. *See* TEX. GOV'T CODE §§ 551.001(2), 551.002, 551.143. Looking beyond the technical statutory

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[8] Under a literal application of the statutory definition of deliberations, the statute would prohibit "meeting in numbers *less than a quorum* for the purpose of secret [verbal exchanges 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] in violation of this chapter." TEX. GOV'T CODE §§ 551.143, 551.001(2) (emphasis added).

definition of "deliberations," the ordinary definition of that word is "a discussion and consideration by a number of persons of the reasons for and against a measure." WEBSTER'S NEW INTERNATIONAL DICTIONARY 596 (3d ed. 2002). Placing this ordinary definition in the context of the phrase in which it appears ("secret deliberations in violation of this chapter"), it becomes sufficiently clear what the core conduct targeted by the statute is—knowingly evading the requirement of open meetings by gathering in smaller groups that do not comprise a quorum for the ultimate purpose of secretly discussing government business with a quorum without holding a proper meeting. Such secret deliberations by a quorum are clearly "in violation of" the remaining provisions in Chapter 551. *See, e.g.,* TEX. GOV'T CODE § 551.002, 551.041. This understanding of the statutory language has been embraced by other courts,[9] as well as by the Attorney General as discussed above. Because this interpretation is a reasonable one and is consistent with the Legislature's intent in broadly requiring open deliberations by governmental bodies, this Court is obligated to adopt such a construction before striking the statute on vagueness grounds. *Skilling*, 561 U.S. at 406.

Moreover, to the extent that the Court's opinion suggests the statutory language is so ambiguous as to render the statute vague, I disagree with this reasoning because it conflates the concept of ambiguity with vagueness. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 31-32 (2012) ("A word or phrase is ambiguous

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[9] *See, e.g., Willmann v. City of San Antonio,* 123 S.W.3d 469, 479-80 (Tex. App.—San Antonio 2003, pet. ref'd); *Esperanza Peace and Justice Center v. City of San Antonio*, 316 F. Supp. 2d 433, 474, 476 (W.D. Tex. 2001).

when the question is which of two or more meanings applies; it is vague when its unquestionable meaning has uncertain application to various factual situations.").[10] Because any ambiguity here may be resolved in such a way as to effectuate the clear legislative intent to prohibit knowing evasions of open-meetings requirements, it cannot be the basis for finding the statute void for vagueness. Further, although the Court's opinion uses numerous hypothetical scenarios and suggests that the statute is hopelessly unclear as to each, each of these examples is flawed for various reasons. Most do not take into account the required mental state, and the actors involved would fail to possess that required mental state. Other examples are flawed because they focus on outlier situations. Many are likely not encompassed within the statutory prohibition because they do not involve deliberations by a quorum. While several of these hypotheticals admittedly show that it may be difficult to discern whether Section 551.143 would apply to certain marginal cases, that fact alone does not prove the statute's vagueness. As the Supreme Court has explained, the mere fact that it may occasionally be difficult to determine how a statute applies to a particular fact pattern does not render the statute facially vague, for "even clear rules 'produce close cases.'"

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[10] Often the terms "ambiguous" and "vague" are used interchangeably, but they have distinct meanings in statutory and legal interpretation. Justice Scalia and Bryan Garner wrote the following: "[T]here is a useful and real distinction between textual uncertainties that are the consequence of verbal ambiguity (conveying two very different senses, as when *table* could refer to either a piece of furniture or to a numerical chart) and those that are the consequence of verbal vagueness (as when *equal protection of the laws* can be given a scope so narrow as to include only protection from injury, or so broad as to include equal access to government benefits)." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 31-32 (2012).

Salman v. United States, 137 S. Ct. 420, 429 (2016) (quoting *Johnson*, 135 S. Ct. at 2560).[11]

C. The Legislature's statutorily-mandated training and resources ensures that a person of ordinary intelligence has a reasonable opportunity to know what is prohibited.

Setting aside the statutory language of Section 551.143, the mandatory training provisions in Chapter 551 further serve to alleviate concerns about the statute's potential for vagueness. Section 551.005 mandates that "[e]ach elected or appointed public official who is a member of a governmental body subject to this chapter shall complete a course of training of not less than one and not more than two hours regarding the responsibilities of the governmental body and its members under this chapter[.]" TEX. GOV'T CODE § 551.005(a).[12] The statute provides that the Office of the Attorney General is responsible for ensuring that the training is made available. *Id.* § 551.005(b).[13] The current one-hour video training

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[11] *See also Williams*, 553 U.S. at 305-06 ("Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt. . . . What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.") (internal citations omitted); *Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications[.]'") (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)).

[12] The training must include instruction on: (1) the general background of the legal requirements for open meetings; (2) the applicability of TOMA to governmental bodies; (3) procedures and requirements regarding quorums, notice, and recordkeeping; (4) procedures and requirements for holding an open meeting and for holding a closed meeting; and (5) penalties and other consequences for failure to comply with the chapter. TEX. GOV'T CODE § 551.005.

[13] Current TOMA training video and handbook available at: https://www.texasattorneygeneral.gov/open-government/open-meetings-act-training, last visited Feb. 20, 2019.

provided by the Attorney General discusses the issue of criminal penalties for conduct amounting to a "walking quorum." To illustrate what that concept means, the video discusses the facts of a federal district court decision in *Esperanza Peace & Justice Ctr. v. City of San Antonio,* in which that court determined that the San Antonio City Council had violated Section 551.143 by gathering successively in small groups the night before a budget vote for the purpose of forming a consensus about how to vote on the budget. 316 F. Supp. 2d 433, 472 (W.D. Tex. 2001).[14]

In addition to the mandatory training video that discusses the concept of a walking quorum, the corresponding "Open Meetings Handbook" also references this concept in multiple places, observing that a walking quorum may arise when members of a governmental body try to "avoid complying with the Act by deliberating about public

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[14] In *Esperanza*, a civil case, a quorum of the San Antonio City Council engaged in a series of telephone calls and in-person discussions the night before a public meeting at which a budget vote would occur. 316 F. Supp. 2d 433 (W.D. Tex. 2001). Though a quorum was not physically present at any one time, a quorum of members participated in the discussions through successive communications, and ultimately they signed a memorandum of understanding reflecting their agreement that had been reached through the deliberations. The City Manager was present and kept track of the number of council members present so that a physical quorum would not be in his office at the same time. The federal district court held that these facts reflected the council's clear intent to "reach a decision in private while avoiding the technical requirements of the Act," thereby constituting a violation of Section 551.143. *Id.* at 477. It explained, "Surely the facts of this case present a classic fact pattern of deliberation by a quorum that purposely attempts to avoid the technical definitions of the Act by shuffling members in and out of an office. Clearly, a quorum of council members deliberated and reached agreement concerning the budget . . . behind closed doors. . . . The transparent subterfuge of separating members physically by an office wall or a telephone line cannot avoid the strictures of the Act." *Id.* at 474.

business without a quorum being physically present in one place."[15] The Office of the Attorney General also operates an Open Meetings Hotline, staffed by attorneys, for the purpose of answering public officials' questions about the scope of the law.

