

NO. 09- CV-59

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION**

**CITY OF ALPINE, CITY OF BIG LAKE,
CITY OF PFLUGERVILLE, CITY OF ROCKPORT,
Diana Asgeirsson, Angie Bermudez, Jacques DuBose,
James Fitzgerald, Jim Ginnings, Victor Gonzalez,
Russell C. Jones, Mel LeBlanc, Lorne Liechty,
A.J. Mathieu, Johanna Nelson, Todd Pearson,
Arthur "Art" Reyna, Charles Whitecotton, Henry Wilson,**

Plaintiffs

V.

**GREG ABBOTT,
TEXAS ATTORNEY GENERAL, and
THE STATE OF TEXAS,**

Defendants

**PLAINTIFF'S ORIGINAL COMPLAINT,
REQUEST FOR INJUNCTIVE RELIEF, &
REQUEST FOR DECLARATORY
JUDGMENT**

A. STATEMENT OF PURPOSE

1. Plaintiffs bring this lawsuit to confirm that the First Amendment is alive and well in Texas. We seek nothing more than to enforce freedom of speech for public officials the citizens of Texas have elected to speak for them. The current "Texas Open Meetings Act", as interpreted by a series of poorly reasoned opinions of a series of Texas Attorneys General and appellate courts, prevents elected officials from doing what they are elected to do-- speak in public or private on issues facing the public. We disagree with that result of "TOMA", and believe, as stated by a unanimous panel of the United States Court of Appeals for the Fifth Circuit, that **"The First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general."** Therefore we bring this action to unshackle Texas elected officials so they can perform their duties as representatives of the citizens who elected them to speak.

B. Parties

2. Plaintiffs the Cities of Alpine, Big Lake, Pflugerville, and Rockport are all Texas municipalities organized under the laws of the State of Texas. Alpine is the county seat of Brewster County. Brewster County is Texas' largest county, is home to Big Bend National Park, and is on the Texas/ Mexico

border. Alpine is the home of Sul Ross State University, the center for tourism in the Big Bend country of Texas, and a popular retirement and vacation destination. Big Lake is the county seat of Reagan County. Big Lake is an oil, gas, and ranching community, in the Permian Basin. Pflugerville is a fast growing diversified city of 50,000 residents in north Travis County. Rockport is the county seat of Aransas County. Rockport, on the gulf coast, is a historic fishing, vacation, and retirement community. All cities have, by duly passed resolutions [attached hereto as Exhibits A, B, C, and D] posted on official agendas and heard at posted city council meetings, voted to authorize the filing of this petition in order to preserve and protect the First Amendment rights of their respective city councilors, their cities, and the citizens residing therein. Each city is a proper party plaintiff, to represent the interests involved in this petition. Each city has the right, and the legal duty, to advocate for, and protect the First Amendment rights of, their respective elected officials, and of their citizens. Each city has standing to bring this lawsuit.

3. Individual plaintiffs, all citizens of the State of Texas, are residents of the cities and towns noted below. They were, and are, elected public officials or city council members of their respective cities. Each plaintiff

has standing to bring this lawsuit., being elected to the office noted below.

Each plaintiff is threatened with criminal prosecution under TOMA if they exercise their First Amendment rights by communicating with each other, and/or the public, outside of a noticed public meeting.

- a. Diana Asgeirsson, is a city council member of the City of Alpine, representing Ward 5. She was first elected to a two year term in May 2007, and was re-elected to a second two year term, taking office in May 2009.
- b. Angie Bermudez is a member of the Alpine city council, first taking office in May 2009.
- c. Jacques DuBose is a council member and mayor pro tem of Boerne, Texas.
- d. James Fitzgerald is a city council member of the City of Alpine, representing Ward 3. He was elected to his first two year term in May 2009.
- e. Jim Ginnings is a member of the Wichita Falls city council.

- f. Victor Gonzalez is a member of the Pflugerville City council. He was first elected in May 2006, and was reelected to a second three year term in May 2009.
- g. Russell C. Jones is a member of the Sugar Land city council, representing District 3. He first took office in 2003, and was reelected in 2005, 2007, and 2009.
- h. Mel LeBlanc is a member of the Arlington city council, representing District 1.
- i. Lorne Liechty is a city council member of the City of Heath, Texas.
- j. A. J. Mathieu is a member of the city council of Joshua, Texas, place 4.
- k. Johanna Nelson is a member of the Alpine city council, representing Ward 4. She first took office in May 2008.
- l. Todd Pearson is the Mayor of Rockport, Texas.
- m. Arthur "Art" Reyna is a member of the Leon Valley city council.
- n. Charles Whitecotton is an alderman of the City of Whiteboro, Texas.
- o. Henry Wilson is a member of the city council of Hurst, Texas.

