

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

CITY OF ALPINE,	§	
CITY OF PFLUGERVILLE,	§	
CITY OF ROCKPORT,	§	
CITY OF WICHITA FALLS,	§	
Diana Asgeirsson, Angie Bermudez,	§	
Jeff Browning, Jacques DuBose,	§	
James Fitzgerald, Jim Ginnings,	§	
Victor Gonzalez, Russell C. Jones,	§	
Mel LeBlanc, Lorne Liechty, A.J. Mathieu,	§	
Johanna Nelson, Cindy O’Bryan,	§	
Todd Pearson, Charles Whitecotton,	§	
Henry Wilson, Kevin Wilson,	§	
Plaintiff	§	
	§	
v.	§	Civil Action No. P:09-CV-59
	§	
GREG ABBOTT,	§	
Texas Attorney General, and	§	
THE STATE OF TEXAS,	§	
Defendants	§	

**PLAINTIFF’S RULE 56 MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE U.S. COURT:

NOW COME, Plaintiffs, CITY OF ALPINE, TEXAS, et al (hereinafter, “Plaintiffs”), and files this Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and asks the court to render Summary Judgment against Defendants, GREGG ABBOTT, Texas Attorney General, and THE STATE OF TEXAS (hereinafter, “Defendants”), and in support thereof would respectfully show as follows:

**I. STATEMENT OF THE FACTS**

1. Plaintiffs brought this 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 Defendant's application of the criminal provisions of the Texas Open Meetings Act, Texas Govt. Code § 551.101 et seq. (hereinafter "TOMA").

2. Each Plaintiff is threatened with criminal prosecution under "TOMA" if they exercise their First Amendment rights by communicating business with each other outside of a noticed public meeting.

3. As this court is aware, the substantive legal arguments of this case have already been tried and appealed with a judgment being entered that supports Plaintiffs claim. *Rangra v. Brown*, 566 F.3d 515 (5<sup>th</sup> Cir. 2009). However, the *Rangra* decision was subsequently dismissed, *sua sponte*, for mootness when it was discovered that Mr. Rangra no longer served as an elected public official due to the expiration of his term limit. *Rangra v. Brown*, 584 F.3d 206 (5<sup>th</sup> Cir. 2009).

4. All Plaintiffs seeking relief under this petition have standing pursuant to 28 U.S.C. § 2201(a) (2000), as they are forced to operate under the legitimate fear that they may face criminal prosecution no matter the effort they put forth to comply with the provisions of "TOMA."

5. Therefore, this case and controversy is not moot and is suitable for final judgment to be entered thereon.

## II. GROUNDS FOR MOTION

### **"TOMA" Infringes On Plaintiff's Right To Free Speech Under The First Amendment To The United States Constitution.**

6. In *New York Times Co. v Sullivan*, 376 U.S. 254 (1964), Justice Brennan, writing for the majority, stated:

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v United States*, 354 U.S. 476 ...Mr. Justice Brandeis, in his concurring opinion in *Whitney v California*, 274 U.S. 357, 375-76, gave the principle its classic formulation:

"Those who won our independence believed... that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they know that order cannot be secured merely through

fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; **that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies**; and that the fitting remedy for evil counsels is good ones. **Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.** Recognizing the occasional tyrannies of governing majorities, **they amended the Constitution so that free speech and assembly should be guaranteed.**

*New York Times Co. v. Sullivan*, 376 U.S. at 268 (emphasis added).

7. The First Amendment does not apply unequally to different classes. An elected or appointed official, (as well as his constituents), does not forfeit his first amendment freedoms as a prerequisite to taking office. “TOMA,” however, does this, singling out public officials for actual or threatened prosecution, for merely discussing public issues, or receiving correspondence or email—the protected exercise of first amendment rights.

8. In 1966 a unanimous United States Supreme Court upheld the idea that elected officials have the same free speech rights as the ordinary citizen. *Bond v. Floyd*, 385 U.S. 116 (1966). In *Bond*, a Georgia man had been elected to the Georgia House of Representatives but had been excluded by other members of the House based on his statements opposing the Vietnam War. The Court concluded that such a measure was a violation of Bond’s free speech. *Id.* In the case the state attempted to argue that while “a citizen might be protected by his First Amendment rights, the State may nonetheless apply a stricter standard to its legislators.” *Id.* at 133. The Court explicitly rejected such an idea. *Id.* The court reasoned that while a state may require something of its elected officials not required of its remaining citizens, such as an oath, this power does not extend to limiting the legislators’ capacity to discuss views. *Id.* at 135.

