NO. 06-51587

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AVINASH RANGRA and ANNA MONCLOVA,
Plaintiff-Appellants,

VS.

FRANK BROWN and GREG ABBOTT,
Defendant-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, PECOS DIVISION

APPELLANTS' BRIEF FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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FEDERAL RULE OF APPELLATE PROCEDURE 35(b)(1)

As required by Fed. R. App. P. 35(b)(1), Appellants submit the following statement to the Court. This proceeding involves a question of exceptional importance. Fed. R. Civ. P. 35(a)(2). The instant case involves CORE political speech protected by the First Amendment. The panel agreed in this matter that the speech at issue is protected and subject to strict scrutiny; however, the panel failed to apply the strict scrutiny standard on the complete record before it. The statute at issue has been declared to be a content-based restriction on the free speech of elected public officials. The statute also singles out a specific class of persons—public officials, and bars them from engaging in political speech (except at a meeting). The record is fully developed in this matter, and Appellants believe that further protracted litigation is unnecessary; therefore, the record is complete for this Court to apply the strict scrutiny standard. Further, this case involves exceptional questions as to the constitutional validity of Tex. Gov't Code Ann. 551.144, and the need for such a determination to prevent further prosecutions under the statute and to ensure that elected public officials no longer have their constitutionally protected speech abridged by this statute. For these reasons, Appellants are asking this Court *en banc* to apply the correct standard in this case and declare the statute at issue as unconstitutional, as it is violative of the First Amendment.

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TO THE HONORABLE COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Come now, Appellants in the above-titled and numbered appeal, and files this, their Brief for Rehearing *En Banc* with this Honorable Court, and in support of such petition would show as follows:

I. POLITICAL SPEECH

This case is about political speech protected by the First Amendment. The First Amendment states, "Congress shall make no law . . . abridging the freedom of

speech." U.S. CONST. AMEND. I. "[L]aws targeting political speech are the principal object of the First Amendment." *Federal Election Comm'n v. Wis. Right to Life, Inc.*, 127 S.Ct. 2652, 2681 (2007) (Scalia, J., concurring in part and concurring in judgment). "[S]peech concerning public affairs is more than self-expression, it is the essence of self- government." *Garrison v Lousiana*, 379 U.S. 64, 74-75 (1964). This case deals with political speech at the First Amendment's core.

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which the government is operated or should be operated, and all such matters relating to public processes.

Mills v Alabama, 384 U.S. at 218-219.

The law at issue in this case directly chills the speech of elected and public officials by criminalizing their constitutionally protected political speech, (a content based restriction), and it is unable to withstand both the facial and as-applied challenges asserted by the Appellants. The law at issue in this case singles out a class of persons—public officials, and prohibits them from speaking out about matters of public importance, except at noticed public meetings. While the panel has decided that the statute at issue is a content-based restriction on the free speech of public officials, and therefore subject to strict scrutiny, it failed to take

the next step to apply the strict scrutiny test and ultimately declare Tex. Gov't Code Ann. 551.144 unconstitutional.[1]

STATEMENT OF ISSUES PRESENTED FOR *EN BANC* CONSIDERATION

This matter involves a question of exceptional importance which requires *En Banc* determination. The panel ruled that TEX. GOV'T CODE ANN. 551.144 infringes political speech as a content based statute, and requires the application of strict scrutiny to determine its constitutional validity. The issue presented in this matter is whether the panel erred in failing to apply the strict scrutiny standard to TEX. GOV'T CODE ANN. § 551.144. The case has been fully litigated, a full trial record was developed below, and protracted litigation will lead to more years of uncertainty by public and legislative bodies across Texas, as well as more improper prosecutions under this strict liability statute.

The law, as the panel correctly decided, is a content-based restriction on the speech of elected public officials, and is therefore subject to strict scrutiny review. The panel should also have noted, however, that the law impermissibly singles out a class of persons—public officials, and prohibits them from discussing public affairs with each other and their constituents. To remand the case to the District Court for further examination under a strict scrutiny review, when this Court could do so itself, would be a waste of judicial resources, result in more years of

[1] TEX. GOV'T CODE § 551.144 is part of the Texas Open Meetings Act, and will be referred throughout this brief as ("TOMA").

litigation, and, most importantly, it would result in the further chilling of constitutionally protected speech by elected public officials. Further, this is an overbroad and unconstitutionally vague statute which requires no scienter to violate it. Public officials across Texas differ as to the meaning and interpretation of this statute, and justice demands that this statute be declared unconstitutional. This Court should speak to the constitutionality of TEX. GOV'T CODE ANN. § 551.144 by applying the strict scrutiny standard and declaring that this statute violates the First Amendment, as a matter of law.

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This instant suit was filed in the United States District Court for the Western District of Texas on September 26, 2005. After much litigation, defendant's Motions to Dismiss were denied, and the case was tried before the Honorable Robert A. Junell on July 26, 2006. A full record was developed. The state had every opportunity to demonstrate the compelling government interest at stake that justified TOMA. After trial, the Court issued its findings of fact and conclusions of law on November 7, 2006. *See Rangra v. Brown*, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006). The District Court ruled in favor of the Defendant/Appellee denying all relief requested by the Plaintiff/Appellant.[2]

[2] The District Court found the speech uttered by Appellants in their official capacity as a member of a decision-making body, and as part of their official duties, is not protected by the First Amendment. The Court found further that the statute at issue was not overbroad or vague.

