No. 11-50441

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

DIANA ASGEIRSSON, *et al*.

Plaintiffs-Appellants,

v.

TEXAS ATTORNEY GENERAL, GREG ABBOTT AND STATE OF TEXAS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS, PECOS DIVISION, NO. P:09CV59

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ABC, INC., AMERICAN SOCIETY OF NEWS EDITORS, THE ASSOCIATED PRESS, ASSOCIATION OF CAPITOL REPORTERS AND EDITORS, ATLANTIC MEDIA, INC., BAY AREA NEWS GROUP, DAILY NEWS, LP, THE E.W. SCRIPPS COMPANY, FIRST AMENDMENT COALITION, HEARST CORPORATION, LIN TELEVISION CORPORATION, THE MCCLATCHY COMPANY, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE NEW YORK TIMES COMPANY, THE NEWSWEEK/DAILY BEAST COMPANY LLC, NORTH JERSEY MEDIA GROUP INC., RADIO TELEVISION DIGITAL NEWS ASSOCIATION, REUTERS AMERICA LLC, THE SEATTLE TIMES COMPANY, SOCIETY OF PROFESSIONAL JOURNALISTS, STEPHENS MEDIA LLC, TIME INC., TRIBUNE COMPANY, USA TODAY AND THE WASHINGTON POST IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE

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Asgeirsson, et al. v. Texas Attorney General,
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The undersigned Counsel of Record certifies that in addition to the attorneys, persons, government entities, associations of persons, firms, partnerships and/or other private entities identified in Plaintiffs-Appellants' Principal Brief filed August 11, 2011, Brief *Amici Curiae* of the Texas Municipal League, *et al*. filed August 17, 2011 and Defendants-Appellees' Principal Brief filed October 20, 2011, 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 disqualifications or recusal.

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IDENTITY OF *AMICI CURIAE* & STATEMENT OF INTEREST

Amici comprise national and regional news organizations, nonprofit open government, freedom of information ("FOI") and First Amendment advocacy groups and news professional and trade associations that regularly gather and disseminate valuable news and information to the public in a variety of media or otherwise support and defend such efforts to do so.[1]

Amici and their members regularly investigate and report on government action and government relations. To fully realize their constitutionally protected watchdog role, *amici* rely on open meetings laws across the country to observe and scrutinize the conduct of public officials, reporting back to the public on the actions taken by elected leaders. To that end, they have an ongoing stake in ensuring such laws remain robust and enforceable.

RULE 29(c)(5) COMPLIANCE

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money intended to fund preparing or submitting this brief; and (c) no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

[1] A complete description of each *amici* is set forth in the addendum to this brief.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Texas Open Meetings Act ("TOMA") is the modern statutory descendant of longstanding historical policies that grant the public access to elected officials' activities. These policies have been a part of American government since before the country's formation, providing citizens with the opportunity to scrutinize their elected leaders and make informed decisions about whether to retain them. Such policies were exalted by the same founders who drafted the First Amendment, a provision Appellants mistakenly interpret in an attempt to strike down TOMA. Rather, the First Amendment's purpose, coupled with the historic presumption that government meetings should be open, demonstrate that Appellants' speech has not been unconstitutionally burdened. TOMA must be sustained, not only to avoid jeopardizing open meetings laws across the country, but also to avoid threatening the public's longstanding ability to scrutinize public officials and participate in the governing process.

Moreover, TOMA is a constitutional, content-neutral statute with an incidental impact on the speech rights of local Texas officials that is nothing more than a reasonable time, place and manner restriction. The law is intended to

prevent a course of conduct—secrecy, collusion and corruption among elected officials—universally recognized as contrary to the purpose and intent of a representative government.

TOMA's criminal sanctions, which penalize officials who knowingly violate its open meetings requirements, raise no constitutional threat to officials' speech because they are narrowly tailored to support the state's compelling interest in making government meetings public. A cursory examination into the content of an alleged TOMA violator's speech is also constitutional, as the U.S. Supreme Court has recognized that laws may be content-neutral while still taking into consideration the content of speech to determine if the offending conduct has been committed.

Any inquiry into a possible TOMA violation considers the substance of speech subject to the restriction only to determine whether public business was conducted in secret. The law does not allow punishment based on the content or viewpoint of the speech and is, therefore, content-neutral. As a content-neutral law, TOMA is a reasonable time, place and manner restriction because it minimally restricts speech, requiring only that when a quorum of public officials meets to discuss public business, the body must open its deliberations to those who elected its members. It in no way impinges on officials' ability to say whatever they choose in the open forum.

