IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

HUMBERTO AGUIRRE, et al. Plaintiffs, v. CHIEF JUSTICE THOMAS R. PHILLIPS, et. al., Defendants	)	Civil Action No.DR 02CA26

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Introduction

The voters of Texas select the justices of the Texas Supreme Court through hotly contested partisan elections. In casting their ballots for this critically important office, the voters are entitled to know how the sitting justices have discharged their duties as elected public officials. Nevertheless, the Court has a adopted a policy which cloaks in secrecy the great bulk of the justices' decisions, their votes on petitions for review.

The plaintiffs in this case, Texan voters, candidates, press and public interest organizations, seek to learn these votes. They do not seek access to any judicial deliberations but simply the recorded decisions of the individual Justices, which establish rules by which the plaintiffs and other Texans must live. Because nearly ninety percent

of cases submitted to the court are denied review, decisions on petitions for review constitute the great majority of the Court's decisions.

The Court's policy of secrecy deprives judicial elections of meaning. Voters cannot know the stance a given Justice has taken on issues of concern, nor can they learn how each Justice has voted on petitions submitted by large campaign contributors. As Justice Oliver Wendell Homes wrote, "[I]t is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifier*, 137 Mass. 392, 394 (1884) quoted in *NBC Subsidiary, Inc. v. Superior Court*, 980 P.2d 337, 351 n. 14 (Cal. 1999).

For this reason, the First Amendment to the U.S. constitution creates a presumption of public access to judicial documents and proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980); *Globe Newspaper Company v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Company v. Superior Court of California*, 464 U.S. 501 (1984)("Press Enterprise I"); *Press-Enterprise Company v. Superior Court of California,* 478 U.S. 1, 8 (1986)("Press Enterprise II). "The first amendment's broad shield for freedom of speech and of the press is not limited to the right to talk and to print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for the freedom to speak is of little value if there is nothing to say." *In re Express-News Corporation*, 695 F.2d 807, 808 (5th Cir. 1982). "Democracies die behind closed doors….When government begins closing doors, it selectively controls information rightfully belonging to the people. The

Framers of the First Amendment…protected the people against secret government," *Detroit Free Press v. Ashcroft*, __ F.3d ___, 2002 WL 1972919 at *1 (6th Cir. 2002).

The reasoning of *Richmond* and its progeny demands the disclosure of votes by elected judges, for the public good served by the accountability of elected officials cannot be denied, and no legitimate state interest militates in favor of hidden justice. "There is a presumption of public access to judicial decisions in part because public monitoring of the courts is an essential feature of democratic control and judicial accountability." *U.S. v. Salemme*, 978 F.Supp. 364, 372 (D. Mass. 1997).

In addition to the First Amendment, federal common law also establishes a right of access to judicial records, *Nixon v. Warner*, 435 U.S. 589, 597 (1978), which "serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." *Securities and Exchange Commission v. Van Waeyenberghe*, 990 F.2d 845 (5th Cir. 1993), quoting *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3rd Cir. 1988).

Defendant Justice Nathan Hecht has himself expressed the need for disclosure of the votes, in dissenting from the Texas Supreme Court's refusal to hear a case that cried out for review under the usual criteria: "If our votes on applications [for review] were always public, some would change…. I am forced to conclude that the time has come for the Court to make public its votes on applications [for review]." *Maritime Overseas Corp. v. Ellis*, 977 S.W. 2d 536, 537, (Tex. 1996).

Factual Background

The Texas Supreme Court accepts review of only a small proportion of cases submitted to it. The nine justices vote on whether to accept petitions for review, with four votes needed to grant a petition. *See* Michael O'Connor*, O'Connor's Texas Civil Appeals* (2000-2001) at 898-899. Of the petitions for review submitted between 1994 and 1998, the Court accepted approximately eleven percent. Thus in the majority of cases, the Court's decision to deny review is dispositive, and the decision is binding within the lower appellate court's jurisdiction. Additionally, with the votes of six justices the Court can "refuse" a petition for review, *id*., elevating the lower appellate court opinion to the level of Supreme Court precedent. Texas Rule of Appellate Procedure 56.1(b)(3). By means of this "refusal" process the Texas Supreme Court can and has effectively issued a Supreme Court opinion without any disclosure as to which of the 6 or more justices have voted for the refusal. *See* First Amended Complaint ("Complaint") ¶¶ 23, 28.