With such an abundance of readily-available resources providing public officials with an understanding of the law (some of which is required viewing), this situation is distinguishable from a typical vagueness challenge in which an innocent actor may be forced to roll the dice by guessing at the meaning of indeterminate or abstract statutory terms, only finding out later if his actions are prohibited. Having statutorily-mandated training and readily-available informational resources is surely a factor that we may take into consideration in evaluating whether the ordinary officeholder is afforded a fair opportunity to know whether a particular course of conduct is prohibited. These training requirements have been in place since 2006,[16] and information regarding Section 551.143's prohibition on walking quorums has been included in official training materials for more than a decade.[17]

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[15] *See* Office of the Attorney General – State of Texas Open Meetings Handbook 7, 20 (2018) ("'[T]he Act would apply to meetings of groups of less than a quorum where a quorum or more of a body attempted to avoid the purposes of the Act by deliberately meeting in groups less than a quorum in closed sessions to discuss and/or deliberate public business, and then ratifying their actions as a quorum in a subsequent public meeting.'") (quoting *Esperanza*, 316 F. Supp. 2d at 476-77).

[16] *See* Acts 2005, 79th Leg., R.S., ch. 105, § 1, eff. Jan. 1, 2006 (adding training requirements to Chapter 551).

[17] *See* Office of the Attorney General – State of Texas Open Meetings Handbook 22 (2008) (discussing "walking quorums" and noting that "[o]n occasion, a governmental body has tried to avoid complying with the Act by deliberating about public business without a quorum being physically present in one place and claiming that this was not a 'meeting' within the Act"; citing the federal district court's opinion in *Esperanza*, the handbook states, "it would violate the spirit of the

If the Legislature believed that the resources currently provided were misleading or constituted an incorrect statement of the law, the Legislature would have amended the statute to clarify its intent. That it has not done so reflects implied approval of the foregoing interpretation by the Legislature.

Further, the fact that training is required under Chapter 551 is not an indication that Section 551.143 is vague. Although the requirements of the Open Meetings Act are admittedly complex, complexity is not the equivalent of vagueness. *See Asgeirsson v. Abbott*, 696 F.3d 454, 466 (5th Cir. 2012) (rejecting vagueness challenge to TOMA, and noting that plaintiffs had "point[ed] to no section of TOMA that is vague on its face"). As the Fifth Circuit explained in *Asgeirsson*,

> 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.

Id.[18]

Act and render a result not intended by the Legislature '[i]f a governmental body may circumvent the Act's requirements by 'walking quorums' or serial meetings of less than a quorum, and then ratify at a public meeting the votes already taken in private.'" *Id*. at 23 (quoting *Esperanza*, 316 F. Supp. 2d at 476).

[18] In analogous circumstances, two federal circuit courts have applied similar reasoning to uphold criminal regulations that were part of complex regulatory schemes. *See United States v. Saunders,* 828 F.3d 198, 206-07 (4th Cir. 2016) ("regulatory complexity does not render a statute (or set of statutes) unconstitutionally vague") (citations and quotations omitted); *United States v. Zhi Guo,* 634 F.3d 1119, 1122 (9th Cir. 2011) ("We recognize that putting together the pieces of this regulatory puzzle is not easy. . . . But a statute does not fail the vagueness test simply because it involves a complex regulatory scheme, or requires that several sources be read together . . . . Because the regulations apprise those who take the time and effort to consult them as to [the scope of the law]

In sum, because the statutory language is susceptible to a reasonable interpretation that renders the statute's meaning sufficiently definite, and because ample training resources help to define the scope of the law, Section 551.143 is not void on its face for vagueness. While the statutory language should be clarified in some respects, the statute is not so indeterminate, abstract, or subjective that government officials will be deprived of fair notice of the conduct that it prohibits. *See Williams*, 553 U.S. at 306 (upholding federal child pornography statute over vagueness challenge where statute involved "clear questions of fact" and "true-or-false determinations," rather than "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings"). Nor is the statute so standardless that it invites arbitrary enforcement. *Johnson*, 135 S. Ct. at 2556. Because it is clear what the statute as a whole prohibits, I reject Appellee's facial vagueness challenge and disagree with the Court's analysis.

II. Section 551.143 violates the First Amendment because it abridges the freedom of speech.

While Section 551.143 is not void for vagueness, it "abridg[es] the freedom of speech" in violation of the First Amendment of the United States Constitution. By criminalizing all policy discussions by a quorum of members of a governmental body outside the context of a formal meeting, the statute significantly infringes on the rights of governmental officials to engage in the free exchange of ideas that are essential to effective

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and do not allow for arbitrary enforcement, the regulations satisfy due process.").

governance. The State has not established that this sweeping regulation prohibiting even informal policy discussions outside of a formal meeting is necessary to achieve its interest in maintaining an open and transparent government. Therefore, I would hold that the statute fails to pass constitutional muster and violates the First Amendment.

A. Section 551.143 is a content-based restriction on speech.

The First Amendment commands that the government "shall make no law. . . abridging the freedom of speech." U.S. Const. amend. I. Applicable to the States through the Fourteenth Amendment, the Free Speech Clause prohibits the government from restricting speech "because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2226 (2015) (internal citations and quotations omitted).

When a statute is attacked as unconstitutional, courts usually begin with the presumption that the law is valid and that the Legislature has not acted unreasonably or arbitrarily. *Ex parte Lo*, 424 S.W.3d 10, 15 (Tex. Crim. App. 2013). However, when the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed; the content-based regulation is presumptively invalid, and the State bears the burden to rebut this presumption. *Id.* A law is content based "[i]f it is necessary to look at the content of the speech in question to decide if the speaker violated the law." *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014). This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Reed*, 135

S. Ct. at 2227.[19] Such a regulation may be upheld only if it is necessary to serve a compelling state interest and employs the least restrictive means to achieve its goal. *Lo*, 424 S.W.3d at 15; *see also Reed*, 135 S. Ct. at 2226 ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

"The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). Under the First Amendment's "overbreadth" doctrine, "a statute is facially invalid if it prohibits a substantial amount of protected speech" in relation to its plainly legitimate sweep. *Williams,* 553 U.S. at 292; *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016). "The person challenging the statute must demonstrate from its text and from actual fact 'that a substantial number of instances exist in which the Law cannot be applied constitutionally.'" *Perry,* 483 S.W.3d at 902 (citing *New York State Club Ass'n v. City of New York,* 487 U.S. 1, 14 (1988)). In conducting an overbreadth analysis, the first step "is to construe the challenged statute," as "it is impossible to determine whether a statute reaches too far without first knowing what it covers." *Williams*, 553 U.S. at 293; *Ex parte Perry*, 483 S.W.3d at 902.

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[19] In *Reed*, the Supreme Court elaborated on the nature of content-based regulations, noting, "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 135 S. Ct. at 2227.