Upon this unfavorable finding by the District Court, Appellants commenced an appeal to this Court on November 30, 2006. After extensive briefing, oral argument in this suit occurred before the appointed panel on January 29, 2008. The panel issued its opinion and judgment on April 24, 2009, with a revision on April 27, 2009. *See Rangra v. Brown*, 566 F.3d 515, No. 06-51587, (5th Cir. Apr. 24, 2009). The opinion agreed with Appellant that TEX. GOV'T CODE ANN. 551.144 is a content-based restriction on constitutionally protected speech, and therefore subject to the test of strict scrutiny. *Id.* The judgment reversed and vacated the District Court's judgment and remanded with instructions for the District Court to apply the strict scrutiny test. *Id.*

This Honorable Court granted both appellants' and the state's competing petitions for rehearing en banc, by Order dated July 27, 2009, and ordered briefing by the parties.

I.
IMPORTANCE & HISTORY OF FIRST AMENDMENT RIGHTS

Our Founding Fathers envisioned a representative form of government that would take the place of citizens meeting in person. The Federalist, No, 52, p. 338 (Scigliano ed. 2000). The electors were to be the "great body of the people of the United States," and the elected were to be anyone who their "fellow-citizens may confer the representative trust." Id., No. 57, p. 366. The opportunity to serve as an elected official was "open to merit of every description, whether native or adoptive, whether young or old, and without

regard to poverty or wealth, or to any particular profession or religious faith." Id., No. 52, p. 337. The ideal government would be where one regular citizen represents many other regular citizens.

This idea is repeated throughout the Federalist Papers when Madison refers to elected officials as "fellow-citizens." Id., Nos. 52, 57, 62. Madison rejected the idea that electors and the elected would be treated by different standards. While referring to the House he stated: "…[T]hey can make no law which will not have its full operation on themselves [the House of Representatives] and their friends, as well as on the great mass of society.… [T]he Framers of the first amendment intended also that its protection should extend not to some limited groups but to all citizens." *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 180 (1971) (BLACK, J., dissenting).

In *New York Times Co. v Sullivan, 376 U.S. 254 (1964),* Justice Brennan, writing for the majority, stated:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v United States, 354 U.S. 476* …Mr. Justice Brandeis, in his concurring opinion in *Whitney v California, 274 U.S. 357, 375-76,* gave the principle its classic formulation:
>
> > "Those who won our independence believed… that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they know that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that

> repression breeds hate; that hate menaces stable government; **that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies**; and that the fitting remedy for evil counsels is good ones. **Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.** Recognizing the occasional tyrannies of governing majorities, **they amended the Constitution so that free speech and assembly should be guaranteed.**

New York Times Co. v Sullivan, 376 U.S. at 268 (emphasis added).

The First Amendment does not apply unequally to different groups. An elected or appointed official, (as well as his constituents), does not forfeit his first amendment freedoms as a prerequisite to taking office. TOMA, however, does this, singling out public officials for actual or threatened prosecution, for merely discussing public issues, or receiving correspondence or email—the protected exercise of first amendment rights. TOMA targets their political speech, but lets them talk about the weather—content based restrictions.

In 1966 a unanimous United States Supreme Court upheld the idea that elected officials have the same free speech rights as the ordinary citizen. *Bond v. Floyd,* 385 U.S. 116 (1966). The Supreme Court's decision that elected officials have the same free speech rights as regular citizens was guided by the proposition that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The Court went on to support the idea that elected officials and electors have equal rights and protections under the law: "The State argues that the New York Times principle should not be extended to statements by a legislator because the

policy of encouraging free debate about governmental operations only applies to the citizen critic of his government. We find no support for this distinction in the New York Times case or in any other decision of this Court. The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than the legislator." *Bond*, at 136.

Our Founding Fathers created a government to be made up of ordinary citizens. The idea that elected officials and voters were to be held to different standards was a concept foreign to them. It is not a crime for ordinary citizens to email each other about pressing public issues. TOMA makes it a crime for city council members to do the same thing. The First Amendment applies to all. Elected or appointed officials have the same First Amendment rights as their fellow citizens, but TOMA impermissibly singles out a certain class of persons, and certain speech, and bans it.

Texans exercise their franchise by electing public officials to act as their representatives—to speak for them, to advocate, block their opponents, to communicate for the masses who elected them. TOMA stills the voice of every public official in Texas, and prevents them from fulfilling their constitutional duty of speaking out on behalf of their constituents. TOMA is a content based restriction that singles out a class of persons, and political speech, and bans it. TOMA violates the First Amendment.

ARGUMENT AND AUTHORITIES

II. The panel erred in failing to apply the strict scrutiny standard to the statute at issue.

In the present case, Appellants have asserted both a facial challenge and an as-applied challenge to the strict liability provision of TEX. GOV'T CODE ANN. § 551.144. This Court should have ruled upon the facial challenge, as a matter of law, that TOMA violates the First Amendment.

