

No. 06-51587

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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AVINASH RANGRA AND ANNA MONCLOVA,  
Plaintiffs-Appellants,

v.

FRANK BROWN AND GREG ABBOTT,  
Defendants-Appellees.

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On Rehearing *En Banc*

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BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE  
FOR FREEDOM OF THE PRESS AND 23 NEWS MEDIA ORGANIZATIONS  
IN SUPPORT OF DEFENDANTS-APPELLEES' BRIEF FOR REHEARING *EN BANC*

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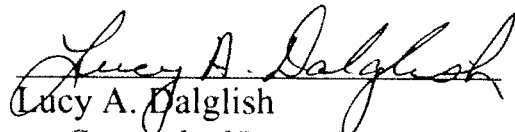
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## **INTEREST OF *AMICI***

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and freedom of information litigation since 1970. The Reporters Committee's interest in this case is in preserving public access to government meetings and information throughout the country under the framework of open meetings laws, which have been enacted by the 50 states, Washington, D.C., and the federal government.

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations that regularly gather and report news to the public. One such station is KTRK-TV, which covers Houston and Southeast Texas. ABC News produces the television programs *World News*, *20/20*, *Primetime*, *Good Morning America*, and *Nightline*, among others.

With some 600 members, ASNE is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in

1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership, and credibility of newspapers.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 5,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and maintains bureaus in 240 cities worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 121 countries.

The Association of Alternative Newsweeklies is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice, Austin Chronicle, and Houston Press. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of 7.5 million and a reach of more than 25 million readers.

The Association of Capitol Reporters and Editors was founded in 1999 and currently has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

Bloomberg News is a 24-hour global news service with more than 2,200 journalists in 108 bureaus around the world, with its world headquarters in New York City. Bloomberg News supplies real time business, financial, and legal news to more than 200,000 subscribers world-wide. As a wire service, Bloomberg provides news to more than 500 newspapers globally. Bloomberg News also provides daily radio and television programming throughout the world through its 750 radio affiliates and on WBBR radio, broadcast over the air in New York City and nationwide over XM, Sirius, and WorldSpace Networks. Bloomberg.com is accessible from anywhere in the world online and is visited by more than 2 million readers each month. Bloomberg News also operates a 24-hour cable news television outlet, which often brings to the coverage of important legal and governmental matters in the public interest. Bloomberg also publishes two monthly magazines. Its Bloomberg Press division publishes more than 50 book titles each year.

The E.W. Scripps Company is a diverse media enterprise with 13 daily newspapers and numerous weekly publications reaching approximately 1 million readers, nine broadcast television stations, five national cable networks that reach more than 90 million households, an electronic commerce and interactive media division and licensing and syndication division. Scripps owns four Texas

newspapers: the *Corpus Christi Caller-Times*, the *Wichita Falls Times Record News*, the *Abilene Reporter-News*, and the *San Angelo Standard-Times*.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst's major interests also include ownership of 29 broadcast stations which reach a combined 18 percent of U.S. viewers; interests in several cable television networks; Internet businesses; and a leading newspaper features syndicate.

MediaNews Group is one of the largest newspaper companies in the United States. It operates 54 daily newspapers in 11 states, with combined daily and Sunday circulation of approximately 2.4 million and 2.7 million, respectively. Each of its newspapers maintains a Web site focused on local news content, hosted by MediaNews Group Interactive. MediaNews Group also owns a television station and operates several radio stations. MediaNews, including its 14 newspapers and four radio stations in Texas, regularly rely on open meetings laws such as those at issue in this case to provide vital information to the public about the deliberations and decisions of legislative bodies.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,500 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club

holds more than 2,000 events including news conferences, luncheons, and panels, and more than 250,000 guests come through its doors.

The New York Times Company is the publisher of The New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates WQXR-FM and more than 50 websites, including nytimes.com, Boston.com and About.com.

The Newspaper Association of America is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

Newsweek, Inc. is a wholly owned subsidiary of The Washington Post Company, a publicly held corporation traded on the New York Stock Exchange. Newsweek, Inc. publishes the weekly news and ideas magazines *Newsweek* and *Newsweek International*, distributed nationally and internationally, respectively; Newsweek.com; Arthur Frommer's Budget Travel magazine, distributed nationally; and BudgetTravel.com.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism.