4. Defendant Greg Abbott is the Texas Attorney General, who is charged with enforcing the criminal provisions of the Texas Open Meetings Act (TOMA), and also charged with defending the constitutionality of state statutes. He may be served through the Office of the Attorney General, Austin, Texas. The State of Texas, may be served through the Office of the Attorney General, Austin, Texas.

5. There are many nonparties to this suit who will be affected by it and could potentially have a claim that their individual free speech rights are being chilled. These include all public officials in Texas, both appointed and elected. This is a declaratory judgment action under 28 U.S.C. § 2201, et seq., and 42 U.S.C. § 1983, for the purpose of protecting the First Amendment, U.S. Const., free speech rights of Plaintiffs, and all others similarly situated, from impairment through the Defendants' application of the criminal provisions of the Texas Open Meetings Act, Texas Govt. Code § 551, (hereinafter TOMA).

6. TOMA is overbroad and vague, and vests the Defendant Abbott in his official capacity as Attorney General, as well as vesting in all District Attorneys throughout the

State of Texas, with excess discretion by which he or they may chill and have chilled Plaintiffs' free speech rights. In fact, any governmental office holder elected or appointed and working in the State of Texas is currently affected by this law, (with the notable exception of the Texas legislature, who exempted themselves), and due to its overbreadth and vagueness, is currently having his or her free speech rights unduly restricted.

C. Introduction

7. TOMA was originally enacted for a beneficial purpose-to keep public decisions from being made secretly by public officials. No one disputes that this is a wonderful concept. The problem addressed herein, however, is that in trying to achieve this just result, the Texas Legislature has drafted and amended the law such that public officials in Texas, and even private citizens who speak to them, are subject to prosecution by the Attorney General or District Attorneys across Texas for merely discussing public issues, do not clearly know what is proscribed, and are having their free speech rights chilled by the threat of prosecution or actual prosecution of their free speech under TOMA.

D. Jurisdiction

8. Because this is a matter arising under U.S. Const Amend. I, 28 U.S.C. § 2201, and 42 U.S.C. § 1983, this court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

9. A substantial part of the events or omissions giving rise to this claim have occurred in the geographical confines of the Pecos Division of the United States District Court for the Western District of Texas. The City of Alpine is located in the Pecos Division of the Western District of Texas. Four individual plaintiffs, namely Alpine city councilors Asgeirsson, Bermudez, Fitzgerald, and Nelson reside in Alpine, in the Pecos Division of the Western District of Texas. All defendants are residents of the State of Texas for purposes of venue. Therefore, venue lies in the Pecos Division of the Western District of Texas. 28 U.S.C. § 1391.

E. Facts

10. Plaintiffs bring this claim for a declaratory judgment under both Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201, 2202.

11. TOMA is facially overbroad—unconstitutional on its face. It is vague, confusing, does not give fair notice of what is a crime and what is not a crime, and is subject to different interpretations by different district attorneys. Its vagueness causes each and every plaintiff named herein to “self censor”, e.g., not speak to fellow city council members or members of the public, about public matters, except at a noticed public meeting. This causes a violation of each plaintiffs’ First Amendment rights each time he or she self censors.

12. TOMA is unconstitutional as applied. TOMA, specifically Sec. 551.144, Texas Govt. Code, prohibits a quorum of a city council from communicating, receiving, or sending communications, except at a public meeting. This violates the First Amendment rights of each plaintiff to be able to express him or herself regarding political speech, and violates his or her First Amendment rights.

Each and every plaintiff has his or her First Amendment rights chilled and violated, by TOMA threatening him or her with criminal prosecution for merely speaking out about public matters. TOMA, as applied, causes each plaintiff to self censor for fear of going to jail because of TOMA.

F. Declaratory Judgment

13. The Plaintiffs request declaratory relief in the form of an injunction against enforcement of the criminal penalties of the act at least until such time as a new drafting of the act can be made by the Texas legislature to correct overbreadth and vagueness problems inherent in the act.

14. Declaratory relief is necessary to prevent the chilling effect on protected speech of government officials until such time as the act makes clear what is proscribed behavior, and does not infringe upon free speech rights.