When the justices receive a petition for review, each is given a pink vote sheet. The votes are then recorded on a purple vote sheet, which is used by the court's administrative assistant to compile the votes of the Justices and distribute the results to the Court and to the Clerk of the Court. *See* James A. Vaught and R. Darbin Darby, *Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes*, 31 Tex. Tech. L. Rev. 63, 68-70 (2000).

The policy of the Court is not to disclose these votes, and the Court's administrative rules do not provide the public access to the votes. Rule of Judicial

Administration 12(d), Texas Government Code Title 2, Subtitle F -- Appendix**.** Any justice may choose to reveal his or her vote, but this happens rarely. Thus, the candidate, voter and organizational plaintiffs – as well as the public at large -- never know the decisions taken by each justice on most of the cases that come before the Court.

Justices on the Supreme Court are selected through partisan elections. Candidates may solicit and accept campaign contributions of up to $5,000 per election (or $15,000 per cycle, if there is a contested primary and a primary run-off) from individuals and organizations other than labor unions and corporations. Texas Code of Judicial Conduct Canon 4D(1); Tex. Elec. Code Ann §§ 253.091, 253.094. This limit does not apply to candidates whose opponents exceed voluntary spending limits. *Id*. § 253.165. Complaint ¶ 25.

Law firms, lawyers, and other donors who have made campaign contributions regularly submit petitions for review to the Court. The fact that a litigant or attorney has contributed to a justice does not disqualify the justice from that case or mandate the justice's recusal. Fifty-two percent of the money raised by the ten justices who faced an election from 1994 through 1998 came from lawyers, law firms and litigants who filed petitions for review during this period, according to a recent study by Texans for Public Justice. In the aggregate, petitions from large donors were approximately ten times more successful than those of non-donors or small donors. Complaint ¶ 26.

Texas law requires candidates to disclose the names and addresses of those who donate over $50, and further requires candidates for judicial office to disclose the occupation, job title, and employers name for all such donors. Tex. Elec. Code Ann §§ 254.031(a)(1) and 254.0611. But while the law thus aims to make transparent the

relationship between those running for office – especially judicial office -- and their campaign donors, the Supreme Court's secret votes thwart this goal by cloaking the donor-candidate relationship from the public.

The complaint challenges the Court's policy and practice of secrecy as a violation of the First Amendment to the U.S. Constitution and federal common law. The six voter plaintiffs wish to know the votes of the justices in order to make more informed choices at the polls. Complaint ¶¶ 7-11, 13, 31-32. The voter plaintiffs include one current and one future candidate for Supreme Court justice, Brad Rockwell and Terry Hogwood, who also wish to learn the incumbents' votes on petitions for review submitted by large campaign donors in order to more effectively campaign. Complaint ¶¶ 11, 14, 38. The organizational plaintiffs Texans for Public Justice, Common Cause, and Texas League of United Latin American Citizens seek the information in order to assess the justices' records on issues of concern to their constituencies, including the treatment of large campaign donors Complaint ¶¶ 15-17, 33-36. Plaintiff Texas Observer is a bi-weekly publication which seeks to learn the votes in order to more fully report on judicial decisions of public interest and on the records of incumbent justices seeking re-election. Complaint ¶¶ 18, 37. Finally, plaintiff Texas Civil Rights Project, a non-profit public interest law foundation, and Terry Hogwood, a practicing attorney, seek the information in order to better serve their legal clients. Complaint ¶¶ 12, 19, 39-41.

