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COURT OF CRIMINAL APPEALS
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PD-0255-18

In the
Court of Criminal Appeals
of Texas

FILED
COURT OF CRIMINAL APPEALS
4/12/2018
DEANA WILLIAMSON, CLERK

STATE OF TEXAS,
Appellant
v.
CHARLIE RILEY,
Appellee

From the Court of Appeals
For the Ninth Judicial District of Texas
Beaumont, Texas
No. 09-17-00124-CR

APPELLEE CHARLIE RILEY'S PETITION FOR DISCRETIONARY REVIEW

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TRIAL JUDGE:	Hon. Randy Clapp Visiting Judge 221st Judicial District Montgomery County

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OTHER STATUTES

STATEMENT REGARDING ORAL ARGUMENT

Petitioner Riley joins, adopts, and incorporates Judge Doyal's statement regarding oral arguments in PD-0254-18 and seeks this Court to allow oral arguments on these important issues.

STATEMENT OF THE CASE

Montgomery County Judge Craig Doyal[1] and County Commissioners Charley Riley and Jim Clark[2] were indicted for allegedly violating § 551.143 of the Tex. Gov't Code, the Texas Open Meetings Act (TOMA). *See* Tex. Gov't Code Ann. § 551.143 (West 2017). The indictments[3] alleged (in relevant part) that Doyal and Riley:

> . . . knowingly conspired to circumvent [TOMA] by meeting in a number less than a quorum for the purpose of secret deliberations in violation of the Texas Open Meetings Act, to-wit: by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond.

Political consultant Mark Davenport was charged as a party with the same offense, but without an allegation that he was a public official. CR [16-06-07318-CR]

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[1] Petitioner Riley adopts by reference all arguments and grounds for review in Doyal's Petition for Discretionary Review (PD-0254-18).

[2] Commissioner Clark's case was resolved with pretrial diversion and has now been dismissed. Clark was not part of the proceedings that formed the basis for the trial court's ruling and the State's appeals in Riley's, Doyal's and Davenport's cases.

[3] Because the indictments also alleged that the offenses constituted official misconduct, the misdemeanor charges were filed in District Court.

at 5.

Doyal filed a Motion to Dismiss the Indictment, which Riley adopted and joined, asserting that § 551.143 was facially unconstitutional and unenforceable as a criminal statute because it violated the First Amendment and was vague and overbroad. CR [16-06-07315-CR] at 45-67; CR35. The trial court held a joint evidentiary hearing on the motion during which the Court heard testimony about the significant practical problems posed by the vague and overbroad statute from legal experts and from individual members of various government bodies. The trial court granted the motion and dismissed the indictments. CR42.

STATEMENT OF PROCEDURAL HISTORY

The State filed an appeal raising two issues: (1) the trial court erred by dismissing the indictment on the ground that § 551.143 is facially unconstitutionally vague and ambiguous, and (2) the trial court erred by dismissing the indictment on the ground that § 551.143 facially violates the First Amendment and is overbroad.

The Ninth Court of Appeals issued an unpublished memorandum opinion reversing the trial court's order dismissing the indictments. The memorandum opinion contained no substantive discussion of the issues but referred to the reasons stated in a published opinion issued the same day in *State v. Doyal*, __S.W.3d__, 2018WL761011 (Tex. App.—Beaumont, February 7, 2018, pet. filed), as the basis for

its disposition. Mem. Op. at 3.

This Court granted Riley's motion to extend time for filing the petition for discretionary review until April 9, 2018.

GROUNDS FOR REVIEW

I. The court of appeals erred in holding that § 551.143 does not violate the First Amendment.

II. The court of appeals erred in holding that § 551.143 is not void for vagueness.

III. The court of appeals erred in failing to address claims raised by Riley that were material to its disposition of the issues.

EVIDENTIARY HEARING TESTIMONY

The trial court held a four-day evidentiary hearing during which several TOMA experts testified, including a former employee of the attorney general's office and attorneys who have provided state-mandated TOMA training. The experts uniformly acknowledged the overall valid purpose of TOMA—to provide transparency in government decision-making. 2RR34-40. But they also uniformly lamented that § 551.143 is so poorly drafted that even experts cannot understand what is prohibited, and this confusion has persisted for decades. 2RR81; 3RR75-76.

Section 551.143 provides:

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

Tex. Gov't Code Ann., § 551.143.

The experts identified numerous vague aspects of § 551.143 that together render the statute hopelessly unclear:

1. **"conspires"**: this term is not defined; it is not clear whether its meaning should derive from the Penal Code, common law, or common usage. 2RR43-44.

2. **"member or group of members"**: it is unclear whether § 551.143 applies only to members of government bodies or also to members of the public. 2RR43, 78; 4RR22. The language suggests that one member could be guilty of conspiring with himself. 2RR43, 78, 82-83; 4RR20-21.

3. **"circumvent"**: this undefined term is ambiguous; one common meaning is"avoid," but some construe the term to mean "violate." Even experienced practitioners have difficulty advising members of a government body seeking guidance on how to legitimately avoid the reach of TOMA with no intent of violating it, because "the very act of trying to keep it legal could be what helps prove a conspiracy." 2RR149-50, 3RR47.

4. **"meeting in numbers less than a quorum"**: the term "meeting" is ambiguous because "meeting" is defined in TOMA as "a deliberation between a quorum of a governmental body …." *see* Tex. Gov't Code Ann. § 551.001(4).

5. **"secret deliberations"**: "deliberation" is defined as "a verbal exchange during

a meeting between a quorum of a governmental body ...", *id.*, § 551.001(2), so it is nonsensical to prohibit meetings of less than a quorum for the purpose of "secret deliberations." 2RR54-56; 3RR24, 95-96, 98. The term "meeting" within the definition of "deliberation" also requires a quorum. It is unclear whether a "verbal exchange" includes only oral/spoken communications or also written communications such as e-mail or text messages. 2RR45-48, 54-55; 4RR24. "Secret" is undefined and ambiguous—does it mean any circumstance other than a posted public meeting, even if the discussion occurs in a public place with reporters and citizens present? 2RR106.

6. **"in violation of this chapter"**: this language is ambiguous because the remainder of TOMA governs only the conduct of quorums of government bodies and contains no rules for non-quorum gatherings. It is nonsensical to criminalize "meeting in numbers less than a quorum . . . in violation of this chapter" because the chapter does not prohibit meeting in numbers less than a quorum. 2RR45-46, 80, 181-82.