In the panel's opinion, the Court correctly stated that the criminal provisions of the Texas Open Meetings Act are content-based regulations of speech which require the statute to pass the strict scrutiny test in order to be found constitutional. *See Rangra v. Brown,* 566 F.3d 515, 518 (5th Cir. 2009). However, the panel erred when it failed to take the next step and apply the strict scrutiny test in the present case; rather, the panel reversed and vacated the judgment of the district court, and remanded the case with instructions for the District Court to apply the strict scrutiny test. *Id.* at 518.

This case presents an exceptionally important First Amendment issue. The panel decision, for the first time in this circuit, expressly declared that elected public officials in Texas are afforded the same First Amendment rights as the general public, that public employee cases no longer apply to determining the free speech rights of public officials, and that political speech—core First Amendment speech, is to be afforded the highest protection under the First Amendment. The panel stopped short of applying the strict scrutiny test, and this Court *En Banc*, should take the necessary next step and declare TEX. GOV'T CODE ANN. § 551.144

unconstitutional as a matter of law, for violating the 1st Amendment to the United States Constitution.

The speech communicated by an elected official is political speech. TOMA abridges the Appellants core protected political speech. TOMA also singles out a certain class of persons—public officials, and denies that class the right of free expression guaranteed by the First Amendment. The panel decision determined that content-based regulation requires that the statute survive the rigors of strict scrutiny. TOMA's laudable goal is the prevention of corruption or the appearance of corruption. Courts have long recognized this goal as compelling, and Appellants do not challenge this compelling interest. However, Section 551.144, as defined through various Texas Attorney General Opinions and case law, is not narrowly tailored to achieve TOMA's goal. TOMA bans protected political speech as a means to ban unprotected speech—reaching a secret back room deal. This act is expressly prohibited through earlier cases of both this Court and the Supreme Court. Core political speech should not be banned; just the secret *quid pro quo* actual corruption of secret deals. As discussed below, this is what most states do in their open meetings laws, but Texas is the outlier.

Let us go back to basics. In *WRTL*, the Supreme Court declared that restrictions on political speech trigger strict scrutiny under the First Amendment. *WRTL* at 467. Second, quoting *New York Times Co. v Sullivan*, the Court reiterated

our "profound national commitment that debate on public issues should be uninhibited, robust, and wide open." *Id.* At 467. Third, the Court ruled that those wishing to express their views on core political issues are entitled to a constitutional safe harbor that does not turn on the subjective evaluation of agency regulators. *Id.* Finally, the Court made clear that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.*

TOMA violates every one of these bedrock First Amendment principles. The statute defines the speech prohibited, so it is a content based restriction, as found by the panel. TOMA keeps debate on public issues from being "uninhibited, robust, and wide open", by prohibiting public officials from speaking out on public issues except at noticed meetings. A TOMA violation depends upon the subjective evaluation of the local district attorney, who, as Defendant Frank Brown testified, have "unfettered discretion" to decide who has, and who has not, violated TOMA. There is no safe harbor for public officials in Texas. Finally, the tie goes to the District Attorney, who can choose "in his own discretion" to prosecute a close case.

For the purposes of the First Amendment, the panel decision determined that elected officials are not public employees. The elected official is an advocate for those who elect him or her. The official's position is to act in the best interests of

those who placed the official in office. As an advocate, the official's speech is political, and therefore protected by the First Amendment.

Unanswered by the panel decision is the fact that TOMA, which restricts First Amendment rights of public officials, and impermissibly singles out public officials as a class who may have their speech curtailed, should have been determined as a matter of law to be facially overbroad, restrictive of protected First Amendment speech, and should be declared as a matter of law by this court *en banc* to violate the First Amendment.

A. Vagueness Concerns

TOMA should be declared facially unconstitutional for at least three independent sufficient reasons.

First, TOMA remains unconstitutionally vague. The trial record amply shows that no one really knows what they should do under TOMA. Charles McNabb, El Paso city attorney, said he tells his council never to speak out, or to each other, except at a meeting. Scott Houston, Counsel for the Texas Municipal League, testified that he almost daily gets questions from Texas Public officials, they are confused about the law, and that he gives much the same advice as Mr. McNabb—shut up and do not talk to each other, or about public issues, except at a duly called meeting. Vague laws chill speech and the vagueness doctrine therefore applies with special force in First Amendment cases. *See Smith v. Goguen*, 415

U.S. 566, 572 (1974). *Baggett v Bullitt,* 377 U.S. 360, 372 (1964). A city council member who is unsure about the law just "shuts up" for fear of being indicted. The vagueness of the law throws a blanket over all political speech of public officials in Texas, self censoring them through fear of prosecution.

This case deals with political speech at the First Amendment's core. "A major purpose of the First Amendment was to protect the free discussion of governmental affairs. *Mills v Alabama,* 384 U.S. 218-219. The vagueness of the law means that all political speech is banned.