The defendants are the Chief Justice and eight Serving Justices of the Texas Supreme Court, and four administrative employees of the Court, all sued in their official capacities. Complaint ¶¶ 20-22. The defendants have moved to dismiss claims against the administrative employees for lack of subject matter jurisdiction, pursuant to

Fed.R.Civ.P. 12(b)(1), and to dismiss claims against all defendants for failure to state a claim for which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6). The plaintiffs have agreed to voluntarily dismiss claims against two of the administrative employees, Nadine Schneider and Jerry Benedict, and a stipulation that effect is being submitted.

Argument

I. Standard for Dismissal

The threshold for dismissal under Fed.R.Civ.P. 12(b)(6) is high. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 46 (1957). "In analyzing the complaint, [the court] will accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff…the issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999). "A motion to dismiss under rule 12(b)(6) is viewed with disfavor and rarely granted." *Benal v. Freeport-Morgan, Inc.*, 197 F.3d 161, 164 (5th Cir. 1999). *See also, Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) *cert. denied sub nom Cloud v. U.S.*, 122 S.Ct. 2665 (2002).

Similarly, motions to dismiss under Fed.R.Civ.P. 12(b)(1) "should be granted sparingly," and only "where adequate time is given to complete discovery and all the jurisdictional facts are fully developed and placed before the court." *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 602 n. 1 (5th Cir. Unit A 1982) (quoting *Chatham Condominium Associations v. Century Village, Inc.,* 597 F.2d 1002, 1012-13 (5th Cir. 1979).) "A motion under 12(b)(1) should be granted only if it appears certain that the

plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Home Builders Association of Mississippi, Inc. v. City of Madison, Mississippi*, 143 F.3d 1006, 1010 (5th Cir. 1998). "[D]ismissal of a claim for want of subject matter jurisdiction is only appropriate where the claim is insubstantial and frivolous, or is immaterial, or the claim is made solely to contrive jurisdiction," *Taylor v. St.Clair*, 685 F.2d 982, 986 (5th Cir.1982). Finally, in determining jurisdiction the court "may evaluate (1) the complaint alone (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts," *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001), but "[n]evertheless, [the court] must accept all factual allegations in the plaintiff's complaint as true." *Id*.

The defendants' motion to dismiss the lawsuit for failure to state a claim is here considered first, in Section II, *infra*. The motion to dismiss the claims against the administrative defendants for lack of subject matter jurisdiction is discussed below in Section III.

II. The Plaintiffs Have Meritorious Claims for Relief.

A. The Plaintiffs are Entitled to Relief on Their First Amendment Claim.

1. The First Amendment Right of Access to Judicial Proceedings and Records is Clearly Established.

The First Amendment right of citizens to access to judicial information and proceedings has been clearly established since the Supreme Court's seminal decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (right of access to criminal trials), and was subsequently reaffirmed in *Press-Enterprise Company v. Superior Court of California*, 464 U.S. 501 (1984) ("Press Enterprise I") (right of access

to voir dire proceedings) and *Press-Enterprise Company v. Superior Court of California,* 478 U.S. 1, 8 (1986) ("Press Enterprise II) (right of access to preliminary hearings). "[T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch…" *Richmond Newspapers*, 448 U.S. at 584 (Stevens, J., concurring.). *See also In the Matter of Dallas Morning News Company*, 916 F.2d 205 (5th Cir. 1990) (First Amendment right of access applies to voir dire proceedings); *United States v. Chagra,* 701 F.2d 354 (5th Cir. 1983) (First Amendment right of access applies to bail reduction hearings); *United States v. Edwards*, 823 F.2d 111, 118 (5th Cir. 1987) (First Amendment guarantees limited right of access to record of closed proceedings concerning potential jury misconduct and presumption that transcript will be released).

Justice Brennan explained that the First Amendment creates a right of access in order to safeguard the democratic process itself:

> [T]he first Amendment embodies more than a commitment to free expression and communicative exchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of government. Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but also the antecedent assumption that valuable public debate – as well as other civic behavior – must be informed.