The experts described how this vague, circular, and internally inconsistent statute results in substantial chilling of lawful speech. Because "deliberation" by definition includes discussion of "any public business," and § 551.143 prohibits "deliberations" among less than a quorum, it severely restricts the speech of members of government bodies, many of whom are unpaid volunteers who just want to serve their communities. *Id.*, § 551.001(2); 4RR11-12, 27. 2RR56. Practitioners have been

forced to simply advise members of government bodies to always refrain from talking to each other outside of posted meetings. 2RR64, 74-76; 3RR48, 51; 4RR28-29. The statute thus prohibits an entire category of speech and deters conversations in public life that would otherwise be perfectly legal. 2RR66, 152; 3RR38, 80. It provides a vehicle for arbitrary enforcement and politically motivated selective prosecution. 3RR50, 61; 4RR18, 24-27, 84-85.

The experts noted that the attorney general attempted to resolve the problem of the incompatible definition of "deliberation" by issuing an advisory opinion concluding that "'meeting in numbers less than a quorum' describes a method of forming a quorum." Tex. Att'y Gen. Op. No. GA-0326 p. 3 (2005). According to the opinion, the conspiracy statute is intended to target "successive gatherings" or "a daisy chain of members, the sum of whom constitute a quorum." *Id.* This interpretation is so far removed from the plain language that it is no surprise that the expert witnesses characterized it as "rewriting" the statute. 2RR58, 3RR102-103. This construction only exacerbated the chilling effect of the ambiguous statute. Members "have to worry not just about who they're talking to, but who the person they're talking to is talking to," either before or afterwards, lest they form a "daisy chain." 2RR74-75, 79, 120-21, 151.

The experts uniformly agreed that the vague conspiracy statute is not necessary

to effectively enforce TOMA because compliance can be adequately achieved through civil sanctions (injunctions, the voiding of actions taken in violation of TOMA, and attorney's fees awards) and criminal sanctions for illegal closed meetings pursuant to § 551.144, which prohibits knowingly participating in or organizing any "closed meeting" that is "not permitted under this chapter." 2RR71-72, 177-78.

The trial court heard from several members of government bodies who struggled with the "very convoluted and confusing" criminal statute. 2RR226. They reported being unable to educate themselves on agenda items (2RR231-234, 239-40, 269; 3RR114); refraining from answering casual unsolicited questions from constituents (2RR230); totally avoiding speaking with other members outside of public meetings (2RR263-65; 3RR122-23); and feeling like they "can go to jail very easily." (2RR226, 235, 265).

Even the State's witnesses' testimony evidenced the chilling effects and ambiguity of § 551.143 by characterizing it as "complicated" because to understand it "you have to put together" numerous court cases, attorney general opinions, and penal code provisions. 5RR100. One official admitted that he "erred on the side of caution" and tried to avoid having "any type of meetings or deliberations" in less than a quorum. 5RR13. There was significant disagreement among the State's own witnesses about what conduct is prohibited even with regard to routine everyday tasks,

such as agenda meetings where staff members discuss public business on an official's behalf or discussions among members for the purpose of "educating and informing." 5RR14-15, 18, 29, 31, 34-35, 40-44, 123, 136-38; SX9 at 2-3.

ARGUMENTS

I. The court of appeals erred in finding that § 551.143 does not violate the First Amendment.

The court of appeals erroneously found that § 551.143 is a content neutral regulation directed at conduct rather than protected speech, and thus applied the wrong standard of review (rational basis rather than strict scrutiny) and erroneously imposed the burden on the appellees to demonstrate that the statute is unconstitutional. Review is warranted because (1) this is an important matter of first impression (2) concerning the constitutionality of a state law, and (3) because the court of appeals' decision conflicts with *Reed v. Town of Gilbert*, -- U.S. --, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015) (a law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive or content-neutral justification). Tex. R. App. P. 66.3(b)-(d).

A. The court of appeals applied the wrong standard in finding § 551.143 content neutral.

The court of appeals, quoting *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012), held that § 551.143 is not content-based because:

> ... a regulation is not content-based merely because the applicability of the regulation depends on the content of the speech. A statute that appears content based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech.

Doyal at *3, quoting *Asgeirsson* at 459-60 (internal citations omitted).

In applying this analysis, the court of appeals rejected the appellees' arguments that the *Asgeirsson* analysis was abrogated by *Reed v. Town of Gilbert.*, which held:

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech .... In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

135 S. Ct. at 2228.

These two decisions are undeniably incompatible. The only reason the court of appeals advanced for applying Fifth Circuit precedent over contrary subsequent Supreme Court authority is that the Supreme Court did not "mention or discuss" *Asgeirsson* in *Reed.*

Reed clarified that government regulation of speech is content based, and thus subject to strict scrutiny, if a law applies to particular speech because of (1) the topic discussed, (2) the idea or message, or (3) its function or purpose. *Id.* at 2227. Because "deliberation" is defined as "a verbal exchange ... concerning an issue within the jurisdiction of the governmental body or any public business," the conspiracy statute on its face regulates speech because of the topic discussed as well as its function and

purpose. Tex. Gov't Code § 551.001(2) (defining "deliberation").

B. The court of appeals erred in finding that § 551.143 regulates conduct rather than speech.

The court of appeals held that § 551.143 is directed only at conduct, i.e., the act of "conspiring to engage in deliberations that circumvent the requirements of TOMA." *Doyal* at *4. Accordingly, it applied rational basis review to determine if the statute had a rational relationship to a legitimate state purpose. *Id.* at *2, 5. According to the court of appeals § 551.143 is comparable to the disorderly conduct statute criminalizing displaying a firearm in public "in a manner calculated to alarm." *See Ex parte Poe*, 491 S.W.3d 348, 354 (Tex. App.--Beaumont 2016, pet. ref'd) (upholding statute targeting the conduct of displaying a firearm in a public place in a manner calculated to alarm).

