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.

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