Richmond Newspapers, 448 U.S. at 586 (Brennan, J., concurring) (emphasis in the original)(internal citations omitted). This principle applies with equal force to civil and criminal proceedings, s*ee Richmond Newspapers*, 448 U.S. at 599 (Stewart, J., concurring), although the First Amendment right of access cases decided by the Supreme Court to date have involved only criminal proceedings. Lower courts have routinely applied the First Amendment right of access to civil cases. *See In Re Grand Jury Subpoena v. Doe No. 1*, 103 F.3d 234 (2d Cir.1996); *Publicker Industries, Inc. v. Cohen*,

733 F.2d 1059 (3rd Cir. 1984); *Grove Fresh Distributors v. Everfresh Juice Co*., 24 F.3d 893 (7th Cir. 1994); *In Re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984); *NBC Subsidiary v. Superior Court*, 980 P.2d 337 (Cal. 1999); *State ex. rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904 (Fla. 1976); *State of Maryland v. Cottman Transmission Systems, Inc*., 75 Md.App. 647 (Md. App. 1988); *see also Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (First Amendment right of access applies to civil proceedings, at least when they "pertain to the release or incarceration of prisoners and the conditions of their confinement").

The U.S. Court of Appeals for the Fifth Circuit has not ruled on the First Amendment right of access in civil cases, though it has suggested that such a right exists. In *Doe v. Stegall*, 653 F.2d 180, 185 (Fifth Cir. Unit A 1981), a civil proceeding in which the plaintiffs wished to keep their identities secret, the Court cited *Richmond* for the proposition that "First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceeding," *Doe v. Stegall*, 653 F.2d 180, 185 (Fifth Cir. Unit A 1981), and noted that *Richmond* left open the right of access to civil proceedings. *Id* at n. 10. Relying on this, the U.S. District Court for the Southern District of Texas has held that the First Amendment right of access applies in civil cases. *Doe v. Santa Fe Independent School District*, 933 F.Supp. 647 (S.D. Texas 1996).

The First Amendment right of access has been held to encompass a broad range of civil documents and proceedings. *See, e.g., Del Papa v. Steffen*, 915 P. 2d 245, 248-49 (Nevada 1996) (First Amendment requires public access to judicial discipline proceeding). *See also Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, 960 F.2d 105, 109 (9th Cir. 1992) (First Amendment could require disclosure of list of almond growers

eligible to vote in referendum of producers); *Society of Professional Journalists v. Secretary of Labor*, 616 F.Supp. 569, 578 (D. Utah 1985) (First Amendment requires access to administrative fact-finding hearings of state Mine Safety and Health Administration).

2. The First Amendment Right of Access Applies to the Information Sought Here.

In determining whether a First Amendment right of access applies to a given document or proceeding, consideration is given to whether there is a tradition of public access, and whether access "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Company*, 457 U.S. at 605-606. A decision taken by sitting justice, including a vote to grant or deny review, is clearly subject to First Amendment disclosure under this standard. Judicial decisions are by tradition and widespread practice attributed to the judges making those decisions, and they are nearly always made public. As a Texas court has noted, "[T]he opinions of this court are public records and anyone who desires to do so may make or secure copies thereof." *Alamo Motor Lines v. Int'l Brotherhood of Teamsters*, 229 S.W.2d 112, 117 (Tex. Civ. App. – San Antonio 1950, no writ) (refusing request to refrain from publishing an opinion). Reflecting this judgment, Texas' rules of civil procedure provides that "[n]o court order or opinion issued in the adjudication of a case may be sealed," even though all other court records, while presumed public, may be sealed upon a sufficient showing of necessity. Tex.R.Civ.P. 76a (10).

Precisely because it is rare for a judge to withhold a decision from the public, case law in this area is sparse. One court did unseal its opinion despite the asserted privacy

interests of alleged government informants and the government's interest in protecting confidential sources, all of which was "outweighed by the public interest in access to the court's full decisions." *U.S. v. Salemme*, 978 F.Supp. 364, 373 (D. Mass. 1997). "A judicial decision 'is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny…. There is a presumption of public access to judicial decisions in part because public monitoring of the courts is an essential feature of democratic control and judicial accountability." *Id*. at 372, quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied sub nom. Citytrust v. Joy*, 460 U.S. 1051 (1983) and citing *United States v. Amodeo,* 71 F.3d 1044, 1049 (2d Cir. 1995).