It is well-established that there is no First Amendment protection for speech that is integral to criminal conduct. *See United States v. Stevens*, 559 U.S. 460, 468-69, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (obscenity, defamation, fraud, incitement, and speech integral to criminal conduct are not constitutionally protected speech). But this principle is invoked to uphold laws in which the gravamen of the offense is clearly unlawful conduct, such as extortion, soliciting an illegal transaction, or assuming another's identity without consent. *See Sanchez v. State*, 995 S.W.2d 677,

687 (Tex. Crim. App. 1999) (upholding sexual harassment provision of the official oppression statute because extortionate speech is not constitutionally protected); *Ex parte Lo*, 424 S.W.3d 10, 17 (Tex. Crim. App. 2013) (noting in dicta that the conduct of requesting a minor to engage in illegal sexual acts falls outside the ambit of First Amendment protection); *Ex parte Bradshaw*, 501 S.W.3d 665, 674 (Tex. App.—Dallas 2016, pet. ref'd) (upholding statute prohibiting the act of assuming another person's identity, without that person's consent, with the intent to harm, defraud, intimidate, or threaten any person by creating a web page or posting or sending a message).

In contrast, "conspiring to engage in deliberations that circumvent the requirements of TOMA" does not involve any conduct other than the deliberations themselves, because deliberating is necessarily a joint undertaking. The State's own expert repeatedly testified that the only thing separating illegal from innocent conduct in various hypotheticals was whether the members had the specific intent to "to avoid compliance with the requirements of the Act." (5RR93, 95, 127, 128, 130-31, 136, 138, 147).[4] Thus, the "conduct" of conspiring to circumvent TOMA is nothing more than an intent element, and one that is highly subjective and prone to

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[4] *See Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 706 (W.D. Tex. 2011), *aff'd*, 696 F.3d 454 (5th Cir. 2012) (construing § 551.143 such that "a meeting of less than a quorum is not a 'meeting' within the Act when there is no intent to avoid the Act's requirements")

misinterpretation. For example, experienced practitioners described the difficulties in formulating advice when members of a government body, with no intent of violating the act, seek guidance on how to conduct informal discussions without triggering TOMA rules, which could easily be misconstrued as "conspiring" to "circumvent" TOMA. (2RR149-50; 3RR47).

The court of appeals contrasted the sign code ordinances at issue in *Reed* as laws directed at speech, rather than conduct, even though the challenged provisions involved time limitations for the display of certain signs. *Doyal* at *4, citing *Reed,* 135 S.Ct. at 2225. It makes no sense to categorize the posting and removing of signs as "speech," but deliberating as "conduct." Because it is directed at discussion of "any public business," § 551.143 it is better categorized as targeting "pure speech," rather than harmful, constitutionally unprotected conduct such as displaying a firearm. *See Virginia v. Hicks*, 539 U.S. 113, 124, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (concern with overbreadth "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct").

Section 551.143 does not just regulate speech—it regulates the "core political speech" that courts characterize as the "zenith" of First Amendment protected speech. *Meyer v. Grant*, 486 U.S. 414, 425, 108 S. Ct. 1886, 1894, 100 L. Ed. 2d 425 (1988) (petition circulation is core political speech because it involves both the expression

of a desire for political change and a discussion of the merits of the proposed change); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) (core political speech involves "interactive communication concerning political change").

C. Section 551.143 does not survive strict scrutiny and is overbroad.

Based on its erroneous finding that § 551.143 regulates conduct rather than the content of speech, the court of appeals erroneously applied rational basis review, examining only whether the statute had a rational relationship to a legitimate state purpose, with the burden resting upon the person challenging the statute to establish its unconstitutionality. *Doyal* at *2, 5.

A content-based restriction of speech is presumptively invalid and the government bears the burden to rebut that presumption. *Ex parte Lo*, 424 S.W.3d at 15. To satisfy strict scrutiny, a law that regulates speech must be (1) necessary to serve a compelling state interest and (2) narrowly drawn. *Id.* at 15. A law is narrowly drawn if it employs the least restrictive means to achieve its goal and if there is a close nexus between the government's compelling interest and the restriction. *Id.* The State has never even attempted to demonstrate that § 551.143 survives this standard.

Section 551.143 does not serve a compelling state interest. In the four decades since its enactment the conspiracy statute has not generated a single successful

criminal conviction, indicating that there is no pressing problem of local government bodies conspiring to flout the rules. The legislature's self-exemption from TOMA also belies any compelling interest, (2RR162-63, 3RR57-58) as does the fact that no other state criminalizes meeting in less than a quorum. *See Lo,* 424 S.W.3d at 23-24 (finding Texas law was not narrowly tailored to serve a compelling interest because no other state criminalized indecent expression). TOMA already has a clearly drafted, narrowly tailored provision, § 551.144, that imposes a duty subject to criminal sanctions to hold open meetings unless an exception applies. *See Lo* at 19 (observing that overbroad statute did "not serve any compelling interest that was not already served by a separate, more narrowly drawn, statutory provision").

Even if there was a compelling state interest, the statute is not the least restrictive means of achieving it. It goes far beyond targeting serial communications intended to make policy decisions outside of public view. Its facial scope prohibits virtually any discussion of public business among less than a quorum, such that elected officials are chilled from communicating with one another and constituents to learn about an issue or to discuss whether an issue warrants consideration by the entire governmental body.

Despite extensive evidence of the statute's overbreadth, the court of appeals dismissed the overbreadth challenge in a single sentence. *Doyal* at *5 ("The alleged

overbreadth of section 551.143 is not real and substantial when judged in relation to its plainly legitimate sweep."). The statute's plainly legitimate sweep is substantially outweighed by the protected speech it chills; the statute is so broadly written that members are advised that the only place they can ever safely talk about any kind of public business is in a public meeting after 72-hours posted notice. 3RR48.

II. The court of appeals erred in finding that § 551.143 is not void for vagueness.

Review is warranted because (1) this is an issue of first impression (2) concerning the constitutionality of a state law, and (3) the court of appeals analysis and holding conflicts with *Johnson v. United States*, -- U.S. --, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015) (a vague provision is not constitutional merely because there is some conduct that clearly falls within the provision's grasp); *Ex parte Ellis*, 309 S.W.3d 71, 86 (Tex. Crim. App. 2010) (when a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even if the law has some valid application); *State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007) (criminal statutes outside the penal code must be construed strictly, with any ambiguity resolved in favor of the accused); and *United States v. Stevens*, 559 U.S. 460, 481, 130 S. Ct. 1577, 1591-92, 176 L. Ed. 2d 435 (2010) (a court may not "rewrite" a law to resolve ambiguous language in order to avoid serious constitutional doubts). Tex. R. App. P. 66.3(b)-(d).