In their watchdog role, journalists rely on TOMA and similar open meeting laws to report on the conduct of public officials, fostering the transparency and accountability that allows the public to make informed decisions about whether elected officials are governing in the public's interest and ultimately whether to retain their representatives. Without laws requiring officials to conduct public business in an open forum—and threat of meaningful sanction for non-compliance—public decisions could increasingly be made in private. In the absence of open meeting laws similar to TOMA, private decisions on public matters could easily go undiscovered by the press and public, potentially increasing the likelihood of corruption and undermining public confidence in government. TOMA and its sanction provisions therefore must be upheld to prevent such potentially damaging effects from occurring.

ARGUMENT

I. TOMA is constitutional because it embodies longstanding presumptions that government meetings are public and is akin to similar transparency principles that historically have not conflicted with the First Amendment

The Texas Open Meetings Act, and § 551.144 specifically, does not conflict with the First Amendment because it and similar open meetings laws nationwide are the statutory manifestation of this nation's longstanding historical policy of holding government meetings in public. Prior to the nation's founding and early in its nascence, government leaders understood the important role citizens play in

observing the conduct of their leaders as they publicly deliberate government business at the federal, state and local level. These polices were advocated for and created by the drafters of the U.S. Constitution.

Moreover, some founders believed that, contrary to Appellants' assertions, the First Amendment embraced the ideas of government accountability and openness made manifest in TOMA. In addition to the history supporting TOMA's constitutionality, the notable lack of a successful challenge to the statute and other similar open meetings laws, discussed more fully in Part II.C, demonstrates that the First Amendment was never intended to be used as means to strike down laws designed to foster government transparency.

A recent string of Supreme Court decisions have recognized that, "[w]here the meaning of a constitutional text (such as 'the freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine." *Doe v. Reed*, 130 S.Ct. 2811, 2836 (2010) (Scalia, J. concurring) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 378 (1995)); *see Nevada Comm'n on Ethics v. Carrigan*, 131 S.Ct. 2343, 2347-48 (recognizing that a "universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional") (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002)).

Well before the nation's founding, town meetings held in colonial New England provided that government assemblies should be open. The policies recognized that the public had "the right to assemble, whenever they are summoned by their selectmen, in their town halls, there to deliberate upon the public affairs of the town, or to give instructions to their representatives in the legislature." Letter from John Adams to Abbe De Mably, *reprinted in* 5 THE WORKS OF JOHN ADAMS 492, 495 (Charles F. Adams ed., 1851). Adams believed that such transparency was necessary because people had a right to know "of the characters and conduct of their rulers." John Adams, *A Dissertation on the Canon and Feudal Law, reprinted in*, THE POLITICAL WRITINGS OF JOHN ADAMS at 13 (George A. Peek, Jr. ed., Hackett Publishing 2003). The openness and full public discussion that characterized early town meetings became the quintessential form of American governance, lauded for its ability to engage citizens in democracy. *See generally* Alexis de Tocqueville, DEMOCRACY IN AMERICA 71-76 (Henry Reeve trans., Bantam Books 2002).

Government secrecy was generally viewed with disdain by the framers of this democracy. When the drafters of the Constitution determined that they would meet in secret, Thomas Jefferson called the decision "abominable" and wrote that "[n]othing can justify this example but the innocence of their intentions, and the ignorance of the value of public discussions." Letter from Thomas Jefferson to

John Adams (Aug. 30, 1787), *reprinted in* 1 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 196 (Lester Cappon ed., 1959).

James Madison, considered to be the architect of the First Amendment, believed that public knowledge of government activity was fundamental to sustain the system of self-governance he helped establish. *See, e.g.*, Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* THE COMPLETE MADISON at 337 (Padover ed. 1953) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own Governors, must arm themselves with the power which knowledge gives.").

The presumption that the public should have access to government meetings was further cemented when states drafting their initial constitutions included provisions requiring that legislative bodies be open to the public. When Vermont adopted its first constitution in 1777, it included a provision that the doors to the state's House of Representatives "shall be open for the admission of all persons." VT. CONST. ch. II, § 12 (1777).[2] Similar open meetings requirements were included in Pennsylvania's Constitution when it was ratified in 1776, as well as in

[2] *Available at* http://vermont-archives.org/govhistory/constitut/pdf/con77.pdf.

Connecticut's Constitution in 1818. *See* PA. CONST. § 13 (1776) ("The doors of the house in which the representatives of the freemen of this state shall sit in general assembly, shall be and remain open for the admission of all persons who behave decently, except only when the welfare of this state may require the doors to be shut");[3] CONN. CONST. art. 3, § 11 (1818) ("The debates of each house shall be public, except on such occasions as in the opinion of the house may require secrecy.");[4] Ann Taylor Schwing, OPEN MEETING LAWS 2d § 1.1, at 2 (2000).