Votes on petitions for review constitute judicial decisions. As discussed in the fact section, *supra,* votes to deny review have the effect of establishing law, and when the vote is to *refuse* review, it has the force of Supreme Court precedent in courts throughout the state. The plaintiffs here do not seek admission to conferences between the justices, nor do they seek a transcript or other documents revealing communications and deliberations of the justices. The only record they seek is the actual vote of each justice. While judicial deliberations are universally maintained in privacy, votes on petition for review are frequently disclosed in jurisdictions other than Texas. Of the forty-two states in which the highest court possesses discretionary review, at least fourteen disclose the votes of the justices. *See* Complaint ¶ 30.

When considering the tradition of public access, it is appropriate to focus on the larger category of judicial decisions, rather than the sub-set of votes on petitions for review. In *Globe Newspaper Company*, the Supreme Court was asked to permit secrecy

in the conduct of trials for sexual offenses involving victims under age 18. In holding that such trials must presumptively be open, the Court looked not to the sub-category of sexual offense trials but rather to the history of openness in criminal trials more broadly. *Globe Newspaper Company*, 457 U.S. at 605; s*ee also*, *Capital Cities Media, Inc. v. Chester*, r797 F.2d 1164, 1175 (3rd Cir. 1986).

Furthermore, a First Amendment right of access need not depend on historical practice if a strong functional interest in disclosure exists. "Because the fist amendment must be interpreted in the context of current values and conditions…the lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access to such hearings. The First Amendment right of access is, in part, founded on the societal interests in public awareness of, and its understanding and confidence in, the judicial system." *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (internal citations omitted).

The functional importance of disclosing the votes of sitting justices is clear. "By signing his name to a judgment or opinion, the judge assures the parties that he has thoroughly participated in that process and assumes individual responsibility for the decision." Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1441, 1443 (1983). The existence of privately funded partisan elections in Texas means that Justices are voting on petitions submitted by their own campaign contributors. Public disclosure of these votes is necessary to check the potential for unfair influence created by this situation. "[A] judge's willingness to assume responsibility for his decisions constitutes the primary check on his power." *Id.* at 1456

Disclosure will permit voters to hold Justices accountable for all decisions they make, including their treatment of large contributors, and permit candidates for Supreme Court to raise questions regarding any appearance of impropriety that may exist. Judicial elections cannot be fully informed when the majority of decisions made by the incumbents are unknown.[1] A more accurate assessment of the Supreme Court justice's judicial record will also enable voters to make more informed choices when the justices leave the bench to seek another public office.

It is a matter of public record that these concerns are real, and not hypothetical, in Texas. The Democratic candidate for Attorney General in the November 2002 elections has called upon his opponent, former Texas Supreme Court Justice Greg Abbot, to reveal his vote on petitions for review, which "ought to be made public considering the amount of money received by the Court." David Pasztor, "Watson calls on Abbot to release his court votes," *Austin American-Statesman*, September 24, 2002, page 5. The U.S. Supreme Court has recognized the need for public accountability in the judicial branch just as in other branches of government. In *Chisom v. Roemer*, 501 U.S. 380 (1991), the Court held that state elections for judges fall within the ambit of Section Two of the Voting Rights Act, prohibiting the imposition of discriminatory practices. Determining that elected judges are "representatives" for purposes of the Voting Rights Act, the Court noted that while judges need not be elected, once such a system is established candidates for the judiciary must "vie for popular support just as other political candidates do." *Id*.