In construing Section 551.143, the court of appeals held that the provision targets conduct rather than speech, and thus does not implicate First Amendment protections. *State v. Doyal*, 541 S.W.3d 395, 401 (Tex. App.—Beaumont 2018). As discussed in the Court's opinion, this conclusion by the court of appeals was erroneous because Section 551.143 reaches speech and not merely conduct. *See* Maj. Op. at 7-8 (explaining that "the statute does not proscribe 'meeting' in the abstract but is directed at a particular kind of meeting—one that is for the purpose of 'deliberations'"). As discussed *supra*, Section 551.143 only prohibits meeting for the purpose of "secret deliberations in violation of this chapter"—that is, secret policy discussions by a quorum of a governmental body outside the proper forum of a public meeting. A discussion necessarily requires speech. Therefore, I agree with the Court's opinion that Section 551.143 regulates speech rather than conduct. I also agree with the Court's determination that the statute reaches protected speech, for "the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general." Maj. Op. at 6-7 (citing *Rangra v. Brown*, 566 F.3d 515, 524 (5th Cir. 2009), *vacated as moot en banc by* 584 F.3d 206 (5th Cir. 2009)). Thus, the First Amendment is implicated, and the next question becomes the level of scrutiny to apply, which in turn depends on whether the statute is content based or content neutral.

B. Because the statute is content-based, strict scrutiny applies.

In 2015, the United States Supreme Court issued its opinion in *Reed*. In *Reed,* the

Supreme Court emphasized that a statute that is content based on its face is subject to strict scrutiny regardless of the government's justification for the law. The Court stated:

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. We have thus made clear that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive. Although a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary. In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

Reed, 135 S. Ct. at 2228 (internal citations and quotations omitted).[20]

Reed has shifted the landscape for analyzing First Amendment claims by holding that all content-based regulations, even if they appear to be viewpoint neutral, are subject to strict scrutiny.[21] The court of appeals failed to rely on *Reed* and instead cited the United States

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[20] The facts in *Reed* involved a challenge to a city's regulation governing the manner in which people could display outdoor signs. *Reed*, 135 S. Ct. at 2224. The challenged regulation identified various categories of signs based on the type of information they conveyed, then subjected each category to different restrictions. *Id.* The Supreme Court held that the regulation was a content-based regulation on speech that could not withstand strict scrutiny. *Id.* at 2227-28. Because the restrictions in the regulation depended "entirely on the communicative content of the sign," the Court reasoned that it had "no need to consider the government's justifications or purposes for enacting the Code." *Id.* at 2227. The Court explained, "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them." *Id.* at 2229. Applying strict scrutiny, the Court went on to conclude that the statute failed to meet that standard because the statute was "hopelessly underinclusive" by more freely allowing certain types of signs while imposing greater burdens on other categories of signs. *Id.* at 2232.

[21] *See, e.g., Auspro Enterprises LP v. Tex. Dep't of Transp.,* 506 S.W.3d 688, 691, 693-94 (Tex. App.—Austin 2016) (substitute op.) (noting that the Supreme Court in *Reed* "refined its framework for analyzing 'content based' regulations of speech" and has "arguably transformed First

Fifth Circuit Court of Appeals's decision in *Asgeirsson v. Abbott*, 696 F.3d at 459-60, for the proposition that "[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." *Doyal*, 541 S.W.3d at 400. *Reed*, however, was decided three years after *Asgeirsson* and calls into question *Asgeirsson*'s reasoning.

Under *Reed*, Section 551.143 is plainly content based on its face. The statute prohibits conspiring to circumvent the act by "meeting in numbers less than a quorum *for the purpose of secret deliberations*." TEX. GOV'T CODE § 551.143 (emphasis added). Whether one looks to the common or the statutory definition of "deliberations," a specific category of speech is implicated—matters within the jurisdiction of the governmental body or matters pertaining to public business. The common definition of "deliberations" involves a discussion regarding the "reasons for and against a [governmental] measure." WEBSTER'S NEW INTERNATIONAL DICTIONARY 596 (3d ed. 2002). The statutory definition of "deliberations" involves a "verbal exchange . . . *concerning an issue within the jurisdiction of the governmental body or any public business*." *See* TEX. GOV'T CODE § 551.001(2) (emphasis added). Thus, it is a violation to discuss a particular subject matter. If members of a governing body subject to TOMA met privately in numbers less than a quorum to discuss

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Amendment free-speech jurisprudence"; *Reed* marked a "significant departure" from the former approach that "would uphold facially content-based restrictions as long as those restrictions could be justified on content-neutral grounds and as long as the regulations were not adopted based on disagreement with the message"; after *Reed*, "[i]f the law is content-based on its face . . . that is the end of the inquiry," and strict scrutiny applies).

golfing or the latest fashion trends, there would be no violation of Section 551.143 because discussing those topics could never amount to a deliberation within the meaning of the statute. However, if during that same meeting, members informally discussed an issue within the jurisdiction of the governing body or public business while being aware that such discussions are prohibited by the Act, then there likely would be a violation of the statute. It is not until the *content* of the discussion is examined that a determination can be made as to whether the provision was violated. As such, Section 551.143 discriminates against an entire subject matter of speech and falls squarely under *Reed*. *See Reed*, 135 S. Ct. at 2227 ("[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."). Therefore, Section 551.143 is subject to strict scrutiny.

C. Section 551.143 is not narrowly tailored to further the compelling state interest.

Because strict scrutiny applies, the State must demonstrate that Section 551.143 furthers a compelling state interest and is narrowly tailored to achieve that interest. *Lo,* 424 S.W.3d at 15. A narrowly-tailored regulation "employs the least restrictive means to achieve its goal." *Id.* "If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny." *Id.* at 15-16. Further, the government's chosen restriction on the speech at issue must be "'actually necessary' to achieve its interest"; in other words, there must be a "direct causal link between the restriction imposed and the

injury to be prevented." *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (plurality op.) (quoting *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011)).

The State asserts compelling interests of transparency, faith in government, creating an environment where corruption cannot thrive, and protecting the rights of public officials to observe and participate in the public policy making for which they were elected. While these certainly are compelling goals, the State has failed to meet its burden in proving that Section 551.143 is necessary to achieve these interests and constitutes the least restrictive means of accomplishing these goals.

Broadly speaking, courts have recognized that the overarching purpose of TOMA is to ensure the transparency of governmental actions and to protect the public's interest in knowing how governmental decisions are made. *See Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990) (recognizing purpose of TOMA is to ensure "that the public has the opportunity to be informed concerning the transactions of public business"); *Finlan v. City of Dallas,* 888 F. Supp. 779, 783 (N.D. Tex. 1995) ("The purpose of the Texas Open Meetings Act is to protect the public's interest in knowing the workings of its governmental bodies. . . .Thus, the public policy embodied in the TOMA is that, absent compelling reasons to the contrary, the public business should be conducted in public.").[22] TOMA seeks to

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[22] *See also Save Our Springs Alliance, Inc. v. Lowry*, 934 S.W.2d 161, 162 (Tex. App.—Austin 1996, orig. proceeding) ("The Open Meetings Act was promulgated to encourage good government by ending, to the extent possible, closed-door sessions in which deals are cut without public scrutiny.") (citing *Cox Enters., Inc. v. Bd. of Trustees of the Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 960 (Tex. 1986) ("The Act is intended to safeguard the public's interest in knowing the workings of its governmental bodies.")).