RTNDA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reuters America LLC is a wholly owned indirect subsidiary of Thomson Reuters PLC. Thomson Reuters is the world's leading source of intelligent information for business and professionals in the financial, legal, tax and accounting, scientific, healthcare and media markets, powered by Reuters, the world's largest international news agency.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Stephens Media LLC is a nationwide newspaper publisher with operations ranging from North Carolina to Hawaii. Its largest newspaper is the *Las Vegas*

*Review-Journal*. The company also publishes the *Herald-Democrat*, a daily newspaper in Sherman, Texas, as well as several weeklies in north Texas.

The Student Press Law Center is a national, nonprofit, non-partisan organization established in 1974 to provide information about and advocate for the free expression rights of student journalists and newspapers. As the only national legal assistance agency devoted exclusively to defending the rights of the student press, SPLC has collected and analyzed student press cases nationwide, and has submitted numerous *amicus* briefs to federal courts of appeals and to the United States Supreme Court.

The Texas Association of Broadcasters is a nonprofit organization representing the interests of more than 1,300 free, over-the-air broadcast television and radio stations licensed by the Federal Communications Commission to serve their local communities. A primary goal of the Association is to protect newsrooms' and citizens' access to information on how elected officials and government entities operate and to their decision-making processes.

The Texas Daily Newspaper Association is a non-profit trade association representing the publishers of Texas daily newspapers that was formed in 1921. The 61-member association provides a myriad of services to its members, including legislative affairs, an internship program, industry-related surveys and an annual meeting.

The Texas Press Association is a non-profit corporation representing the interests of more than 500 daily and weekly newspapers in the state of Texas. The association's mission is to promote and preserve the future of Texas newspapers.

The Tribune Company operates businesses in publishing, interactive and broadcasting, including eight daily newspapers including the *Los Angeles Times*, *Chicago Tribune*, *Baltimore Sun*, and *Hartford Courant*; 23 television stations; a cable news channel; WGN Radio; and WGN America. Directly affected by the decision in this case are Tribune's television stations in Dallas and Houston, Texas, and New Orleans, Louisiana, which cover news through their broadcasts and Web sites.

*The Washington Post* is a leading newspaper with a nationwide daily circulation of over 647,000 and a Sunday circulation of over 878,000.

#### **SUMMARY OF ARGUMENT**

The *en banc* Court, having vacated the panel decision of this Court by grant of the petition for rehearing, should affirm the district court's ruling in favor of the Defendants-Appellees as it correctly concludes the Texas Open Meetings Act does not regulate speech and adequately weighs the First Amendment interests at issue. *Rangra v. Brown*, No. P-05-CV-075 (W.D. Tex. 2006) (App. to Plaintiffs-Appellants' Br. at 103-104.) This case came before the district court and a panel of this Court on constitutional arguments of overbreadth and vagueness, and was

decided at the district court on such grounds. (App. to Plaintiffs-Appellants' Br. at 90.) These are the traditional arguments asserted when challenging constitutionality of open meetings laws. *See Kansas ex rel. Murray v. Palmgren*, 646 P.2d 1091, 1099 (Kan. 1982). The Texas Open Meetings Act survived this challenge in the district court.

The district court considered all aspects of First Amendment jurisprudence and the policies that underlie these open government laws. It correctly applied the relevant case law from the few instances where open meetings statutes have been constitutionally challenged as general violations of free speech and association rights and found the Texas statute was not overbroad or vague. The panel's ruling, however, erroneously held that the statute must be analyzed under the much more exacting strict scrutiny standard, an application without precedent in any other constitutional challenge to open meetings laws or the other laws that its decision would affect. *Amici curiae* urge the *en banc* Court to affirm the lower court opinion, which recognizes government *action* is at issue, not *speech*, and find the Texas open meetings law meets the established standards as neither vague nor overbroad.

