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.

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