Finally, the spirit of openness was mirrored at the federal level, where the first meeting of the House of Representatives in 1789 was open to the press. Frank Thayer, LEGAL CONTROL OF THE PRESS § 10, 35 (1st ed. 1944). The Senate opened its doors to the public in 1794. *Id*. at 34.

While the founders were advocating for public access to the deliberations and decisions of their government, they did not appear to contemplate any conflict between the First Amendment and open meetings requirements. To the contrary, many viewed the First Amendment as granting individuals a right to access public officials when they discussed government business to check against "the inherent tendency of government officials to abuse the power entrusted to them." *See*

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[3] *Available at* http://avalon.law.yale.edu/18th_century/pa08.asp.

[4] *Available at* http://www.ct.gov/sots/cwp/view.asp?a=3188&q=392280.

Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538 (1977).

Jefferson in particular viewed the First Amendment as enabling robust, public debate as part of an effort to prevent self-interested representation and avoid private factions from taking control of politics. *See* Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 892 (1986) (summarizing Jefferson's views on the First Amendment). In Jefferson's view, the First Amendment helped foster public disclosure by government officials to prevent the negative consequences that result from officials withholding information from the public. *Id*. at 893. Jefferson's concerns about secrecy are in many ways analogous to the compelling state interest in transparency and government accountability furthered by TOMA.

The framers believed a central requirement of self-governance was allowing citizens to monitor the conduct of their leaders, developing policies that recognized such rights and later enshrining them in state constitutions. TOMA and similar open meetings statutes in every state and the District of Columbia seek to realize that promise of transparency and accountability that the framers embraced. TOMA, therefore, cannot infringe upon Appellants' First Amendment rights when the framers advocated for the type of openness that the Texas law requires.

Furthermore, the U.S. Supreme Court's recent decisions in *Reed*, 130 S.Ct. 2811, and *Carrigan*, 131 S.Ct. 2343, combined with the history of openness described above, demonstrate that Appellants misinterpret the free speech protections of the First Amendment. Because TOMA's requirements further the First Amendment rights rather than impinge upon them, and in light of the fact that no constitutional challenge to similar laws has been upheld by an appellate court, this Court should uphold TOMA.

II. The District Court correctly determined that TOMA is a content-neutral regulation that does not violate any recognizable First Amendment right of city officials

A. TOMA's criminal sanctions are constitutional because they are narrowly tailored to serve the government's significant interest in holding public meetings and are similar to other laws with criminal sanctions that have overcome constitutional challenges

TOMA's imposition of criminal liability upon individuals who knowingly violate the act is a reasonable restriction because it is narrowly tailored to serve the government's compelling interest in preventing public officials from deliberately holding secret meetings. Appellants' tunnel-vision-like focus on the criminal provisions of TOMA as an unconstitutional burden on their speech is misguided and improperly interprets the analysis this Court must undertake. Rather, the proper inquiry demonstrates that TOMA remains a reasonable time, place and manner restriction on speech because its penal provisions are not "substantially broader than necessary to achieve the government's interest." *Ward v. Rock*

Against Racism, 491 U.S. 781, 800 (1989). Hence, TOMA, like all other open meetings laws, is unconcerned with the particular content or viewpoint of the speech and is instead only focused on when, in what forum and through what procedural means the public's business is conducted.

The criminal provisions of TOMA subject a public official to criminal liability only if the individual "*knowingly* (1) calls or aids . . . (2) closes or aids . . . or (3) participates in" a closed meeting. Tex. Gov't Code Ann. § 551.144(a)-(b) (emphasis added). Requiring a party to knowingly violate a reasonable time, place and manner regulation is sufficiently narrowly tailored to survive a First Amendment challenge. *See Hill v. Colorado*, 530 U.S. 703, 727 (2000). In *Hill*, the court held that the regulation was narrowly tailored because, as here, it required an individual to *knowingly* get within eight feet of another without permission before criminal liability attached. *See id*. The knowledge requirement saved the law from sweeping up inadvertent or accidental expression that might be protected but otherwise banned under the statute. *See id*.

Similarly, the knowledge requirement in TOMA's criminal sanctions prevents broad application, applying only to those who deliberately conduct such activity. TOMA's penal provisions, imposed on those who knowingly violate the act, are narrowly tailored and this Court should therefore find that TOMA is still a reasonable time, place and manner restriction.[5]

[5] Additionally, the presence of criminal sanctions in TOMA is not an anomaly, as 20 other states in addition to Texas include criminal penalties for violations of their open meeting laws. *See* Daxton R. "Chip" Stewart, *Let the Sunshine in, or Else: An*

Unlike Appellants' assertions that the criminal provisions create a state of fear among elected officials who may easily break the law, the knowledge requirement and the necessity of certain triggering circumstances—namely the presence of a quorum of public officials meeting to discuss public business—create clear and specific rules instructing officials on how to avoid breaking the law. Rather than leaving ambiguous the conduct that will subject a public official to criminal liability, TOMA makes officials keenly aware of their responsibilities. The statute offers officials a clear path to avoiding criminal liability and then seeks to deter them from impermissible conduct, similar to many other ethics laws.