9. The Supreme Court’s decision that elected officials have the same free speech rights as regular citizens was guided by the proposition that “debate on public issues should be uninhibited, robust, and wide-open.” *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The Court went on to support the idea that elected officials and electors have equal rights and protections under the law.

10. Since 1966, *Bond* has been cited positively by a number of different courts: “The Court rejected a differing first amendment standard for publicly-elected officials.” *Miller v. Town of Hull, Massachusetts*, 878 F.2d 523, at 532-33 (1<sup>st</sup> Cir. 1989). “The Supreme Court specifically rejected the argument that elected officials have lesser first amendment rights than ordinary citizens.” *Id.*, at 534. “The Court in *Bond* stated in dicta that if the statements in question had been made by a private citizen, they would have been protected by the first amendment.” *Vacca v. Barletta*, 753 F.Supp. 400, at 405 (D. Mass, 1990). “*Bond* squarely holds that legislators enjoy the same degree of first amendment protection as private citizens.” *Gewertz v. Jackson*, 467 F. Supp. 1047, at 1058 (D.C.N.J., 1979).

**“TOMA” Is Unreasonably Overbroad And Vague, Making Plaintiff’s Ability To Comply With The Law Virtually Impossible.**

**A. “TOMA” is Overbroad:**

11. “Overbroad statutes may be facially attacked because their very existence may discourage persons from engaging in protected expression out of fear of prosecution under the law.” *Broadrick v. Oklahoma*, 413 U.S. at 612 (1973). The United States Supreme Court ruled in the *Broadrick* decision that when First Amendment freedoms are threatened by an Act, the Act must be tailored in such a way that still allows for protected speech and does not run the risk of suppressing speech with the threat of possible criminal sanctions. *Id.*

12. It is important to note that when an act is overbroad *any* enforcement of that act is unconstitutional “until or unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.” *Id.* When a law imposes criminal penalties on speech, like “TOMA,” suppression of speech will naturally occur. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2001). The *Ashcroft* court noted that even *minor* punishments can chill protected speech. *Id.*

13. A federal court reviewing a constitutional challenge to a state statute should not impose a limiting construction contrary to state interpretation or practice. *Erznoznik v. City of Jacksonville*, 422 U.S. 205

(1975). Limiting constructions should be found either in the state courts or in the state's Attorney General opinions, which act as persuasive but not binding authority on the courts.

14. Two attempts have been made by Texas courts of appeal to limit the "TOMA" definition of what constitutes "verbal exchange" and when a "quorum" exists. The first, in 1993, limited verbal exchange to "a reciprocal giving and receiving of spoken words." *Dallas Morning News v. Board of Trustees*, 861 S.W.2d 532 (Tex. App.—Dallas 1993). However, this limitation has been overturned by the amendments to the Act in 1999. The second case addressed a phone conversation between two members of the board and held that a quorum did not exist; however, they based their reasoning not on requiring physical presence to have a meeting, but that *three* members were needed to have a meeting, thus leaving open the possibility that physical presence is NOT required in order to have a meeting. *Harris County Emergency v. Harris County Emergency*, 999 S.W.2d 163 (Tex. App.—Houston [14th Dist.] 1999).

15. Prior to 1999, § 551.001 of "TOMA" defined meeting as: "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." In 1999, however, a new definition of meeting was added, making mere expressions by government officials a violation of the Act and thereby eliminating the attempts by courts to limit the scope. Now, a meeting can also include, "a gathering ... 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." §551.001(B)(iv).

