Notes

Do Public Officials Leave Their Constitutional Rights at the Ballot Box? A Commentary on the Texas Open Meetings Act

Devon Helfmeyer*

* B.A., The University of North Carolina at Asheville, 2007; J.D., The University of Texas School of Law, 2011. I would first like to thank Jim Harrington, my boss, professor, and mentor, for his encouragement and advice on this Note and all things legal. I would also like to thank Mary Murphy and the rest of the TJCLCR staff for their thoughtful advice and insightful comments. Finally, I owe a special thanks to Drs. Gene Helfman and Judy Meyer for their editorial assistance and endless support, and to Professor Lynn Blais for suggesting I look into the Texas Open Meetings Act.

I. INTRODUCTION

Profound questions of constitutional law arise when an individual right is pitted against an undeniable societal interest. The Texas Open Meetings Act (TOMA)[1] is a prime example. By prohibiting quorums of governmental bodies from discussing public matters in private, TOMA implicates both the free speech rights of public officials and the public's interest in transparent government.

This Note uses the recent case of *Rangra v. Brown*[2] to frame the discussion of the constitutionality of TOMA. All fifty states and the federal government have open meetings laws of some nature,[3] making the questionable constitutionality of these laws a problem of national importance. Discrepancies among statutes with regard to criminal versus civil penalties are particularly relevant. The two main questions to be answered become: Do public officials, and elected officials in particular, forfeit their constitutional rights when they take public office? And if so, what types of free speech restrictions are constitutionally justified? Nationwide applicability, combined with inconsistency among the circuits, means that the First Amendment implications of open meetings laws may be destined for the Supreme Court.

The short answer to the first question is "no." The longer answers to both questions, and the ones on which the constitutionality of these laws will depend, involve analyses of TOMA, the relationship between the state and public officials, and the courts' treatment of the classes of restrictions on free speech. Courts have disagreed about the extent to which public officials forfeit constitutional rights upon taking office. Therefore, as state legislatures redraft or amend existing open meetings laws, these bodies have an obligation to consider and balance the competing interests of public officials' free speech rights against the public's interest in transparent government. The questionable constitutionality of TOMA should put the Texas Legislature on notice that it is time to consider a new method of guaranteeing open government to the Texas people.

Because the constitutionality of TOMA is of such importance, this issue has received significant media attention as well as some scholarly comment. For example, in the Spring 2008 issue of the *Texas Tech Administrative Law Journal*, Mandi Duncan analyzed TOMA and

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[1] TEX. GOV'T CODE ANN. §§ 551.001–551.146 (Vernon 2008).

[2] *See* Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006) (trial court) ("*Rangra I*"); Rangra v. Brown, 566 F.3d 515 (5th Cir. 2009) (original appeal) ("*Rangra II*"); Rangra v. Brown, 576 F.3d 531 (5th Cir. 2009) (granting rehearing en banc) ("*Rangra III*"); Rangra v. Brown, 584 F.3d 206 (5th Cir. 2009) (dismissing for mootness) ("*Rangra IV*").

[3] For a discussion of other open meetings laws, see *infra*, Part VI; *see also* The Reporters Committee for Freedom of the Press, Open Government Guide, http://www.rcfp.org/ogg/ (last visited Apr. 24, 2010).

commented on the constitutional challenge in *Rangra*.[4] Duncan concentrated on TOMA's vagueness and overbreadth, as well as on the policy arguments in favor of redrafting TOMA. This Note, in contrast, focuses on TOMA's facial constitutionality, and subjects TOMA to a strict scrutiny analysis.

This Note consists of seven parts. Part I provides an overview of TOMA, with special emphasis on the enabling and criminal provisions. Part II frames the constitutionality of TOMA around *Rangra v. Brown*, a recent case in the Fifth Circuit. Part III is an analysis of the extent to which public officials retain their right of free speech when they take office. Part IV considers whether TOMA is a content-based restriction on speech. Part V considers Texas's interests in enacting and enforcing TOMA. Part VI contains a survey of open meetings laws from around the country. In conclusion, Part VII outlines an alternative method of guaranteeing open government that is both less restrictive and constitutional.

II. THE TEXAS OPEN MEETINGS ACT[5]

The Texas Open Meetings Act was originally adopted in 1967 as article 6252-17 of the Revised Civil Statutes[6] to "help make governmental decision-making accessible to the public."[7] TOMA requires that "[e]very regular, special, or called meeting of a governmental body shall be open to the public."[8] TOMA also requires that the "governmental body . . . give written notice of the date, hour, place, and subject of each meeting held by the governmental body."[9] TOMA is not a blanket prohibition on closed meetings; it contains several exceptions wherein closed meetings are allowed.[10]

A "meeting," as defined by TOMA, is "a deliberation between a quorum of a governmental body . . . during which public business or public policy over which the governmental body has supervision or

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[4] Mandi Duncan, *The Texas Open Meetings Act: In Need of Modification or All Systems Go?*, 9 TEX. TECH ADMIN. L.J. 315 (2008).

[5] For an in-depth overview on the Texas Open Meetings Act, see ATTORNEY GENERAL GREG ABBOTT, OPEN MEETINGS 2010 HANDBOOK (2010).

[6] Act of May 8, 1967, 60th Leg., R.S., ch. 271, § 1, 1967 Tex. Gen. Laws 597.

[7] OPEN MEETINGS 2010 HANDBOOK, *supra* note 5, at 2.

[8] TEX. GOV'T CODE ANN. § 551.002 (Vernon 2008).

[9] *Id.* § 551.041.

[10] These exceptions, known as executive sessions, involve discussions of: "(1) purchase or lease of real property; (2) security measures; (3) receipt of gifts; (4) consultation with attorney; (5) personnel matters; (6) economic development; and (7) certain homeland security matters. . . . [However, all] final actions, decisions, or votes must be made in an open meeting." TEXAS MUNICIPAL LEAGUE, THE TEXAS OPEN MEETINGS ACT AT A GLANCE (2006). There are also situations in which the requirements for open meetings are modified. *See, e.g.*, TEX. GOV'T CODE ANN. § 551.045 (modifying notice requirement for emergency meetings).

control is discussed or considered or during which the governmental body takes formal action."[11] Under TOMA, the *content* of the information discussed ("public business") determines whether something is a meeting or not. A "quorum" is defined as the number of people required to constitute a majority of the governing body, unless otherwise specified.[12] However, TOMA "does not require that governmental body members be in each other's physical presence to constitute a quorum."[13] For example, if enough members of a governmental body meet with one another *individually* to discuss a particular issue, this will constitute a quorum.[14] A "deliberation" is "a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business."[15] Again, the *content* of the meeting is crucial—TOMA does not apply to gatherings of public officials for purely social purposes.[16]

TOMA can be enforced through both civil and criminal proceedings. It contains an enabling provision that allows interested persons to file a lawsuit for either injunctive relief or a writ of mandamus to enforce its provisions.[17] TOMA grants standing to a wide range of individuals and groups: an "interested person" can include a city,[18] a government league,[19] an environmental group,[20] a police officers' association,[21] and many other groups and individuals.[22] TOMA's civil enforcement provisions are similar to many other states' open meetings laws.[23]

The most controversial section of TOMA, and the part subject to

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[11] TEX. GOV'T CODE ANN. § 551.001(4).

[12] *Id.* § 551.001(6).

[13] Tex. Att'y Gen. Op. No. GA-0326 (2005) at *3.

[14] *Id.*

[15] TEX. GOV'T CODE ANN. § 551.001(2). Although the statute says "verbal," "deliberation" has been construed to include written communication such as e-mail. *See* Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex Nov. 7, 2006).

[16] TEX. GOV'T CODE ANN. § 551.001(4).

[17] *Id.* § 551.142(a) ("An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body."). TOMA also creates liability for a person who knowingly discloses information about a lawful closed meeting. *Id.* § 551.146(a)(2).

[18] *See* Matagorda County Hosp. Dist. v. City of Palacios, 47 S.W.3d 96, 102 (Tex. App.—Corpus Christi 2001, no pet.).

[19] *See* Hays County v. Hays County Water Planning P'ship, 106 S.W.3d 349, 357–58 (Tex. App.—Austin 2003, no pet.).

[20] *See* Save Our Springs Alliance, Inc. v. Lowry, 934 S.W.2d 161 (Tex. App.—Austin 1996, orig. proceeding [mand. denied]).