achieve this purpose by requiring "openness at every stage of a governmental body's deliberations." *Acker*, 790 S.W.2d at 300. Pursuant to the regulations in TOMA, citizens are "entitled not only to know what government decides but to observe how and why every decision is reached." *Id.* Thus, the Act requires that "[t]he executive and legislative decisions of our governmental officials as well as the underlying reasoning must be discussed openly before the public rather than secretly behind closed doors." *Id.*

How does Section 551.143 fit into this broader asserted goal of ensuring an open and transparent government? As noted above, Section 551.143 operates to prohibit public officials from conducting "secret deliberations" and "walking quorums" that would permit governmental bodies to engage in policy discussions outside the public eye. As the Texas Supreme Court noted in *Acker*, TOMA strictly prohibits this type of informal discussion amongst governmental officials—"When a majority of a public decisionmaking body is considering a pending issue, there can be no 'informal' discussion. There is either formal consideration of a matter in compliance with the Open Meetings Act or an illegal meeting." *Id*. But why is such a sweeping regulation necessary to ensure public knowledge of and access to governmental affairs? Must the public be privy to every single conversation amongst members of a governmental body in order to prevent corruption and to ensure access and transparency? The State has not put forth any evidence, aside from sweeping generalizations and speculation, to support the notion that even informal discussions by public officials prior to a formal meeting will frequently result in corruption, secret decision-

making, or a lack of transparency. Because other provisions in TOMA require the holding of formal meetings to conduct actual business, such as casting votes, it cannot be said that the public would be denied access to governmental decision-making in the absence of Section 551.143.[23] Moreover, the remedy for a governmental decision made in the absence of a public meeting is to invalidate the decision. Even without the provisions in Section 551.143, the government cannot take any binding formal action absent a properly-held public meeting. *See Esperanza Peace,* 316 F. Supp. 2d at 477 ("Governmental actions taken in violation of the Act are subject to judicial invalidation.") (citing *Smith County v. Thornton,* 726 S.W.2d 2, 3 (Tex. 1986)). Further, voters can determine whether their elected officials are providing enough transparency.

By prohibiting all informal discussions amongst officeholders—even those that are not aimed at secrecy or corrupt decision-making—Section 551.143 sweeps too broadly to include innocent speech that has no bearing on TOMA's purposes. While everyone seems to agree that the government may validly regulate conduct that would amount to secret and/or corrupt decision-making outside the public eye, Section 551.143 goes far beyond that by prohibiting even informal deliberations which might aid governmental officials in learning about issues and perspectives ahead of a formal vote. Because of this, rather than advancing the government's interests in effective government, Section 551.143 arguably undermines

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[23] *See* TEX. GOV'T CODE §§ 551.002 ("Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter."); 551.144 (imposing criminal penalties for knowingly holding a closed meeting).

the broader purpose of TOMA to ensure effective representation for all citizens.[24]

Further, due to the significant threat of criminal sanctions, Section 551.143 operates to chill even more speech than is already encompassed within the statute's broad scope. Many public officials, out of fear of even just being accused of a TOMA violation, avoid communicating with each other or even being seen together outside of an official meeting.[25] This chilling effect results in a significant infringement upon the rights of public officials to communicate one-on-one regarding policy issues.

While of course our Texas Legislature has the right to criminalize open-meeting violations if the statute is otherwise constitutional, most states find that criminalizing open-meetings law violations is unnecessary. Legal scholars note that all fifty states have open

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[24] *See* Carlos Doroteo, *The Texas Open Meetings Act: an Old-Fashioned, Wild West, First Amendment Shootout,* 56 S. TEX. L. REV. 675, 677, 700 (2015) ("There are also many instances where the speech that TOMA criminalizes arguably does not further the Act's purpose. Whether intentional or not, the overall result is that TOMA places restraints on the ability of the legislative body to legislate and, in doing so, arguably deprives citizens of effective representation. . . . Certain conduct that contributes to effective representation and is consistent with TOMA's purpose may nevertheless be criminalized by the Act. In such instances, TOMA is undermining the principles of a representative democracy."); Scott Houston, *Texas Open Meetings Act: Constitutional?*, 13 TEX. TECH. ADMIN. L.J. 79, 84 (2011) ("No one would argue that [government officials] should come to a 'meeting of the minds' on the issues outside of a properly posted meeting, but it should be acceptable for them at least to have a conversation without the threat of jail time."); Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy,* 78 TENN. L. REV. 309, 360 (2011) (explaining that open meeting laws "have tended to (1) chill discussion and thus decrease collegial decision making; (2) reduce the actual number of public meetings held; and thus (3) shift authority to staff, or to lobbyists") (internal citations omitted).

[25] The record of the pretrial hearing in this case reflects this unfortunate truth; for example, one witness, the mayor of Oak Ridge North, testified that, as a result of Section 551.143, all of the officials in the city are "afraid to" speak to each other and "don't do it." The witness testified that, as a result of this chilling effect, Section 551.143 "greatly hampers" local governmental operations.

meeting laws, but the majority of those state laws do not impose criminal sanctions for violating the open meeting requirements. *See* Devon Helfmeyer, *Do Public Officials Leave Their Constitutional Rights at the Ballot Box – A Commentary on the Texas Open Meetings Act*, 15 TEX. J. ON CIVIL LIBERTIES & CIVIL RIGHTS 205, 227-30 (2010) (noting that only nineteen states impose criminal sanctions for violating open-meetings laws, and of those, only twelve—Texas included—allow prison as a punishment option); Christopher J. Diehl, *Open Meetings and Closed Mouths: Elected Officials' Free Speech Rights After* Garcetti v. Ceballos, 61 CASE W. RES. L. REV. 551, 593 (2010). Stated plainly, "[t]his shows that criminal penalties, particularly imprisonment, are not necessary to the proper and effective functioning of open meeting laws." Diehl, *supra*, at 593; *see also* Helfmeyer, *supra*, at 231 ("The federal and numerous state open meetings laws that lack criminal provisions indicate that less restrictive means are available to advance the goal of open government and access to information.").

The State puts forth a number of arguments in support of its position that Section 551.143 is compliant with the First Amendment, including that the statute may be upheld as a reasonable time, place, or manner restriction that is subject to intermediate scrutiny. Judge Yeary similarly posits that the statute may be upheld as a reasonable time, place, or manner regulation on speech in a nonpublic forum.[26] But, even assuming that some lesser level of

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[26] *See Minnesota Voters Alliance v. Mansky,* 138 S. Ct. 1876, 1885-86 (2018) (discussing nonpublic forum analysis for time, place, or manner restrictions, and noting, "our decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums"; in that context, the question is whether such regulation is "reasonable in light

scrutiny would apply here, for all the reasons I have just described, the statute fails to meet even these less rigorous standards of review. To pass constitutional muster, even these lesser standards would require a reasonably precise fit between the government's asserted goal and its chosen means of advancing these goals. By prohibiting significantly more speech than is necessary to ensure transparency and a lack of corruption, and by infringing upon an even greater amount of speech due to a chilling effect on public officials' speech, the statute fails to pass constitutional muster under any formulation of First Amendment scrutiny.

