Case No. PD-0265-18

TO

THE COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

MARC DAVENPORT,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

APPEALED FROM THE COURT OF APPEALS, 9th DISTRICT
AT BEAUMONT, TEXAS
CASE NUMBER: 09-17-00125-CR
221st District Court, Montgomery County, Texas
Trial Court Cause No. 16-06-07318-CR

APPELLEE'S PETITION FOR DISCRETIONARY REVIEW

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United States Supreme Court Cases

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Statement Regarding Oral Argument

Petitioner believes that oral argument would assist the Court in disposition of the issues presented in this petition. Petitioner respectfully requests oral argument.

Statement of the Case

Nature of the Case: This is an appeal of the Court of Appeals' decision to reverse the trial court's order to dismiss the indictment against Petitioner.

Trial Court: The Honorable Judge Randy Clapp, by assignment to the 221st District Court, Montgomery County, Texas.

Trial Court's Disposition: Petitioner was indicted for violating the Texas Open Meetings Act under Government Code section 551.143 along with Appellees Craig Doyal and Charlie Riley.[1] The trial court granted the motion to dismiss the indictment against Petitioner and Appellees Craig Doyal and Charlie Riley. The State appealed the trial court's ruling.

[1] Petitioner Davenport adopts by reference all arguments and grounds for review in Appellee Doyal's (PD-0254-18) and Appellee Riley's (PD-0255-18) Petitions for Discretionary Review.

Court of Appeals' Disposition: The Court of Appeals reversed the trial court's order dismissing the indictment against Petitioner.

Statement of Procedural History

(1) The Court of Appeals' opinion was handed down on February 7, 2018.

(2) No Motion for Rehearing was filed.

(3) The Petition for Discretionary Review is due on April 9, 2018.

Grounds for Review

I. The Court of Appeals erred when it held that Government Code section 551.143 applies to conduct rather than speech and therefore is not subject to strict scrutiny.

II. The Court of Appeals erred when it held that Government Code section 551.143 is not unconstitutionally overbroad.

III. The Court of Appeals erred when it held that Government Code section 551.143 is not unconstitutionally vague.

Argument

I. The Court of Appeals erred when it held that Government Code section 551.143 applies to conduct rather than speech and therefore is not subject to strict scrutiny.[2]

The Court of Appeals held that section 551.143 of the Texas Government Code is directed at conduct rather than speech.[3] The Court of Appeals stated that

[2] Court of Appeals opinion, p. 4, Appendix A.

[3] Court of Appeals opinion., p. 4, Appendix A, Court of Appeals opinion, p. 11, Appendix B. Appendix A is the Court of Appeals opinion in Appellee Davenport's case. Appendix B is the Court of Appeals opinion in Appellee Doyal's case. The Court of Appeals incorporates the same reasons for its decision in reversing Appellee Davenport's case as it does in Appellee Doyal's case.

section 551.143 targets the act of conspiring to circumvent the Texas Open Meetings Act (TOMA), not the content of the deliberations.[4] However, this analysis is incorrect because section 551.143 does not come into play unless those deliberations involve an issue within the jurisdiction of the governmental body or public business. The Court of Appeals erred in applying a rational basis standard of review to section 551.143. Section 551.143 is a content based restriction on its face and is therefore subject to strict scrutiny. Review is proper because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision.[5] Review is also proper because the Court of Appeals has decided an important question of state law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals and United States Supreme Court.[6]

The Court of Appeals states that, "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."[7] The Court of Appeals, citing *Asgeirsson v. Abbott* as support, concluded that section 551.143 is content neutral because a statute that appears content based on its face may still

[4] Court of Appeals opinion, p. 11, Appendix B.
[5] Tex. R. App. P. 66.3(f).
[6] Tex. R. App. P. 66.3(c).
[7] Court of Appeals opinion, p. 11, Appendix B

be considered content neutral if it is justified without regard to the content of its speech.[8]

However, the reasoning that supports the Court of Appeals opinion conflicts with the reasoning in *Reed v. Town of Gilbert*.[9] In *Reed*, the Supreme Court struck down a sign ordinance that was content based and did not satisfy strict scrutiny.[10] A government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.[11] The phrase "content based" requires a court to consider whether a particular regulation of speech on its face draws distinctions based on the message a speaker conveys.[12] The Court of Appeals in this case, using the same reasoning as the court in *Asgeirsson*, determined that the statute was content neutral because the regulation of speech under section 551.143 is justified without reference to the content of the regulated speech. The Court of Appeals' justification is that because the statute promotes transparency in government, and even though the statute may be content based on its face, it can still consider section 551.143 content neutral and subject to a rational basis scrutiny standard of review rather than strict scrutiny.[13] This analysis is incorrect.