## ARGUMENT

### I. **The Court did not have the opportunity to consider the far-reaching effects of the panel decision on open government laws that mirror the Texas law in structure.**

The district court analyzed the Texas Open Meetings Act, § 551.144, as government regulation of itself and properly concluded the law was in concert with the First Amendment. The panel's decision however, did not reach this same conclusion because it focused instead on subjecting the statute to strict scrutiny in an effort to protect the elected officials' First Amendment Rights. In contrast, the district court's reasoning took into account the purposes served by such statutes: facilitating open government and the functioning of democracy. It liberally quoted the Kansas Supreme Court:

Appellants argue the [Kansas Open Meetings Act] has a potential inhibiting effect on the 'rights of public officials to assemble and discuss public affairs.' It is urged citizens have the right to unfettered discussion of governmental affairs in private while retaining anonymity. Appellants' claim reveals a basic misconception regarding the nature of a public official's position. The First Amendment does indeed protect private discussions of governmental affairs among citizens. **Everything changes, however, when a person is elected to public office.** Elected officials are supposed to represent their constituents. In order for those constituents to determine whether this is in fact the case they need to know how their representative has acted on matters of public concern. Democracy is threatened when public decisions are made in private. Elected officials have no constitutional right to conduct governmental affairs behind closed doors. Their duty is to inform the electorate, not hide from it. The KOMA places no constraints on purely private discussions by public officials.

*Palmgren*, 646 P.2d at 1099 (emphasis of district court).

This analysis reflects an understanding of the importance of open meetings laws throughout a democratic country, one which the panel decision of this Court failed to consider when it applied a rigorous strict scrutiny standard to the Texas statute. In almost every instance, meetings of the executive branch at the local, state, and federal level fall under the rubric of open government laws. The laws allow reporters to attend meetings and facilitate accurate news reporting, thus helping the public hold their elected officials accountable for their actions.

All states and the District of Columbia have statutes similar to the Texas law providing citizens with a right to attend the meetings of their government bodies. *See* The Reporters Committee for Freedom of the Press, *Open Government Guide* (5th ed. 2006) available at <http://www.rcfp.org/ogg/> (compendium of open records and open meetings laws in the United States). Most of these laws were passed about 50 years ago and are similar in structure. Christopher W. Deering, *Closing the Door on the Public's Right to Know: Alabama's Open Meetings Law After Dunn v. Alabama State University Board of Trustees*, 28 *Cumb. L. Rev.* 361, 366-67 (1997-98). They were largely the product of press and public frustration at being shut out of public discussions and were designed to increase access to such meetings. *Id.*

One state in this circuit views the public's right to attend government proceedings as so fundamental it has enshrined it in the Louisiana state constitution. *See e.g.*, La. Const. Article XII, § 3 (1974) ("No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law."). Open meetings laws are also in effect at the federal level. *See* Government in the Sunshine Act, 5 U.S.C. § 552b(b); Federal Advisory Committee Act, 5 U.S.C. App. 2. These laws complement the open records laws in each of the states and the federal Freedom of Information Act. *See Open Government Guide*; Freedom of Information Act, 5 U.S.C. § 552.

Open meetings laws exist within a broader framework of open government laws that require elected and appointed government officials to disclose personal information about their finances. *See* Ethics in Government Act, 5 U.S.C. § 501. This is done in part to ensure citizens know and understand whether and how elected officials' finances could potentially affect their actions. *See generally* Bipartisan Campaign Reform Act of 2002 ("McCain-Feingold Act") 2 U.S.C. § 434 (2002); Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601; American Bar Association Model Judicial Conduct Rule 2.11.

The Texas open meetings law fits squarely within this broad framework of open government laws in both spirit and letter, a factor which was not taken into account by the panel's decision. Despite Plaintiffs-Appellants' contentions, the

statute mirrors many statutes throughout the country in imposing criminal penalties, including jail time. (See Plaintiffs-Appellants' Br. Reh'g En Banc 18-21.) The Texas statute, § 551.144, explicitly requires the member of the public body *knowingly* participate in a closed meeting to be punished with a fine or confinement in a county jail of between thirty days and six months. Several other states have similar or more severe punishments. *See, e.g.*, Ark. Code Ann. § 25-10-104, §§ 5-4-104, 201, 401 (fine of no more than \$100 and/or jail term of up to thirty days); Cal. Gov't Code § 54959; Cal. Penal Code § 19 (fine of up to \$1,000 and/or six months in jail); Colo. Rev. Stat. § 24-72-201 (term of up to ninety days in jail); Fla. Stat. § 286.011(3)(b), 775.082(4)(a), 775.083(a)(d) (fine of up to \$1,000 and/or up to *one year* in jail); N.D. St. § 12.1-3201 (fine of up to \$2,000 or *one year* in jail); Neb. Rev. Stat. §§ 84-712.09, 28-106 (fine of up to \$500 or three months in jail); Nev. Rev. St. §§ 241.040, 193.150 (fine of up to \$1,000 or six months in jail); Okla. Stat. Ann. Tit. 25, § 314 (term of up to *one year* in jail); S.C. Code Ann. § 3-4-110 (term of thirty to ninety days in jail); S.D. Codified Laws § 22-6-2 (up to \$200 fine and/or thirty days in jail). Indeed, five states have jail terms equivalent to or longer than the Texas law provides, not merely one as the Plaintiffs-Appellants contend. (Plaintiffs-Appellants' Br. Reh'g En Banc 18-21.) The Texas statute fits well within the bounds of these state open meetings laws.