[21] *See* Rivera v. City of Laredo, 948 S.W.2d 787 (Tex. App.—San Antonio 1997, writ denied).

[22] *See* Burks v. Yarbrough, 157 S.W.3d 876 (Tex. App.—Houston 2005, pet. denied) (holding that standing under section 551.142 is interpreted broadly, to include the interest of the general public); *see also* OPEN MEETINGS 2010 HANDBOOK, *supra* note 5, at 57 (citing *Burks*, 157 S.W.3d 876; *Hays County Water Planning P'ship*, 41 S.W.3d 174; *Save Our Springs Alliance*, 934 S.W.2d 161). *But see* City of Abilene v. Shackelford, 572 S.W.2d 742, 746 (Tex. Civ. App.—Eastland 1978, writ. denied) (holding that an "interested person" under TOMA must show "particular injury or damage" to have standing).

[23] *See* discussion on "Open Meetings Acts Across the Country," *infra* Part VI.

litigation in *Rangra*, is the provision that *criminalizes* violations of the Act:

> A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
>
> (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
>
> (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
>
> (3) participates in the closed meeting, whether it is a regular, special, or called meeting.[24]

Violation of section 551.144 is a misdemeanor punishable by a fine of between $100 and $500, or confinement in the county jail for between one and six months, or both.[25] Although the state of mind required for culpability under the act is "knowingly,"[26] "[a] member of a governmental body may be 'held criminally responsible [under section 551.144] for his involvement in the holding of a closed meeting which is not permitted under the Act regardless of his mental state with respect to whether the closed meeting is permitted under the Act.'"[27] Essentially, TOMA allows for the criminal punishment of public officials meeting in private, based on the content (official business) of their speech.

The criminal provisions of TOMA raise important questions of constitutional law, particularly with regard to the free speech rights of public officials. Although these questions have not all been answered, some were addressed by Texas courts and the Fifth Circuit in *Rangra v. Brown*.[28]

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[24] TEX. GOV'T CODE ANN. § 551.144(a) (Vernon 2008). TOMA also criminalizes: a conspiracy to circumvent the requirements of the act, *id.* § 551.143; a governmental body member's participation in a closed meeting with knowledge that the meeting's agenda is not being followed or that the meeting is not being recorded, *id.* § 551.145; and the unauthorized disclosure of the agenda or recordings of a lawfully closed meeting, *id.* § 551.146. All of the crimes under TOMA are misdemeanors.

[25] *Id.* § 551.144(b).

[26] *See* TEX. PENAL CODE ANN. § 6.03(b) (Vernon 2003) ("A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.").

[27] Tex. Att'y Gen. Op. No. JC-0307 (2000) at *3 (quoting Tovar v. State, 978 S.W.2d 584, 587 (Tex. Crim. App. 1998)).

[28] *See Rangra I*, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex Nov. 7, 2006) (trial court); *Rangra II*, 566 F.3d 515 (5th Cir. 2009) (original appeal); *Rangra III*, 576 F.3d 531 (5th Cir. 2009) (granting rehearing en banc); *Rangra IV*, 584 F.3d 206 (5th Cir. 2009) (dismissing for mootness).

III. *RANGRA V. BROWN*

Rangra v. Brown involved a challenge to TOMA by two members of the Alpine City Council, Avinash Rangra and Anna Monclova. Rangra and Monclova claimed that the criminal provisions of TOMA violate Article I, Section 8 of the Texas Constitution[29] and the First Amendment of the United States Constitution.[30] They claimed that TOMA was unconstitutionally vague and overbroad.[31]

The controversy arose as a result of a pair of e-mails exchanged between four of the five Alpine City Council members. In the first e-mail, Councilwoman Katie Elms-Lawrence wrote to Avinash Rangra, Manuel Payne, and Anna Monclova:

> Avinash, Manuel ... Anna just called and we are both in agreement we need a special meeting at 6:00 pm Monday ... so you or I need to call the mayor to schedule it (mainly you, she does'nt [sic] like me right now I'm Keri's MOM).. we both feel Mr. Tom Brown was the most impressive..no need for interviewing another engineer at this time ... have him prepare the postphonment [sic] of the 4.8 million, get us his firms [sic] review and implementations for the CURE for South Alpine....borrow the money locally and get it fixed NOW....then if they show good faith and do the job allow them to sell us their bill of goods for water corrections for the entire city.....at a later date..and use the 0% amounts to repay the locally borrowed money and fix the parts that don't meet TECQ [sic] standards....We don't have to marry them ... with a life long contract, lets [sic] just get engaged!
>
> Let us hear from you both
>
> KT[32]

Councilman Rangra responded the following day:

> Hello Katie....

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[29] Article I, § 8 is the free speech provision of the Texas Constitution. It states, in relevant part: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence."

[30] *Rangra I*, at *1–2; *see* U.S. CONST. amend. I.

[31] *Id.*

[32] *Id.* at *2.

> I just talked with John Voller of Hibb and Todds of Abilene ... and invited him to come to the Monday meeting.... I asked him to bring his money man also.... these guys work for Sul Ross ... He said ... he will be at meeting Monday....
>
> I'll talk with Tom Brown also after my 8:00 class ...
>
> Thanks for the advice..... and I'll talk with Mickey as per your, Anna, and Manuel directions ... and arrange the meeting on Monday....
>
> We must reach some sort of decision SOOOOOOOOOOOOON.
>
> Avinash
>
> Katie.... please correct my first name spellings ... Thanks.[33]

Rangra and fellow councilmember Katie Elms-Lawrence were indicted in state court for violations of the criminal section of TOMA[34] in February 2005.[35] Eighty-third District Attorney Frank Brown, a named defendant in the civil case, brought the charges against Rangra and Elms-Lawrence.[36] District Attorney Brown eventually dismissed the charges without prejudice,[37] meaning that he reserved the right to reinstate the charges at a later date.[38]

A. *Rangra I*

Fearing renewed prosecution, Rangra, joined by then-councilwoman Anna Monclova, sued District Attorney Brown and Texas Attorney General Gregg Abbott under 42 U.S.C. § 1983.[39] *Rangra v. Brown* was first heard in the United States District Court for the Western District of Texas, Pecos Division.[40] The trial court rejected Rangra and Monclova's arguments that TOMA is unconstitutional, holding that

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[33] *Id.*

[34] TEX. GOV'T CODE ANN. § 551.144 (Vernon 2008).

[35] Betse Esparza, *2005: The Year in Review*, ALPINE AVALANCHE, Dec. 29, 2005, *available at* http://www.alpineavalanche.com/articles/2005/12/29/news/news01.txt.

[36] Jack D. McNamara, *Rangra Wins*, NIMBY NEWS, May 17, 2007, *available at* http://www.nimbynews.com/07-Rangra-wins-Archives-05-17-07.html.

[37] *Rangra II*, 566 F.3d 515, 518 (5th Cir. 2009).

[38] BLACK'S LAW DICTIONARY 502 (8th ed. 2004).

[39] *Rangra II*, 566 F.3d at 518.

[40] *Rangra I*, 2006 WL 3327634 (W.D. Tex. 2006).

"because the speech was uttered entirely in the speaker's capacity as a member of the city council, and thus is the kind of communication in which he or she is required to engage as part of his or her official duties, it is not protected by the First Amendment . . . ."[41] By deciding that TOMA does not regulate First Amendment-protected speech, the court did not have to address TOMA's overbreadth or vagueness. However, in dicta, Judge Junell opined that TOMA is neither vague nor overbroad, and would therefore be constitutional even if it did regulate speech.[42]

B. *Rangra II*

On appeal to the Fifth Circuit, the district court's opinion from *Rangra I* was reversed.[43] Writing for a Fifth Circuit panel, Judge Dennis held: "The First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general."[44] Dennis held that TOMA does in fact regulate speech, and because it does so on the basis of the content of that speech, TOMA should be subject to strict scrutiny.[45] The Fifth Circuit panel remanded the case for reconsideration under a strict scrutiny analysis.[46]

C. *Rangra III* and *IV*

Between *Rangra I* and *II*, Mr. Rangra's city council term expired, and a consecutive-term-limits rule precluded him from seeking reelection. After the initial hearing and judgment in *Rangra II*, the Fifth Circuit decided to hold a rehearing en banc.[47] In a one-sentence per curiam opinion, the full court dismissed the case for mootness.[48] In an emphatic dissent, Judge Dennis characterized the court's holding as "incorrect, injudicious, and result-oriented."[49] Reiterating the standing section of his *Rangra II* opinion, Judge Dennis argued that the case was not moot because Mr. Rangra could run for city council in the future,

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[41] *Id.* at *6.