[1] The fact that the justices to the Texas Supreme Court are elected distinguishes this case from one seeking the votes of appointed justices, such as the votes of the U.S. Supreme Court justices on petitions for certiorari. The context of judicial elections greatly enhances the public's interest in, and need for, the votes and thus weights the First Amendment analysis clearly in favor of disclosure.

at 400. Similarly, in ruling that judges are "policymaking" officials for purposes of the Age Discrimination in Employment Act, *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the court acknowledged the political role played by the judiciary.

Thus the secret votes of the Texas Supreme Court are subject to the First Amendment right of disclosure both because they constitute judicial decisions, which carry a tradition of public access, and because of the positive functional role that disclosure would play in governance. The cases cited by the defendants deny a First Amendment right of access precisely because the information sought did not meet this test, and not because there is no "general right of access to government records." Def. Br. at 6. *See Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994) (plaintiff not entitled to records of traffic violation prosecutions in order to solicit business; First Amendment requires public access "where 'a tradition of accessibility implies the favorable judgment of experience'…and where 'public access plays a significant positive role in the functioning of the particular process in question'"); *Calder v. Internal Revenue Service*, 890 F.2d 781, 784 (5th Cir. 1989)(no right of access to Internal Revenue Service records because no tradition of access to this type of records); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175 (3rd Cir. 1986) (no First Amendment right of access because of failure to allege that a tradition of public access exists); *American Civil Liberties Union of Mississippi, Inc. v. State of Mississippi*, 911 F.2d 1066 (5th Cir. 1990) (no right of access to records of former state agency where order requiring disclosure did not take into account privacy interests of persons named in agency files).

Each of these cases, although denying the particular access sought, acknowledges that the First Amendment can and does require access to government information under the framework established in *Richmond Newspapers* and its progeny. Therefore, to the extent that they cite *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) for the broader assertion that "[t]there is no constitutional right to have access to particular government information," *Calder*, 890 F.2d at 784, quoting *Houchins,* 438 U.S. at 14, this citation of *Houchins* is dicta. Furthermore, it is clear that the *Richmond* decision revised the First Amendment doctrine as it had been expressed in *Houchins* and other previous cases. Justice Stevens, in his *Richmond* concurrence, observed, "Twice before, the Court has implied that any governmental restriction on access to information, no matter how severe and how unjustified, would be constitutionally acceptable…Today, however, for the first time, the Court unequivocally holds that arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." 448 U.S. at 582-83 (discussing *Houchins* and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *see also* Eugene Cerruti*, "Dancing in the Courthouse": the First Amendment Right of Access Opens a New Round*, 29 U.Rich.L.Rev. 237 (1995).

Finally, the plaintiffs in this action do not assert a right to government assistance of any kind,[2] so the cases cited by defendants denying such claims have no relevance. *See Lyng v. International Union,* 485 U.S. 360 (striking union members are not entitled to food stamp assistance, therefore deprivation of such assistance does not abridge their

[2] Every plaintiff who has been granted access to government information under the First Amendment has had some benefit he or she sought from acquiring the information – without such an interest, there would be no standing to litigate such a claim. If seeking this benefit could be construed as an impermissible claim of entitlement

freedom of expression in violation of the First Amendment); *Pitrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001) (no sixth amendment due process violation where city failed to protect plaintiff from danger).

3. The Court's Practice of Secrecy is Not Narrowly Tailored to Serve an Essential, Overriding Interest.

Once it is established that a given record or proceeding is subject to the First Amendment's right of access, a "presumption of openness" is created which "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press Enterprise I*, 464 U.S. at 510; *see also In the Matter of Dallas Morning News Company*, 916 F.2d 205, 206 (5th Cir. 1990), quoting *Press Enterprise I*; *Rovinsky v. McKaskle*, 722 F.2d 197 (5th Cir. 1984) (opinion on rehearing en banc), citing *Globe Newspaper Co.*, 457 U.S. at 608-09.