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[8] *Id.* at p. 9.
[9] 135 S. Ct. 2218 (2015).
[10] *Id.* at 2231.
[11] *Id.* at 2227.
[12] *Id.*
[13] *See Asgeirsson v. Abbott*, 696 F.3d 454, 461–62 (5th Cir. 2012).

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.[14] A court must consider whether a law is content neutral on its face before turning to the law's justification or purpose.[15] A speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.[16] Here the Court of Appeals applied the wrong analysis in deciding that section 551.143 is content neutral and subject to a rational basis review. Because section 551.143 only criminalizes topics that are within the definition of deliberation[17] it is content based on its face and subject to strict scrutiny.

When the government seeks to restrict and punish speech based on its content the usual presumption of constitutionality is reversed.[18] Content based regulations are presumptively invalid and the government bears the burden to rebut that presumption.[19] The Supreme Court applies the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of

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[14] *Reed*, 135 S. Ct. at 2228.
[15] *Id.* at 2229.
[16] *Id.* at 2230.
[17] Tex. Gov't Code § 551.001(2). "Deliberation" means 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.
[18] *Ex parte Lo*, 424 S.W.3d 10, 15 (Tex. Crim. App. 2013).
[19] *Id.*

its content."[20] To satisfy strict scrutiny, a law that regulates speech must be necessary to serve a compelling state interest and be narrowly drawn.[21] A law is narrowly drawn if it employs the least restrictive means to achieve its goal and there is a close nexus between the government's compelling interest and the restriction.[22]

Section 551.143 is unconstitutional under strict scrutiny analysis because it does not serve a compelling government interest. Even if it did serve a compelling government interest the law is not narrowly drawn to achieve that interest. The central justification for TOMA is open and transparent government. The belief is that transparency in government allows the public to see how decisions are made and who is making them. While this is certainly a valid justification it does not rise to the level of a compelling government interest.

There are no other reported cases of criminal prosecution under section 551.143 in this State. It would be expected that if the danger of deliberations outside of open meetings were of such a compelling interest then there would have been other instances of criminal prosecution. In addition, the Texas Legislature does not see TOMA as a compelling interest because it is common for the Legislature to suspend their rules so that TOMA does not apply.[23] Even if there is a compelling government interest, section 551.143 is not narrowly tailored to achieve that interest.

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] RR Vol. 3, 57:17-24.

Because the Court of Appeals applied a rational basis standard of review rather than strict scrutiny in its First Amendment analysis of section 551.143 this Court should grant review.

II. The Court of Appeals erred when it held that Government Code section 551.143 is not unconstitutionally overbroad.[24]

The Court of Appeals begins its overbreadth analysis by citing *United States v. Salerno* and *McGruder v. State* for the assertion that a facial challenge is the most difficult successful challenge to make because the challenger must show that no circumstances exist under which the law would be valid.[25] Neither *Salerno* or *McGruder* included an overbreadth challenge under the First Amendment and therefore that is not the standard that must be met in this case to show that section 551.143 is overbroad.[26] The Court of Appeals later cites to the applicable test.[27] The applicable test under the First Amendment overbreadth doctrine, is whether a statute is facially invalid because it prohibits a substantial amount of protected speech judged in relation to the statute's plainly legitimate sweep.[28] The Court of Appeals

[24] Court of Appeals opinion, p. 6, Appendix A.
[25] Court of Appeals opinion, p. 4, Appendix A.
[26] *U. S. v. Salerno*, 481 U.S. 739, 745–46 (1987) (facial challenge under the 5th and 8th Amendments); *McGruder v. State*, 483 S.W.3d 880, 883 (Tex. Crim. App. 2016) (facial challenge under the 4th Amendment).
[27] Court of Appeals opinion, p. 5, Appendix A.
[28] *Ex parte Lo*, 424 S.W.3d at 18.

concluded that the Appellee has not met the burden to show that the statute prohibits a substantial amount of activity that is protected by the First Amendment.[29]

Section 551.143 is not narrowly tailored and is overbroad because it infringes on a substantial amount of protected speech. The Supreme Court has recognized categories of unprotected speech.[30] Speech integral to criminal conduct is not a protected category of speech.[31] However, speech under section 551.143, is not integral to any other traditional criminal conduct. It is speech about an issue within the jurisdiction of the governmental body or public business, not speech as part of conduct that forms a criminal act. Further, because of the language of section 551.143 is not sufficiently clear it creates a situation where there is a substantial amount of protected speech that can subject a member or members of a governmental body or a member of a governmental body and another person to criminal prosecution.

