No. 06-51587

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AVINASH RANGRA AND ANNA MONCLOVA,

Plaintiff-Appellants,

v.

FRANK BROWN AND GREG ABBOTT,

Defendant-Appellees.

ON REHEARING *EN BANC*

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA FIRST AMENDMENT COALITION IN SUPPORT OF DEFENDANT-APPELLEES

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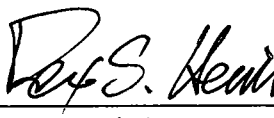
By: 

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INTEREST OF AMICUS

The Coalition is an award-winning, nonprofit public interest organization dedicated to advancing more open and accountable government, freedom of speech, and public participation in civic affairs. The Coalition's activities include strategic litigation to enhance the rights of democratic self-governance for the largest number of citizens; legal consultations on open government rights for journalists, bloggers, and others; legislative oversight of bills affecting government transparency and free speech; and public advocacy through writings and talks.

Among the open-government laws championed by the Coalition is California's principal open-meetings law, the Brown Act, CAL. GOV'T. CODE § 54950 *et seq.*, which requires the governing bodies of virtually all California local public agencies—from city councils to county boards of supervisors to local school boards—to conduct their business in the open: at noticed, public meetings that citizens may attend to observe the deliberations and policy choices made by their representatives.

Although the Brown Act allows legislative bodies to meet in "closed session" to address certain specified matters requiring confidentiality, most of "the people's business"—including tradeoffs and compromises on politically sensitive issues—is required to be conducted in front of "the people."

The Coalition has had broad and long experience in enforcing the Brown Act and participating in the adoption of legislative amendments to it. We believe strongly that the Brown Act, and similarly, the Texas Open Meetings Act, implement democracy at the local level of government. By requiring elected officials to deliberate publicly, the open meetings laws do not suppress speech. Rather, they amplify speech, benefitting both government officials (as speakers) and citizens (as listeners and voters).

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental basis of the panel's April 24, 2009 decision is that the statute at issue, the Texas Open Meetings Act ("TOMA"), is a content-based restriction on speech, subject to strict scrutiny analysis. *Rangra v. Brown*, 566 F.3d 515, 521 (5th Cir. 2009). This conclusion is wrong.

As its name suggests, TOMA requires Texas governmental bodies to open their meetings to the public. TEX. GOV'T CODE §§ 551.002; 551.001(4) (defining "meeting"). Under TOMA, public officials can voice any viewpoint they wish on any subject they choose. TOMA only requires that a quorum of such officials state their views in a specific setting: a publicly noticed meeting, when deliberating or making decisions about public business and public policy over which they have supervision and control. *Id.* Because it is viewpoint and subject matter neutral and motivated by a content-neutral interest in open government, TOMA does not

"'raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 387 (1992) (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). Accordingly, TOMA is content-neutral. Therefore, it is not subject to strict scrutiny. Instead, it is a constitutional time, place, and manner regulation.

ARGUMENT

I. Because TOMA imposes neither viewpoint nor subject matter restrictions on speech, and because its purpose is wholly unrelated to content, it is not a content-based statute subject to strict scrutiny.

Content-based regulations of speech pose grave risks of government manipulation of public dialogue, and they are therefore subject to much closer scrutiny than content-neutral regulations. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994) (explaining rationale for more exacting scrutiny of content regulations that present risk of government suppression or coercion of public debate). A regulation of speech is content-based if it restricts the viewpoints or subject matter expressed. *Id.* at 642-43; *see also* Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 934 (3d ed. 2006). Because TOMA restricts neither, and because its purpose is wholly unrelated to the content of speech, it is a content-neutral regulation.

A. TOMA is a content-neutral regulation because it does not restrict the viewpoints or subject matter expressed by public officials.

Viewpoint restrictions silence or favor speakers who express certain views on a topic. *See, e.g., R.A.V.*, 505 U.S. at 391-92 (striking down a statute punishing hate speech based on race, color, creed, religion or gender, but permitting such speech not addressed to these topics); *see also Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (striking down a law prohibiting criticism of any foreign government within five hundred feet of that government's embassy). Unlike the statutes in *R.A.V.* and *Boos*, which purposely silenced speakers voicing certain viewpoints or criticisms, TOMA is not viewpoint specific. Rather, TOMA applies to all public officials who serve on designated public bodies, regardless of the viewpoints they express. *See* TEX. GOV'T CODE § 551.001(4). Therefore, it is not based on viewpoint, and it cannot be content-based for that reason.