Finally, courts have routinely upheld time, place and manner restrictions despite the existence of criminal sanctions within a speech-restricting statute. *See Hill*, 530 U.S. at 707-08, 714 (upholding a law that made it a misdemeanor to knowingly get within eight feet of another to hand the person a leaflet without consent); *Phelps-Roper v. Strickland*, 539 F.3d 356, 358-61 (6th Cir. 2008) (upholding a law that made it a misdemeanor to picket within 300 feet of a funeral); *Shuger v. State*, 859 N.E.2d 1226, 1233-34 (Ind. App. Ct. 2007) (upholding a statute that made it a misdemeanor to interfere with another's hunting activities). *See also Carrigan*, 131 S.Ct. at 2347 (noting that a conflict of interest statute containing civil penalties requiring voting recusal, along with a prohibition

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Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws, 15 COMM. L. & POL'Y 265, 290 (2010).

from advocating at the legislative session during which the particular vote was to occur, would be a reasonable time, place and manner speech restriction).

TOMA's criminal provisions promote a significant government interest and are narrowly tailored to leave alternatives for public officials to communicate information. As such, this Court should find TOMA's criminal provisions constitutional.

B. TOMA's minimal and incidental impact on Appellants' free speech should be subject to intermediate scrutiny as it is a content-neutral regulation unconcerned with the substance of what elected officials say

The U.S. Supreme Court has said content-neutral restrictions on speech are subject to intermediate scrutiny. Efforts by Appellants to subject TOMA's requirements to strict scrutiny are misplaced. TOMA does not violate the First Amendment rights of public officials because it is a content-neutral law that restricts speech in the most minimal and incidental way, requiring only that public officials conduct public business in the open.

Strict scrutiny has been reserved solely for content-based restrictions "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). *See* also Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 58 (1987) (describing content-neutral laws as those that impose minimal impediments to a speaker's ability to contribute to the "marketplace of ideas" relative to

countervailing government interests); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 367 (2006) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957)).

Additionally, subjecting TOMA to strict scrutiny would be inappropriate as the U.S. Supreme Court has traditionally reserved its use only for those laws that have a direct impact on a speaker's ability to discuss a particular issue or to express a particular viewpoint. *See, e.g., Boos v. Barry*, 485 U.S. 312, 316, 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 & Schuster v. Members of the N.Y. 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); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 806, 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).

Because TOMA focuses on when officials must disclose speech, rather than on the particular content or viewpoint of an officials' speech, strict scrutiny is inappropriate.

i. TOMA is a content-neutral restriction on conduct that has only incidental effects on speech

The purpose TOMA's restrictions is to prevent public officials from conducting government business in private, decreasing the chances of corruption and promoting public participation in the political process. The statute's narrow disclosure procedures are triggered only when a quorum of public officials meets to discuss government business. *See* Tex. Gov't. Code §§ 551.001(4), 551.002 (2011). When triggered, the law merely requires that such speech be disclosed to the public, placing no restrictions about what is said in that forum. Because the law impacts only *when* speech by public officials must be disclosed, as opposed to placing restrictions on *what* officials say, this Court should affirm the district court's determination that the law is content-neutral.

TOMA's examination of the substance of public officials' speech to determine whether the open meetings law has been violated is also content-neutral. Laws can still be content-neutral even if the content of the speech must be considered to determine whether or not the law has been violated. *See Hill*, 530 U.S. at 721. In *Hill*, the Supreme Court held that a law prohibiting protesters from "knowingly approach[ing]" a person entering a health clinic "for the purpose of… engaging in oral protest, education, or counseling with such other person" was content-neutral and, therefore, subject to intermediate scrutiny. *Id*. at 707-08, 725-

26. While determining whether the law was violated required an inquiry into the substance of the speech, the Court held that the law was nevertheless content-neutral. *Id*. at 721-23. "We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at 721.

The need for a "cursory examination . . . to exclude casual conversation from the coverage of a regulation of picketing" did not, the Court held, render the law in *Hill* content-based. *Id*. at 722. Similarly, TOMA exists to eradicate a course of conduct deemed repugnant by the citizens of Texas, namely the act of conducting government business in private. Here too, enforcing the law requires merely a "cursory examination" of the content of private exchanges to separate "casual conversation" from the secret dealing and collusion prohibited by the law. This Court should find, in accordance with *Hill*, that the law is a content-neutral regulation of conduct.