In sum, the State has not shown how criminalizing informal, initial discussions by a governmental body prior to a formal meeting is necessary to ensure its interest in transparency and public access to governmental deliberations. In other words, the State has failed to meet its burden of demonstrating how prohibiting any and all policy discussions by a quorum of a governmental body outside of the public eye is narrowly tailored to serve the compelling state interests of promoting public trust, public access in government, and transparency. Therefore, because the statute sweeps up more speech than is required to fulfill the government's asserted purpose, the statute fails to comport with the First Amendment and is fatally overbroad.

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of the purpose served by the forum") (citations omitted); *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (observing, in context of content-neutral regulation on public speech, "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information"; the law must not "burden substantially more speech than is necessary to further the government's legitimate interests") (citations and quotations omitted).

III. Conclusion

I would hold that Section 551.143 unduly infringes upon the First Amendment rights of officeholders in this state to engage in informal discourse amongst themselves regarding matters within the jurisdictions of their offices. Although I recognize that having an open and transparent government is a compelling interest which justifies some regulation in this area, the government has failed to show that this sweeping regulation that prohibits essentially all private policy discussions amongst officeholders is narrowly tailored to achieve that interest. On this basis, I respectfully disagree with the Court's reasoning but concur in its judgment reversing the judgment of the court of appeals and upholding the trial court's order dismissing the indictment.

Filed: February 27, 2019

Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0254-18

THE STATE OF TEXAS

v.

CRAIG DOYAL, Appellee

ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW FROM THE NINTH COURT OF APPEALS MONTGOMERY COUNTY

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

Yet another perfectly good statute falls today, adding fuel to the claims that this Court is often too quick to reject the considered will of our state's Legislative Department.[1] In my opinion, striking this law is unnecessary. The Court's decision to strike the law relies on opinions from the United States Supreme Court that are, in the first place, less than a model

[1] *See Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017) (Newell, J., dissenting) ("Of late, this Court has gotten fairly adept at striking down statutes as facially unconstitutional.").

of clarity, and that, in any event, are not at all like the case before us. It is also a product of the Court's failure to perceive the rather plain import of the Legislature's choice of words establishing a very simple prohibition: "conspiring to circumvent the Open Meetings Act by meeting in numbers less than a quorum for the purpose of secret deliberations [that would otherwise violate the Act]."

Relying on *Johnson v. United States*,135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Court concludes that "a vagueness challenge to a statute that implicates First Amendment freedoms does not require a showing that there are no possible instances of conduct clearly falling within the statute's prohibitions." Then, relying on its own opinion in *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1986), the Court refuses even to require a showing that the statute is vague as applied to Appellee. I am unconvinced that Appellee ought to be able to prevail in his facial vagueness challenge if he cannot make these showings.

I would hold (for some, but not all, of the reasons identified in Judge Slaughter's concurring opinion) that Section 551.143(a) of the Government Code, the Texas Open Meetings Act, is not unconstitutionally vague. TEX. GOV'T CODE § 551.143(a). But I disagree with Judge Slaughter that it nevertheless violates the First Amendment to the United States Constitution—an issue that the Majority need not address, having struck the statute on vagueness grounds. I write further to explain the reasons for my dissent.

I. VAGUENESS

Today the Court allows Appellee to prevail in a facial challenge to the constitutionality of Section 551.143(a) without having to demonstrate that it would be impermissibly vague in all of its applications. Majority Opinion at 8–11. I am unconvinced that this reflects an accurate assessment of the law. Moreover, why should Appellee be permitted to prevail in a facial vagueness claim to dismiss the prosecution against him when we do not even know what the facts of his case may show? Indeed, the Court today affirms a judgment granting Appellee's motion to dismiss under circumstances in which it is entirely possible he would not even be able to prevail in an as-applied challenge. I cannot go along with this.

A. In a Facial Challenge, Must Appellee Show That the Statute is Vague in All of its Applications?

When a litigant raises a facial challenge to a statute on ordinary vagueness grounds, based on the Due Process Clause of the United States Constitution, a court

> should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A [litigant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982).[2] It

[2] I have no doubt that when a statute cannot reasonably be implemented because it is simply too amorphous to identify with *any* certainty *what* conduct is proscribed within its ambit, then it should be stricken as facially unconstitutional. *Cf. Parker v. Levy*, 417 U.S. 733, 755 (1974) (observing that the Supreme Court has invalidated statutes under the Fifth Amendment Due Process Clause "because they contained no standard whatever by which criminality could be ascertained"). And a statute that

is true that the Supreme Court has held that when First Amendment rights are implicated, a "more stringent vagueness test should apply." *Hoffman*, 455 U.S. at 495. But, even so, the United States Supreme Court held in 2010 that, "even to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010).

Humanitarian Law Project involved a lawsuit in which the plaintiffs attempted to block any application of a criminal provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) to their conduct on grounds that the provision was unconstitutionally vague and that it criminalized the enjoyment of their First Amendment rights. *Id*. at 10–11. The Supreme Court held that the Court of Appeals, in conducting a faulty vagueness analysis, had "contravened the rule that '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of a law as applied to the conduct of others.'" *Id*. at 20 (citing *Hoffman Estates*, 455 U.S. at 495). The Supreme Court then continued, "That rule makes no exception for conduct in the form of speech." *Id*. Chief Justice Roberts, who authored the opinion for the Court, explained further:

> Such a plaintiff may have a valid overbreadth claim under the First Amendment, but our precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression. Otherwise, the doctrines would be substantially

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is that defective, I agree, should be subject to a facial challenge. I cannot agree, however, that Section 551.143(a) even approaches that level of indefiniteness.

redundant.

Id. He then concluded:

> Of course, the scope of the [relevant criminal provision of the AEDPA] may not be clear in every application. But the dispositive point is that the statutory terms are clear in their application to plaintiff's proposed conduct, which means that plaintiff's challenge must fail. Even assuming that a heightened standard applies because the [relevant] statute potentially implicates speech, the statutory terms are not vague as applied to plaintiffs.

Id. at 21.

I am aware that this Court has held that, "when a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct." *Long v. State*, 931 S.W.2d at 288. But it is not clear to me that our holdings in that regard could survive *Humanitarian Law Project*, which declined to treat First-Amendment-implicated vagueness claims any differently than ordinary vagueness claims.

The Court today relies upon two more recent Supreme Court opinions to hold that Appellee may nevertheless challenge Section 551.143(a) on facial vagueness grounds: *Johnson v. United States*, 135 S. Ct. at 2560–61, and *Sessions v. Dimaya*, 138 S. Ct. at 1214 n.3. Majority Opinion at 8–11 & n.33. Neither opinion cites, much less explicitly overrules, *Humanitarian Law Project*, however. And the subsequent Ninth Circuit case that the Court cites—for the proposition that *Humanitarian Law Project* and its many precedents have now been rejected—did no more than tentatively observe that they "may not reflect the current

state of the law." *Id.* at 9 n.33 (citing *Henry v. Spearman*, 899 F.3d 703, 709–10 (9th Cir. 2018)). Until the Supreme Court plainly proclaims its demise, I will continue to rely on the clear holding of *Humanitarian Law Project*.