Second, vague laws invite discriminatory enforcement on the basis of viewpoint and that risk is particularly acute when what is at stake is political speech that may be harshly critical of those in power. That is precisely what happened here, as Rangra's seeking out a new city water engineer was against the wishes of local developers who wanted to keep the incumbent firm hired that would extend water lines to areas favorable for developments. The "unfettered discretion" local District Attorneys possess, like Defendant Brown, means they could interpret the law to indict their political enemies.

Third, if TOMA stands, prosecutors may expand it to maximize their leverage against political enemies. Persons should not be prosecuted for merely discussing public affairs, political speech at the core of the First Amendment.

B. TOMA discriminates against speech based on its content and the identity of the speaker

It is fundamental that the government cannot regulate speech based on either its content or the identity of the speaker. *First Nat'l Bank of Boston v Bellotti,* 435 U.S. 765 at 777 (1978). Short of shouting "fire" in a crowded theater, all speech, and all viewpoints, must be heard. Yet in TOMA, the State of Texas violates both tenets of *Bellotti*. First, the content of the speech is defined, singled out, and prohibited. If a public official speaks out about a public issue, he violates TOMA. If he talks about the weather, or high school football, there is no violation.

Second, a class of persons is singled out to have their free speech rights curtailed. If a member of the public in Alpine wants to discuss a water project with others, say, at a public forum, there is no First Amendment violation. However, if a member of Alpine's city council wants to discuss the same water project at the same forum, and other members of the council may hear it on the radio, he has violated the law. The only way the public official/ city council member can protect himself, is to self- censor, and never talk about public issues except at a noticed council meeting. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case by case litigation, will choose simply to abstain from protected speech. *Virginia v Hicks,* 539 U.S. 113

(2003). Thus, this class of persons, public officials, is singled out, to lose their right to speak out publicly on matters of public concern.

The panel decision correctly decided that public officials have the same First Amendment rights as private citizens. Why is it, then, that public officials can go to jail for six months for talking about political events in Alpine, while their neighbor, who is not an official, is free to say the same things without fear of going to jail?

C. THE PANEL CORRECTLY DECIDED THAT ELECTED PUBLIC OFFICIALS ENJOY THE SAME FREE SPEECH RIGHTS AS THOSE AFFORDED TO CITIZENS.

The panel held that "[t]he First Amendment's protection of elected official's speech is full, robust, and analogous to that afforded citizens in general." ***Rangra v. Brown***, 566 F. 3d at 518. (5th Cir. 2009). At no point do Appellees challenge this holding of the panel. Since elected officials enjoy First Amendment protection for their speech, ***by definition "political speech"*** [3]**,** analogous to that afforded citizens in general, content-based restrictions such as *Tex. Gov't Code Ann. § 551.144* must be narrowly tailored to meet a compelling governmental interest in order to be found constitutional. The representative form of government across the country requires that the citizen-representative speak, not only on his or her own

[3] Appellees have also not challenged the conclusion that the speech at issue is necessarily political.

behalf, but for those who elected him or her to conduct public affairs on the constituents' behalf.

Appellants challenge Appellees, in their reply brief, to state unequivocally, just what their compelling government interest is, that requires state censorship of political speech. Appellants answer, to such statement, is if the interest is not actual *quid pro quo* corruption, then it is insufficient to withstand this First Amendment challenge.

Because Appellees have not met their burden of showing that TOMA is the least restrictive way to achieve open government, TOMA should be declared in violation of the First Amendment as a matter of law.

D. STRICT SCRUTINY

The speech at issue in this case is political speech. As such, it is subject to strict scrutiny. The panel decision below confirmed this standard of review. *See Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976); *see also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 205 (2003). Strict scrutiny requires "the *Government* must prove [the challenged statute] furthers a compelling interest and is narrowly tailored to achieve that interest." *Wis. Right to Life, Inc.*, 127 S.Ct. at 2664 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978)). It is undisputed that the Texas Open Meetings Act (TOMA), specifically TEX. GOV'T

CODE § 551.144 (Vernon 2006), serves the legitimate governmental interest of "preventing corruption, or the appearance of corruption." *See Wis. Right to Life*, 127 S.Ct. at 2672; *see also Buckley* 424 U.S. at 14. The issue before this Court *En Banc* is whether TOMA is the most narrowly tailored statute possible to achieve that compelling interest.

E. TEX. GOV'T CODE ANN. § 551.144 IS A CONTENT-BASED RESTRICTION ON THE POLITICAL SPEECH OF ELECTED OFFICIALS—NOT TIME, PLACE, MANNER

Appellees assert that **Tex. Gov't Code § 551.144** is a time, place and manner restriction on the speech of elected officials; however, they fail to show this Court how **Tex. Gov't Code § 551.144** qualifies as such a restriction. Time, place, and manner statutes are not First Amendment core political speech cases—they are intermediate scrutiny cases involving assembly, passing out brochures, etc. As shown below, time, place, manner cases only apply when the speech proscribed is *content neutral.*

The panel opinion correctly noted that TOMA is *content based*—it criminalizes speech dealing with public matters, and leaves alone speech dealing with the weather, how is your wife's health, or how the high school football team is doing. Strict scrutiny cases deal with the core First Amendment freedom of political speech, when the statute seeks out speech based on its content. Political speech at the core of the First Amendment is rarely allowed to be restrained, *see*

New York Times Co. v Sullivan, 376 U.S. 254 (1964); *New York Times Co. v United States,* 403 U.S. 713 (1971) (Pentagon Papers). See also *Bond v Floyd,* **385 U.S. 116 (1966)**, *Wood v Georgia, 370 U.S. 375 (1962),* and the more recent campaign and political speech cases of *Republican Party of Minn. v. White,* 536 U.S. 765 (2002), and *Federal Election Comm'n v. Wis. Right to Life, Inc.*, 127 S.Ct. 2652 (2007), to see that the government carries a heavy burden to show that the statute at issue is the most narrowly tailored possible to achieve the compelling government interest.