Nor is TOMA a subject matter restriction that prohibits discussion of particular topics while allowing the discussion of others. *Hill v. Colorado*, 530 U.S. 703, 722-23 (2000) ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.") (*citing Consolidated Edison Co. of N.Y., Inc. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 538 (1980)). Such restrictions are constitutionally repugnant, because "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control

over the search for political truth." *Consolidated Edison*, 447 U.S. at 538; *see also Hill*, 530 U.S. at 722-23. Unlike a subject matter restriction banning, for example, only sexual speech (*United States v. Playboy Entertainment Group,* 529 U.S. 803 (2000); *Ashcroft v. ACLU*, 542 U.S. 656 (2004)) or speech on disputed legal or political issues (*Republican Party of Minn. v. White*, 536 U.S. 765 (2002)), TOMA does not require that officials meet publicly only when discussing certain subjects, such as schools, taxes, or public utilities. TEX. GOV'T CODE § 551.001(4) (defining "meeting" without reference to any subject matter); *compare Carey v. Brown*, 447 U.S. 455, 461, n.4 (1980) (prohibiting protesting, but excluding labor protesting from the general ban) (*citing Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972)). To the contrary, public officials need only meet publicly when discussing anything within the purview of their bodies' supervision or control.

The panel held that TOMA's requirement that there be no private discussions by public officials of "public business or public policy over which the governmental body has supervision or control" is a subject matter restriction. *Rangra*, 566 F.3d at 521-22. However, TOMA identifies this category of speech only in relation to the *acts* that TOMA aims to restrict—clandestine deliberation and decision-making. TEX. GOV'T CODE § 551.001(4). This is not a subject matter restriction.

The Supreme Court made this clear in *Hill*, a case the panel did not discuss. *Hill* involved a criminal statute prohibiting one person from approaching within eight feet of another person near a health care facility for the purposes of passing a leaflet, displaying a sign, or engaging in "oral protest, education or counseling" without the second person's consent. *Hill*, 530 U.S. at 707. This statute was motivated by protests outside abortion clinics. The Supreme Court held that it was a constitutional time, place, and manner restriction on speech, because it applied to all demonstrators, regardless of viewpoint, and it was justified by the government's interest in ensuring safe access to health care. *Id.* at 715, 719-20.

The Court rejected the contention that the statute was a content-based speech restriction. *Hill*, 530 U.S. at 719. Although the statute only restricted certain speech, defined as "oral protest, education, or counseling", the Court explained that the statute did not regulate this *speech* for its own sake, but rather, to prevent the *act* of an unwelcome approach to a person seeking health care. *Id.* at 724. The identification of a specific category of restricted speech—"oral protest, education, or counseling" speech—only defined the type of speech activity that would likely constitute an unwelcome approach. *Id.* Thus, it was constitutionally permissible for the statute not to include speech, e.g., about the weather, because such speech did not pose the same risk of unwelcome approach. *Id.* at 720-722.

Like the statute in *Hill*, TOMA specifically regulates one category of speech—speech related to "public business or public policy" over which the public body exercises control or supervision. TEX. GOV'T CODE § 551.001(4). And as in *Hill*, TOMA includes this identification only for the purpose of distinguishing speech activity that is likely to involve the act that TOMA aims to prohibit—closed-door decision-making—from speech that would not have this consequence. *Hill*, 530 U.S. at 724. Because it is the act of secret decision-making and not the subject matter of speech that TOMA regulates, TOMA is not a subject matter restriction on speech. Therefore, as in *Hill*, TOMA is not content regulation subject to strict scrutiny.

B. TOMA is a content-neutral regulation because its purpose is wholly unrelated to the content of the speech in question.

Because TOMA aims to prevent closed-door decision-making rather than curbing any particular speech for its own sake, the purpose of TOMA is wholly unrelated to the content of public officials' speech. Contrary to the panel's conclusion that TOMA is content-based because it facially defines the regulated speech by reference to its content, it is well-established that the appropriate test for content neutrality is whether the regulation is "*justified* without reference to the content of regulated speech." *Rangra*, 566 F.3d at 521; *Hill*, 530 U.S. at 720 (*citing Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

Under this standard, the Supreme Court upheld the must-carry provision in *Turner Broad. Sys., Inc. v. F.C.C.*, which required all cable programmers to carry free broadcast channels. 512 U.S. at 646. The Court found that the must-carry provision appropriately forced cable programmers to make certain speech available to the public, because it furthered the government's interest in ensuring the public's access to free television content. The statute did not stem from a desire to favor the content of noncable broadcasters or any particular cable programming. 512 U.S. at 646.