The Supreme Court has found laws with much greater restrictions on individuals' speech to be content-neutral. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (law that prohibits the targeted picketing of a particular residential home is content-neutral even though the law was created in response to conduct by one side of abortion debate); *Ward*, 491 U.S. at 788, 791-92 (1989) (finding that a law requiring events on city property to use the city's sound equipment and

technician was content-neutral); *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (finding a wiretapping law that made it illegal to tape private conversations without consent was content-neutral).

TOMA exists to prevent public officials from operating in secrecy and shutting their constituents out of the political process. If a quorum of officials from one public body discusses public business without proper notice or in an improperly closed proceeding, there is a violation regardless of the substance of the discussions or the viewpoints expressed by the public officials. As in *Hill*, the content of the speech is of consequence only to determine whether officials have engaged in a course of conduct that is restricted by law.

This Court should find TOMA to be a content-neutral law and proceed to determine that, under intermediate scrutiny, the law is a constitutional time, place and manner restriction.

ii. TOMA is a reasonable time, place and manner restriction that is narrowly tailored to promote a legitimate government interest

TOMA is a reasonable time, place and manner restriction narrowly tailored to promote a legitimate government interest because it minimally impacts speech to preserve public access to government decisions. It is well recognized that the government may impose reasonable time, place and manner restrictions on speech. *See Buckley v. Valeo*, 424 U.S. 1, 18 (1976). A content-neutral time, place and

manner restriction will be found constitutional if it is narrowly tailored to serve a legitimate government interest. *See Ward*, 491 U.S. at 798-99; *Hill*, 530 U.S. at 725-26. Additionally, time, place and manner restrictions must also "leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The government's significant interest in TOMA's requirements cannot be overstated. As the District Court correctly held, TOMA was created to provide transparency in government decision making, to discourage fraud and corruption, and to foster trust in government. *Asgeirsson v. Abbott*, 773 F.Supp. 2d 684, 704 (W.D. Tex. 2011), R. USCA5 1007. The court went on to find that the government had "not merely significant interests but, rather, compelling interests" in TOMA. *Id*. at 702, R. USCA5 1002. To this end, Texas has sought only to regulate the procedural manner through which the public's business is discussed rather than proscribe what can be said or favor particular speech.

Indeed, promoting public trust in government is often seen as one of the principal reasons for the creation of open meetings laws. *See* Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245, 245-46 (2008) (summarizing the policy rationales behind open meetings laws).

The state of Texas governs with the consent—and under the supervision—of its citizens. To better foster trust among the people and their government, the state has sought to ensure that business conducted on behalf of the people be open to the public. Because the legitimacy of the state's representative government in the eyes of its citizens would be dramatically weakened without TOMA, the state's interest in the regulation certainly satisfies and even goes beyond the legitimate interest required for the law to be considered a reasonable time, place and manner restriction.

TOMA's requirement that public business be conducted in the open also leaves open ample alternatives for communication by public officials. As the district court recognized, public officials subject to the law are free to communicate their thoughts and positions to many different people, including other public officials. In fact, the law actually promotes the officials' expression. *Asgeirsson*, 773 F.Supp.2d at 698, R. USCA5 995. TOMA merely requires that when a *quorum* of public officials meet to discuss public business, the officials provide ample notice and open the meeting to the public. It therefore promotes a significant government interest and is narrowly tailored, leaving alternatives for public officials to communicate information.

C. When challenged on First Amendment grounds, open meetings acts across the country have been upheld

TOMA's penalties are not unique. TOMA is similar to other open meetings laws that have been challenged and upheld by appellate courts as reasonable restrictions.

The high courts of Illinois, Kansas, Colorado, Minnesota and Nevada have all upheld their state open meeting acts when challenged on First Amendment grounds. In *People ex rel. Difanis v. Barr*, Illinois public officials argued that the state's open meetings law was vague and, similar to Appellants, that its terms kept them under constant threat of prosecution for speaking outside a public forum. *See People ex rel. Difanis v. Barr*, 414 N.E. 2d 731, 738 (Ill. 1980). The Illinois Supreme Court held the state's open meetings act was a reasonable time, place and manner restriction that did not chill officials' speech. *Id*. at 739. Whatever speech was incidentally limited by the law, the court held, was narrow and the limitation imposed was "reasonable when viewed in relation to a public official's obligation to carry out the public trust honorably and in good faith." *Id*.

The Kansas Supreme Court also turned back a First Amendment challenge to the state's open meetings act by officials who argued that the regulation burdened their rights to assembly and speech. *State ex rel. Murray v. Palmgren*, 646 P.2d 1091, 1099 (Kan. 1982). The court upheld the law because it "places no

constraints on purely private discussions by public officials. It regulates only the conduct of public business." *Id*. Additionally, the court held, any impact on speech was justified by the compelling justification for the law, "[d]emocracy is threatened when public decisions are made in private." *Id*.