The first step in an overbreadth analysis is to construe the challenged statute because it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.[32] The Court of Appeals did not perform this analysis to determine whether section 551.143 reaches too far. There are many

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[29] Court of Appeals opinion, p. 6, Appendix A.
[30] *U.S. v. Stevens*, 559 U.S. 460, 468–69 (2010) (listing obscenity, defamation, incitement, and speech integral to criminal conduct as categories of unprotected speech).
[31] *Sanchez v. State*, 995 S.W.2d 677, 688 (Tex. Crim. App. 1999) (bribery and extortion).
[32] *Id.* at 474.

counties and municipalities throughout the State of Texas and there are innumerable situations where protected speech may become subject to criminal prosecution because section 551.143 reaches too far.

Section 551.143 has the effect of reaching a substantial amount of protected speech because every member of a governmental body has constituents that they may have interactions with. These interactions can cause a member of the governmental body to be wary of what they discuss with a constituent because they may not know who else that constituent has talked to or whether the constituent is relaying the member's position on the topic to another member of the governmental body. It is the consequence of a law going too far to subject a member to criminal prosecution when the member would instead be simply communicating about a constituent's concern.

In addition, a concerned citizen who speaks with a member of a governmental body could also be subject to prosecution. If a citizen decides that they are going to speak with members of their local city council about an issue that is important to them, those conversations could lead to the possibility of a prosecutor deciding that the citizen was helping those council members get around TOMA. It creates a situation where it discourages communication between members of a governmental body and the people the members represent. This Court should grant review in order to perform a proper overbreadth analysis of section 551.143.

III. The Court of Appeals erred when it held that Government Code section 551.143 is not unconstitutionally vague.[33]

This Court should grant review because the Court of Appeals incorrectly found that section 551.143 is sufficiently clear for a person of ordinary intelligence to know what is prohibited. The Court of Appeals held that section 551.143 was not vague and provided reasonable notice of prohibited conduct.[34] The Court of Appeals analyzed section 551.143 by taking the plain meaning of the terms that are not defined by statute: conspire, circumvent, and secret, and used a Texas Attorney General opinion to explain how the definition of deliberation in section 551.001 of the Government Code is consistent with definition of deliberations as used in section 551.143.[35] The Court of Appeals concluded that the Attorney General's reasoning was persuasive and that the language of section 551.143 is clear enough so that ordinary people can understand what conduct is prohibited.[36] Importantly, the Attorney General opinion used civil cases to guide its interpretation of section 551.143.[37] The Attorney General opinion is not helpful because section 551.143 is a criminal statute and a more strict standard of review applies.

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[33] Court of Appeals opinion, p. 14, Appendix B.
[34] Court of Appeals opinion, p. 14, Appendix B.
[35] Court of Appeals opinion, p. 12–13, Appendix B (citing Tex. Att'y Gen. Op. No. GA-0326) (2005).
[36] Court of Appeals opinion, p. 14, Appendix B.
[37] Tex Att'y Gen. Op. No. GA-0326, p. 4–5 (citing *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001); *Willmann v. City of San Antonio*, 123 S.W.3d 469 (Tex. App.—San Antonio 2003, pet. denied)).

Under a First Amendment analysis for vagueness, a criminal law must: (1) be sufficiently clear to afford a person of ordinary intelligence a reasonable opportunity to know what is prohibited, (2) establish determinate guidelines for law enforcement, and (3) be sufficiently definite to avoid chilling protected expression.[38] A criminal law may be held facially invalid even if the law has some valid application.[39] Further, when construing a criminal statute outside the penal code, the statute must be construed strictly, with any doubt resolved in favor of the accused.[40]

The Court of Appeals relied on an attorney general opinion that uses civil cases to guide its interpretation of section 551.143. A person of ordinary intelligence, is not going to have that attorney general opinion nor the case law to help them make sense of section 551.143 when trying to figure out what is prohibited and what is not. Because the statute is not sufficiently clear, this creates a chilling effect on speech regarding matters within the jurisdiction of the governmental body and public business because members of governmental bodies and citizens do not know what is lawful and not lawful.[41]

At the hearing in the trial court, three Texas mayors who are subject to section 551.143 testified.[42] Each testified that they have difficulty understanding what is

[38] *Ex parte Ellis*, 309 S.W.3d 71, 87 (Tex. Crim. App. 2010).
[39] *Id.*
[40] *State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007).
[41] *Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983).
[42] RR Vol. 2, 222:11-19, Vol. 2, 257:19-25, Vol. 3, 110:6-15.

considered a violation of the statute but that they do their best to avoid a situation where they could be in violation.[43] The fear of being punished with jail time leads them to not engage in conversations with fellow council members.[44] A public official has to be very careful about making sure they are following the law because criminal charges can end a person's political career.