Similarly, TOMA's open meetings requirement is justified by the government's interest in ensuring public access of an even more important sort than that in *Turner*—access to what the government and its elected representatives are doing and why they are doing it. Just as the purpose of the must-carry provision in *Turner* was satisfied regardless of the programming involved, the purpose of TOMA is satisfied regardless of the subject matter or viewpoints expressed during open meetings. It is the fact that the open meetings are being held, not what is being said, that is important. Indeed, the more that public officials freely and openly discuss different viewpoints or subjects, the more effective TOMA is. Thus, TOMA's purpose is unrelated to the content of the speech at meetings of public bodies, so strict scrutiny does not apply.

II. Applying strict scrutiny to TOMA and time, place, and manner restrictions like it would lead to absurd results.

The panel's conclusion that TOMA is subject to strict scrutiny would open the floodgates for exacting review of every regulation of speech that affects the time, place, or manner of speech at meetings of all government bodies. Thus, restrictions requiring, for example, that public officials limit meetings to so many hours, allot time evenly amongst themselves, organize the agenda, limit how long citizens can speak, and myriad common-place regulations of meeting procedure would be subject to strict scrutiny under the panel's analysis.

Under strict scrutiny, a regulation must be "the least restrictive means among available, effective alternatives." *Ashcroft*, 542 U.S. at 666. Regulations must also serve a compelling government interest to be upheld under strict scrutiny. *Playboy*, 529 U.S. at 813.

None of the regulations just described could withstand strict scrutiny review because there are infinite "plausible, less restrictive" alternatives to such administrative rules. *Ashcroft*, 542 U.S. at 666. Moreover, none of them appear to serve a compelling government interest. For example, how could a two hour limit on a debate on a particular topic be said to serve a compelling government interest, but a one hour limit would not? Yet, under the panel's analysis, because the limit is on debate of a particular topic, i.e., subject matter, it is content-based and therefore subject to strict scrutiny.

Indeed, if the panel's decision were to be adopted *en banc*, the amount of oral argument before this Court could only be limited only if that limit met the strict scrutiny test. This is because under the panel's analysis, any oral argument restriction is content-based because that argument has a specific content, just like TOMA is limited to matter before specified government bodies. As the authorities above demonstrate, this is not content discrimination.

Adopting the panel's analysis would cripple the effective administration of government (legislative, administrative, and judicial) and ultimately would thwart the very First Amendment values the panel wants to further. The panel's decision leads to absurd results that do not advance any First Amendment interests. It should be rejected by this Court.

III. Conclusion

TOMA does not trigger any of the concerns underlying the constitutional ban on content-based restrictions. TOMA does not attempt to "suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641. Nor does TOMA "effectively drive certain ideas or viewpoints from the marketplace." *Id.* (citations omitted). To the contrary, TOMA acts in a content-neutral manner to maximize public debate while protecting the citizenry's crucial interest in open government. For these reasons,

the panel's holding that TOMA should undergo strict scrutiny analysis should be reversed.

Instead, TOMA should be analyzed under the familiar test for time, place, and manner restrictions. Time, place, and manner restrictions must be justified without reference to content, serve a significant governmental interest, and leave open "ample alternative channels for communication of the information." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981) (approving of a time, place, and manner prohibition on distributing literature or soliciting of funds at state fair except at booths).

TOMA fulfills these requirements. TOMA restricts public meetings for the purpose of preventing closed-door decision-making, not to restrict speech. In doing so, it serves the significant and undisputed government interest in protecting public access to open government. Finally, TOMA provides ample alternative channels for communication, as public officials are free to discuss public business and public policy in public meetings, or to talk privately, so long as a quorum of

officials is not present. Thus, TOMA is a valid time, place, and manner restriction, so Appellants' constitutional attack on TOMA should be rejected.

Dated: September 8, 2009

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Dated: September 8, 2009

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The undersigned counsel of record does hereby certify that on September 8, 2009, two true and correct copies of the **Brief *Amicus Curiae* of the California First Amendment Coalition in Support of Defendant-Appellees** were served on the parties to this appeal (*) along with a computer readable disk copy of the brief via United States First Class Mail, and one true copy to other interested persons via United States First Class Mail :

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Counsel also certifies that on September 8, 2009, via Fed Ex, the original and twenty (20) copies of the **Brief *Amicus Curiae* of the California First Amendment Coalition in Support of Defendant-Appellees** and one computer-readable disk copy in Adobe Portable Document Format, have been filed with the Clerk for the United States Court of Appeals for the Fifth Circuit, addressed as follows:

Mr. Charles R. Fulbruge III, Clerk
U.S. Court of Appeals for the Fifth Circuit
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