[42] *Id.* at *6–9 ("[I]t is not necessary to consider whether the Act is overbroad or vague. However, the Court finds even if those issues are reached, the statute is constitutional.").

[43] *Rangra II*, 566 F.3d 515 (5th Cir. 2009).

[44] *Id.* at 518.

[45] *Id.* ("[W]hen a state seeks to restrict the speech of an elected official on the basis of its content, a federal court must apply strict scrutiny . . . .").

[46] *Id.* ("[B]ecause the district court dismissed the elected officials' challenge to a state statute that regulates their speech on the basis of its content without applying the required strict scrutiny analysis, we reverse the district court's judgment and remand the case for the performance of that task.").

[47] *Rangra III*, 576 F.3d 531 (5th Cir. 2009) (announcing rehearing en banc).

[48] *Rangra IV*, 584 F.3d 206 (5th Cir. 2009).

[49] *Id.* at 207 (Dennis, J., dissenting).

subjecting himself to renewed prosecution under TOMA.[50]

Although the Fifth Circuit en banc dismissed the case for mootness in *Rangra IV*, the question of TOMA's constitutional fitness remains unanswered. In an exercise in judicial timidity, the Fifth Circuit has again refused to answer the constitutional question presented.[51] In response to the dismissal, elected officials and municipalities across Texas have joined together to file a lawsuit against the State of Texas and Attorney General Abbott.[52] The plaintiffs include cities (Alpine, Big Lake, Pflugerville, Rockport, and Wichita Falls) and public officials (Diana Asgeirsson, Angie Bermudez, Jacques DuBose, James Fitzgerald, Jim Ginnings, Victor Gonzalez, Russell C. Jones, Mel LeBlanc, Lorne Liechty, A.J. Mathieu, Johanna Nelson, Todd Pearson, Arthur "Art" Reyna, Charles Whitecotton, and Henry Wilson).[53] The lawsuit was filed December 14, 2009, in the United States District Court for the Western District of Texas, Pecos Division[54]—the same court in which *Rangra I* was litigated. Notwithstanding the change in plaintiffs, the new lawsuit makes the exact same complaint as was made in *Rangra I*.[55] The plaintiffs ask the court to honor the Fifth Circuit panel's decision in *Rangra II* and "apply strict scrutiny standards to TOMA."[56] With this new lawsuit, it appears the Fifth Circuit will be forced to analyze TOMA's effect on free speech.

IV. FREE SPEECH RIGHTS OF PUBLIC OFFICIALS

The Texas Open Meetings Act undoubtedly sets limits on the extent to which public officials can communicate, but that alone does not subject it to First Amendment scrutiny. The question becomes whether public officials' communication, made pursuant to their jobs as public officials, should be considered "speech" under the First Amendment, and if so, how much protection such communication should receive. An analysis of the First Amendment, and the relationship between public

[50] *Id.* at 208 (Dennis, J., dissenting).

[51] Courts, including the Supreme Court and the Fifth Circuit, often refuse to answer a constitutional question if there is any alternative method of resolving the case. *See, e.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (establishing the *Pullman* doctrine, allowing federal courts to ignore constitutional questions presented by state laws); Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm. of State Bar of Tex., 283 F.3d 650, 653 (5th Cir. 2002) (applying the *Pullman* doctrine). The Fifth Circuit did not invoke the *Pullman* doctrine when it dismissed *Rangra IV*; however, the *Pullman* doctrine is illustrative of federal courts' hesitance to answer difficult constitutional questions.

[52] Plaintiff's Original Complaint, City of Alpine v. Abbott, No. P09-CV-59 (W.D. Tex. 2009).

[53] *Id.*

[54] Nick Pipitone, *Valley Elected Officials Closely Watching Texas Open Meetings Act Lawsuit*, THE MONITOR, December 27, 2009, *available at* http://www.themonitor.com/articles/texas-33901-open-lawsuit.html.

[55] Plaintiff's Original Complaint at 16, City of Alpine v. Abbott, No. P09-CV-59 (W.D. Tex. 2009).

[56] *Id.* at 17.

officials and the government, shows that public officials' communications are "speech," and that such speech should be afforded effective protection against government restriction.

When presented with this issue, the Fifth Circuit's three-judge panel in *Rangra II*, led by Judge Dennis, found that officials' speech does retain First Amendment protection.[57] However, after hearing the case en banc, the Fifth Circuit as a whole vacated Judge Dennis's decision and dismissed the case for mootness.[58] As a result, the question remains unanswered in the Fifth Circuit. Other courts, including the Supreme Court, have created a separate category of free speech jurisprudence dealing with the government's authority to restrict speech depending on whether it is acting as sovereign or employer.

A. Is Texas Acting as Sovereign or Employer?

The Supreme Court recently held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[59] In *Garcetti v. Ceballos*, Richard Ceballos, a deputy district attorney, filed a § 1983 complaint against his supervisors at the Los Angeles County district attorney's office.[60] Ceballos' complaint alleged that the district attorney's office subjected him to adverse employment actions in retaliation for engaging in protected speech—he wrote an internal memorandum in which he recommended a case's dismissal on the basis of purported governmental misconduct.[61] *Garcetti* is the last of a long line of cases dealing with the government's authority to regulate speech of public employees.[62] However, *Garcetti* does not clearly answer the question of the relationship between the government and elected officials: elected officials are undoubtedly public employees, but is the government their employer?

In *Rangra I*, the United States District Court for the Western District of Texas found that *Garcetti* was controlling on a challenge to TOMA by a Texas elected official.[63] However, as this Note shows, the

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[57] 566 F.3d 515.

[58] *Rangra IV*, 584 F.3d 206 (5th Cir. 2009).

[59] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[60] *Id.* at 410.

[61] *Id.* at 414.

[62] *See, e.g.*, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563 (1968); United States Civil Service v. Nat'l Ass'n. of Letters Carriers, 413 U.S. 548 (1973); Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Rust v. Sullivan, 500 U.S. 173 (1991). For a detailed overview of the government-as-employer distinction, see WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS 293–386 (3d ed.) (2002).

[63] *Rangra I*, 2006 WL 3327634 (W.D. Tex. 2006) at *5.

Rangra I court's analysis was flawed in applying the *Garcetti* approach to an elected official's challenge of TOMA. Additionally, a number of differences exist between the disciplinary action in *Garcetti* and the criminal provisions of TOMA.

Judge Junell, in *Rangra I*, wrote that "[f]or purposes of determining what constitutes protected speech under the First Amendment, there is no meaningful distinction among public employees, appointed public officials, and elected public officials."[64] This is a bold statement, and arguably a faulty one.[65] Judge Junell inappropriately cited *Rash-Aldridge v. Ramirez*[66] in support of this assertion.[67] *Rash-Aldridge* concerned a Laredo city councilwoman's removal—as a result of her speech—from an *appointed* position on a local metropolitan planning board.[68] Although the Fifth Circuit used a *Garcetti*-like approach to uphold the disciplinary action in *Rash-Aldridge*, Ms. Rash-Aldridge was not punished in her elected-official capacity.[69] *Rash-Aldridge* pointed out this distinction, emphasizing that "Rash-Aldridge was appointed to the [planning board], not elected."[70] Judge Junell's analysis in *Rangra I* would have been appropriate only if Rash-Aldridge had lost some right deriving from her elected membership on the city council (i.e., her right to vote on issues before the council), rather than being removed from her appointed position on the planning board.

The distinction between government employees and elected public officials may seem arbitrary and minuscule, but it is very important. It parallels the distinction between the government acting as employer and the government acting as sovereign. *Garcetti* stands for the concept that "the government as employer indeed has far broader powers [to restrict speech] than does the government as sovereign."[71] The city council (the government) in *Rash-Aldridge* was acting as employer—it had appointed Ms. Rash-Aldridge to the metropolitan planning board—rather than as sovereign. Texas, on the other hand, is acting as a sovereign when it prosecutes public officials under TOMA. To claim that *Garcetti* justifies TOMA, and that Texas is acting as an employer by enforcing TOMA, is

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[64] *Id.*

[65] Judge Dennis's opinion for the three-judge panel in *Rangra II* is consistent with my disapproval of the district court's assertion, but did not go into an analysis of Judge Junell's reasoning. *See Rangra II*, 566 F.3d at 522 ("The district court's premise that the First Amendment's protection of elected officials' speech is limited just as it is for the speech of public employees, however, is incorrect. Job-related speech by public employees is clearly less protected than other speech because the Court has held that government employees' speech rights must be balanced with the government's need to supervise and discipline subordinates for efficient operations. . . . *Garcetti* did nothing to impact the speech rights of elected officials whose speech rights are not subject to employer supervision or discipline.").