This Court should grant review in order to determine the proper standard of scrutiny under the First Amendment for section 551.143 and whether the statute is overbroad and vague. Guidance from this Court is extremely important for the numerous members of governmental bodies throughout the State of Texas. Ordinary citizens who serve their communities need clear standards to ensure that they can efficiently and effectively serve their communities by knowing with certainty what speech subjects a person to criminal prosecution.

Prayer for Relief

Petitioner respectfully prays that this Court grant review and, after full briefing on the merits, reverse the judgment of the Court of Appeals, and reinstate the order of the trial court dismissing the indictment against Petitioner.

[43] RR Vol. 2, 226:11-24, Vol. 2, 261:13-16, Vol. 3, 111:15-112:17.
[44] RR Vol. 2, 230:9-231:4, Vol. 2, 266:11-16, Vol. 3, 117:8-19.

Respectfully submitted,

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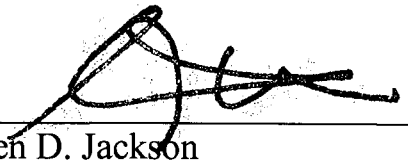
By: 

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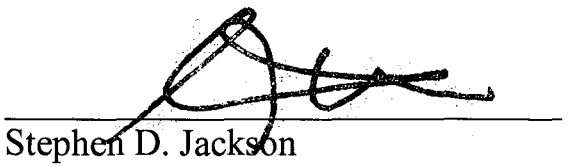
Certificate of Service

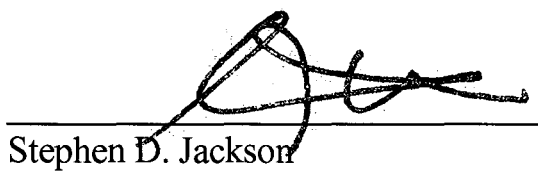
I certify that a true and correct copy of the above Petition for Discretionary Review was served on counsel representing the State of Texas and the State Prosecuting Attorney by electronic service on April 9, 2018.



Stephen D. Jackson

Certificate of Compliance

I certify that a copy of the above and foregoing Petition for Discretionary Review has a word count of 2,580 after excluding the contents listed in Texas Rule of Appellate Procedure 9.4(i)(1).



Stephen D. Jackson

Appendix

A.

State of Texas v. Marc Davenport, No. 09-17-00125-CR, 2018 WL 753357 (Tex. App.—Beaumont Feb. 7, 2018) (mem. op.)

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00125-CR

THE STATE OF TEXAS, Appellant

V.

MARC DAVENPORT, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 16-06-07318-CR

MEMORANDUM OPINION

The State appeals the trial court's order dismissing the indictment against Appellee Marc Davenport (Davenport or Appellee) for conspiracy to circumvent the Texas Open Meetings Act. 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.

On June 24, 2016, a Grand Jury indicted Appellee, Marc Davenport, for Conspiracy to Circumvent the Texas Open Meetings Act under section 551.143 of the Government Code. *See* Tex. Gov't Code Ann. § 551.143 (West 2017). Although Davenport and the State agree that he was not a member of a "governmental body," Davenport was charged as a party to the conspiracy with language in the indictment tracking Penal Code section 7.02(a)(2). *See* Tex. Penal Code Ann. § 7.02(a)(2) (West 2011). The indictment alleged that:

> . . . Marc Davenport, on or about August 11, 2015 and continuing through August 24, 2015 and before the presentment of this indictment, . . . did then and there, with the intent to promote or assist the commission of the offense described herein, solicit, encourage, direct, aid or attempt to aid Jim Clark or Charlie Riley or Craig Doyal who, did then and there as a member of a governmental body, to wit: the Montgomery County Commissioner's Court, knowingly conspire to circumvent Title 5 Subtitle A Chapter 551 of the Texas Government Code . . . 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[.]

Riley and Doyal were indicted in separate indictments.

On October 31, 2016, Davenport filed a Motion to Dismiss for Lack of Jurisdiction arguing that Davenport was not a member of a "governmental body" and that at no time was he acting as a "public servant" or "in an official capacity as a public servant." The trial court denied Davenport's Motion to Dismiss for Lack of

Jurisdiction.[1] Davenport also opposed the State's proposal to join or consolidate for trial Davenport's case with two other cases, *State of Texas v. Craig Doyal*, No. 16-06-07315-CR, and *State of Texas v. Charlie Riley*, No. 16-06-07316-CR.