B. Even If He Need Not Show the Statute is Vague in All of its Applications, Must Appellee Still Show That the Statute is Vague as Applied to His Own Conduct?

There is another—even more compelling—reason to find that neither *Johnson* nor *Dimaya* should be relied upon to control our conclusion relating to the propriety of granting Appellee relief on a facial challenge to Section 551.143(a) in a pre-trial setting. Even if *Johnson* and *Dimaya* stand for the proposition that it is no longer necessary to the success of a facial vagueness challenge to establish that the statute is vague in all of its applications, it is still necessary, according to *Hoffman* and *Humanitarian Law Project*, to show that the scope of the statute's vagueness extends to the litigant's own conduct. *See Hoffman*, 455 U.S. at 495 (holding that, in the context of a facial challenge, a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others"); *Humanitarian Law Project*, 561 U.S. at 20 (holding that this rule applies equally to vagueness claims implicating First Amendment speech).[3] Appellee has not

[3] Dissenting from the Court's judgment in Dimaya, Justice Thomas explained:

> This Court's precedents likewise recognize that, outside the First Amendment context, a challenger must prove that the statute is vague as applied to him. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010); *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008); *Maynard* [*v. Cartwright*], 486 U.S. [356] 361, 108 S.Ct. 1853[, 100 L.Ed.2d 372 (1988)]; *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, and n. 7, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (collecting cases). *Johnson* did not

made that showing.

Indeed, the fact that Appellee raises his facial claim in a pre-trial proceeding distinguishes this case from both *Johnson* and *Dimaya*. In both of those cases, appeals were taken after a trial court judgment had already been obtained. As a result, the facts underlying those cases were well known and, consequently, the courts were in a position to judge whether the vagueness of the law at issue reached as far as the cases that were presented. Here, in contrast, we address Appellee's claims in a pre-trial posture, not knowing whether the evidence at trial might show that Appellee committed a clear incursion upon the requirements of the law. *Humanitarian Law Project* at least established that

> a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others.

561 U.S. at 20. Even to the extent that *Johnson* and *Dimaya* might evidence a limitation on the principle that "a statute is void for vagueness only if it is vague in all of its applications," neither of those cases had occasion to examine whether a person challenging a statute's facial constitutionality for vagueness must first establish that the law is vague as applied to his own

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> overrule these precedents. While *Johnson* weakened the principle that a facial challenge requires a statute to be vague "in all applications," 576 U.S., at __, 135 S.Ct. at 2561 (emphasis added), it did not address whether a statute must be vague as applied to the person challenging it. That question did not arise because the Court concluded that ACCA's residual clause was vague as applied to the crime at issue there: unlawful possession of a short-barreled shotgun. See *id.*, at ___, 135 S.Ct., at 2560.

Dimaya, 138 S. Ct. at 1250 (Thomas, J., dissenting)

conduct.[4]

C. Is Section 551.143(a) Either: (1) Vague In All of Its Applications or (2) Vague With Respect to Appellee's Conduct?

Courts are obliged to construe a statutory provision in such a manner as to avoid constitutional infirmity whenever such a reading is at least plausible—even if it is not necessarily the most evident construction. *See, e.g.*, *United States v. Harriss*, 347 U.S. 612, 618 (1954) ("[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction.") (citations omitted); *Johnson v. United States*, 135 S. Ct. at 2578 (Alito, J., dissenting) ("Whether [a constitutional construction] is the *best*

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[4] The Court declares that to force a defendant to demonstrate that a statute is vague as it applies to him in the context of a facial challenge will lead to "a result [that] is illogical." Majority Opinion at 11 n.35. As far as I am concerned, the illogic of the result arises from the fact that the Court allows a facial vagueness challenge to succeed even when the defendant cannot illustrate that the statute is vague in all of its applications. Calling a statute facially unconstitutional on vagueness grounds when there is at least some conduct that it plainly proscribes is, itself, illogical. And to declare that such a statute is essentially a nullity, and can be challenged even in post-conviction habeas corpus proceedings (at least once some other defendant has succeeded in such a challenge)—even by an applicant whose conduct is plainly proscribed—seems the height of illogicality. In this context, as in the First Amendment overbreadth context, I would not recognize the availability of such retroactive application of a "facial" vagueness challenge to provide post-conviction relief. *Cf. Ex parte Fournier*, 473 S.W.3d 789, 803 (Tex. Crim. App. 2015) (Yeary, J., dissenting) ("The windfall that inevitably flows from judicially declaring an overbroad penal provision to be facially unconstitutional need not extend so far as to apply retroactively to grant habeas corpus relief to applicants who have suffered no First Amendment infraction themselves."); *Ex parte Lea*, 505 S.W.3d 913, 916 (Tex. Crim. App. 2016) (Yeary, J., dissenting) (same).

interpretation [of a statute] is beside the point. What matters is whether it is a reasonable interpretation of the statute."). It is certainly possible to construe Section 551.143(a) of the Government Code as definite and specific enough to embrace certain core conduct, even if its application to other "marginal" conduct seems less certain.[5] If construing the statute in this way saves it from a claim of facial invalidity on vagueness grounds, then precedent directs that we should take that approach.

Section 551.143(a) provides:

> A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

Under the plain language of this provision, an offense is shown by evidence that the actor "knowingly conspire[d.]" Black's Law Dictionary defines "conspire" to be to "engage in a conspiracy; to join in a conspiracy." BLACK'S LAW DICTIONARY at 376 (10th ed. 2014). "[C]onspiracy," in turn, is defined as "[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement[.]" *Id*. at 375.

Just what is the "unlawful act" or "objective" that the actor must knowingly conspire to do before he may be convicted under this provision? He must conspire to "circumvent"

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[5] *See Corwin v. State*, 870 S.W.2d 23, 29 (Tex. Crim. App. 1993) ("That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.") (quoting *United States v. Petrillo*, 332 U.S. 1, 7 (1947)).

the Open Meetings chapter of the Government Code.[6] Chapter 551 of the Government Code affirmatively requires (with certain exceptions): (1) that government business be transacted in a "meeting" (defined as a "deliberation" involving a "quorum"—that is, a majority—of the governmental body, during which public business or public policy are discussed or considered or during which formal action is taken, TEX. GOV'T CODE §551.001(4) & (6)); (2) that such meetings must be preceded by notice to the public, and must be "open to the public[,]" TEX. GOV'T CODE §§ 551.041 & 551.002; and (3) that such meetings must be duly and fully documented for public consumption by minutes or recording, TEX. GOV'T CODE §§ 551.021 & 551.022.