[66] 96 F.3d 117 (5th Cir. 1996) (per curiam).

[67] *Rangra I*, at *5.

[68] 96 F.3d. at 118.

[69] *Id.* at 119.

[70] *Id.*

[71] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (quoting Waters v. Churchill, 511 U.S. 661, 671 (1994)).

to claim that the Texas State Government has the authority to "hire and fire"[72] all members of "governmental bodies," as defined by TOMA.[73]

The Fifth Circuit, in *Jenevein v. Willing*, further highlighted the flaws in Judge Junell's *Rangra I* decision that applied *Garcetti* to elected officials.[74] Writing for a panel of the Fifth Circuit, Judge Higginbotham clearly rejected the *Rangra I* analysis: "the preferable course ought not draw directly upon the *Pickering-Garcetti* line of cases for sorting the free speech rights of employees elected to state office."[75] However, not all courts have taken this approach.[76]

The Fifth Circuit has addressed the issue of whether an elected official is in fact an "employee" of the state. In *Jenevein*, the Fifth Circuit emphasized the difference between the relationship between state and elected official, and the relationship between state and ordinary state employee:

> Our "employee" is an elected official, about whom the public is obliged to inform itself, and the "employer" is the public itself, at least in the practical sense, with the power to hire and fire. It is true that Judge Jenevein was an employee of the state. It is equally true that as an elected holder of state office, his relationship with his employer differs from that of an ordinary state employee.[77]

Such a characterization of an elected official also supports the argument that Texas is acting as sovereign rather than employer when it enforces TOMA. Because elected officials have a very different relationship with the state than other public employees, the state should have different, and in this case lesser, authority to restrict their speech. It

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[72] Jenevein v. Willing, 493 F.3d 551, 557 (5th Cir. 2007).

[73] TOMA defines a "Governmental body" as: "a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members; a county commissioners court in the state; a municipal governing body in the state; a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality; a school district board of trustees; a county board of school trustees; a county board of education; the governing board of a special district created by law; a local workforce development board . . . ; a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both . . . ." TEX. GOV'T CODE ANN. § 551.001(3) (Vernon 2008) (internal numbering omitted).

[74] *See Jenevein*, 493 F.3d at 558.

[75] *Id.*

[76] *See, e.g.*, Hartman v. Register, No. 1:06-CV-33, 2007 WL 915193, at *6 (S.D. Ohio Mar. 26, 2007) ("[T]he distinction between the public employee in *Garcetti* and an elected official, in this case Plaintiff, is inconsequential."); Hogan v. Twp. of Haddon, No. 04-2036, 2006 WL 3490353, at *7 (D.N.J. Dec. 1, 2006) (applying *Garcetti* to an elected township commissioner); Shields v. Charter Twp. of Comstock, 617 F. Supp. 2d 606, 615 (W.D. Mich. 2009) ("As a[n elected] board member, Plaintiff Shields may not technically have been an employee of the Township, but he surely was a representative of the Township, and the concerns underlying *Garcetti* apply with equal force to his situation.").

[77] *Jenevein*, 493 F.3d at 557.

follows that when the state seeks to restrict the speech of elected officials, it is acting more as sovereign than as employer.

B. Criminal Provision of TOMA

The distinction between what *Garcetti* allows a government to do when acting as an employer and what Texas does when enforcing TOMA is further highlighted by the criminal nature of TOMA. Neither in Justice Kennedy's majority opinion in *Garcetti*, nor in any of the three dissenting opinions, is there any mention of criminal sanctions against Mr. Ceballos.[78] Had the State of California prosecuted Ceballos for his memorandum, little doubt exists that the Supreme Court would have issued a different ruling.[79] Criminal guilt in our society carries with it considerably more stigma than civil liability, though the penalty for both might be the same. For that reason, the Constitution confers greater due process rights on those charged with crimes than those in civil suits. Criminally accused are given protections against warrantless searches and seizures,[80] the right to a grand jury,[81] freedom from self-incrimination,[82] due process,[83] freedom from double jeopardy,[84] the right to an impartial jury,[85] and the right to an attorney.[86] Similarly, an accused cannot be convicted unless the prosecution can prove his guilt "beyond a reasonable doubt."[87] In contrast, a defendant in a civil trial has a limited right to a jury trial[88] and can be found liable if a "preponderance of the evidence" supports such a conclusion.

The Supreme Court is hesitant to allow for criminal prosecution of speech,[89] and has meticulously defined those types of speech for which it

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[78] *See* Garcetti v. Ceballos, 547 U.S. 410 (2006).

[79] *But see* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563, 574 (1968) ("While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.").

[80] U.S. CONST. amend. IV.

[81] U.S. CONST. amend. V.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] U.S. CONST. amend. VI.

[86] *Id.*

[87] *In re* Winship, 397 U.S. 358, 364 (1970).

[88] U.S. CONST. amend. VII.

[89] *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 898–99 (1990) (O'Connor, J., concurring) ("A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome than a neutral civil statute. . . ."); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ("If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."); New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (holding that the Sedition Act "was inconsistent with the First Amendment."). *But see* Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding the constitutionality of a group libel criminal law).

is appropriate to apply criminal penalties:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[90]

The classes of speech removed from First Amendment protection in *Chaplinsky* share a moral depravity and a lack of social value. And even *Chaplinsky* has been whittled down: after *New York Times v. Sullivan*, it is unconstitutional to criminalize seditious libel;[91] after *Cohen v. California*, it is unconstitutional to criminalize profanity;[92] and, arguably, after *R.A.V. v. City of St. Paul*[93] and *Brandenburg v. Ohio*,[94] the criminalization of fighting words is in question.[95] The speech subject to prosecution under TOMA has none of the qualities discussed in *Chaplinsky*. Therefore, applying *Garcetti*—a case involving a deputy district attorney being passed over for promotion—to uphold a criminal statute is ill-founded.

The criminal aspect of TOMA further supports the conclusion that Texas is acting as sovereign rather than as employer when it enforces TOMA. Criminal prosecution is the action of a sovereign. Concluding otherwise would be tantamount to granting employers the ability to perform criminal prosecutions on their employees. It would also run the risk of allowing the government to boot-strap an ability to *criminalize* employees' speech onto its authority to *civilly* regulate that same speech.

C. Free Exchange of Ideas Argument

Because Texas is acting as sovereign when it enforces TOMA, public officials prosecuted under TOMA are given greater First

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[90] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[91] New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

[92] Cohen v. California, 403 U.S. 15, 25 (1971) ("one man's vulgarity is another's lyric").

[93] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down a city ordinance against hate speech).

[94] Brandenburg v. Ohio, 395 U.S. 444 (1969) (significantly increasing fighting words standard).

[95] I realize that there is a healthy debate about the extent to which *R.A.V.* and *Brandenburg* limit the "fighting words" doctrine, and have no intention of joining that debate in this Note. But, that there is discussion that the doctrine has been weakened supports my assertion that the Court has historically been very hesitant to uphold criminal prosecution of speech.

Amendment protections.[96] However, the inquiry does not end there. Perhaps the nature of the "speech" prescribed under TOMA does not deserve protection for a more basic reason: First Amendment jurisprudence reflects a valuing of free speech for the important role it plays in the free exchange of ideas and the pursuit of truth.[97] In *Cohen v. California*, Justice Harlan famously wrote:

> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion . . . in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[98]

Free speech jurisprudence is replete with cases of undesirable speech being given protection in order to stimulate the marketplace of ideas.[99] The Reporters Committee for Freedom of the Press, in their amicus curiae brief brought in support of rehearing *Rangra* en banc, made a similar argument defending TOMA.[100]

In all these cases, the Court strengthened individuals' rights to *contribute* to the exchange of ideas. If society were a market and speech were sold by vendors, the Court has emphasized the importance of allowing as many vendors as possible to set up shop at the market, regardless of the nature of their wares. The defendants being prosecuted under TOMA, however, are like vendors trying to assert their right as members of the market to sell secret commodities, only to customers of their choosing, from a shop down the street with locked doors and tinted windows. The metaphor illustrates that protecting the free speech rights of Texas public officials, by arguing that TOMA is unconstitutional, is contrary to one of the principles on which the First Amendment was

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[96] *See Rangra II*, 566 F.3d 515, 522–23 ("[W]hen the state acts as a sovereign, rather than as an employer, its power to limit First Amendment freedoms is much more attenuated."); *see also* Waters v. Churchill, 511 U.S. 661, 671–72 (1994).

