No. 06-51587

In the United States Court of Appeals for the Fifth Circuit

AVINASH RANGRA AND ANNA MONCLOVA,
Plaintiff-Appellants,

v.

FRANK BROWN AND GREG ABBOTT,
Defendant-Appellees

On Petition for Rehearing *En Banc*

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF DEFENDANT-APPELLEES

Lucy A. Dalglish
Counsel of Record
Minnesota Bar No. 257400
5th Circuit Admission Pending
Gregg P. Leslie
Hannah Bergman
Samantha Fredrickson
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100

CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. L. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Lucy A. Dalglish
   Gregg P. Leslie
   Hannah Bergman
   Samantha Fredrickson
   Reporters Committee for Freedom of the Press
   1101 Wilson Blvd., Suite 1100
   Arlington, VA 22209-2275
   Amicus Curiae

2. Avinash Rangra
   Plaintiff/ Appellant

3. Anna Monclova
   Plaintiff/ Appellant

4. Dick DeGeurin
   DeGuerin, Dickson & Hennessey
   1018 Preston Avenue, Seventh Fllor
   Houstong, Texas 77002
   Attorney for Plaintiff/Appellants Avinash Rangra and Anna Monclova

5. Arvel Rodolphus Ponton III
   2301 North Highway 118
   P.O. Box 9760
   Alpine, Texas 79831
   Attorney for Plaintiff/Appellants Avinash Rangra and Anna Monclova

6. Dennis Olson
   Visiting Professor of Law
   Texas Tech University School of Law
   1802 Hartford Avenue
   Lubbock, Texas 79409-0004
   After July 15, 2007

University of Detroit Mercy School of Law
651 East Jefferson Avenue
Detroit, Michigan 48226
Consultant for Messrs. DeGuerin and Ponton

7. Frank D. Brown
District Attorney for the 83rd Texas Judicial District
Defendant

8. Greg Abbott
Attorney General of Texas
Defendant

9. J. Steven Houston
P.O. Box 396
Marathon, Texas 79842
Attorney for Defendant/Appellee Frank D. Brown

10. Sean Jordan
James Todd
Jeff Rose
Office of the Attorney General
State of Texas
P.O. Box 12548
Capitol Station
Austin, Texas 78711
Attorneys for Defendant/Appellee Greg Abbott

11. Scott N. Houston
Texas Municipal League
Texas City Attorneys' Association
1821 Rutherford Lane, Suite 400
Austin, TX 78754-0000
Amicus Curiae

12. Joseph Robert Larsen
Freedom of Information Foundation of Texas
Ogden, Gibson, Broocks & Longoria
711 Louisiana Street, Suite 1900
Pennzoil S Tower
Houston, TX 77002-0000
Amicus Curiae

_____

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
Hannah Bergman
Samantha Fredrickson
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209-2275
Telephone: 703-807-2100
Facsimile: 703-807-2109

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS*

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 access to government meetings throughout the country under the framework of open meetings laws, which have been enacted in the 50 states, Washington, D.C., and by the federal government.

SUMMARY OF ARGUMENT

This Court should grant the Defendant-Appellees' petition for *en banc* review as it conflicts with decisions of the U.S. Supreme Court and involves a question of exceptional importance in First Amendment law. 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 Appellant's Br. at 90.) These are the traditional arguments asserted when challenging constitutionality of open meetings laws. *See Kansas, ex rel., Murray v. Palmgren, et al,* 646 P.2d 1091, 1099 (Kan. 1982). The Texas Open Meetings Act survived this challenge in the district court. *Rangra v. Brown,* No. P-05-CV-075 (W.D. Tex. Nov. 7, 2006) (App. to Appellant's Br. at 103-104.)

Yet, a panel of this Court held *sua sponte* that the Texas Open Meetings Act is a content-based restriction of speech and thus is subject to a strict scrutiny standard. This decision was made without the benefit of full briefing and argument on the question, and its effect could be disastrous for the framework of open government laws across this country. As a result of this decision, open meetings and open records law in this Circuit and at the federal level are likely to be challenged on similar First Amendment grounds, particularly where they have criminal sanctions such as the Texas statute. Widespread challenges of open meetings laws by elected officials wanting to avoid accountability could threaten the democratic process and encourage officials to violate open government laws with impunity. This undesirable outcome does not further the democratic goals underlying the U.S. Constitution.

Indeed, the panel did not consider all aspects of First Amendment jurisprudence and the policies that underlie these open government laws. Even in the few instances where open meetings statutes have been challenged as general violations of free speech and association rights, strict scrutiny was not applied. *See Cole v. State,* 73 P.2d 345, 350 (Colo. 1983) ("We are of the opinion that 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: The public's right of access to public information.").

Since this panel's *sua sponte* ruling said that the statute must be analyzed under the strict scrutiny standard, it did not fully explore the breadth of laws that its decision would affect. *Amicus curiae* urges *en banc* review of this panel's decision to apply a strict scrutiny standard to a law that merely regulates government *action* rather than restricts *speech.*

ARGUMENT

I. The panel decision has far-reaching effects on open government laws in every state and at the federal level that the Court did not have the opportunity to consider.

The panel's decision applying a strict scrutiny standard to the Texas Open Meetings Act could affect the framework of open government laws throughout this country. In almost every instance, meetings of the executive branch at the local, state and the federal level fall under the rubric of these open government laws. The laws allow reporters to attend meetings and facilitate accurate news reporting, thus helping the public hold their elected officials accountable.

But by calling into question the constitutionality of these laws, in at least the Fifth Circuit, elected officials could feel free to disregard their mandates. Some will undoubtedly feel empowered to bring constitutional challenges to the laws as they strive to keep their actions from the watchful eyes of the press and public. As a consequence, the underpinnings of a participatory democracy are threatened.