Appellees believe that the public's right of open government, is the paramount issue herein. They are wrong. Open government is a statutory creation. The paramount issue is the right of individual public officials to do that for which they were elected—communicate with each other and the public, without fear of going to jail. In other words, the paramount issue is the First Amendment rights of public officials, and the fact that TOMA impermissibly infringes upon those rights.

The issue is framed incorrectly by Appellees, who state that the panel decision may negatively impact various states' laws. However, we are dealing here with the First Amendment, which states "Congress shall make no law abridging the freedom of speech". Thus, the issue is the rights of ***individuals*** to freely express themselves. This is the paramount right. When a state law intrudes into this right, and is not the most narrowly tailored possible, it must fall. The issue is not the

right of the sovereign to pass laws. The issue is the fact that one of those laws has intruded upon protected rights reserved to the individual by the First Amendment.

In this case, the statute at issue criminalizes an elected official's speech solely based upon the content of that speech, and it is not content-neutral or a restriction on the time, place and manner of the speech. In other words, the only way one commits a crime in Texas under *Tex. Gov't Code § 551.144*, is if one engages in political speech.[4] TOMA forbids all such political speech by public officials if it is ever spoken about except at a meeting. Thus, TOMA violates the First Amendment rights of public officials.

Time, place, manner regulations must be "applicable to all speech irrespective of content." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). Thus, time, place, manner restrictions "may not be based upon either the content or subject matter of speech." *Consolidated Edison Co. of New York v. Public Service Comm'n of New York*, 477 U.S. 530, 536 (1980).

The tug of war between content based restrictions *[strict scrutiny]*, and time, place, and manner restrictions *[intermediate scrutiny]* was explained in *Burson v Freeman,* 504 U.S. 191 (1991), dealing with a Tennessee statute

[4] If a Texas public official talks to a fellow city council-member about the weather, or high school football, there is no violation. If the same council-member asks about the police department, or even sends an e-mail about setting up a special open meeting, as was the case here, as a member of a quorum, he or she has committed a crime for engaging in political speech, even though he has decided nothing. This is content based restriction. This is core First Amendment political speech.

prohibiting soliciting votes within 100 feet of the entrance to a polling place. *Burson,* at 197:

> This court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are ***content neutral,*** (emphasis added) are narrowly tailored to serve a significant government interest, and leave open ample alternatives for communication. *United States v Grace,* 461 U.S. 171 (1983). See also *Ward v Rock Against Racism***,** 491 U.S. 781 (1989).

The test to be used is whether the statute is a facially **content- neutral**, time, place, or manner restriction. ***Burson*** decided that "whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign," 504 U.S. at 197, and decided the case on strict scrutiny standards, ruling that the statute is a "facially content based restriction in a public forum". TOMA, like the statute in *Burson,* is a "facially **content based** restriction in a public forum", and unlike in *Burson,* TOMA must fall, because it is the broadest open meetings law in the country, not the narrowest.

By neglecting to address the issue of a public official's free speech rights, the Appellees ignore the foundation of the panel's decision that an elected public official is not a public employee. The panel correctly reached the conclusion that **§ 551.144** is a content-based restriction, based upon the position that an elected official holds in the representative form of government. An elected official is not an employee in the traditional sense of the word; rather, the elected official never ceases to be an elected official while he or she is in office. The official cannot

declare that he or she is not an official when he or she is at home, at a restaurant, or on the street corner. The official is always a representative of the citizens who elected him or her, and when he or she speaks, it is as an official as well as a citizen.

Speech uttered by an elected official is speech which advocates for the position of the electorate. Consequentially, the speech is necessarily "political." Therefore, it is only right that cases, such as *Republican Party of Minn. v. White,* 536 U.S. 765 (2002), are relied upon to settle whether the statute unconstitutionally impedes the free speech of a citizen-representative.

United States v Playboy, 529 U.S. 803 (2000) analyzed the issue of content based regulations, in that case dealing with the telecommunications act regulating adult movie channels. They noted that because the Act was a content based speech restriction, it could stand only if it satisfied strict scrutiny. See *Sable Communications of Cal., Inc. v FCC,* 492 U.S. 115 (1989), noting that if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. *Reno v ACLU***,** 521 U.S. 844 (1997). When the government restricts speech, the Government bears the burden of proving the constitutionality of its actions. *Greater New Orleans Broadcasting Assn. v United States*, 527 U.S. 173 (1999). Content based regulations are presumptively invalid, and the

government bears the burden to rebut that presumption. *R.A.V. v St. Paul,* 505 U.S. 377 (1992).