A. The court of appeals erred in requiring that a vague statute "always operate unconstitutionally."

In reversing the trial court's finding that § 551.143 is unconstitutionally vague, the court of appeals held that Riley "failed to meet his burden to establish that the conspiracy provisions at issue always operate unconstitutionally under all possible circumstances." Slip op. at 3.

When a vagueness challenge involves First Amendment considerations, a criminal law may be facially invalid even though it may not be unconstitutional as applied to the defendant's conduct or even if the law has some valid application. *Gooding v. Wilson*, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972); *Ex parte Ellis*, 309 S.W.3d 71, 86 (Tex. Crim. App. 2010).

The Supreme Court recently disavowed the prior standard that an unconstitutional law must be vague in all applications, even as to laws with no impact on protected speech. In *Johnson v. United States*, -- U.S. --, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), the Court held a vague statute is not constitutional "merely because there is some conduct that clearly falls within the provision's grasp." 135 S. Ct. at 2561 (finding the residual clause of the Armed Career Criminal Act unconstitutionally vague even though it was not vague in all applications).

Because the court of appeals' analysis was limited to whether the statute had some conceivable legitimate application, the court failed to address the many vague

aspects of the statute and substantial chilling effect on protected speech. As established in the hearing testimony, the statute's ambiguities create a minefield of uncertainty that pervades every aspect of an official's duties and leaves them leery of having even casual conversations with constituents and colleagues (2RR230-234, 239-40; 3RR114, 122-23, 263-64).

B. The court of appeals erred in failing to apply the strict construction required for criminal statutes.

In finding that the terms in § 551.143 are not vague and self-contradictory, the court of appeals adopted a construction advanced by the attorney general. Quoting an advisory opinion, the court of appeals found that the statute is targeted at "members of a governmental body who gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body." *Doyal* at *5, quoting Tex. Att'y Gen. Op. No. GA-0326 p. 3 (2005). The language "'meeting in numbers less than a quorum' describes a method of forming a quorum." *Id.* The court of appeals agreed with the attorney general that "[t]his construction is discernible from a plain reading of the provision." *Id.*; Tex. Att'y Gen. Op. No. GA-0326 p. 4.

This analysis is flawed because both the attorney general and the court of appeals relied solely on civil cases in interpreting the statute to target "successive gatherings." *Id.,* citing *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316

F.Supp.2d 433, 473, 476 (W.D. Tex. 2001). Civil courts must construe statutes liberally to effectuate the legislative purpose. *Esperanza,* 316 F. Supp. 2d at 472 (construing TOMA's provisions liberally in favor of open government).

But, in finding that this construction is "discernible from a plain reading of the provision," the court of appeals failed to apply the strict construction required for criminal statutes. Ambiguity in the ambit of the statute's coverage must be resolved in favor of the accused to ensure that there is fair warning of the boundaries of criminal conduct. *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001–02, 108 L. Ed. 2d 132 (1990); *State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007) (criminal statutes outside the penal code must be construed strictly, with any ambiguity resolved in favor of the accused). It is not enough that a particular construction is "discernable" from a liberal reading of the text. *See State v. Cortez*, PD-0228-17, 2018 WL 525696, at *5 (Tex. Crim. App., Jan. 24, 2018) (refusing to apply a broad interpretation to criminal statute because courts have a duty to narrowly construe statutes in favor of the accused).

Construing the statute strictly, there is nothing in its plain language about sequential, successive, or serial deliberations. It is highly unlikely that an ordinary person would understand the phrase "meeting in numbers less than a quorum" to mean "a method of forming a quorum." Moreover, the constitution demands that laws be

sufficiently clear that a person of ordinary intelligence be given a reasonable opportunity to know what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). It does not require an ordinary person to be familiar with attorney general advisory opinions, which are not even binding on prosecutors.

A court may not "rewrite" a law to resolve ambiguous language in order to avoid serious constitutional doubts. *United States v. Stevens*, 559 U.S. 460, 481, 130 S. Ct. 1577, 1591-92, 176 L. Ed. 2d 435 (2010). Nor may a statute be upheld "merely because the Government promised to use it responsibly." *Ex parte Thompson*, 442 S.W.3d 325, 350 (Tex. Crim. App. 2014); *Stevens*, 559 U.S. at 480, 130 S. Ct. at 1591. The attorney general's liberal "daisy chain" interpretation is a strained attempt to rewrite an unconstitutionally vague and overbroad criminal statute and a clear derogation of the required strict construction.

C. The court of appeals' suggested definitions do nothing to resolve the statute's ambiguity.

In attempt to show that the statute's undefined terms have plain meanings, the court of appeals supplied two dictionary definitions for "conspire," three definitions for "circumvent," and two definitions for "secret." *Doyal* at *4. This effort only further demonstrates that the statute fails to provide sufficient notice of what is prohibited. For example, the court's definitions for "circumvent" ("to overcome or

avoid the intent, effect, or force of: anticipate and escape, check, or defeat by ingenuity or stratagem: make inoperative or nullify the purpose or power of esp. by craft or scheme") encompass a broad range of conduct. Members may legitimately endeavor to conduct informal discussions in less than a quorum so as "avoid" triggering TOMA requirements with no intention of violating the law, just as a citizen can legally avoid paying taxes. The court of appeals' suggested definitions of just those three terms are subject to many permutations, some of which embrace wholly innocuous conduct, creating an intolerable risk of arbitrary application.

Due process requires that criminal laws establish determinate guidelines to prevent and avoid arbitrary enforcement "on an ad hoc and subjective basis." *Grayned*, 408 U.S. at 108-109. A jury trying to make sense of the law would be confronted with multiple ambiguous undefined terms, terms that are used contrary to their definitions in TOMA, and nothing whatsoever to indicate that the law is intended to target "successive gatherings" or "daisy chains." In these circumstances, there is no lawful jury charge that could provide constitutionally sufficient determinate guidelines to prevent subjective and arbitrary enforcement.

III. The court of appeals failed to address claims material to its disposition.

In disposing of Riley's appeal by reference to its opinion in *State v. Doyal*, the court of appeals failed to address several arguments raised by Riley.