[97] *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas–that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."); New York Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'") (quoting JOHN STUART MILL, ON LIBERTY 15 (Oxford: Blackwell, 1947)).

[98] Cohen v. California, 403 U.S. 15, 24 (1971).

[99] *See, e.g.*, *Cohen*, 403 U.S. at 15 (overturning the conviction of a man for wearing a jacket displaying the phrase, "Fuck the Draft"); Texas v. Johnson, 491 U.S. 397 (1989) (striking down Texas's flag-burning statute); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (overruling Ohio's criminal syndicalism statute based on a challenge by the Ku Klux Klan).

[100] Brief for The Reporters Committee for Freedom of the Press as Amici Curiae Supporting Appellees at 16, Rangra v. Brown, 584 F.3d 206 (2009) (No. 06-51587) ("The types of statutes that have been analyzed under the weight of strict scrutiny have one common thread: they are aimed at keeping certain types of speech *away* from the public.").

founded. Allowing public officials to meet in private to discuss official business actually decreases the exchange of ideas. However, just because speech does not contribute to the marketplace of ideas does not mean that it is not deserving of protection.

In *Givhan v. Western Line Consolidated School District*, the Supreme Court recognized that the First Amendment protects the right to speak privately just as it protects the right to speak publicly.[101] In a discussion on the freedom of speech from his majority opinion, then-Justice Rehnquist wrote: "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately . . . rather than to spread his views before the public."[102] Though the First Amendment was designed and has been interpreted chiefly to allow for open access to the marketplace of ideas, this does not mean that speech made in private deserves no First Amendment protection. The Court has even recognized a right not to speak.[103] As a result, there is no reason to refuse protection for Texas public officials' speech rights based solely on the fact that the speech is in private rather than in public.

That public officials have some First Amendment rights when speaking in their official capacity, however, does not automatically mean that TOMA is unconstitutional. To decide TOMA's constitutionality, it is necessary to determine the extent to which TOMA infringes on free speech, weigh Texas's interests in enforcing TOMA, and analyze any potential alternatives that could achieve the same purpose as TOMA.

V. IS TOMA A CONTENT-BASED RESTRICTION?

TOMA applies only to speech by public officials regarding official business.[104] Discussion by members of a city council about Sunday's Cowboys game or the weather would not be subject to TOMA. Content-based regulations of speech are presumed to be unconstitutional.[105] Though it sounds tautological, a regulation of speech is content-based if it is not "facially content-neutral."[106] In *Burson v. Freeman*, the Supreme Court held that a regulation was content-based because it conditioned individuals' exercise of free speech rights

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[101] 439 U.S. 410 (1979).

[102] *Id.* at 415–16; *see also* Am. Booksellers v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) ("[T]he Constitution does not make the dominance of truth a necessary condition of freedom of speech.").

[103] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that the First Amendment prohibits a school from requiring students to salute the flag).

[104] TEX. GOV'T CODE ANN. § 551.001(2) (Vernon 2008) (defining "Deliberation" as "a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.").

[105] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

[106] Burson v. Freeman, 504 U.S. 191, 197 (1992).

"entirely on whether their speech [was] related to a political campaign."[107] Similarly, in *Republican Party of Minnesota v. White*, the Court considered the Minnesota Supreme Court's canon of conduct, which prohibited judicial candidates from discussing "their views on disputed legal or political issues."[108] The Court, in an opinion by Justice Scalia, held such a restriction to be content-based and in violation of the First Amendment.[109]

TOMA restricts only discussions involving content "concerning an issue within the jurisdiction of the governmental body or any public business."[110] The statute is not facially content-neutral, and therefore it is a content-based regulation of speech and is presumed to be unconstitutional. Judge Dennis's opinion in *Rangra II* comports with this analysis that TOMA is a content-based restriction.[111]

Texas could claim that, to the extent that TOMA is a restriction on speech, it is a time, place, and manner restriction on speech.[112] The Court has upheld such restrictions as constitutional.[113] However, time, place, and manner restrictions are not always constitutional.[114] In *Burson v. Freeman*, the Court limited the constitutionality of such restrictions: "[T]he government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication."[115] Because TOMA is not content-neutral, its constitutionality cannot be saved by claims that it is a time, place, or manner restriction.

Content-based regulations are not automatically unconstitutional. However, courts subject such laws to the highest level of scrutiny.[116] For TOMA to survive a constitutional challenge, it will have to pass a strict scrutiny analysis. Despite the popular myth that strict scrutiny is "'strict' in theory and fatal in fact,"[117] laws have a significant chance of surviving

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[107] *Id.*

[108] 536 U.S. 765 (2002).

[109] *Id.*

[110] TEX. GOV'T CODE ANN. § 551.001(2) (Vernon 2008).

[111] Rangra v. Brown, 566 F.3d 515, 518 (5th Cir. 2009).

[112] *See* Cole v. State, 673 P.2d 345, 350 (Colo. 1983) (per curiam) (upholding Colorado's Sunshine Law as a constitutional time, place, and manner restriction).

[113] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[114] Burson v. Freeman, 504 U.S. 191, 197 (1992).

[115] *Id.* (citing United States v. Grace, 461 U.S. 171, 177 (1983)).

[116] *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868 (1997) (applying "the most stringent review" to a content-based federal criminal law); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1269 (arguing strict scrutiny "provides 'the baseline rule' under the First Amendment for assessing laws that regulate speech on the basis of content.") (quoting Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 800 (1996) (Kennedy, J., concurring in part and dissenting in part)).

[117] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND L. REV. 793, 794 (2006) (quoting Gerald Gunther, *The Supreme Court,*

a strict scrutiny analysis. In an empirical study, Professor Adam Winkler found that "30 percent of all applications of strict scrutiny . . . result in the challenged law being upheld."[118] More specifically, Professor Winkler found that of the 222 laws subjected to strict scrutiny analysis for restricting free speech, 22% survived.[119] Similarly, state laws have a survival rate of 23%.[120] State laws restricting free speech, such as TOMA, have a 21% survival rate.[121] To withstand strict scrutiny, a law must be narrowly tailored to serve a compelling state interest, which cannot be achieved by less restrictive means.[122]

VI. TEXAS'S INTERESTS IN ENACTING AND ENFORCING TOMA

> [S]uppose the proceedings to be completely secret . . . that judge will be at once indolent and arbitrary: how corrupt so ever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.[123]

In 1827, Jeremy Bentham wrote against the Court of Star Chamber and other secret courts, and Americans have been organizing to fight for open government since before the Revolution. In 1765, John Adams published an essay in the *Boston Gazette* advocating for an informed citizenry in which he said, "whenever a general Knowledge and sensibility have prevailed among the People, Arbitrary Government and every kind of oppression have lessened and disappeared in Proportion."[124] To ensure knowledge among the people, the 1766 Boston Town Meeting initiated one of America's first open meetings policies, requiring its representatives to make the House of Representatives

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1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972)).

[118] Winkler, *supra* note 117, at 796.

[119] Winkler, *supra* note 117, at 815. Professor Winkler found that "free speech law is the area of law in which the most strict scrutiny cases arise (222 of 459), comprising 48 percent of all strict scrutiny applications in the federal courts during the covered period." *Id.* at 844.

[120] *Id.* at 818.

[121] *Id.* at 855.

[122] United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000).

[123] JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827).

[124] John Adams, *A Dissertation on the Canon and Feudal Law*, BOSTON GAZETTE, Sept. 30, 1765, in Robert Taylor et. al. eds., Papers of John Adams 108 (1977).

debates public.[125] The country has changed much over the past 240 years, and open meetings laws look very different from the Boston Meeting's public debate requirement. Nevertheless, the inherent interest remains the same: keep our institutions open and transparent or risk arbitrary laws, unaccountable officials, and an uninformed public.