"It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without government interference or control." *Playboy* at 803. TOMA prohibits all political speech of Texas' public officials, from the moment they are sworn in, preventing them from communicating with each other or the very voters who elected them, except at once or twice monthly meetings. It is content based, and violates the First Amendment.

Appellees' have not shown how *Tex. Gov't Code § 551.144* is a time, place and manner restriction, because TOMA is content based, not content neutral, meaning time, place, manner has no place in this scheme. TOMA should be declared unconstitutional as a matter of law.

F. THIRTY-FOUR OTHER STATES HAVE LAWS MORE NARROWLY TAILORED THAN TEX. GOV'T CODE § 551.144.

It must be assumed that the desire for "Sunshine Laws", or open meetings laws, is a national tenet of good government. Thirty five states have open meetings laws. Texas is the only state that will throw you in jail for merely talking about public matters outside of a public meeting. Texas is the outlier—the radical state.

That all the other states have found less restrictive means of achieving open government—open government without restricting First Amendment rights of public officials, proves the point. TOMA is NOT the least restrictive means of achieving open government, it is the MOST restrictive means of doing so. Yet we know from all the strict scrutiny cases, that such turns the First Amendment on its head. Since the existence of other, less restrictive means exists to achieve the desired end of "open government", TOMA must fall, and be declared in violation of the First Amendment by this Court *En Banc. Playboy; Republican Party of Minnesota v White.*

Thirty-four other states have open meetings laws. However, they all differ markedly from the Texas Open Meetings Act. Twenty-one of the thirty-four states remedy violations of the act without a criminal sanction, opting instead for injunctions or civil penalties directed either at the governmental body or its individual members.

> *See* Alaska Stat. §§ 44.62.310 – 44.62.312; Ariz. Rev. Stat. Ann § 38-431; Ark. Code Ann §§ 54950 - 54960.5; Conn. Gen. Stat. Ann § 1-206; Fla. St. Const. Art. I, § 24(b); Idaho Code Ann. §§ 67-2341 - 67-2347; Ind. Code Ann. §§ 5-14-1.5-1 – 5-14-1.5-8; Ky. Rev. Stat Ann. §§ 61.810 - 61.850; Me. Rev. Stat. Ann. Tit. 1, § 1005; Md. Code Ann., State Gov't §§ 10-501 – 10-502; Mass. Gen. Laws Ann. Ch. 30A, §§ 11A – 11A½; Minn. Stat. Ann. §§ 13D.01 – 13D.07; Miss. Code Ann. §§ 25-41-1 – 25-41-17; Mo. Ann. Stat. §§ 610.010 – 610.200; N.Y. Pub. Off. Law §§ 100 – 111; Ohio Rev. Code Ann. § 121.22; Or. Rev. Stat. §§ 192.610 – 192.695; R.I. Gen. Laws § 42-46-1; Utah Code Ann. § 52-4-1; Wash. Rev. Code Ann. § 42.30; Wis. Stat. Ann. § 19.81.

Thirteen states have available criminal sanctions, but in five of the states with criminal sanctions, the sanction is only a fine.

> *See* Ga. Code Ann. § 50-14-6; 65 Pa. Cons. Stat. Ann. §§ 701-716; Vt. Stat. Ann. tit. 1, § 310; W. Va. Code Ann. 6-9-A1; Wyo. Stat. Ann. §§ 16-4-401 – 16-4-408.

Seven of the eight with a potential sanction of imprisonment have much shorter sentences.

> *See* Cal. Gov't Code §§ 54950 – 54950.5, Colo. Rev. Stat. Ann. § 24-72-201, Neb. Rev. Stat. §§ 610.010 – 610.200, Nev. Rev. Stat. §§ 241.010 – 241.040, N.D. Cent. Code §§ 44-04-01 – 44-04-23, S.C. Code Ann. §§ 30-04-60 – 30-4-110, S.D. Codified Laws § 1-25-1.

The only state with a potential imprisonment that matches or exceeds that in TOMA is Oklahoma, with a one-year jail term. *See* Okla. Stat. Ann. tit. 25, § 314.

Even though the Oklahoma statute provides for a more severe sanction, the statute mitigates that severity by having a significantly more closely-drawn statute to avoid infringing First Amendment rights. Under the Oklahoma open meetings act, a meeting is defined as the "conducting of business of a public body by a majority of its members being personally together." Okla. Stat. Ann. tit. 25 § 304. In short, the Oklahoma Open Meeting Act has a tougher jail term than TOMA, but it is drafted much more narrowly and avoids issues of overbreadth and vagueness.

Most states other than Oklahoma, even with less stringent penalties, have been careful to avoid the myriad flaws in TOMA. For example, to violate

California's Open Meetings Act (Brown Act), there must be a collective decision, commitment or promise, or actual vote taken at a closed meeting. Cal. Gov't. Code § 54952.6. Nevada's law only applies if there has been an action taken, meaning a decision, commitment or promise, or affirmative vote. Nev. Rev. Stat. 241.015(1)(a)-(d).

