IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0254-18

THE STATE OF TEXAS

v.

CRAIG DOYAL, Appellee

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

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

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

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

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

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

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

I. VAGUENESS

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

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

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

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

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

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

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

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

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

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

redundant.

Id. He then concluded:

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

Id. at 21.

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

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

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

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

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

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

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

made that showing.

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

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

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

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

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

conduct.[4]

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

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

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

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

Section 551.143(a) provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Indeed, granting Appellee relief on his First-Amendment-enhanced due process void-for-vagueness argument, when the statute can readily be construed to admit of many valid applications, is to confuse the due-process vagueness analysis with the First Amendment overbreadth doctrine. *See id*. at 19 ("By deciding how the statute applied in hypothetical circumstances, the Court of Appeals' discussion of vagueness seemed to [erroneously] incorporate elements of First Amendment overbreadth doctrine."). And in doing so, the Court essentially grants Appellee relief on overbreadth grounds without inquiring whether he has satisfied his burden to establish an indispensable facet of such a claim—"that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

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

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

II. THE FIRST AMENDMENT

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

Opinions that delineate the First Amendment restrictions on criminal proscriptions

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

FILED: February 27, 2019
PUBLISH