On March 20, 2017, Doyal filed a Motion to Dismiss the Indictment in Doyal's case. On March 22, 2017, Davenport filed a Motion to Join Defendant Craig Doyal's Motion to Dismiss the Indictment. The Doyal motion asserted that section 551.143 of the Government Code must be reviewed under strict scrutiny, is facially unconstitutional because it violates the First Amendment, and is overbroad, vague and confusing.[2] The trial court held a hearing on the motion to dismiss. On April 4, 2017, in three separate orders, the trial court dismissed the indictments against Davenport, Doyal, and Riley. The State appealed.

We overturned the trial court's ruling granting Doyal's motion to dismiss. *See State v. Doyal*, No. 09-17-00123-CR, slip. op. (Tex. App.—Beaumont Feb. 7, 2018, no pet. h.), *available at* http://www.search.txcourts.gov/

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[1] Davenport filed a petition for a writ of mandamus with this Court challenging the trial court's jurisdiction on the basis that he is not a public servant. *See In re Davenport*, No. 09-17-00084-CR, 2017 Tex. App. LEXIS 2571 (Tex. App.—Beaumont Mar. 23, 2017) (orig. proceeding). We denied the petition after concluding that Davenport failed to show why a challenge on direct appeal would be an inadequate remedy. *Id.* at *2.

[2] An appellate court may take judicial notice of its own records, such as pleadings, in the same or related proceedings involving the same or nearly same parties. *See Turner v. State*, 733 S.W.2d 218, 223 (Tex. Crim. App. 1987).

DocketSrch.aspx?coa=coa09. And, we overturned the trial court's ruling granting Riley's motion to dismiss. *See State v. Riley*, No. 09-17-00124-CR, slip. op. (Tex. App.—Beaumont Feb. 7, 2018, no pet. h.), (mem. op. not designated for publication), *available at* http://www.search.txcourts.gov/DocketSrch.aspx?coa=coa09. For the reasons discussed in *State v. Doyal* and *State v. Riley*, we also reverse the order dismissing Davenport's indictment.

In remanding Davenport's case, we emphasize that the only matter that is currently before us pertains to the facial constitutional challenges that were made in Doyal's Motion to Dismiss. Davenport did not assert any additional grounds for dismissal in Davenport's Motion to Join. No other challenges or issues are currently before us in this appeal. We expressly have not ruled upon an "as applied challenge" nor have we been asked to review the application of the statute to Davenport, a consultant and someone who alleges he is not a member of a governmental body.

While a defendant has the right to seek a dismissal of an indictment based on a claim that the statute under which the defendant was indicted is facially invalid, the bar to succeeding on these types of claims is high. 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).[3]

The overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort." *State v. Johnson*, 475 S.W.3d 860, 865 (Tex. Crim. App. 2015) (citing *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *Ex parte Thompson*, 442 S.W.3d 325, 349 (Tex. Crim. App. 2014)). When making a "substantial overbreadth" challenge under the First Amendment, the challenger must establish that the statute as written "prohibit[s] a substantial amount of protected expression, and the danger that the statute will be unconstitutionally applied must be realistic and not based on 'fanciful hypotheticals.'" *Id.* (footnotes omitted) (quoting *United States v. Stevens*, 559 U.S. 460, 485 (2010) (Alito, J., dissenting)). Therefore, Davenport had the burden to

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[3] Courts are directed to avoid sustaining a defendant's facial challenge to a statute when possible because such challenges, when they are sustained, allow the courts to nullify a legislative act without first requiring that a record be created regarding the defendant's conduct. *See Wash. State Grange v. Wash. 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); *see also King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 737 (Tex. 2017) ("'It is not the usual judicial practice . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.'") (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485-86 (1989)).

demonstrate "'that a substantial number of instances exist in which the Law cannot be applied constitutionally.'" *See id.* (quoting *N.Y. State Club Ass'n*, 487 U.S. at 14). "The Supreme Court 'generally does not apply the "strong medicine" of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law.'" *Id.* (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 n.6 (2008)). Based upon the appellate record currently before us, we conclude that Davenport has failed to establish that the statute in question prohibits a substantial amount of activity that is protected by the First Amendment, judged in relation to its plainly legitimate sweep.

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

REVERSED AND REMANDED.

LEANNE JOHNSON
Justice

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

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

B.

State of Texas vs. Craig Doyal, No. 09-17-00123-CR,
____ S.W.3d ____, 2018 WL 761011 (Tex. App.—Beaumont Feb. 7, 2018)

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

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Publish

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