16. This means that deliberation between the members is no longer required, so verbal exchange is no longer required to have a meeting that violates "TOMA." Thus, a meeting now can violate "TOMA" if any third party attends an open meeting and asks a question or makes a statement about board matters. This is

evident by the language used in *Gardner v. Herring*, when the court noted that “*under the pre-1999 Act*, a meeting occurred when there was a ‘giving and receiving of spoken words’ about a matter of public business.” 21 S.W.3d 767, 771 (Tex. App.—Amarillo 2000)(emphasis added). That court noted the change in the Act in a footnote, that meeting now includes a new definition, but that the alteration “lacked retroactive effect,” conceding that a different outcome would be possible under the new definition. *Id.* In *Willmann v. City of San Antonio*, the court noted that “a governmental body does not always insulate itself from “TOMA’s” application simply because less than a quorum of the parent body is present.” 123 S.W.3d 469, 478 (Tex. App.—San Antonio 2003).

17. In 1992, the Attorney General addressed whether the circulation of a letter among city council members, which they sign, could constitute a violation of “TOMA.” The opinion found that if a quorum of the members had signed the letter and the letter contained public business, then it was a violation. The AG noted the Act’s “requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time.” Atty Gen. Op. DM-95 (1992).

18. In 2000, the AG specifically noted again that “the Act has been construed to apply to situations in which members of a governmental body act as a body but are not in each other’s physical presence.” Atty Gen. Op. JC-307 (2000). In fact, the AG states that avoiding the technical definition of “meeting” or “deliberation” will not protect one from the Act, meaning that the definition of “meeting” is not a reliable indicator of all the situations which could be construed to constitute a “meeting” or a “deliberation.” *Id.*

19. In that same opinion, the AG also eliminates the verbal exchange construction given by the courts of appeal, concluding that *Gardner* and *Dallas Morning News*, where members merely listened but did not respond to a verbal presentation, did not distinguish between *written* and spoken exchange. *Id.* The AG opinion seems to say that “deliberation” could include written communication and electronic mail. *Id.*

20. Another AG opinion makes clear that the new definition of meeting eradicates the need for any form of deliberation between the members at all. Atty Gen. Op. JC-0313 (2000), holding a committee “subject to [TOMA]...*regardless of whether the committee members or any Board members engage in a deliberation as defined by [the Act.]” Id.* (emphasis added). This means that the purpose of TOMA, which is to prevent government officials from conspiring in secret about public business, is totally ignored because no two members actually have to communicate with each other to violate the Act (which is true after the 1987 Amendments, but even more likely a scenario now).

**B. “TOMA” is Vague:**

21. Vague laws may do three types of damage: first, they may trap the innocent by not providing fair warning; second, they can impermissibly allow policemen, judges, prosecutors, and juries to decide basic policy matters; third, especially true where the First Amendment is involved, vagueness can inhibit the exercise of constitutional freedoms. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In the area of the First Amendment, the Supreme Court has found that precision of regulation must be even more important. *United States v. Robel*, 389 U.S. 258 (1967). The key principle in determining if a statute is void for vagueness is whether the law affords fair warning of what is proscribed. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

22. The Attorney General has said that even assembling in an informal setting, such as a social occasion, could subject members to the Act if there is any exchange about **public business** or policy among a quorum. Atty Gen. Op. H-785 (1976). Public business, however is **not** limited to those issues within the jurisdiction of the governmental body in question. §551.001(3). And therein lies the heart of the vagueness problem. A quorum of local city officials in a social gathering must conclude that “TOMA” prohibits a conversation regarding increased state funding for the school district in which they reside even though they

have no policy-making authority with the state or school district or else risk prosecution; there is no statutory good faith exception. *Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

23. “TOMA” leaves so many possibilities for what could constitute a violation that local prosecutors and judges have virtually unfettered discretion to decide what is and what is not a violation. There is no limiting construction of “TOMA” that this Court could impose that removes its inherent vagueness, but leaves the definitions created by the Texas legislature intact. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). The statute should be struck down, and enforcement thereof prohibited, until the Texas legislature can write a new law that will pass First Amendment muster.

**“TOMA” is not a valid Time, Place and Manner restriction on speech.**

24. “TOMA” is an act which some claim to be a time, place, and manner restriction on the speech of government officials; however, “facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct.” *Id* at 613.

25. Time, place, manner regulations must be “applicable to all speech irrespective of content.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). Thus, time, place, manner restrictions “may not be based upon either the content or subject matter of speech.” *Consolidated Edison Co. of New York v. Public Service Comm’n of New York*, 477 U.S. 530, 536 (1980).