15. Plaintiffs also seek declaratory judgment that the criminal provisions of TOMA are unconstitutional, as being violative of the First Amendment to the United States Constitution.

16. The plaintiff- cities represent the public interests of their elected city council members in each city. The plaintiff- cities also represent the interests of the citizen- voters who elected the respective city councils, and thus the interests of such voters in being able to receive information and communications from their city councilors at any time and at any place.

17. The individual plaintiffs are public servants, and are elected representatives of their respective cities as city council members. They represent the interests of the voters who elected them, their cities, and of other elected or appointed public officials in Texas.

18. The language of TOMA (Tex. Govt. Code Sec. 551.144, and its criminal provisions threatening to jail public officials for exercising their free speech rights), is overbroad, vague, and facially should be declared unconstitutional for not giving public officeholders sufficient notice of what is a crime, and what is not.

19. TOMA also should be struck down as applied, because, as applied, it prevents plaintiffs from exercising their constitutionally protected rights of free speech, of freely communicating among themselves and their fellow city councilors, and also from freely communicating with the citizens who elected them to office. Each plaintiff has to self censor to keep from being prosecuted for violating TOMA. Therefore, TOMA should be struck down, as applied, for violating the First Amendment rights of the plaintiffs and all other public officials in Texas.

20. The Texas Attorney General has stated that the Texas Open Meetings Act is not limited to discussions involving a quorum of members of a governing body as follows:

“we construe section 551.143 to apply 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’l Op. No. GA-326. (2005).

21. The plaintiffs/ members of the various City Councils find that their political expression with each other and the general public has been chilled by the criminal provisions of the Texas Open Meetings Act.

22. The Texas Open Meetings Act is not limited to public officials. The Attorney General has stated:

“the law permits the charging of a person who is not a member of a governmental body with an offense under the Open Meetings Act” Tex. Att’y Gen’l Op. No. JC-0307 (2000);

This means that the right of citizens to receive information, protected political expression, from the public officials whom they elected, is violated and chilled by the Texas Open Meetings Act. Citizens are afraid to talk to the officials who represent them, and those same officials are afraid to talk to the citizens, for fear of being indicted and prosecuted under TOMA. This chilling effect on free speech is violative of the First Amendment.

23. The defendant, Abbott, acting as the duly elected Attorney General for the State of Texas, acting under color of law, has deprived the plaintiffs of their rights under the First Amendment to the United States Constitution, in violation of 42 USC § 1983.

24. The plaintiffs' actions/statements involved a matter of political, social, or other concern and are constitutionally protected under the First Amendment. Furthermore, plaintiffs' interests in their statements outweigh any interest of the State of Texas in promoting efficient operation and administration of government services.

25. The attached brief [Plaintiff's Brief in Support of Declaratory Judgment] explains in further detail the necessity of such action.

G. The Act- TOMA

24. *Sec. 551.144, TEX. GOVT. CODE*, provides criminal penalties for the violation of the act by public officials, should a public official "participate in a closed meeting". *Sec. 551.001* defines meeting as:

(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

(B) a gathering at which the members receive information from, give information to, ask questions of, or receive questions from any third person ...

Deliberation includes a verbal exchange between a member of a public body and another person. 551.001 (2).

Deliberation is no longer limited to verbal exchanges, or face to face meetings. AG Opinion GA-0326 (2005).

25. The Act does not provide fair notice of what is proscribed. An overly zealous prosecutor may indict and seek to convict a public official for discussing public business with fellow elected officials at a Lions Club meeting, for sending an informational email, for sending a letter stating his position on public matters, for discussing public business at the coffee shop with citizens, or for stating his position on public issues. If a public official states his views on public matters on the radio, and a quorum of his public body listens to the radio, a crime has occurred.

26. If a public official runs for reelection, and mails a flyer to all his constituents (including fellow members of his governing body), that he is opposed to a tax increase, a crime has occurred. If a Jeff Davis County commissioner also sits on the Jeff Davis County Underground Water District

Board, attends a water board meeting, and talks to the County Judge about public business, a crime has occurred. If a concerned citizen mails a letter opposing a certain action, to a quorum of a body, a crime has occurred. If a city councilor emails his fellow city councilors a proposed agenda and requests an open meeting, a crime has occurred. If a city councilor "Tweets", sends a "Facebook" message, sends an email, or engages in other social communication, among a quorum of the city council, a crime has occurred.