The interest in open government is tempered by the government officials' constitutional right to free speech. Freedom of speech is a fundamental right guaranteed by the First Amendment. The next step in the strict scrutiny analysis is to look at the government interest furthered in restricting this fundamental right.[126] For a law to pass strict scrutiny, the government's interests must be compelling. Texas's interest in having an open meetings law is two-fold: (1) maintaining a free, transparent government;[127] and (2) enforcing the right of the people to access information.[128] Both interests are vital in a democracy.

A. Open Government

Texas believes open meetings are necessary to ensure open government, and that an "open government is the cornerstone of a free society."[129] TOMA "commits public officials at all levels of government to the principle of government in the sunshine."[130] Open meetings are a mechanism through which the public can communicate with the government and contribute to the decision-making process. In theory, by allowing for public involvement, open meetings result in a more informed populace better able to make more-educated decisions at the polls, which should result in a more representative government.

Without open meetings, governmental bodies are able to make

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[125] *Id.*

[126] *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); Fallon, *supra* note 116, at 1315–16 ("However the purposes of strict scrutiny are characterized, there are three crucial steps in applying the formula: (1) identifying the preferred or fundamental rights the infringement of which triggers strict scrutiny; (2) determining which governmental interests count as compelling; and (3) giving content to the requirement of narrow tailoring.").

[127] *See* Brief for The Reporters Committee, *supra* note 100, at 9 ("The Texas Open Meetings Act, like the open meetings laws in all 50 states and the federal government, promotes the First Amendment goals of open government and rigorous debate about matters of public concern."); *see also* Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for implementing new technologies consistent with Florida's position as a leader in open government*, 35 FLA. ST. U. L. REV. 245, 245–46 (2008) ("The philosophical underpinnings of open meetings laws are rooted in the concepts of democracy; the citizenry must be well informed in order to effectively self-govern. In addition to self-governance, open meetings laws contribute to a less corrupt, more efficient government and encourage more accurate news reporting.").

[128] *See* Va. Pharmacy Bd. v. Va. Consumer Counsel, 425 U.S. 748 (1976) (recognizing access to information as an important interest).

[129] Texas Attorney General, Open Government, http://www.oag.state.tx.us/open/index.shtml (last visited Apr. 24, 2010).

[130] Greg Abbott, Letter Introducing the Texas Open Meetings Handbook, in OPEN MEETINGS HANDBOOK 2008, *supra* note 5.

important decisions without any input from the people whom the decisions will affect most. Even where votes are cast in the open, neither the public nor the courts have any awareness of the intent, purpose, or evolution of the outcome if the deliberations are held in secret. Thus, interpreting laws and decisions made behind closed doors can become an arduous and, likely, inaccurate task.

In addition to TOMA, Texas has a Public Information Act (PIA),[131] which "gives the public the right to request access to government information."[132] Under the PIA, people can request that the government disclose certain information or documents in the government's control.[133] Pursuant to the PIA, the Office of the Attorney General publishes thousands of Open Records Letter Rulings, which help illustrate the application of the PIA.[134] To address more novel questions regarding the construction of the PIA, the Office of the Attorney General issues formal opinions, known as Open Records Decisions.[135] All of these policies further Texas's interest in ensuring open government.

B. Right to Access Information

Aside from the policy arguments in favor of open and transparent government, amici have argued that open meetings laws are simply statutory reiterations of "the public's right to attend government proceedings."[136] This alleged right comes from the line of cases protecting the right to receive information.[137] The first of such cases contemplated by the Supreme Court was *Martin v. City of Struthers*, which struck down an ordinance prohibiting a Jehovah's Witness who, while distributing handbills, summoned people from inside their homes.[138] When discussing the First Amendment, the Court said, "This freedom embraces the right to distribute literature, and necessarily

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[131] TEX. GOV'T CODE ANN. §§ 552.001–552.353 (Vernon 2008).

[132] ATTORNEY GENERAL GREG ABBOTT, PUBLIC INFORMATION 2008 HANDBOOK (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf. The preamble to the PIA, which states its purpose and effect, is discussed *infra*, note 209.

[133] TEX. GOV'T CODE ANN. § 552.221 (Vernon 2008).

[134] *See* Texas Attorney General, Open Letter Rulings, http://www.oag.state.tx.us/open/index_orl.php (last visited Apr. 24, 2010).

[135] *See* Texas Attorney General, Open Records Decisions, http://www.oag.state.tx.us/open/ogindex.shtml (last visited Apr. 24, 2010).

[136] Brief for The Reporters Committee, *supra* note 100, at 4. *But see* Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 404–05 (1979) (Rehnquist, J., concurring) (stating, "it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings."); Houchins v. KQED, 438 U.S. 1, 16 (Stewart, J., concurring) ("The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government.").

[137] HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 12–14 (1999).

[138] 319 U.S. 141 (1943).

protects the right to receive it."[139] The next important case regarding the right to receive information was *Lamont v. Postmaster General*, in which the Court struck down a statute that restricted the freedom to receive communist propaganda through the mail.[140] Justice Brennan, in a concurring opinion, wrote, "I think the right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[141] The most important case in this area is *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, wherein the Court struck down a Virginia prohibition on pharmacy advertising for prescription drugs.[142] The Court held that "where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both."[143]

These "right to receive" cases all articulate a negative right—they prevent the government from prohibiting the receipt of information rather than affirmatively requiring the government to publish information. They all involve willing speakers and recipients, whose communication is being interrupted by the government. The closest the Supreme Court has come to placing an affirmative duty on a government speaker was in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.[144] In *Pico*, the Court enjoined a school district from removing books from school libraries when those books were removed as a result of their political and social content.[145] Still, *Pico* does not place an obligation on the school district to purchase and shelve additional books; it merely prevents the school from removing the books.

The Supreme Court has recognized that the Framers constructed the First Amendment with knowledge of the revolutionaries' struggle for open government under British rule.[146] Justice Sutherland wrote: "The aim of the struggle was . . . to establish and preserve the right of the . . . people to full information in respect of the doings or misdoings of their government."[147] However, the people's right to access information generally prohibits the government from preventing access to information—it does not affirmatively require the government to be open. Justice Brandeis, in his famous concurring opinion in *Whitney v.*

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[139] *Id.* at 143 (internal citations omitted).
[140] 381 U.S. 301 (1965).
[141] *Id.* at 308 (quoted in FOERSTEL, *supra* note 137, at 13).
[142] 425 U.S. 748 (1976). *Virginia Board of Pharmacy* is most famous because it included commercial speech under the protection of the First Amendment, but it also has important implications with the right to receive information.
[143] *Id.* at 756.
[144] 457 U.S. 853 (1982).
[145] *Id.*
[146] *See* Grosjean v. Am. Press Co., 297 U.S. 233, 247–49 (1936).
[147] *Id.* at 247.

California,[148] accurately articulated that the point of the First Amendment is to cultivate an informed populace,[149] but to do so by *allowing* people to discuss issues publicly.[150] He makes no mention of requiring discussions be made in public.[151]

The Texas Open Meetings Act, on the other hand, places an affirmative duty on public officials to speak openly, and places criminal sanctions on those who refuse. Most analogous is the Court's rejection of compelled speech in cases such as *Miami Herald Publishing Co. v. Tornillo*.[152] *Tornillo* struck down as unconstitutional a Florida "right to reply" statute that required newspapers to allow equal space to political candidates who sought to respond to editorial or endorsement content.[153] TOMA is similar to the Florida statute struck down in *Tornillo* because both laws require that issues be discussed publicly. A private apology by the Miami Herald would not have satisfied the Florida right-to-reply statute's requirement, just as private discussions of official business would violate TOMA. The Court struck down the Florida statute because it forced newspapers to provide political candidates with a *public* opportunity to respond to criticism. Similarly, TOMA requires that discussions of official business be done *publicly*.

To support the constitutional interpretation advocated in this Note, it is not necessary to deny the existence of a right to receive information; the Court has explicitly recognized such a right. However, the right to receive information is a negative right that prevents the government from intercepting communications between willing speakers and listeners. Construing the First Amendment to allow the government to compel speech is not supported by First Amendment jurisprudence.

Although no positive right of the people to attend government proceedings exists, Texas's interest in promoting open governance and ensuring the people's right to access information is compelling. However, a compelling interest alone is not enough to survive strict scrutiny. The interests furthered by the act must also be narrowly tailored. The most basic articulation of the narrow-tailoring requirement is that "the government's chosen means must be 'the least restrictive alternative' that would achieve its goals."[154] Professor Fallon interprets

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[148] 274 U.S. 357, 372 (1927).

[149] *Id.* (They believed that "the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

[150] *See id.* ("They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.").