26. “TOMA’s” regulations limit the content of speech. “TOMA” prohibits the “deliberation” of “any public business” between government officials of the same governing body in any situation where proper notice has not been given to the public. *See* Tex. Gov’t Code § 551.001, *et seq.* Deliberation is defined as “a verbal exchange during a meeting ...” and the exchange must concern “an issue within the jurisdiction of the governmental body.” Tex. Gov’t Code § 551.001 (2). A violation of “TOMA” is dependent on what speech a government official uses during a “meeting,” and that speech falls under the subject matter of

protected political speech. “TOMA” is regulating the political speech of government officials because issues in a governmental body’s jurisdiction are most often political issues.

27. Valid time, place, manner restrictions regulate *when* and *where* speech can occur, not the content. *See Cox v. New Hampshire*, 312 U.S. 569 (1941). *See also Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Linmark Associates v. Willingboro*, 431 U.S. 85 (1977); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (all cases limited speech irrespective of content and did not limit the speech of selected groups of individuals).

28. “TOMA” seeks to muzzle all elected and appointed officials, preventing them from communicating about **any** public business with each other or the public except at a duly noticed meeting. That restriction is overbroad and facially unconstitutional.

**Plaintiffs Are Under The Continual Threat Of Criminal Prosecution, Thus Chilling Their Right To Engage In Constitutionally Protected Speech.**

29. The United States Supreme Court has held that when an individual alleges an intention to engage in conduct which is constitutionally protected, yet proscribed by state law, and there is a realistic threat of prosecution under that state law, an individual “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979), *quoting Doe v. Bolton*, 410 U.S. 179 (1973). Whether a threat of prosecution adequately satisfies the actual controversy requirement in a given case is a “factual and case-specific” question. *Navegar, Inc. v. United States*, 103 F.3d 994, 999 (D.C. Cir. 1997).

30. In the instant case, Plaintiffs have yet to face criminal prosecution. However, such prosecution to conviction is not required. Operating with the knowledge that they may, at any time be subjected to such prosecution and conviction, “TOMA” certainly has created a chilling effect with regards to Plaintiff’s speech.

31. When it is clear that provisions apply to a specific class of individuals, “the imminent threat of such prosecutions can be deemed speculative only if it is likely that the government may simply decline to enforce these provisions at all.” *Id.* at 1000.

32. “TOMA” is clearly meant to be applied to public officials, and those who communicate with them. These public officials, plaintiffs herein, have a legitimate fear of the “threat of prosecution” for allegedly violating the criminal provisions of “TOMA,” merely by exercising their first amendment right of free expression. Thus, the threat of prosecution under the Texas Open Meetings Act is only speculative if it is unlikely that the government would seek to enforce the Act. However, the previous indictments of Avinash Rangra and Katie Elms Lawrence under the Act, demonstrates that the government is willing to enforce the Act.

### **III. SUMMARY JUDGMENT EVIDENCE**

33. Plaintiffs ask the Court to take judicial notice of Chapter 551, et. seq. of the Texas Government Code.

### **IV. STANDARD OF REVIEW – F.R.C.P. 56**

34. Summary judgment is proper in any case where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). A plaintiff moving for summary judgment satisfies its burden by submitting summary judgment proof that establishes all elements of its cause of action as a matter of law. *San Pedro v. U.S.*, 79 F.3d 1065, 1068 (11<sup>th</sup> Cir. 1996); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5<sup>th</sup> Cir. 1986). Plaintiff must show that no reasonable trier of fact could find other than for plaintiff. *Calderone v. U.S.*, 799 F.2d 254, 259 (6<sup>th</sup> Cir. 1986).

### **VII. CONCLUSION**

35. Plaintiffs ask for summary judgment on all issues, all claims, all theories of damages, and all parties.

### VIII. PRAYER

For these reasons, Plaintiffs ask the court to grant this motion and sign an order for final summary judgment. In addition, Plaintiffs respectfully request the award of:

- a. Reasonable attorney fees;
- b. Costs of court;
- c. All other relief the court deems appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on July 12, 2010 a complete and correct copy of *Plaintiff's Rule 56 Motion For Summary Judgment*, was filed electronically with the United States District Court for the Western District of Texas, Pecos Division, with notice of case activity to be generated and sent electronically by the Clerk of the Court with ECF notice being sent to the following counsel of record:

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