Not one of the thirty-four other states with open meetings laws defines meeting as expansively as Texas, nor does any other state punish the mere receiving or giving of information or the asking or receiving of questions from a third person. This proves that TOMA is not the "least restrictive means" to achieve the stated government goal, of restricting corruption, or the appearance of corruption, since Texas has the most onerous open meetings law in the country. The Texas law is an outlier—a radical law.

The government bears the burden of defending the constitutionality of restrictions on political speech. *WRTL II,* 127 S. Ct. at 2664 (opinion of Roberts, C.J.). Texas has never demonstrated that corruption is so much worse in Texas, that it requires the most onerous and radical open meetings law in the country to prevent that corruption.

In fact, TOMA primarily acts against the perception of corruption, rather than actual "dirty dealing" corruption. This is because TOMA not only prohibits secret face to face meetings where corrupt decisions are made by public officials,

(actual *quid pro quo* corruption), but TOMA also prohibits public officials from even communicating with each other and the public who elected them, except at duly noticed meetings (the mere *appearance* of corruption). Neither the Texas legislature, nor the Texas Attorney General, has ever shown why it is required to cut off political speech of public officials to combat actual corruption.

This is the same quandary facing the United States Supreme Court in *Citizens United v F.E.C.,* No. 08-205, pending re-argument on September 9, 2009. Campaign finance law deals with proscriptions on political speech, and the laws are analyzed on a strict scrutiny basis.

The First Amendment prohibits government regulation of speech, unless the regulation satisfies strict scrutiny. Critical to the strict scrutiny analysis is the identification of the compelling state interest. The state would aver that TOMA is required to ensure that citizens have access to governmental decision making. Appellants believe that is woefully insufficient—that a compelling state interest sufficient to allow the banning of political speech by public officials – state censorship-- should be limited to actual evidence of individual corruption.

Campaign speech cases rest upon *Buckley v Valeo,* 424 U.S. 1 (1976), which attempted to draw a bright line rule between the First Amendment and express campaign advocacy. A series of decision since then, notably *Austin v Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and *McConnell v F.E.C.*, 540 U.S.

93 (2003), have eroded the line between where the First Amendment protects political speech, and where the government may prohibit political speech. The rationale for *Austin* and *McConnell* rests upon the shaky sands of the government justifying the banning of political speech because the use of corporate funds may have the mere appearance of corruption, with no actual proof thereof. The state, in *Rangra*, attempts to justify TOMA on the grounds that the public should have access to everything their officials say, and that the official cannot speak unless at a public meeting. However, there is no effort, however feeble, by the State to suggest that a public official merely speaking equals actual corruption.

The United States Supreme Court has asked the parties in *Citizens United* whether they should overrule *Austin* and *McConnell,* and the briefs by Appellant Citizens United, and supporting *Amicus Curiae,* advocate that there should be a return to First principles, that campaign finance reform has become a murky quagmire violating the First Amendment rights of individuals and corporations to express political speech, and that there should be a return to *Buckley*, and the First Amendment. They seek to have the Court prohibit government regulation of political speech, under strict scrutiny, unless there is evidence of "actual quid pro quo corruption", as the sole justification for restricting political speech rights. The absolutely central truth of the First Amendment, is that the government cannot be trusted to assure, through censorship, the 'fairness' of political debate. *Austin,* 494

U.S. at 679-80 (Scalia, J., dissenting). This Court may wish to review the Supreme Court's opinion in *Citizens United,* before issuing its opinion, because the *Citizens United* opinion will be a complete Supreme Court primer on political speech and the First Amendment—the very issues this Court must decide herein.

The trial record below is full and complete, and reflects that TOMA's criminal provisions leave unfettered discretion to the prosecutor, sweeps protected speech into the prosecution, as well as unprotected speech, and is overbroad. The record is ample, and needs not be revisited in another trial for this Court to rule, as a matter of law, that TOMA does not pass strict scrutiny, and must fall.

G. IT IS PROPER FOR THIS COURT TO APPLY THE STRICT SCRUTINY TEST RATHER THAN TO EXTEND THE LITIGATION PROCESS.

The core political speech protected by the First Amendment had long been recognized as a fundamental foundation of our democracy. This freedom is essential to our very democracy and self governance, and self defining to our very nature as a free people. That is why such core political speech is meant to enjoy the maximum possible protection under our constitution. *Republican Party of Minnesota v White*, 536 U.S. 765 (2002)(Debate on the qualifications of candidates is at the core of the electoral process and of the First Amendment freedoms); *Rossignol v Voorhaar,* 316 F.3d 516 (4th Cir. 2003)(First Amendment affords the broadest free speech protection to political expression in order to assure the unfettered exchange of ideas, since in a republic where the people are sovereign, the