To be guilty under Section 551.143(a), then, it is necessary for an actor to "knowingly conspire" to "circumvent" these easily identified, manifest requirements of the Open Meetings Act. But that is not all. The actor must also "knowingly conspire" to "circumvent" these requirements of the Open Meetings Act *in a particular way*. The object of the conspiracy must be to circumvent those requirements "by meeting in numbers less than a quorum" and doing so "for the purpose of" conducting "secret deliberations" that would constitute "a violation of this chapter." On its face, this lengthy adverbial phrase does pose

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[6] The dictionary definition of the word "circumvent" carries different shades and gradations of meaning, but the one that is plain from the context of the statute is: "**2:** to overcome or avoid the intent, effect, or force of : anticipate and escape, check, or defeat by ingenuity or stratagem : make inoperative or nullify the purpose or power of esp. by craft or scheme". WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED at 410 (2002). *See also* WEBSTER'S II NEW COLLEGE DICTIONARY at 204 (1999) ("**2.** To overcome by clever maneuvering.").

a certain dilemma. It criminalizes the act of "meeting in numbers less than a quorum[,]" but only "for the purpose of secret deliberations[.]" And yet, Section 551.001(2) defines "deliberation" for purposes of the Open Meetings Act to be a "verbal exchange during a meeting" of the governmental body, and Section 551.001(4) defines a "meeting" to require a quorum of the governmental body. This being the case, for Section 551.143(a) to speak in terms of a "meeting" of *less than a quorum* for the purpose of *deliberations* (secret or otherwise) would seem to be nonsense, a non-sequitur, a paradox—a literal absurdity. If "deliberations" in Section 551.143(a) requires a quorum, how can one deliberate in the presence of less than a quorum?

Here, what may be considered by some to be an absurdity is readily resolved when it is considered in context of the balance of the statutory language and the evident purpose of the overall statutory scheme. It is possible to make perfectly good sense of the statute when we consider that, by use of the qualifier "secret," the Legislature delineated an understanding of "deliberations" slightly different than the definition set out in Section 551.001(2). It is evident enough that the statute is designed to proscribe "verbal exchanges" between members of a governmental body "concerning an issue within the jurisdiction of the governmental body" (or, for that matter, "any public business"), TEX. GOV'T CODE § 551.001(2), that are conducted by a majority of the governmental body—but in a way that is in "secret," so as to avoid the manifest requirements of an actual quorum, an announced and open meeting, and full documentation. *See Acker v. Texas Water Commission*, 790 S.W.2d 299, 300 (Tex. 1990)

("When a majority of a public decisionmaking body is considering a pending issue, there can be no 'informal' discussion. There is either formal consideration of a matter in compliance with the Open Meetings Act or an illegal meeting.").

Then-Attorney General Greg Abbott construed Section 551.143(a) in a way similar to this, in a 2005 Attorney General Opinion. He reached the same construction of the statute by interpreting "quorum" to reach the concept of a so-called "walking quorum," whereby a majority of a governmental body meets, not all at once, but serially. TEX. ATT'Y GEN. OP. GA-0326, at 2 (2005).[7] By this reasoning, he construed Section 551.143(a) "to apply to members of a governmental body who gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body." *Id*. To illustrate judicial support for this construction, he cited a case that clearly illustrates a violation of Section 551.143(a): *Esperanza Peace and Justice Center v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Texas 2001). *Id*. at 3. As United States District Judge Orlando Garcia described the offense that occurred in *Esperanza*:

> The Mayor met and spoke with groups of council members of less than a quorum to reach a "consensus,"—that is, to arrive at a majority decision on the budget—prior to the formal meeting. The City Manager kept track of the

[7] A previous Attorney General Opinion reached a similar conclusion as early as 1992. *See* TEX. ATT'Y GEN. OP. DM-95, at 4 (1992) ("If a quorum of a governmental body agrees on a joint statement on a matter of governmental business or policy, the deliberation by which that agreement is reached is subject to the requirements of the Open Meetings Act, and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time.").

> number of council members present so that a formal quorum would not be together in his office. The consensus reached was memorialized in the consensus memorandum containing the signatures of each council member, and manifested when the council adopted the budget set forth in the memorandum at the next day's public meeting—a "fiat accompli." A clearer manifestation of intent to reach a decision in private while avoiding the technical requirements of the [Open Meetings] Act can hardly be imagined.

316 F. Supp. 2d at 476–77. I second Judge Garcia's observation that, whatever questions may be raised about the potential reach of Section 551.143(a), there can be little doubt it embraces at least these core facts.

The Court spins a number of hypothetical scenarios in an effort to illustrate a lack of pellucidity at the margins—as if the breadth of application necessarily translates into fatal vagueness. Majority Opinion at 17–22. Many of these scenarios strike me as falling within the plain ambit of the statute as I have construed it, pursuant to our duty to preserve its constitutionality. Others may illustrate arguable incursions upon the statute as I have construed it—depending upon whatever evidence may be offered to establish the requisite intent. And still others seem to me not to violate the statute at all because they do not involve an agreement to circumvent the Open Meetings Act by specifically involving a *majority* of the governing body in "secret deliberations." In any event, I agree with Chief Justice Roberts' observation in *Humanitarian Law Project* that, "[w]hatever force these arguments might have in the abstract, they are beside the point here." 561 U.S. at 22. The statute is susceptible to a construction that would render any number of obvious applications to be clear, and under those circumstances, Appellee should not have been permitted to prevail in a due process

void-for-vagueness attack on its facial validity. Appellee has failed to show that the statute is vague in all of its applications.

Indeed, granting Appellee relief on his First-Amendment-enhanced due process void-for-vagueness argument, when the statute can readily be construed to admit of many valid applications, is to confuse the due-process vagueness analysis with the First Amendment overbreadth doctrine. *See id*. at 19 ("By deciding how the statute applied in hypothetical circumstances, the Court of Appeals' discussion of vagueness seemed to [erroneously] incorporate elements of First Amendment overbreadth doctrine."). And in doing so, the Court essentially grants Appellee relief on overbreadth grounds without inquiring whether he has satisfied his burden to establish an indispensable facet of such a claim—"that 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).

Finally, even if the Court is correct that it is unnecessary for Appellee to show vagueness in all possible applications of the statute before he may succeed in a facial challenge, we should still deny relief. To assert a successful facial challenge, he must at least show that whatever vagueness infects the statute makes it unclear whether his own conduct is proscribed. *Hoffman*, 455 U.S. at 495; *Humanitarian Law Project*, 561 U.S. at 20. Because the trial court granted Appellee's motion to dismiss in a pre-trial setting, we know nothing

about the State's theory of the case, much less what its evidence may have revealed.[8] For all we know, whatever conduct Appellee engaged in falls within the clear ambit of the statute, whatever its murkiness at the margins. He has not shown otherwise. For this reason, if no other, the trial court erred to grant Appellee's motion to dismiss. The Court errs to reverse the judgment of the court of appeals with respect to Appellee's vagueness claim.

II. THE FIRST AMENDMENT

My construction of the statute also preserves it, I believe, from First Amendment attack. As thus circumscribed, Section 551.143(a) represents a reasonable time, place, or manner restriction upon nonpublic, not public, speech. For this reason, I disagree with Judge Slaughter's conclusion that it must be invalidated as an unconstitutional encroachment upon the free speech rights of public decisionmakers. Moreover, even if I agreed that strict scrutiny represented the appropriate standard for gauging the constitutionality of the statute for First Amendment purposes, I would hold that the legislative will should prevail.