Plaintiffs-Appellants also assert that under the Texas statute officials cannot know when the statute applies to them, as there is “not a time, place or manner to distinguish when the official is speaking in his or her capacity, and when he or she is speaking as a fellow citizen.” (Plaintiffs-Appellants’ Br. Reh’g En Banc 21.)

This is not the situation — Texas is in line with many states on these issues.<sup>1</sup> The Texas statute is directed at situations where there is a quorum of the public body and therefore a public meeting, by definition.<sup>2</sup> Other states consistently define meetings as expansively as does Texas. Indeed, some states such as Colorado require only two members of a public body to be present before the open meetings law applies. *See* Col. Rev. Stat. § 24-6-402(2)(a) (“All meetings of two or more members of any state public body at which any public business is discussed or at

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<sup>1</sup> *See, e.g.*, Cal. Gov’t. Code § 54952.2 (stating, generally, that members are not considered to be in a “meeting” for the purposes of the law if they engage in individual conversations or if even a majority of members are present at a conference, public discussion, social or ceremonial occasion, or in other instances); Colo. Rev. Stat. § 24-6-402(2)(a) (stating that meetings including two or more members of a public body must be open to the public); Fla. Stat. § 286.011 (stating that “all meetings” where “official acts are to be taken are declared to be public meetings open to the public at all times”).

which any formal action may be taken are declared to be public meetings open to the public at all times.”). The Appellants, as elected officials, surely are aware when they have formed a quorum of the body on which they serve — and thus that all discussion and action in those settings are within their ‘official capacity’. No one asserts, as they apparently believe, that “talking about public issues with other members of the council . . . is a crime” under the statute. (Plaintiffs-Appellants’ Br. Reh’g En Banc 21.) It is only a *quorum* of the council talking about public issues outside of an open meeting that has the *potential* to be a crime — a line no doubt aimed at preventing laws from being made and enforced in secret.

Indeed, these open government laws are designed to provide citizens a method of communicating with their government, whether it is through participation in open meetings, comments on proposed regulations, or an informed decision to not take part in government action based on details available to them. The Texas statute is a crucial part of this system of laws, and to call into question its constitutionality is to call into question the constitutionality of these similar statutes.

**II. Strict scrutiny is not appropriately applied to a statute that regulates government action rather than individual speech.**

The District Court appropriately did not apply strict scrutiny to the Texas open meetings law as it is not the type of statute that should be subject to strict

scrutiny analysis, which would require a showing that any compelling state interest must be furthered only by the least restrictive means. The Supreme Court has reserved strict scrutiny for cases determining the constitutionality of regulations that “suppress, disadvantage, or impose differential burdens upon speech because of its content.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). The Court first applied a form of heightened scrutiny in a First Amendment case in 1957, *see generally*, Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal. Hist. 355 (2006) (citing *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)), and since then the use of the strict scrutiny standard has been reserved only for content-based restrictions on speech.

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. *See, e.g., Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 94 (1972) (applying strict scrutiny and holding unconstitutional a city ordinance that banned all picketing outside schools except when it concerned labor disputes); *Boos v. Barry*, 485 U.S. 312, 334 (1988) (holding that a city ordinance that prevented people from carrying signs criticizing foreign governments within 500 feet of an embassy was an unconstitutional content-based regulation that did not meet strict scrutiny); *Simon and Schuster v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (holding that New York’s “Son of

Sam” statute that regulated the income made from a serial killer’s story was an unconstitutional content-based restriction subject to strict scrutiny); *U.S. v. Playboy*, 529 U.S. 803, 826-27 (2000) (holding that a law requiring adult-oriented cable channels to scramble or limit their programming during certain hours of the day was an unconstitutional content-based restriction that failed to meet strict scrutiny).