Every state and the District of Columbia has a statute 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) (a compendium of open records and open meetings laws in the United States, available at http://www.rcfp.org/ogg/). Most of these laws were passed about 50 years ago. 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.*

Some states in this Circuit have seen the public's right to attend government proceedings as so fundamental they have added it to their state constitutions. *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 open records laws in each of the states and the federal Freedom of Information Act. *See Open Government Guide*; 5 U.S.C. § 552.

These 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 ("McCain-Feingold Act") 2 U.S.C. § 434; Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601; American Bar Association's Model Judicial Conduct Rule 2.11.

The 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. If this is to be the effect of the panel's decision, this issue should be deliberated by the full Court.

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

The Texas open meetings law is not the type of statute that should be subject to strict scrutiny analysis. The Supreme Court has reserved the application of strict scrutiny to 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. *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 picketing about labor disputes); *Boos v. Barry*, 485 U.S. 312, 334 (1988) (holding that a city ordinance that prevented people from carrying signs in criticism of 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 Board*, 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 pornography

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 what content can be aired on television stations, 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 cites many of the above-mentioned cases for the proposition that the strict scrutiny standard applies to speech regulations that are content-based. At footnote 10 of its opinion, the panel recognizes 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." (citing *Turner Broad. Sys.*, 512

U.S at 641.) The cases cited by the panel stand for the proposition that strict scrutiny is used when laws restrict a person's core First Amendment rights. The panel's reasoning fails to recognize that the Texas statute preserves, not restricts, citizens core First Amendment rights by keeping government officials accountable for their actions.

Thus, 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 mentioned above, the Texas statute does not regulate an individual's speech in a public forum, or regulate the type of content that television stations 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 interest public, as opposed to 'behind closed doors.'" (App. to Appellant's 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 that government officials may speak about. 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 it is conveying; it regulates only that governmental bodies must take action in public.

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 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.

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 subject the Texas statute, and by extension all open meetings statutes in

this Circuit and even all such statutes in this country — laws that are aimed at keeping political discussion "uninhibited, robust and wide open" — to strict scrutiny would go against the very purpose and goals of this Court's adoption of that standard. The application of strict scrutiny to the Texas Open Meetings Act is inappropriate.

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

The First Amendment protects not only speech, but also, as is relevant in this case, freedom of assembly, 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, 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 Board v. Virginia Consumer Counsel*, 425 U.S. 748; *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *see also Lamont v. Postmaster General*, 381 U.S. 301 (1965) Open government laws are the content-neutral, procedural framework in which citizens can receive information about their government's action.

It is perhaps easiest to think of open meetings laws as a mechanism that enables citizens to petition the government in an orderly and coherent fashion. The right to petition is the oldest and most basic of the rights the First Amendment protects, stemming from the Magna Carta. 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.

Ironically, the panel incorrectly considered the Texas statute in terms of the elected officials' speech rights. 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. District 742 Community Schools, et al.* 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 (KOMA) said:

> Appellants argue the KOMA 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. It regulates only the conduct of public business. As such the KOMA is not unconstitutionally overbroad.

Murray, 646 Kan. at 1099.

The Kansas court was not framing the question as whether the elected officials had First Amendment rights, but whether the statute was violating the rights of citizens the First Amendment was meant to protect. This Court should review this case *en banc* because the panel answered the wrong question. 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 exactly 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. The full Court should take this opportunity to bring this case in line with the Supreme Court's First Amendment jurisprudence.

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, *amicus* urges *en banc* review of the panel decision.

Respectfully submitted,

Lucy A. Dalglish
Counsel of Record
Minnesota Bar No. 0257400
5th Circuit Admission Pending
Gregg P. Leslie
Hannah Bergman
Samantha Fredrickson
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209

CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements,
and Type Style Requirements

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

> [X] this brief contains _____ words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), *or*
>
> [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

> [X] this brief has been prepared in a proportionally spaced typeface using *Microsoft Word* in *Times New Roman 14-point typeface*, or
>
> [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

_____
Lucy A. Dalglish
Counsel for *Amicus Curiae*

Dated: May 7, 2009

CERTIFICATE OF SERVICE

The undersigned counsel of record does hereby certify that one true and correct copy of the *Amicus Curiae* Brief, along with a computer readable disk copy of the brief, was served via United States First Class Mail on May 7, 2009 to each of the following:

Dick DeGuerin
DeGuerin, Dickson, & Hennessey
1018 Preston Ave., 7th Floor
Houston, Texas 77002

Arvel Rodolphus Ponton, III
2301 N. Highway 118
P.O. Box 9760
Alpine, Texas 79831

Scott N. Houston
Texas Municipal League
1821 Rutherford Lane, Suite 400
Austin, TX 78754-0000

J. Steven Houston
P.O. Box 388
Marathon, Texas 79842

Joseph R. Larsen
Ogden, Gibson,
Broocks, &Longoria, L.L.P.
1900 Pennzoil South Tower
711 Louisiana Street
Houston, TX 77002

James Todd
Assistant Attorney General
Sean D. Jordan
Deputy Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC-059)
Austin, Texas 78711-2548

Counsel also certifies that on May 7, 2009 the original and 20 copies of the *Amicus Curiae* Brief and one computer-readable disk copy in Adobe Portable Document Format, was dispatched to the clerk, as addressed below, via FedEx (Overnight Delivery):

Mr. Charles R. Fulbruge III, Clerk
U.S. Court of Appeals for the Fifth Circuit
600 Maestri Place
New Orleans, Louisiana 70130

Hannah Bergman