The court of appeals failed to address Riley's claim that § 551.143 is subject to strict scrutiny pursuant to *Reed v. Town of Gilbert*, 135 S.Ct. at 2227, because it regulates speech based on its function or purpose (Appellee Riley's Brief at 46-47).

The court of appeals failed to address Riley's claim that, pursuant to *Johnson v. United States*, 135 S. Ct. at 2561, a successful vagueness challenge does not require that a law be vague in all applications (Riley's Brief at 26-27); in fact, the court of appeals erroneously rejected his constitutionally challenges on this basis.

The court of appeals held that the terms "conspire," "circumvent," "secret," and the fact that "deliberation" by definition requires a quorum did not render the statute unconstitutionally vague and overbroad (*Doyal* at *4-5), but the court did not address the ambiguity arising from additional vague terms in the statute. Riley asserted that "deliberation," which is defined as a "verbal exchange," is also ambiguous because is it unclear whether it is limited to oral discussions or also includes written communication (Riley's Brief at 29, 40, 68). The language "member or group of members" makes it is unclear whether the statute applies only to members of government bodies or also to members of the public (Riley's Brief at 8, 40, 54, 65). These ambiguous terms contribute significantly to the statute's overbreadth because officials are advised to avoid responding to e-mails, using social media, and communicating with constituents (Riley's Brief at 8, 10, 14, 39, 40).

The court of appeals failed to address Riley's claim that § 551.143 is subject to strict scrutiny, pursuant to *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 311-12, 130 S. Ct. 876, 895, 175 L. Ed. 2d 753 (2010), because it functions as a prior restraint due to the complexity of the law, the threat of criminal liability, and the heavy costs of defending against prosecution (Riley's Brief at 52-54).

The court of appeals failed to review the evidence from the hearing in the light most favorable to the trial court's judgment.

The judgment of the court of appeals should be vacated and remanded to address these arguments. Tex. R. App. P. 47.1.

PRAYER

Riley prays that this Court grant discretionary review, reverse the court of appeals, and affirm the trial court's order dismissing the indictments; alternatively, the Court should vacate the court of appeals' judgment and remand pursuant to Texas Rule of Appellate Procedure 47.1.

Respectfully submitted,

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The undersigned attorney certifies that the relevant sections of this computer-generated document have 4,500 words, based on the word count function of the word processing program used to create the document.

/s/ W. Troy McKinney

APPENDIX

1. *State v. Riley*, No. 09-17-00124-CR (Tex. App.—Beaumont, February 7, 2018) (mem. op. not desig. for publication).

2. *State v. Doyal*, __S.W.3d__, 2018WL761011 (Tex. App.—Beaumont, February 7, 2018, pet. filed).

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00124-CR

THE STATE OF TEXAS, Appellant

V.

CHARLIE RILEY, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 16-06-07316-CR

MEMORANDUM OPINION

In June 2016, a grand jury indicted several of the members of the Montgomery County Commissioners Court, including Charlie Riley, for conspiring to violate the Texas Open Meetings Act (TOMA). *See* Tex. Gov't Code Ann. § 551.143 (West 2017). In pertinent part, Riley's indictment alleges he knowingly conspired to circumvent TOMA over a two-week period that began on August 11, 2015, by "meeting in a number less than a quorum for the purpose of secret

APPENDIX
#1

deliberations" regarding "the contents of the potential structure of a November 2015 Montgomery County Road Bond[.]" Subsequently, Riley filed a motion with the trial court asking the court to dismiss his indictment.[1] Riley's motion asserts that section 551.143 of TOMA is unconstitutional on its face. According to the arguments that are presented in the motion, the conspiracy provisions that are in TOMA violate the rights of elected public officials to engage in free speech and are unconstitutional

[1] Technically, Riley filed a "Motion to Join Defendant Craig Doyal's Motion to Dismiss the Indictment," which Doyal filed in trial court cause number 16-06-07315-CR. However, the cases were not filed in the same trial court cause numbers, the record does not contain an order granting Riley's motion to join Doyal's motion, and the record does not show that Riley's case was consolidated with the case the State filed against Doyal. Riley's motion states that he "adopts and joins" Doyal's motion, and Riley advanced no arguments in his motion separate from those presented by Doyal in his motion to dismiss. Doyal's motion to dismiss was filed in cause number 16-06-07315-CR, a case that is styled *The State of Texas v. Craig Doyal*. Nonetheless, the transcript from the hearing the trial court conducted on the motion to dismiss reflects that the trial judge who presided over Riley's case also presided over the case against Doyal. The trial court conducted a joint hearing on Riley's and Doyal's motions. During the hearing, the State did not complain that the Code of Criminal Procedure does not authorize a defendant in one case to file a motion adopting motions filed by another defendant in another case. The transcript of the motion to dismiss hearing reflects that the attorneys for Doyal, Riley, and Marc Davenport, another defendant who the State alleged engaged in the conspiracy, were present and participated in the hearing on the requests these defendants filed to dismiss their indictments. The attorneys for the defendants represented that they were acting together and calling witnesses together on their respective motions. Because the trial court granted Riley's motion, the trial court's decision appears to have been based on the grounds that Doyal presented in his motion, as Riley's motion did not advance any grounds that were separate from the grounds that Doyal advanced in his motion.

restrictions on their rights because the provisions in TOMA are overly broad. *See* U.S. CONST. amend. I (prohibiting Congress from making a law that abridges the freedom of speech); U.S. CONST. amend. XIV (prohibiting a State from making or enforcing any law that abridges the privileges or immunities of a citizen of the United States); Tex. Gov't Code Ann. § 551.143 (making it an offense to conspire to circumvent TOMA). Riley's motion further asserts that because the conspiracy provisions in TOMA fail to sufficiently define the conduct that is prohibited by the Act, the provisions are vague and confusing such that the ordinary citizen cannot determine how he can avoid violating the statute.

In *State v. Doyal*, an opinion we handed down today, the Court overturned the trial court's order granting Craig Doyal's motion to dismiss because Doyal failed to meet his burden to establish that the conspiracy provisions in TOMA always operate unconstitutionally under all possible circumstances. No. 09-17-00123-CR, slip op. (Tex. App.—Beaumont Feb. 7, 2018, no pet. h.), *available at* http://www.search.txcourts.gov/DocketSrch.aspx?coa=coa09. For the same reasons, we also hold that Riley failed to meet his burden to establish that the conspiracy provisions at issue always operate unconstitutionally under all possible circumstances. *See id.* For the reasons that we explained in *Doyal*, we reverse the order the trial court signed granting Riley's motion to dismiss. *Id.* at 11-14.