ability of the citizenry to make informed choices among candidates for office is essential); *Day v Holahan*, 34 F.3d 1356 (8th Cir. 1994), (Discussion of public issues and debate on the qualifications of political candidates is integral to the operation of our democratic system of government; the First Amendment affords the broadest protection to such political expression); *Iowa Right to Life Committee, Inc. v. Williams*, 187 F. 3d 963 (8th Cir. 1999)(Discussion of public issues and debate on the qualifications of political Candidates is integral to the Federal Constitution and the First Amendment affords the broadest protection to such political expressions in order to assure the unfettered interchange of ideas); *Arizona Right to Life Political Action Committee v Bayless* 320 F.3d 1002 (9th Circ. 2003)(The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open); *Perry v Bartlett*, 231 F.3d 155 (4th Cir.2000) (First Amendment affords the broadest protection to political expression to assure unfettered interchange of ideas to bring about political and social changes desired by the people); *Wiggins v Lowndes County*, 363 F.3d 387 (5th Cir. 2004)(Political speech regarding a public election lies at the core of matters of public concern protected by the First Amendment); *Coral Springs Street Systems, Inc. v City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004)(Political speech enjoys the highest level of First Amendment protection); *Phelan v Laramie County Community*

College Board of Trustees, 235 F.3d 1243 (11th Cir. 2000)(Core political speech is entitled to the broadest protection).

As the cases cited throughout the panel's opinion show, it is proper for this Court to decide whether the statute survives the strict scrutiny test, which it stated was applicable in this case. The panel relied heavily upon the *Wisconsin Right to Life* case, in which the Supreme Court did not hesitate to apply the correct standard. *Wisc. Right to Life*, 127 S.Ct. at 2664-74. No new laws have been passed in Texas which would result in a changed legal landscape for the determination of this case. *See Ashcroft v. ACLU*, 542 U.S. 656, 669-72 (2004).

H. THE RECORD IN THE PRESENT CASE IS FULLY DEVELOPED; THEREFORE, REMANDING THIS CASE RESULTS IN PROTRACTED LITIGATION OVER THE SAME ISSUES.

The law in this case has been developed, the trial afforded both sides ample opportunity to present their cases, the initial complaint asserted that TOMA violates the First Amendment, putting the government on notice that they had the burden of proof of establishing the constitutionality of the statute, no facts can change what TOMA is, and no new trial is necessary for this Court, En Banc, to rule that TOMA, as a matter of law, fails to pass the strict scrutiny test. The law as it stands in Texas has not changed; the statute still stands as it was at the beginning of this case. A remand with an instruction to apply the strict scrutiny standard unnecessarily prolongs the case, as the record is in a state now where this

Court can decide, as a matter of law, that the statute does not survive strict scrutiny. The trial was conducted with testimony from the Plaintiffs/Appellants, the Defendant, and several witnesses who spoke to the application and construction of the statue. There is no more development necessary, because Appellants cannot see how the record could be any more complete.

The case brought by Appellants was not a case which is seeking damages in the traditional sense; rather, the case is seeking declaratory and injunctive relief, which this Court can render without more prolonged litigation over issues which have been developed and presented to the Court.

CONCLUSION AND PRAYER FOR RELIEF

It is undisputed that open government demands that decisions be made in the open, and that the public has full opportunity to know what is decided, and the reasons behind it. Citizens elect persons to speak for them, in a republican form of government. In Texas, at the moment that official is sworn in, TOMA renders her or him mute, and he or she is unable to speak to anyone about public matters, except at a meeting. This violates the First Amendment rights of all the elected officials. Due to its overbreadth and vagueness, TOMA, through the various interpretations by the Texas Attorney General and the discretion of the various District attorneys, muddies the water as to what speech qualifies as a criminal act, and what does not. Chief Justice Roberts put it very eloquently that the benefit of

doubt must go to speech, and not the speaker, for, as he stated in *Wisconsin Right to Life*, "[t]he First Amendment's command that 'Congress shall make no laws . . . abridging the freedom of speech' demands at least that." *Wisc. Right to Life*, 127 S.Ct. at 2674. "Enough is enough." Id.at *2672 (2007).*

TOMA, as it stands today, is an impermissible content-based regulation of protected free speech. The law is overbroad and unconstitutionally vague. These issues have been fully litigated in this matter and the time is now to issue a declaration that TEX. GOV'T CODE § 551.144 is unconstitutional for abridging the political speech of advocacy of elected public officials.

In Texas, TOMA must be declared unconstitutional, because the First Amendment's command, that "congress shall make no laws… abridging the freedom of speech", demands at least that. Therefore, Appellants respectfully pray this Court *En Banc*, reverse the trial court's judgment, and render declaratory judgment and injunctive relief for Appellants by declaring Tex. GOV'T CODE § 551.144 unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 2009, via United States first class mail, the original and nineteen true copies of the foregoing Appellants Brief for Rehearing En banc and an electronic disk containing the Petition have been filed with the Clerk for the United States Court of Appeals for the Fifth Circuit.

Charles R. Fulbruge III
Clerk of the Court
United States Court of Appeals for the Fifth Circuit
600 Camp Street
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I hereby certify that on the 8th day of May, 2009, via United States first class mail, postage prepaid, two true and correct copies of the Appellants Petition for

Rehearing En banc and an electronic disk containing the Petition have been served on the following counsel:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the limitation of Fed. R. App. P. 35 and 40 because this brief contains 30 pages or less, excluding the parts of the brief excepted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, font size 14, and size 12 for footnotes.

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