Thus, assuming that votes on petitions for review are subject to First Amendment disclosure, the Texas Supreme Court bears the burden of demonstrating an overriding interest in maintaining secrecy, of identifying higher values served by the secrecy, and of showing that its policy is narrowly tailored to serve those values. However, the defendants identify no interest whatsoever that is served by secrecy, beyond stating that disclosing the votes "discloses no information at all," and that in the event of disclosure "no meaningful distinction could be drawn between the discussions and tentative decisions of the Texas Supreme Court and those of any other judicial body." Def. Br. at

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to affirmative government aid, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196-97 (1989), then all such claims would have failed. .

9-10 (discussing claim common law right of access). To question the usefulness of the information is not to demonstrate an interest in withholding it.

Access to the votes would not in any way compromise the secrecy of judicial deliberations. Any assertion that it might is belied by the fact that many state supreme courts provide such disclosure. *See* Complaint ¶ 30. While the justices are entitled to confer in private, as elected officials they must be accountable to the public for their official acts. *Chisom*, 501 U.S. at 400. The possible wrath or approval of voters in response to a Justice's vote is a reason for disclosure, and not a rationale for secrecy. In fact, the majority of states noted in the Complaint as disclosing votes on petitions for review have an elected judiciary, including Alabama, Alaska, California, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, New Mexico, Ohio, Oklahoma (disclosing votes to deny review); Utah, and West Virginia. *See* Bureau of Justice Statistics, *State Court Organization 1998*, *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sco9802.pdf.

B. The Plaintiffs are entitled to relief on their Federal Common Law Claim

Federal court decisions have established a common law right of public access to judicial records. "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner*, 435 U.S. 589, 597 (1978). This common law right of access, like its First Amendment counterpart, "serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." *Securities and Exchange Commission v. Van Waeyenberghe*, 990 F.2d 845 (5th Cir. 1993)

(district court erred in sealing transcript and final order of permanent injunction), quoting *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3rd Cir. 1988).

The common law establishes a presumption of access, which the court must balance against the interests favoring nondisclosure. *Van Waeyenberge*, 654 F.2d at 848 The Fifth Circuit has cautioned that "the district court's discretion to seal the record of judicial proceedings is to be exercised charily." *Id.* at 848, quoting *Federal Savings and Loan Ins. Corp. v. Bain*, 808 F.2d 395, 399 (5th Cir. 1987) *cf. Belo Broadcasting Corporation v. Clark,* 654 F.2d 423 (5th Cir. Unit A 1981) (no common law right to copy audiotapes of discussions between defendants and FBI agents where members of press were allowed to listen to tapes in court and transcripts were prepared and distributed for their use).

There can be no doubt that the common law right of access includes judicial orders and opinions in both criminal and civil cases. "There is a presumption of public access to judicial decisions in part because public monitoring of the courts is an essential feature of democratic control and judicial accountability." *United States v. Salemme*, 978 F.Supp. 364, 372 (D. Mass. 1997) (common law requires release of Memorandum and Order discussing confidential government informants). The Court in *Van Wayenberge* found a right of access to a final order of permanent injunction in an S.E.C. civil enforcement proceeding. 990 F.2d at 850. *See also, Federal Savings and Loan Ins. Corp*, 808 F.2d at 399 (district court properly unsealed injunction in FSLIC enforcement proceedings).

Any balance of interests must weigh in favor of disclosing votes on petitions for review. As discussed *supra* in Section II, A, the interests served by disclosing the votes

are the same interests served by the disclosure of any judicial opinion or order, including democratic control and accountability in the judicial system and the accountability of elected judges to voters. And, as discussed *supra* in Section II, the defendants have asserted no significant interest in maintaining secrecy.

The defendants, in opposing the common law claim, characterize it as an attempt to gain access to "conferences in which the members of a state's highest court deliberate over whether to grant discretionary review," def. br. at 9, but that is patently not the case. If access to the votes of the justices were equivalent to access to judicial deliberations, then the justices' signed opinions on the merits would also be, in effect, disclosing deliberations. Clearly a vote on a petition for review reveals no more confidences of the court than does a signature on an order or opinion.