In remanding Riley's case for further proceedings, we recognize that Riley did not ask the trial court to consider if section 551.143 of TOMA operated unconstitutionally "as applied" to the facts and circumstances of his particular case. Consequently, the facts and circumstances that led to the indictments of Montgomery County's elected officials were not at issue in this appeal, which concerned only the much broader question of whether the provision in the statute that Riley challenged always operated unconstitutionally under all possible circumstances. *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011) (explaining that "as applied" challenges to the constitutionality of a statute require the facts of the case to be developed, so such challenges "cannot be properly raised by a pretrial motion to quash the charging instrument").

We also note the very high bar that defendants face when they claim that a statute is facially invalid. The United States Supreme Court has explained: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also McGruder v. State*, 483 S.W.3d 880, 883 (Tex. Crim. App. 2016) (explaining that to prevail on a facial challenge, the defendant is required to establish that the statute always operates unconstitutionally with respect to all possible

circumstances). Courts strive to avoid sustaining facial invalidity challenges because granting such claims allows a court to nullify a legislative act without the benefit of a record to establish what the defendant did to allegedly violate a statute. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008) (noting that facial challenges are disfavored for several reasons, explaining that they often rest on speculation, run contrary to the principles of judicial restraint, and threaten to short circuit the democratic process). The Texas Supreme Court also indicates that courts should avoid granting motions claiming that statutes are facially invalid "'for reasons relating both to the proper functioning of courts and to their efficiency[.]'" *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 737 (Tex. 2017) (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989)). In other words, the courts have a judicial preference requiring "the lawfulness of the particular application of the law" to "be decided first[,]" a process that in criminal cases nearly always requires a trial. *Id.* at 737-38.

While we have concluded that Riley failed to meet his burden of proving his facial invalidity and vagueness claims, we have neither considered nor is it appropriate at this point for us to consider whether section 551.143 is invalid "as applied." Consequently, this opinion cannot be interpreted as any indication regarding this Court's views regarding the validity of the allegations that are in

Riley's indictment. We cannot overemphasize that individuals charged with crimes, including elected officials, are presumed innocent prior to trial. *See* Tex. Code Crim. Proc. Ann. art 38.03 (West Supp. 2017).[2]

We sustain the State's appellate issues, reverse the trial court's order dismissing Riley's indictment, and remand the cause to the trial court for further proceedings consistent with the Court's opinion.

REVERSED AND REMANDED.

HOLLIS HORTON
Justice

Submitted on January 24, 2018
Opinion Delivered February 7, 2018
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.

[2] Article 38.03 of the Code of Criminal Procedure provides:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

Tex. Code Crim. Proc. Ann. art. 38.03 (West Supp. 2017).

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00123-CR

THE STATE OF TEXAS, Appellant

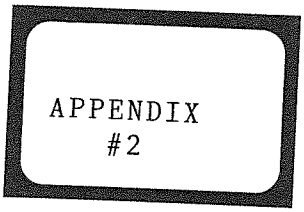
V.

CRAIG DOYAL, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 16-06-07315-CR

OPINION

The State of Texas appeals the trial court's dismissal of an indictment, which alleged that appellee Craig Doyal, as a member of the Montgomery County Commissioners Court, knowingly conspired to circumvent the Texas Open Meetings Act ("TOMA"). We reverse the trial court's order dismissing the indictment and remand the cause to the trial court for further proceedings consistent with this opinion.



Doyal, a member of the Montgomery County Commissioners Court, was indicted for knowingly conspiring to circumvent the provisions of TOMA by meeting in a number less than a quorum for the purpose of secret deliberations "by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond[.]" *See* Tex. Gov't Code Ann. § 551.143 (West 2017). Doyal filed a motion to dismiss the indictment, asserting that section 551.143 is facially unconstitutional because it violates the free speech provisions of the First Amendment and is vague and overbroad.

Doyal[1] asserted that he, a county commissioner, and a political consultant met with representatives of a local political action committee ("PAC") to discuss placing a road bond referendum on the November 2015 ballot, and as a result of the meeting, a memorandum of understanding was produced, in which the Texas Patriots PAC promised its political support for putting a road bond proposal on the commissioners' special meeting agenda. According to Doyal, he posted the agenda for a special meeting of the Commissioners Court, and citizens praised the commissioners' work at the special meeting and thanked them for putting a road bond on the ballot. Doyal

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[1]Doyal is the elected County Judge of Montgomery County, and not technically a commissioner. The County Judge is a member of Commissioners Court. Tex. Loc. Gov't Code Ann. § 81.001(a) (West Supp. 2017).

asserted that the county attorney wrote him a letter stating that the commissioners had complied with the requirements of TOMA, and voters passed the bond in the November election. Doyal alleged that the discussions between himself, the other commissioner, the consultant, and the members of the PAC were not a meeting under TOMA and were not intended to be an agreement to conspire to avoid TOMA.

In his motion to dismiss, Doyal argued that section 551.143 of the Texas Government Code burdens free speech and is subject to strict construction. According to Doyal, the statute facially "does not make sense[]" because "[m]eeting in numbers of less than a quorum does not violate a statute that requires a quorum to meet in open session." Doyal contended that because TOMA applies only to specific speech by public officials, it is a content-based penal regimen subject to review under strict scrutiny. According to Doyal's motion to dismiss, section 551.143 is constitutionally overbroad because it prohibits a substantial amount of protected speech when judged in relation to the statute's plainly legitimate sweep. Doyal further asserted that section 551.143 is vague and confusing because the terms "conspire" and "secret" are not defined, and the statute fails to explain what kind of "deliberations" are covered.

The State's response in the trial court asserted that section 551.143 is "both constitutional and enforceable." According to the State, section 551.143 is content

neutral because "it does not restrict speech based on specific content, but simply requires that the disclosure of the speech take place in an open forum." The State asserted that the purpose of section 551.143 is to control the effects of closed meetings, including decreased transparency, encouragement of fraud or corruption, and increased mistrust in governmental entities. In addition, although the State argued that intermediate scrutiny is the proper standard for reviewing section 551.143, the State contended that even if the strict scrutiny standard applied, section 551.143 meets that test because "it is narrowly tailored and serves a compelling state interest."