Ordinances and regulations like these prohibit individuals from discussing certain topics in public forums, regulate the content that can be aired on cable channels, and curb protests based on their messages. These are the types of laws traditionally subjected to strict scrutiny in an effort to prevent government from stifling public debate.

To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’

*Mosley*, 408 U.S. at 95-96 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964)).

The panel’s decision correctly concluded that the above-mentioned cases support application of strict scrutiny *only* to speech regulations that are content based. But it erred in concluding that TOMA is a content-based regulation of

speech. At footnote 10 of its opinion, the panel recognized that the purpose of applying strict scrutiny to regulations burdening speech is to protect a person's right to "decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that stifles speech on account of its message . . . contravenes this essential right." *Rangra v. Brown*, 566 F.3d 515, 520 n.10 (5th Cir. 2009) (quoting *Turner Broad. Sys.*, 512 U.S at 641). However, these cases truly stand for the proposition that strict scrutiny is only properly applied when laws restrict a person's core First Amendment rights. The panel's reasoning failed to recognize that TOMA preserves, not restricts, citizens' core First Amendment rights by keeping government officials accountable for their actions.

The Texas statute is not the type of law that should be subject to analysis under a strict scrutiny standard. Unlike the laws in the cases cited above where strict scrutiny was correctly applied, the Texas statute does not regulate an individual's speech in a public forum, or regulate the type of content that cable channels must air. In fact, the statute does not regulate *speech* at all. It regulates only the *action* taken by government officials. As the District Court recognized, "The Act simply requires speech to be open and public. . . . The TOMA does not impede the freedom of speech; the Act simply requires speech to be made openly,

and in the presence of the interested public, as opposed to ‘behind closed doors.’” (App. to Plaintiffs-Appellants’ Br. at 99.)

Additionally, the Texas statute makes no distinction based on the type of government action, as a content-based regulation would do. The law prevents a member of a governmental body from “knowingly organizing or assisting in organizing an impermissible closed meeting.” Tex. Gov’t, Code § 551.144(a). The law in no way attempts to regulate the subject matter of government officials’ speech. Strict scrutiny only applies when “the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.” *Turner Broad. Sys.*, 512 U.S. at 642. The Texas statute does not regulate speech based on the message government officials are conveying; it requires only that governmental bodies must take action in public.

The Texas Open Meetings Act, like the open meetings laws of all 50 states and the federal government, promotes the First Amendment goals of open government and rigorous debate about matters of public concern. *See supra* Section I. Unlike the statutes previously subjected to strict scrutiny — laws aimed at prohibiting the flow of information to the public — the Texas statute promotes public exchange by requiring public officials to conduct actions in a public setting. “Above all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its

content.” *Mosley*, 408 U.S. at 95. The Texas statute is not an example of a governmental restriction on speech or expression because of its “message, ideas, subject matter or its content.” The law does not restrict the rights of individuals to express their thoughts and ideas.

The proper standard for open meetings laws is to analyze them with regard to traditional time, place, or manner regulations. *See Cole v. State*, 673 P.2d 345, 350 (Colo. 1983) (“It is a well recognized constitutional principle that the government may adopt reasonable time, place, and manner regulations which do not discriminate among speakers and ideas in order to further an important governmental interest. . . . the restraints on appellant’s freedom of speech are reasonable and justified in view of the important governmental interest furthered by the Open Meetings Laws.”); *see also Difanis v. Barr*, 414 N.E.2d 731, 739 (Ill. 1980). As noted above, open meetings laws have consistently been upheld when applying this proper legal standard.

Strict scrutiny is used by courts to ensure that laws do not censor speech. The application of this standard to a law that fosters openness would do more to censor speech and stifle public debate than it would to protect First Amendment values. To apply strict scrutiny to the Texas statute — and by extension all open meetings statutes in this Circuit and even all such statutes in this country, which the Supreme Court said are aimed at keeping political discussion “uninhibited,

robust and wide open” — contradicts the very purpose and goals of this Court’s adoption of that standard. The decision to apply strict scrutiny to the Texas Open Meetings Act was erroneous and should not prevail here.