III. The Claims Against Plaintiffs' Adams and McCarthy are Not Barred by Immunity Under the Eleventh Amendment.

Defendants John T. Adams, Clerk of the Texas Supreme Court,[3] and Osler McCarthy, Staff Attorney for Public Information, are not immune from suit under the Eleventh Amendment because their jobs require them to enforce and implement the Supreme Court's policy of secrecy, which they have consistently done. While the Eleventh Amendment holds states immune from suit in federal courts, a state official may be sued in his or her official capacity if the official is charged with enforcing an unconstitutional practice. *Ex parte Young,* 209 U.S. 123 (1908). In order for the *Ex parte Young* exception to apply, the defendant officials must have a "particular duty to

[3] Since the filing of the complaint John T. Adams has retired as Clerk, but his successor in that office is automatically substituted as a defendant in this action. Fed.R.Civ.P. 25 (d).

enforce the statue in question and a demonstrated willingness to enforce that duty." *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc).

In contrast to the *Okpalobi* defendants, who were held immune, defendants Adams and McCarthy posses both the particular duty and demonstrated willingness to enforce the practice of secrecy. In *Okpalobi,* the plaintiffs sued to invalidate a Louisiana statute creating tort liability for abortion providers, and named the Governor and Attorney General as defendants. The defendants were found to be immune because they had no role whatsoever to play in implementing or enforcing the tort provision. The court held that a "mere duty to uphold the laws of the state" did not establish sufficient connection between the defendants and the unconstitutional statute. *Id.* at 417 n. 19. "Indeed, if there is no act, or potential act, of the state official to enjoin, an injunction would be utterly meaningless. *Here there is no act, no threat to act, and no ability to act.*" *Id*. at 421 (emphasis added). In contrast, Adams and McCarthy have clearly defined responsibilities requiring them to carry out the Court's unconstitutional practice of secret voting.

As Clerk of the Court, Adams duties include to "faithfully record the proceedings and decisions of the supreme court" and maintain such records. Tex. Gov't Code. § 51.004 (3); 16 Tex. Jur. 3d Courts § 31 and n. 77. Once the secret votes of the justices on petitions for review are tabulated, they are given to the Clerk, who prepares orders accordingly. *See* James A. Vaught and R. Darbin Darby, *Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes*, 31 Tex. Tech. L. Rev. 63, 69 (2000). The Clerk's office "files and preserves the records of all matters docketed with the Supreme Court," as a recently-posted job

description announced. http://www.supreme.courts.state.tx.us/jobs/clerk.html. The duties of the Clerk therefore require him to obey the Court's policy of keeping the votes on petitions for review secret.

Osler McCarthy is listed on the Texas Supreme Court's web site as the staff attorney for public information, and public advisories issued by the court are posted under a heading bearing his name, including summaries of orders and opinions. *See* http://www.supreme.courts.state.tx.us/Advisory. Like Adams, McCarthy has obeyed and enforced the Court's policy of maintaining the votes on petitions for review secret.

Thus, while the Defendants cite *Okpalobi* in support of their claim of immunity, it is clear that Adams and McCarthy are subject to suit under the very standard enunciated by that case.[4] Both have duties which actively require them to enforce the Court's policy of secrecy, and both have obeyed and implemented the policy during their tenure.

Conclusion

For the foregoing reasons, the Defendants motion to dismiss claims against defendant Adams and McCarthy under Fed.R.Civ.P. 12 (b)(1), and to dismiss all claims under Fed.R.Civ.P. 12 (b)(6) should be denied.

[4] To the extent there is any contestable issue of fact regarding the Court's jurisdiction over claims against Adams and McCarthy, dismissal of those claims would be improper without an evidentiary hearing. *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 602 n. 1 (5th Cir. Unit A 1982).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 3, 2002 I served a copy of the Plaintiffs' Opposition to the Defendants' Motion to Dismiss by the U.S. Postal Service, postage pre-paid, on James C. Todd, Assistant Attorney General, Office of the Attorney General, Capitol Station, PO Box 12548, Austin, Texas 78711-2548 .

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