In Colorado, the state Supreme Court held that the state's open meetings law did not violate the free assembly and speech rights of public officials. *Cole v. State*, 673 P.2d 345, 346 (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." *Id.* at 350. The Minnesota Supreme Court rejected a similar challenge, holding that the legislature was "justified" in passing the state's open meetings law because, without it, "the public cannot be fully informed about a decision or it cannot detect improper influences." *St. Cloud Newspapers, Inc. v. District 742 Cmty. Schools*, 332 N.W.2d 1, 7 (Minn. 1983).

This case is also not the first time TOMA has been challenged on constitutional grounds. In 2001, the law's requirement that meeting agendas be "clear and complete" was challenged before the state appellate court because it prevented officials' ability to discuss matters not on the agenda at a meeting, which officials claimed unconstitutionally burdened their First Amendment rights. *See Hays Cnty. Water Planning P'ship v. Hays Cnty. Tx.*, 41 S.W.3d 174, 181-82 (Tex.

App. 2001). The court held that TOMA "may not, and does not, restrict or abridge protected speech." *See id.* at 182. TOMA, the court held, does not prevent officials from speaking at all, it merely regulates "the location and timing" of official speech.[6]

Court after court has recognized the significant and compelling reasons behind open meetings acts and found the minor impediments the laws impose on the speech of public officials to be wholly justified. This Court should likewise hold that TOMA does not unconstitutionally restrict the speech of Appellants and other public officials.

III. Invalidating TOMA will remove a major incentive for public officials to meet in public, increasing the likelihood that officials will negotiate in secret and potentially allowing government corruption to escape public scrutiny

Striking down TOMA could lead to an increase in secret meetings and result in corruption of government operations. Open meetings laws provide a powerful incentive for government officials to conduct their business in full view of the public and the press. This transparency allows citizens to monitor the conduct of their elected officials and insist upon accountability.

[6] The Nevada Supreme Court relied on *Hays Cnty*. in their 2003 decision in *Sandoval v. Bd. of Regents of the Univ.* The court found that, like TOMA, Nevada's open meeting law does not limit in any way the speech of public officials, "provided they place the topic on the agenda." *Sandoval v. Bd. of Regents of the Univ.*, 67 P.3d 902, 907 (Nev. 2003).

Despite Appellants assertions that TOMA's criminal sanctions are too harsh, the most common complaint leveled against open meetings laws is that they do not do enough to deter public officials from operating in secret. *See* Stewart, *supra*, at 265. After surveying the open government laws of every state and the federal government, Stewart concluded that the "remedies and penalties available do not provide adequate teeth to effectively coax government officials to consistently comply with their duties." *Id*. at 302. In other words, most open meetings laws should go further in terms of sanctions to encourage public officials to meet in the open.

Including criminal sanctions in open meetings laws is one of the best ways to deter improper behavior, Stewart concludes, because they "offer a moralizing effect by 'strengthen[ing] moral inhibitions,'" and "'may stimulate habitual law-abiding conduct.'" *Id*. at 291 (quoting Johannes Andenaes, PUNISHMENT AND DETERRENCE 8 (1974)). But, as the examples below illustrate, even criminal sanctions are not always enough to prevent public officials from secretly meeting.

When Dallas City Council members were contemplating whether to subsidize a new $141 million basketball arena, the public was essentially shut out of the discussion as officials tried to negotiate a deal in secret. *See* Todd J. Gillman, *U.S. Judge Faults City on Arena: Dallas Officials Deny Breaking Secrecy*

Law, THE DALLAS MORNING NEWS 1A (June 7, 1995), *available at* 1995 WLNR 5296409.[7]

A District Court judge found that council members used improper executive sessions to try to cut a deal with the owner of the Dallas Mavericks and later misled the judge as to the content of those discussions. *Id*. Using public dollars to fund a private sports arena is a matter of public interest that deserves a full public debate. But despite TOMA's strong requirements that the negotiations be made public, officials hid the discussion from the public. The judge ruled the activities constituted misdemeanor violations of TOMA. *Id*.

In another example, TOMA's criminal sanctions did not prevent elected officials from a small south Texas community from repeatedly meeting in secret without providing notice to the public. *See* James Pinkerton, *Entire Board of Aldermen on Trial: Advocates of Open Government Hail Prosecution in Valley Town*, HOUSTON CHRONICLE (July 18, 1998), *available at* 1998 WLNR 7386124. Officials were charged with failing to provide notice of when they planned to meet and abusing TOMA's executive sessions privilege provisions. *Id*. During one executive session called to discuss a personnel matter, the aldermen actually

[7] To facilitate access to secondary sources, "WLNR," or Westlaw NewsRoom, citations are provided whenever possible.

discussed whether to purchase police equipment, returning to the open session to approve the expenses without discussion. *Id*.