[151] *See id.* at 375–76 ("[T]hey eschewed silence *coerced* by law—the argument of force in its worst form." (emphasis added)). Brandeis does not express any concern for *allowing*, as opposed to *coercing*, silence. Granted, the Court was not confronted by an open government requirement in *Whitney*, so it is possible that this inference is overstretched.

[152] 418 U.S. 241 (1974).

[153] *Id.* at 256. The Court held that the statute was unconstitutional because it was "[c]ompelling editors or publishers to publish that which 'reason' tells them should not be published . . . ."

[154] Fallon, *supra* note 116, at 1326 (quoting Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656,

the least restrictive alternative element to "insist[] that infringements of protected rights must be *necessary* in order to be justified."[155] An infringement is not necessary if the government can accomplish the same result with a less burdensome restriction on the protected right.[156] Assuming that other jurisdictions are attempting to advance similar interests in their open meetings laws, it is helpful to survey those laws to see if the compelling interests could be achieved through less restrictive means.

VII. OPEN MEETINGS LAWS ACROSS THE COUNTRY

Each of the fifty states, the District of Columbia,[157] and the United States[158] have open meetings laws.[159] The statutes are all relatively similar in requiring meetings be open and in providing for some form of punishment or sanction for violations of the law. However, other than Texas, only eighteen states have criminal sanctions as part of their open meetings laws. They are listed below, organized by circuit:

First and Second Circuits: No states in the First or Second Circuits have criminal provisions in their open meetings laws.

Third Circuit: In Pennsylvania, any member of an agency who intentionally participates in a meeting that violates the open meetings law is guilty of a summary offense and can be subject to a fine not to exceed $100.[160]

Fourth Circuit: In South Carolina, it is a misdemeanor to willfully violate the open meetings law. Such a crime is punishable by: a fine of not more than $100 and thirty days' imprisonment for the first offense; a fine of not more than $200 and sixty days imprisonment for the second offense; and a fine of not more than $300 and ninety days imprisonment for the third and all subsequent offenses.[161]

In West Virginia, it is a misdemeanor for any member of a public or governmental body subject to the open meetings law to willfully and knowingly violate the law. Such a crime is punishable by a fine of no more than $500 for the first offense, and between $100 and $1000 for the second and subsequent offenses.[162]

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666 (2004)).

[155] *Id.* (emphasis added).

[156] *Id.*

[157] D.C. CODE § 1-207.42 (2009).

[158] Government in the Sunshine Act, 5 U.S.C. § 552b (2004).

[159] *See* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE (2006) *available at* http://www.rcfp.org/ogg/index.php.

[160] 65 PA. CONS. STAT. § 714 (2009).

[161] S.C. CODE ANN. § 30-4-110 (2009).

[162] W. VA. CODE § 6-9A-7(a) (2010).

Fifth Circuit: Texas is the only state in the Fifth Circuit to have a criminal provision in its open meetings law.[163]

Sixth Circuit: In Michigan, it is a misdemeanor to intentionally violate the open meetings law; such a crime is punishable by a fine not to exceed $1000 for first offense, and not to exceed $2000 and a year of imprisonment for a second violation within the same term.[164]

Seventh Circuit: In Illinois, it is a Class C Misdemeanor to violate any of the provisions of the open meetings law.[165] Such a crime is punishable by imprisonment of not more than thirty days and by a fine not to exceed $1500.[166]

Eighth Circuit: A person who violates the Arkansas open meetings law is guilty of a Class C Misdemeanor,[167] and can be punished by no more than thirty days in jail. The statute also provides a possible fine up to $250.[168]

For a first offense in Nebraska, it is a Class IV misdemeanor for any member of a public body to knowingly violate or conspire to violate the act, or to attend or remain at a meeting knowing that the body is in violation of the act; it is a Class III misdemeanor for the second offense.[169] Class III misdemeanors are punishable by imprisonment of up to thirty days and a fine of no greater than $500, and Class IV misdemeanors carry a fine of up to $500 and can be punishable by imprisonment for up to three months.[170]

Violation of the South Dakota open meetings law is a Class 2 misdemeanor,[171] which can result in a criminal penalty of up to thirty days in jail and a fine of up to $500.[172]

Ninth Circuit: In California, it is a misdemeanor for a member of a state or legislative body to attend a meeting in violation of the Open Meeting Act, where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under the Act.[173] Such a crime is punishable by imprisonment not exceeding six months, or by a fine not exceeding $1000, or by both.[174]

In Nevada, it is a misdemeanor for a member of a public body to attend a meeting of that public body where action is taken in violation of the open meetings law, with knowledge of the fact that the meeting is in

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[163] For a discussion of the Texas Open Meetings Act, see Part I, *supra*.
[164] MICH. COMP. LAWS § 15.272 (2004).
[165] 5 ILL. COMP. STAT. 120/4 (2010).
[166] 730 ILL. COMP. STAT. 5/5-4.5-65 (2009).
[167] ARK. CODE ANN. § 25-19-104 (West 2005).
[168] *Id.* § 5-4-401.
[169] NEB. REV. STAT. § 84-1414(4) (2009).
[170] *Id.* § 28-106(1).
[171] S.D. CODIFIED LAWS § 1-25-1.1 (2009).
[172] *Id.* § 22-6-2.
[173] Bagley-Keene Open Meeting Act, CAL. GOV'T CODE § 11130.7 (West 2009).
[174] CAL. PENAL CODE § 19 (West 1999).

violation of the law.[175] It is also a misdemeanor to wrongfully exclude someone from a meeting.[176] Such a crime may be punished by imprisonment for not more than six months, or by a fine of not more than $1000, or by both fine and imprisonment.[177]

In Hawaii, it is a misdemeanor to violate any provision of the open meetings law;[178] such a crime is punishable by a fine of not more than $2000.[179]

Tenth Circuit: In New Mexico, it is a misdemeanor to violate the open meetings law, punishable by a fine of not more than $500.[180]

In Utah, a member of a public body who knowingly or intentionally violates or advises a violation of any of the closed meeting laws is guilty of a Class B Misdemeanor,[181] punishable by not more than six months' imprisonment[182] and a fine of not more than $1000.[183]

In Oklahoma, willful violations of the open meetings law are misdemeanors, punishable by a fine not to exceed $500, one-year imprisonment, or both.[184]

In Wyoming, it is a misdemeanor, punishable by a fine not to exceed $750, for any member of an agency to knowingly and willfully violate or conspire to violate the open meetings law.[185]

Eleventh Circuit: In Florida, any board or commission member who knowingly breaks the open meetings law is guilty of a misdemeanor of the second degree,[186] punishable by up to sixty days in jail[187] and a $500 fine.[188]

In Georgia, it is a misdemeanor, punishable by a fine of up to $500, to knowingly and willfully conduct or participate in a meeting in violation of the open meetings law.[189]

The above survey shows that twelve of the nineteen states with criminal provisions include imprisonment as an option for punishment: South Carolina, Texas, Illinois, Michigan, Arkansas, Nebraska, South Dakota, California, Nevada, Utah, Oklahoma, and Florida. The remaining states have a variety or combination of alternative

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[175] NEV. REV. STAT. § 241.040(1) (2008).
[176] *Id.* § 241.040(2).
[177] *Id.* § 193.150.
[178] HAW. REV. STAT. § 92-13 (2009).
[179] *Id.* § 706-640.
[180] N.M. STAT. § 10-15-4 (2009).
[181] UTAH CODE ANN. § 52-4-305 (2009).
[182] *Id.* § 76-3-204.
[183] *Id.* § 76-3-301.
[184] OKLA. STAT. tit. 25, § 314 (2009).
[185] WYO. STAT. ANN. § 16-4-408 (2009).
[186] FLA. STAT. § 286.011(3)(b) (2009).
[187] *Id.* § 775.082(4)(b).
[188] *Id.* § 775.083(1)(e).
[189] GA. CODE. ANN. § 50-14-6 (2009).

enforcement provisions: civil fines,[190] voiding any action taken by the governmental body while in closed session,[191] or even removal from office.[192]