**III. The underpinnings of First Amendment law support a different analysis of the Texas Open Meetings Act, which would put it in line with the rights protected by the Amendment.**

The First Amendment protects not only freedom of speech, but also, as is relevant in this case, the right to assemble, freedom of the press, and the right to petition the government. Open government laws in general, and the Texas statute at issue here, are the statutory guarantees that allow citizens to exercise their First Amendment rights in a meaningful way. “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.” Sandra F. Chance and 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 (2008). The Supreme Court likewise has recognized the importance of access to government proceedings as part of what the Framers of the Constitution envisioned the First Amendment as protecting. “Underlying the First Amendment right of access to criminal trials is the common

understanding that ‘a major purpose of that Amendment was to protect the free discussion of government affairs.’” *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982) (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *see also*, *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J. dissenting) (“What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny.”).

The Supreme Court also recognized that the First Amendment includes a right to receive ideas and information. *See Virginia Pharmacy Bd. v. Virginia Consumer Counsel*, 425 U.S. 748; *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *see also Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) Open government laws are the content-neutral procedural framework through which citizens can receive information about their government’s actions.

It is perhaps easiest to think of open meetings laws as mechanisms that enable citizens to petition the government in an orderly and coherent fashion — a basic right granted by the First Amendment. At its essence, the right allows a citizen to come before a public body to listen, observe, or speak. Today, that right is embodied in a framework of open meetings laws that require a government body

to give notice of meetings, to post agendas, and to discuss only what is on the agenda. *See e.g.* Tex. Gov't. Code § 552.001 *et. seq.* With that scheduling information, citizens can speak out in the allotted time frame and exercise the full spectrum of rights the First Amendment gives them.

The panel considered the Texas statute in terms of the elected officials' speech rights. But the First Amendment does not protect the right of elected officials to take action in secret. This has been understood by other courts, including the Supreme Court of Minnesota when analyzing that state's open meetings law in response to an overbreadth and vagueness challenge. *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 7 (Minn. 1983) ("The Open Meeting Law does not violate the rights of free speech or free assembly under the First Amendment of the United States Constitution. These rights protect expression of ideas, not the right to conduct public business in closed meetings.")

Likewise, the Supreme Court of Kansas when analyzing an overbreadth challenge by elected council members to the Kansas Open Meetings Act did not frame the question as whether the elected officials had First Amendment rights, but whether the statute was violating the rights of the *citizens* the First Amendment was meant to protect. *Palmgren*, 646 P.2d at 1099. Here, the issue is not whether the city council members have a free speech right under the First Amendment as elected officials, but whether the statute violates the rights of *citizens* that the First

Amendment was meant to protect. If the statute is analyzed in those terms, there is no question that it does not violate the First Amendment.

This is analogous to the approach taken by the U.S. Supreme Court when it analyzed a state statute placing restrictions on campaign contributions by corporations. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The Supreme Court reframed the question that had been posed by the lower court: “The proper question therefore is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether the statute ‘abridges expression that the First Amendment was meant to protect.’” *Id.* at 776. This Court should take this opportunity to consider these issues through the same lens the Supreme Court would.

### CONCLUSION

Open meetings laws like the Texas statute exist to further the goals of a democracy by promoting the First Amendment values of open government, public debate, petition and assembly. To call into question the constitutionality of the Texas Open Meetings Act and to subject it to the highest form of constitutional scrutiny by mischaracterizing it as a restriction on the speech of elected officials could potentially have a disastrous impact upon the public’s right to access, observe, and criticize their government officials. The panel’s decision to subject

the statute to strict scrutiny threatens these core First Amendment rights rather than protects them. For these reasons, *amici* urge the *en banc* court to affirm the district court's decision.

Respectfully submitted,

  
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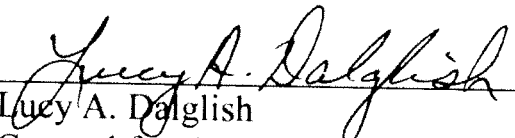
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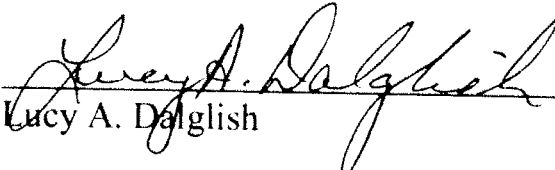
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