Fines and other penalties are not always enough to deter public officials from meeting secretly. For example, over the last eight years, the Boston City Council in Massachusetts has been embroiled in an open meeting conflict over secret meetings it has held and continues to hold. *See* John Ruch, *Councilors testify in Open Meeting lawsuit*, JAMAICA PLAIN GAZETTE (July 8, 2011).[8] After admitting to holding numerous secret meetings from 2003-2005, the city council was fined more than $10,000 and reprimanded by the Suffolk County Superior Court in 2005. *Id*. Six years later, councilmembers are again in court on charges of continuing to hold secret meetings and to conduct votes on issues not listed in the agenda. *Id*. Massachusetts does not impose criminal liability on public officials who violate the law and can only fine the governmental body itself for violations, so no councilmember is individually responsible for his or her bad acts. As such, the law can only "compel" the council to comply or, once again, fine the council as a whole. Mass. Gen. Laws ch. 30A § 23(c) (2011).

The officials described in the Texas examples highlight the fact that despite TOMA's criminal sanction provisions designed to prevent parties from conspiring

[8] *Available at* http://jamaicaplaingazette.com/2011/07/08/councilors-testify-in-open-meeting-lawsuit/.

to hold secret meetings, violations can still occur. And in Boston, fines and criticism by a court have not been enough to generate compliance by public officials.[9] If TOMA's criminal provisions are removed, it is possible that even more public officials throughout Texas will feel little to no incentive to hold public meetings, as the largest deterrent to conducting secret meetings will be removed.

As the number of secret meetings increase, the opportunities for the press and public to monitor the conduct of elected officials will decrease. Without the ability to openly monitor public official government action, Texans' confidence in state and local government could be severely harmed. TOMA's criminal provisions should be upheld, therefore, not only to encourage public officials' compliance but also to prevent the public from losing faith in its system of democratic representation.

[9] The violations discussed are merely examples of open meetings violations that occur regularly throughout the country, including elsewhere in the Fifth Circuit. *See, e.g.*, Richard Burgess, *Officials Seek Fines from 3: Lawsuit Filed on Closed Meeting*, BATON ROUGE ADVOCATE, B (Dec. 21, 2010), *available at* 2010 WLNR 25181442; Michael S. Arnold, *Board Will Pay Fines: Open Meetings Case Protested*, NEW ORLEANS TIMES-PICAYUNE at A1 (July 20, 1995), *available at* 1995 WLNR 988439; Jennifer Jacob Brown, *Did Supes Violate Open Meetings Law?*, THE MERIDIAN STAR (Dec. 13, 2009), *available at* 2009 WLNR 25127068 (discussing potential open meetings violation in Meridian, Miss.).

CONCLUSION

The decision of the District Court finding that TOMA does not unconstitutionally burden or chill the free speech rights of government officials under the First Amendment of the U.S. Constitution should be affirmed.

Dated: Arlington, VA
October 27, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,997 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Further, I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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ADDENDUM

Identity of *amici*:

The Reporters Committee for Freedom of the Press

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 the 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.

ABC, Inc.

ABC, Inc., alone and through its subsidiaries, owns and operates, *inter alia*, ABC News, abcnews.com, the ABC Television Network and local broadcast television stations, including WABC-TV in New York City, which regularly gather and report news to the public. Programs produced and disseminated by ABC News include "World News Tonight with Diane Sawyer," "20/20," "Nightline," "Good Morning America" and "This Week with Christiane Amanpour."

American Society of News Editors

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News

Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as 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 the credibility of newspapers.

The Associated Press

The Associated Press ("AP") 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 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP reports news in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

Association of Capitol Reporters and Editors

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

Atlantic Media, Inc.

Atlantic Media, Inc. is a privately held, integrated media company that publishes *The Atlantic, National Journal* and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Bay Area News Group

Bay Area News Group is operated by MediaNews Group, one of the largest newspaper companies in the United States with newspapers throughout California and the nation. The Bay Area News Group includes *The Oakland Tribune, The Daily Review, The Argus, San Jose Mercury News, Contra Costa Times, Marin Independent Journal, West County Times, Valley Times, East County Times, Tri-Valley Herald, Santa Cruz Sentinel, San Mateo County Times, Vallejo Times-Herald* and *Vacaville Reporter*, all in California.