Opinions that delineate the First Amendment restrictions on criminal proscriptions

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[8] The indictment alleges that Appellee violated Section 551.143(a) simply by "engaging in a verbal exchange concerning an issue within the jurisdiction of" the governmental body of which he was a member. *See* Majority Opinion at 2 (quoting the indictment). It did not allege when, where, or with whom (other members?) or how many (less than a quorum at any one time, but ultimately adding up to a quorum?). It is conceivable that he may yet be acquitted, or that he may, even if convicted, mount a successful vagueness-as-applied challenge on direct appeal, depending upon the arguments he makes and the State's evidence at trial. Indeed, if he is convicted on facts that fail to establish a knowing conspiracy to involve a quorum of members in "secret deliberations," he may even challenge the legal sufficiency of the evidence to support his conviction. I express no opinion as to these questions. My only point is that he should not be permitted to bar prosecution on the basis of a pre-trial attack on the facial validity of the statute based on vagueness when the statute is susceptible to an interpretation that would render it plainly applicable to many fact scenarios.

tend to be somewhat *sui generis*. We often find ourselves trying to force the square peg of a new statutory regulation implicating speech within the round hole of prior First Amendment precedent. This is such a case. The United States Supreme Court has not weighed in on the First Amendment implications of open meetings legislation, so we have yet to obtain that Court's guidance as to the appropriate standard to apply.

Judge Slaughter believes that the appropriate standard is strict scrutiny because Section 551.143(a) places criminal restrictions on speech based on its "subject matter," which the Supreme Court has lately identified as "content-based" speech. Concurring Opinion at 20–23 (taking the position that strict scrutiny applies because the statute regulates speech according to it subject matter). For this proposition, she relies upon *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). *Reed* indeed involved the suppression of speech (street signs advertising church services) on the basis not of its message, but simply because of its subject matter. But because it involved speech in a *public* forum, it may not represent the best analogy to open meetings legislation.

Since *Reed* was decided, the Supreme Court has reiterated that the standard for measuring regulations on *nonpublic* speech is different—the so-called nonpublic forum standard, which will tolerate reasonable restrictions based upon time, place, or manner, so long as the restrictions are *viewpoint* neutral. *See Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885–86 (2018) ("[O]ur decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums[.]"). In *Mansky*,

the issue was whether a state could impose reasonable time, place, and manner restrictions upon political paraphernalia worn within a polling place—a place that, at least for the duration of its function *as a polling place*, was regarded by the Supreme Court as a nonpublic forum. *Id*. at 1886. The Supreme Court therefore held that the nonpublic forum standard applied, even though it nevertheless struck down the specific regulation at issue in *Mansky* as insufficiently precise to satisfy even *that* standard. *Id*. at 1885, 1888–92.

While the fit is not perfect, I would apply the nonpublic forum standard to gauge the First Amendment tolerableness of Section 551.143(a). That the Open Meetings Act regulates only the private speech of governmental body members has previously been recognized. *See Asgeirsson v. Abbott*, 696 F.3d 454, 461 (5th Cir. 2012) ("The prohibition in TOMA is applicable only to private forums and is designed to *encourage* public discussion."). Though it may be "content-based" in contemplation of *Reed*, the Open Meetings Act is plainly viewpoint neutral—it bans "walking quorums" without reference to a governmental body member's particular view of whatever public business he may wish to debate or discuss outside of the Act's requirements. Indeed, as *Asgeirsson* recognized, the Open Meetings Act does not prohibit public speech at all—it requires that the specified speech, regardless of viewpoint, be *conducted* in public. *Id*. As *Asgeirsson* went on to observe, "the requirement to make information public is treated more leniently than are other speech regulations." *Id*. at 463.

As I have construed Section 551.143(a), it constitutes a reasonable time, place, or

manner restriction. "Although there is no requirement of narrow tailoring in a nonpublic forum, the State must [still] be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Manksy*, 138 S. Ct. at 1888. If we limit our construction of the statute to apply only to the core "walking quorum" conduct, as illustrated by cases such as *Esperanza* and *Hitt v. Mabry*, 687 S.W.2d 791, 793 (Tex. App.—San Antonio 1985, no pet.),[9] then the statute should readily survive a First Amendment attack. *See Boos v. Barry*, 485 U.S. 312, 331 (1988) (holding that a statute challenged under the First Amendment overbreadth doctrine may be saved by a judicial narrowing construction). So construed, it plainly achieves the legitimate policy objectives of open meeting legislation—transparency, public involvement, and anti-corruption—by assuring that the affirmative requirements of the statutory scheme—openness, notice, and documentation of a governmental body's official business—are not thwarted by artifice and stratagem. And it does so without unnecessarily restricting the private speech rights of government body members so long as their private interactions do not rise to the level of knowingly conducting their official business as a governmental body outside the glare of public scrutiny. For this reason, I would hold that Section 551.143(a) constitutes a reasonable time, place, and manner restriction under the nonpublic forum standard.

But, even if I believed that *Reed* identified the appropriate standard by which to

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[9] In *Hitt*, the plaintiff sought to enjoin the school superintendent and president of the Board of Trustees, among others, to prevent them from issuing a letter that had been agreed upon only by virtue of "an informal telephone poll of the Board" without any public meeting. 687 S.W.2d at 793.

measure Section 551.143(a), I would hold that the statute survives strict scrutiny analysis. Like Judge Slaughter, I have no doubt that the interests underlying the Open Meetings Act are compelling ones. Concurring Opinion at 24. The statute, as the reasonable construction I have outlined above would narrow it, would also extend only so far as to serve those compelling interests, and would not otherwise restrict the legitimate private speech of governmental body members. Such members would remain free to discuss among themselves, in whatever numbers they desire, any topic that does not involve "an issue within the jurisdiction of the governmental body or any public business." TEX. GOV'T CODE § 551.001(2). They may even discuss official business among themselves, in numbers less than a quorum, so long as those discussions do not take place as part of a knowing conspiracy ultimately to conduct official business as a de facto quorum without adhering to the affirmative requirements of the Open Meetings Act.

I also do not agree that the imposition of criminal penalties for violations of the act equates to a failure on the part of the Legislature to narrowly tailor its terms. Civil remedies for violations of the act are just that—remedial only. *See* TEX. GOV'T CODE §§ 551.141 & 551.142 (providing that an action taken by a governmental body in violation of the open meeting chapter "is voidable" and that violations may be vindicated by way of mandamus and injunctive remedies). They provide no real disincentive to members of governmental bodies to try to conduct business in secret. The worst that could happen under that type of regime is that civil remedies may be imposed and that efforts to avoid the requirements of

the Open Meetings Act could be thwarted. To provide a true disincentive, the stigma of a criminal penalty is necessary. Besides, the fact that a violation is only a misdemeanor shows that even the criminal penalty has been narrowly tailored. Misdemeanors are the least restrictive criminal stigma available and adequate to do the job. Section 551.143(a) is therefore, in my view, sufficiently narrowly tailored to achieve the State's compelling interests.

III. CONCLUSION

Because the Court strikes down a statute that is plainly salvageable, I respectfully dissent.

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