27. TOMA was originally designed to prevent "closed door meetings", so that the public could participate in observing the public's business being conducted. Plaintiffs agree that no public **decisions** should be made in a smoke filled room. However, TOMA, as recently amended, now prevents public officials in Texas from exercising their free speech rights, for fear of being charged with a crime. Public decisions should be made publicly. However, the right of fellow citizens in Texas, to express themselves, or their opinions, should not be chilled just because they take the salutary step of becoming public officials. TOMA, as written and as applied, however, does this. Free speech rights are chilled, or lost, through the application of TOMA. The net sweeps too wide.

F. Law of the Case.

28. The exact same complaint as herein was made in *Rangra v Brown*, (No. P-05-CV-075), (W.D. Tex. Nov. 7, 2006)(2006 WL 3327634); Judgment reversed by *Rangra v. Brown*, 566 F. 3d 515 (5th Cir. April 24, 2009)(No. 06-51587); Rehearing En Banc Granted by *Rangra v Brown*, 576 F. 3d 531 (5th Cir. Jul. 27, 2009); Dismissed as Moot by *Rangra v Brown*, 584 F. 3d 206, (5th Cir. Sep. 10, 2009)(Dennis, J., Dissenting).

29. The Fifth Circuit has now ruled that the Texas Open Meetings Act must be analyzed under strict scrutiny standards applicable to laws banning content based restrictions of political speech. Although *Rangra v. Brown* was dismissed as moot, because the plaintiff was term limited off the Alpine city council while the case sat awaiting decision at the 5th Circuit, the 5th Circuit decision still stands as the law of the circuit. The same complaint as in *Rangra*, the same law, the same First Amendment to the United States Constitution, and the same chilling effect by TOMA on constitutionally protected speech is addressed herein, as was addressed by the 5th Circuit in *Rangra*. As to the applicability of strict scrutiny analysis to content based restrictions on freedom of speech, *Rangra* still stands as the law of the case, and the law of the circuit. “The First Amendment’s protection of elected officials’ speech is full, robust, and analogous to that afforded citizens in general. Furthermore, when a state

seeks to restrict the speech of an elected official on the basis of its content, a federal court must apply strict scrutiny and declare that limitation invalid unless the state carries its burden to prove both that the regulation furthers a compelling state interest and that it is narrowly tailored to serve that interest.” *Rangra*, 566 F. 3d at 516.

30. Plaintiffs herein, as further explained in the accompanying brief, request that this Honorable Court conduct a trial in this case, applying strict scrutiny standards to TOMA, [the same relief ordered in the *Rangra* panel decision], determine that TOMA is not the least restrictive means of achieving open government, and thereafter declare that the criminal provisions of TOMA violate the First Amendment to the United States Constitution.

G. Prayer

31. For these reasons, plaintiffs ask for judgment against the defendants for the following:

- a. declaratory judgment and injunction that the criminal provisions of TOMA may not be enforced;
- b. declaratory judgment that the criminal provisions of TOMA violate the First Amendment of the United States Constitution, both on their face and as applied;
- c. Reasonable attorney fees;
- d. Costs of court;
- e. All other relief the court deems appropriate.

Respectfully Submitted,

DEGUERIN & DICKSON

Dick DeGuerin

10 18 Preston Ave., 7th Floor

Houston, Texas 77002

Telephone: 713-223-5959

Facsimile: 713-223-9231

State Bar Card No. 05638000

LAW OFFICE OF ROD PONTON

Rod Ponton

2301 North Hwy 118

P.O. Box 9760

Alpine, Texas 79831

Telephone: 432-837-0990

Facsimile: 432-837-0971

State Bar Card No. 16115170

Stubbeman, McRae, Sealy, Laughlin, and
Browder

Pat Long Weaver

Two Fasken Center, Suite 800

550 West Texas Avenue

Midland, Texas 79701

432-682-1616

432-684-4884 (fax)

Law Offices of William M. McKamie, P.C.
941 Proton Road
San Antonio, Texas 78258
210-546-2122
210-546-2130 (fax)

By: _____
William M. McKamie
State Bar No. 00793423

Bradford E. Bullock
State Bar No. 13686800

ATTORNEYS FOR PLAINTIFFS

Certificate of Service

I hereby certify that I caused the foregoing Plaintiff's Original Complaint, and attachments, to be served upon Defendants in accordance with the Federal Rules of Civil Procedure on this the ___ day of December, 2009.

Rod Ponton