The trial court held a hearing, but heard no testimony regarding the underlying facts. Rather, Doyal's witnesses offered opinion testimony regarding their interpretations of section 551.143, the challenges it poses, and its constitutionality. The trial judge signed an order granting Doyal's motion to dismiss the indictment. No party requested the trial court to make findings of fact and conclusions of law, and none were filed. The State then filed this appeal, in which it raises two issues for our consideration: (1) the trial court erred by dismissing the indictment on the ground that section 551.143 is facially unconstitutionally vague and ambiguous, and (2) the trial court erred by dismissing the indictment on the ground that section 551.143 facially violates the First Amendment and is overbroad.

"Whether a statute is facially constitutional is a question of law that we review *de novo*." *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). If we determine that there is a reasonable construction which will render the statute constitutional, we must uphold the statute. *Tarlton v. State*, 93 S.W.3d 168, 175 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). We presume that a statute is valid and that the Legislature did not act unreasonably or arbitrarily. *Ex parte Lo*, 424 S.W.3d at 14-15. "The burden normally rests upon the person challenging the statute to establish its unconstitutionality." *Id.* at 15.

"The First Amendment—which prohibits laws 'abridging the freedom of speech'—limits the government's power to regulate speech based on its substantive content." *State v. Stubbs*, 502 S.W.3d 218, 224 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *see* U.S. Const. amend. I. "Content-based regulations are those that distinguish favored from disfavored speech based on the idea or message expressed." *Stubbs*, 502 S.W.3d at 224. "[W]hen the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed." *Ex parte Lo*, 424 S.W.3d at 15. "Content-based regulations (those laws that distinguish favored from disfavored speech based on the ideas expressed) are presumptively invalid, and the government bears the burden to rebut that presumption." *Id.* Accordingly, we apply strict scrutiny to content-based regulations.

Id. On the other hand, if the statute punishes conduct and not speech, we apply a rational basis level of review to determine if the statute has a rational relationship to a legitimate state purpose. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Before a statute will be invalidated on its face as overbroad, the overbreadth must be real and substantial when "judged in relation to the statute's plainly legitimate sweep." *Id.* A statute should not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional application. *See In re Shaw*, 204 S.W.3d 9, 15 (Tex. App.—Texarkana 2006, pet. ref'd). With respect to issues of vagueness, statutes are not necessarily unconstitutionally vague merely because the words or terms employed in the statute are not specifically defined. *See Engelking v. State*, 750 S.W.2d 213, 215 (Tex. Crim. App. 1988). When a statute does not define the words used therein, we give the words their plain meaning. *See Parker v. State*, 985 S.W.2d 460, 464 (Tex. Crim. App. 1999); *see also* Tex. Gov't Code Ann. § 311.011(a) (West 2013) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."). Under the void-for-vagueness doctrine, a statute will be invalidated if it fails to define the offense in such a manner as to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *See State v. Holcombe*, 187 S.W.3d

496, 499 (Tex. Crim. App. 2006); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

"TOMA requires that meetings of governmental bodies be open to the public." *Asgeirsson v. Abbott*, 696 F.3d 454, 458 (5th Cir. 2012). Section 551.143(a) of TOMA, which makes a violation of TOMA a criminal offense, provides as follows:

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

Tex. Gov't Code Ann. § 551.143(a). Chapter 551 defines the term "deliberation" as "a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business." *Id.* § 551.001(2) (West Supp. 2017). In addition, chapter 551 defines "governmental body" to include a county commissioners court. *Id.* § 551.001(3)(B). Furthermore, chapter 551 defines a "meeting" as follows:

> (A) a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action; or
>
> (B) except as otherwise provided by this subdivision, a gathering:

> (i) that is conducted by the governmental body or for which the governmental body is responsible;
>
> (ii) at which a quorum of members of the governmental body is present;
>
> (iii) that has been called by the governmental body; and
>
> (iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.
>
> . . .
>
> The term does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.
>
> The term includes a session of a governmental body.

Id. § 551.001(4). Lastly, chapter 551 defines "quorum" as "a majority of a governmental body, unless defined differently by applicable law or rule or the charter of the governmental body." *Id.* § 551.001(6).

In analyzing section 551.144 of TOMA,[2] the U.S. Court of Appeals for the Fifth Circuit held that "[t]ransparency is furthered by allowing the public to have access to government decisionmaking . . . . The private speech itself makes the government less transparent regardless of its message. The statute is therefore content-neutral." *Asgeirsson*, 696 F.3d at 461-62. The *Asgeirsson* court held that a regulation is not content-based merely because the applicability of the regulation depends on the content of the speech. *Id.* at 459. "A statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech." *Id.* at 459-60. Doyal contends that *Asgeirsson* was abrogated by *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). He emphasizes that this Court need not follow cases from the Fifth Circuit Court of Appeals and argues that two additional U.S. Supreme Court cases "show that Section 551.143 does not pass constitutional muster even under intermediate scrutiny[,]"[3] and that *Asgeirsson*

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[2]Section 551.144 makes calling or aiding in calling a closed meeting, closing or aiding in closing a meeting to the public, or participating in a closed meeting a criminal offense. Tex. Gov't Code Ann. § 551.144 (West 2017).

[3]Doyal argues that under *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017) and *Matal v. Tam*, 137 S.Ct. 1744 (2017), section 551.143 cannot survive even intermediate scrutiny. In those cases, the Supreme Court invalidated a law banning sex offenders from using social media and held that the First Amendment bars a law that prohibited disparaging trademarks. *Packingham*, 137 S.Ct. 1735, 1738; *Matal*, 137 S.Ct. at 1751. We reject the assertion that these cases render it impossible for section 551.143 to survive intermediate scrutiny.

dealt with section 551.144, which is "a simple, clear statute[,]" but section 551.143 is "so vague that experts call it 'gibberish' and are confused about its meaning and application."