Daily News, LP

Daily News, LP publishes the *New York Daily News*, a daily newspaper that serves primarily the New York City metropolitan area and is the sixth-largest paper in the country by circulation. The *Daily News*' website, NYDailyNews.com, receives approximately 22 million unique visitors each month.

The E.W. Scripps Company

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites and licensing and syndication. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington-based Scripps Media Center, home of the Scripps Howard News Service. The E.W. Scripps Company operates four newspapers in Texas including the *Abilene Reporter-News, Corpus Christi Caller-Times, San Angelo Standard-Times* and the *Wichita Falls Times Record News*.

First Amendment Coalition

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Hearst Corporation

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include the following: ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany* (N.Y.) *Times Union*; interests in an additional 43 daily and 74 non-daily newspapers owned by MediaNews Group, which include *The Denver Post* and *The Salt Lake Tribune*; nearly 200 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a minority joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate.

LIN Television Corporation

LIN Television Corporation d/b/a LIN Media, along with its subsidiaries, is a local multimedia company that owns, operates or services 32 network-affiliated broadcast television stations, interactive television stations and niche websites and mobile platforms in 17 U.S. markets, including properties in Buffalo, N.Y., and New Haven, Conn.

The McClatchy Company

The McClatchy Company publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including *The Sacramento* (Cal.) *Bee*, *The Miami Herald*, *The Kansas City* (Mo.) *Star* and *The Charlotte* (N.C.) *Observer*. The newspapers have a combined average circulation of approximately 2.5 million daily and 3.1 million Sunday.

National Press Photographers Association

The National Press Photographers Association ("NPPA") is a nonprofit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 8,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

The New York Times Company

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

The Newsweek/Daily Beast Company LLC

The Newsweek/Daily Beast Company LLC publishes *Newsweek* magazine and operates the website TheDailyBeast.com. Through nine print editions, *Newsweek* magazine appears weekly in more than 170 countries and is read by 19 million people. The Daily Beast was launched in 2008 by Tina Brown and Barry Diller of IAC. It is a multi-platform brand consisting of a news and current affairs website that attracts an average of six million unique visitors per month from around the world, as well as a conference division and a book publishing imprint.

North Jersey Media Group Inc.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: *The* (Bergen County) *Record*, the state's second-largest newspaper, and *The* (Passaic County) *Herald News*. NJMG also publishes more than 40 community newspapers serving towns across five counties, including some of the best weeklies in the state. Its magazine group produces high-quality glossy magazines, including *(201) Best of Bergen*, nearly a dozen community-focused titles and special-interest periodicals, such as *The Parent Paper*. The company's Internet division operates many news and advertising websites and online services associated with the print publications.

Radio Television Digital News Association

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reuters America LLC

Reuters America LLC serves the financial markets and news media with real-time, high-impact multimedia news and information services and is part of Reuters, the world's largest international news agency. Through Reuters.com and affiliated websites around the world and via multiple platforms, including online, mobile, video and outdoor electronic displays, Reuters provides trusted, unbiased, professional-grade business news, financial information, market data and national and international news directly to an audience of business professionals around the world. In addition, Reuters publishes a portfolio of market-leading titles and online services, providing authoritative and unbiased market intelligence to investment banking and private equity professionals.

The Seattle Times Company

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

Society of Professional Journalists

Society of Professional Journalists ("SPJ") 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

Stephens Media LLC is a nationwide newspaper publisher with operations from North Carolina to Hawaii, including the Sherman, Texas, *Herald Democrat*. Its largest newspaper is the *Las Vegas Review-Journal*.

Time Inc.

Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including *Time*, *Fortune*, *Sports Illustrated*, *People*,

Entertainment Weekly, *InStyle* and *Real Simple*. Time Inc. publications reach over 100 million adults, and its websites, which attract more visitors each month than any other publisher, serve close to two billion page views each month.

Tribune Company

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America. On the publishing side, Tribune publishes eight daily newspapers — *Chicago Tribune*, *Hartford* (Conn.) *Courant*, *Los Angeles Times*, *Orlando Sentinel* (Central Florida), *The* (Baltimore) *Sun*, *The* (Allentown, Pa.) *Morning Call*, (Hampton Roads, Va.) *Daily Press* and *Sun-Sentinel* (South Florida).

USA Today

USA TODAY is the nation's No. 1 newspaper in print circulation and, with USATODAY.com, reaches a combined 5.9 million readers daily.

The Washington Post

The Washington Post is a leading newspaper with nationwide daily circulation of over 623,000 and a Sunday circulation of over 845,000.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2011, the foregoing brief for *amici curiae* was filed with the Court's CM/ECF system providing electronic service. I further certify that I caused to be served 2 true and correct copies of the foregoing brief *amici curiae* by first-class mail, postage prepaid on the following counsel of record for all parties:

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