Open meetings laws in other states have survived constitutional challenges.[193] Indeed, courts,[194] amici,[195] and commentators[196] have cited such unsuccessful challenges in support of the constitutionality of TOMA. However, none of the challenged laws contained criminal provisions. The Kansas Supreme Court upheld the Kansas Open Meetings Act (KOMA)[197] in *State ex rel. Murray v. Palmgren* against three county commissioners' vagueness and overbreadth challenges.[198] KOMA violators are not subject to criminal sanctions; rather, they are "liable for the payment of a civil penalty."[199] In upholding KOMA, the Kansas Supreme Court made a point of distinguishing the Act from a criminal law.[200] The Colorado Sunshine Law[201] was challenged in *Cole v. State*.[202] The Supreme Court of Colorado upheld the Colorado Sunshine Law as a reasonable time, place, or manner regulation that furthered an important government interest because the "restraints on appellant's freedom of speech are reasonable and justified . . . ."[203] Nevertheless, the Colorado Sunshine Law's civil penalties put a lesser restraint on free speech than TOMA's criminal sanctions. The Supreme Court of Minnesota upheld Minnesota's Open Meeting Law[204] in *St. Cloud Newspapers, Inc. v. District 742 Community Schools*.[205] Like the Kansas and Colorado laws, Minnesota's Open Meeting Law did not contain a provision for criminal penalties.[206]

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[190] These civil fines vary in their severity. *E.g.*, Louisiana Open Meetings Law, LA. REV. STAT. ANN. § 42:13 (2006) (up to $100 per violation); Missouri Sunshine Law, MO. REV. STAT. § 610.027(4) (2000) (up to $5000 for a purposeful violation).

[191] *E.g.*, North Carolina Open Meeting Law, N.C. GEN. STAT. § 143-318.16A(a) (2009).

[192] *E.g.*, Arizona Open Meetings Law, ARIZ. REV. STAT. ANN. § 38-431.07(A) (2009) (at the court's discretion).

[193] *See, e.g.*, State *ex rel.* Murray v. Palmgren, 646 P.2d 1091 (Kan. 1982); Cole v. State, 673 P.2d 345 (Colo. 1983) (per curiam); St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch., 332 N.W.2d 1 (Minn. 1983).

[194] *Rangra I*, 2006 WL 3327634, at *6 (W.D. Tex. 2006).

[195] *See* Brief for The Reporters Committee, *supra* note 100, at 1, 12–13.

[196] Duncan, *supra* note 4, at 321.

[197] KAN. STAT. ANN. §§ 75-4317–75-4320a (2009).

[198] 646 P.2d 1091 (Kan. 1982).

[199] KAN. STAT. ANN. § 75-4320(a).

[200] 646 P.2d at 1097–98, 1101 (differentiating KOMA from a penal statute for determining the strictness of construction appropriate for judicial review).

[201] COLO. REV. STAT. § 24-6-402 (2009).

[202] 673 P.2d 345 (Colo. 1983) (per curiam).

[203] *Id.* at 350.

[204] MINN. STAT. § 13D.06 (2005).

[205] 332 N.W.2d 1 (Minn. 1983).

[206] MINN. STAT. § 471.705(13D.06) ("Any person who violates . . . [the Law] shall be subject to personal liability in the form of a civil penalty.").

VIII. ALTERNATIVES TO TOMA

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. As a result, TOMA fails the strict scrutiny analysis's narrow-tailoring requirement, and thus violates the First Amendment. As news coverage demonstrates, public officials in Texas have not given up the fight against restricting their speech.[207] TOMA remains the subject of litigation, and the new suit has chosen a wide enough class of plaintiffs to avoid the mootness problem,[208] hopefully forcing the courts to answer the constitutional questions presented. The widespread existence of similar open meetings laws indicates that this issue will likely be litigated in multiple circuits, which may result in a split. The eventual striking down of TOMA's criminal sections will force Texas to draft a new open meetings law. Rather than waiting for the Supreme Court to strike down TOMA's criminal provisions, Texas should be proactive and redraft TOMA to comply with the First Amendment. Fortunately, there are numerous models to consider in drafting the new law, including existing Texas laws.

The new TOMA should begin with a statement of purpose, similar to that in the Public Information Act.[209] A statement of purpose helps to set the tone and formalizes the interests furthered by the act. Many other states' open meetings laws include statements of purpose.[210] Because the only unconstitutional provisions of the existing TOMA are those concerning criminal punishment for violations, much of the Act can remain the same.[211] Other than adding a statement of purpose, the only

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[207] *E.g.*, Pipitone, *supra* note 54.

[208] *See* Plaintiff's Original Complaint at 1, City of Alpine v. Abbott (2009) (No. 09-CV-59).

[209] TEX. GOV'T CODE ANN. § 552.001(a) (Vernon 2008) ("Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.").

[210] *E.g.*, New York Open Meetings Law, N.Y. PUB. OFF. LAW § 100 (McKinney 2008) ("It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.").

[211] The Texas Legislature should also consider the suggestions made by Mandi Duncan in her comment on TOMA's vagueness. *See* Duncan, *supra* note 4. Ms. Duncan makes good suggestions related to changing the definition of "meeting"; however, she does not advocate removing the criminal sections, which is constitutionally necessary. *Id.* at 328–30.

part of TOMA that should be changed is Subchapter G: Enforcement and Remedies; Criminal Violations. The criminal violations need to be removed, both from the title of the subchapter and from the text of the Act.

TOMA should retain the provision allowing for all actions taken during an unlawful closed meeting to be voidable.[212] Texas has a legitimate concern regarding the danger of secret decision-making; official action taken during a closed meeting should therefore have no effect. Section 142, which grants standing to any "interested person" and allows for "reasonable attorney fees" should remain; however, an "interested person" should be defined as "any resident of the region subject to the jurisdiction of the governmental body against which the complaint is directed." Thus, any Texas resident would have standing to sue a member of the Texas Legislature, just as any Alpine resident would have had standing to sue Mr. Rangra and Ms. Monclova. The harm in hidden decision-making is suffered by society as a whole; therefore, as wide a population as is reasonable should have standing to seek enforcement of the Act. Granting such broad standing will eliminate the need for direct governmental enforcement.

Allowing attorney's fees will further obviate the need for governmental enforcement by providing an incentive for attorneys to enforce TOMA. One concern with awarding attorney's fees against public officials is that the government will indemnify the public official, and indemnification would nullify the purpose of punishing public figures. To combat such an outcome, the new TOMA should specify that "no state, municipal or other government can indemnify an individual liable under the Act."[213]

TOMA's criminal provisions, sections 551.143–551.146,[214] should be removed. A general provision on civil enforcement and remedies can address the interests protected by these unconstitutional sections. Allowing recovery of attorney's fees would serve as a sufficient punitive remedy,[215] making additional civil fines unnecessary. If a plaintiff can prove actual harm, compensatory damages should be allowed. However, to prevent public officials from drowning in litigation, the new TOMA should require plaintiffs suing for compensatory damages to show a particularized harm to have standing.

Many states choose to levy civil monetary fines on open meetings laws violators. Texas, however, should not include such a provision. In

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[212] TEX. GOV'T CODE ANN. § 551.141 (Vernon 2008).

[213] On a similar note, North Dakota's open meetings law requires public officers being sued for violations of the law to pay for their own counsel. N.D. CENT. CODE § 44-04-21.1(3).

[214] Section 143 criminalizes conspiracies to circumvent the requirements of the Act; section 144 criminalizes calling, participating in, or aiding a closed meeting in violation of the Act; section 145 criminalizes a governmental body member's participation in a closed meeting with knowledge that the meeting's agenda is not being followed or that the meeting is not being recorded; and section 146 criminalizes the unauthorized disclosure of the agenda or recordings of a lawfully closed meeting.

[215] Most open meetings laws have civil fines of around $500. *See* Reporters Committee for Freedom of the Press, *supra* note 3. Attorney's fees would be at least that high.

New York Times Co. v. Sullivan, the Supreme Court recognized the danger in excessive civil remedies.[216] That is not to say that the civil fines assessed by other states' open meetings laws are unconstitutional; the civil fines merely walk a dangerously fine line between constitutional and unconstitutional restrictions on speech.

As it stands today, the Texas Open Meetings Act is on the wrong side of that fine line. Although TOMA was enacted to further the compelling state interest of open and accountable government, it does not employ the least restrictive means to achieve that interest. Therefore, TOMA cannot survive strict scrutiny, and thus violates the First Amendment. Despite the Fifth Circuit's attempt to avoid the issue in *Rangra v. Brown*, free speech rights are alive and well for public officials like Mr. Rangra and Ms. Monclova. Public officials do not leave their constitutional rights behind when they take office.

[216] 376 U.S. 254, 277 (1964) ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.")