First, we note that *Reed* does not mention or discuss *Asgeirsson*, and we reject Doyal's assertion that *Reed* abrogated *Asgeirsson*. *See Reed*, 135 S.Ct. at 2218-39. Second, in *Reed*, the issue facing the Supreme Court was the constitutionality of a town's "Sign Code" that prohibited the display of outdoor signs without a permit, but exempted numerous categories of signs from that requirement, including ideological signs, political signs, and temporary directional signs relating to a qualifying event. *Id.* at 2224-25. In *Reed*, a church and its pastor wished to advertise the time and location of its Sunday church services, which were held in a variety of different locations due to financial constraints. *Id.* at 2225. The church was twice cited for exceeding the time limits for displaying temporary directional signs, as well as its failure to include the date of the event on the signs. *Id.* The church filed suit in federal district court, arguing that the Sign Code violated its freedom of speech. *Id.* at 2226. After the District Court granted summary judgment in favor of the town, the Court of Appeals affirmed, and the Supreme Court granted certiorari. *Id.* After concluding that the town's Sign Code was clearly not content-neutral, but instead was "content based on its face[,]" the Supreme Court held that the Sign Code could

not survive strict scrutiny because the Sign Code was not narrowly tailored to further a compelling government interest. *Id.* at 2228-32.

We conclude that, unlike the circumstances in *Reed*, which involved the particular type of speech or message on signs, section 551.143 of TOMA is directed at conduct, *i.e.*, the act of conspiring to circumvent TOMA by meeting in less than a quorum for the purpose of secret deliberations in violation of TOMA. *See* Tex. Gov't Code Ann. § 551.143; *Reed*, 135 S.Ct. at 2228-32; *Asgeirsson*, 696 F.3d at 461-62. It is not the content of the deliberations that is targeted by section 551.143; rather, section 551.143 targets the act of knowingly conspiring to engage in deliberations that circumvent the requirements of TOMA. *See* Tex. Gov't Code Ann. § 551.143. "The prohibition in TOMA is applicable only to private forums and is designed to *encourage* public discussion[.]" *Asgeirsson*, 696 F.3d at 461. Therefore, we reject Doyal's contention that we must apply strict scrutiny in reviewing section 551.143.

This Court's opinion in *Ex parte Poe*, 491 S.W.3d 348 (Tex. App.—Beaumont 2016, pet. ref'd), is instructive. *In Ex parte Poe*, the appellant asserted that the disorderly conduct statute is facially unconstitutional due to its alleged vagueness and its alleged violation of his rights under the First, Second, Fifth, and Fourteenth Amendments. *Id.* at 350. The statute at issue in *Ex parte Poe* provided

that "'A person commits an offense if he intentionally or knowingly . . . displays a firearm or other deadly weapon in a public place in a manner calculated to alarm.'" *Id.* at 354. This Court concluded that the statute punishes conduct (displaying a firearm in a public place in a manner calculated to cause alarm) rather than protected expression, and that the statute bears a rational relationship to the State's legitimate interest in protecting its citizens from harm. *Id.* We therefore rejected Poe's argument that strict scrutiny applied, and we began by presuming that the statute is valid and that the Legislature did not act arbitrarily or unreasonably in enacting it. *Id.* We also rejected Poe's argument that the word "alarm" was undefined and inherently subjective, and instead gave the undefined terms in the statute their plain meaning. *Id.*

In the case at bar, Doyal argues that section 551.143 is vague because the terms "conspire," "circumvent," and "secret" are not defined, and the statute does not explain what type of deliberations are covered. As was the case in *Poe*, the terms at issue have a plain meaning. "Conspire" is commonly understood to mean "to make an agreement with a group and in secret to do some act (as to commit treason or a crime or carry out a treacherous deed): plot together[.]" Webster's Third International Dictionary 485 (2002). "Circumvent" means "to overcome or avoid the intent, effect, or force of: anticipate and escape, check, or defeat by ingenuity or

stratagem: make inoperative or nullify the purpose or power of esp. by craft or scheme[.]" *Id.* at 410. "Secret" means "kept from knowledge or view: concealed, hidden" and "done or undertaken with evident purpose of concealment[.]" *Id.* at 2052.

Doyal asserts that because chapter 551 defines "deliberation" as a verbal exchange during a meeting between a quorum of members concerning an issue within the jurisdiction of the governmental body or any public business, yet section 551.143 refers to deliberations of less than a quorum, the statute is unconstitutionally vague. *See* Tex. Gov't Code Ann. §§ 551.001(2), 551.143. The Attorney General has opined that TOMA does not require that a governmental body's members be in each other's physical presence to constitute a quorum, and, therefore, section 551.143 applies to "members of a governmental body who gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body." Tex. Att'y Gen. Op. No. GA-0326 p. 3 (2005).[4] The Attorney General explained that the definition of "deliberations" as used in section 551.143 "is consistent with its definition in section 551.001 because 'meeting in numbers less than a quorum'

[4]We recognize the difficulties this language causes the State in its attempt to prove this element beyond a reasonable doubt; however, a statute that creates difficulty for the State in meeting its burden of proof is not unconstitutional.

describes a method of forming a quorum, and a quorum formed this way may hold deliberations like any other quorum." *Id.* at p. 4; *see Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp.2d 433, 473, 476 (W.D. Tex. 2001). The Attorney General also opined that "[t]his construction is discernible from a plain reading of the provision." Tex. Atty's Gen. Op. No. GA-0326 p. 4. We find the Attorney General's reasoning persuasive.

We conclude that section 551.143 describes the criminal offense with sufficient specificity that ordinary people can understand what conduct is prohibited. *See Holcombe*, 187 S.W.3d at 499. The statute provides reasonable notice of the prohibited conduct. *See Holcombe*, 187 S.W.3d at 499; *see also Kolender*, 461 U.S. at 357; *see also* Tex. Gov't Code Ann. § 551.143. We conclude that the statute is reasonably related to the State's legitimate interest in assuring transparency in public proceedings. *See Asgeirsson*, 696 F.3d at 461-62. The alleged overbreadth of section 551.143 is not real and substantial when judged in relation to its plainly legitimate sweep. *See Broadrick*, 413 U.S. at 615. Doyal has not satisfied his burden to prove that the statute is unconstitutionally vague and overbroad. *See id.* We sustain the State's appellate issues, reverse the trial court's order dismissing the indictment, and remand the cause to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STEVE McKEITHEN
Chief Justice

Submitted on January 24, 2018
Opinion Delivered February 7, 2018
Publish

Before McKeithen, C.J., Horton and Johnson, JJ.