IN THE UNITED STATES DISTRICT COURT
for the Western District of Texas
San Antonio Division

ALFRED E. EHM, *pro se*	)	
	)	
Plaintiff	)	
	)	
V.	)	Civil Action: SA 06 CA 0103 RF
	)	
BOARD OF TRUSTEES of the METRO-POLITAN RAPID TRANSIT AUTHO-RITY OF SAN ANTONIO	)	
	)	
Defendant	)	

BRIEF IN OPPOSITION TO DEFENDANT'S "MOTION TO DISMISS WITH PREJUDICE"

PLAINTIFF opposes Defendant's "Motion to Dismiss with Prejudice" and respectfully would show the Court as follows:

1. Defendant is not entitled to the dismissal of this action because (1) Plaintiff has so far not obstructed the speedy disposition of this action, and (2), by publicly citing the lawsuit in its "meeting notice and agenda" of Febr. 9th, the Transit Board in effect acknowledged that it had received proper service of process. The primary function of a dismissal is to promote the expeditious and efficient administration of justice by removing from the court's workload a matter that the plaintiff has unnecessarily delayed, to the disadvantage of the defendant. Plaintiff has until now not even had an opportunity to hinder the disposition of this action because no task that he could delay has been placed upon him.

2. The two-page "meeting notice" of and "agenda" for the Transit Board's extraordinary meeting of Febr. 13, 2006, which the Board published in paper-form only on Febr. 9th or 10th, lists under subject XIV., entitled "Legal Briefing," an otherwise unexplained item identified only as

"Alfred E. Ehm v. Board of Trustees of the Metropolitan Rapid Transit Authority." Plaintiff knows that outside counsel had come to brief the Board and to take instructions from them because he accidently came to sit next to the gentleman in the audience. What the Board formally decided following its executive session is not publicly known, because they have as of this date not published the minutes of their Febr. 13th meeting. (The *Texas Open Meeting Act* requires the Board to hold all votes in open session.) Plaintiff assumes that the Board settled upon a legal strategy and then instructed the agency's Chief Counsel and the outside counsel to submit the answer that is now before the Court and to concurrently try to bring about the immediate dismissal of the complaint. But the ten Trustees who participated in the closed board meeting in the evening of Febr. 13th claim now that they did *not* actually receive notice that plaintiff had brought an action against them and were, therefore, denied the opportunity to respond in any manner to Plaintiff's allegations.

3. Defendant's plea that the Court dismiss the complaint *with prejudice* is also an unreasonable request. Dismissal with prejudice is a very drastic remedy that the courts grant only in the most egregious cases of plaintiff misconduct. Plaintiff has not offended the Court in any manner, has not hindered the efficient administration of justice, and has not committed some other offense that would even remotely justify the severe punishment that Defendant desires to bring upon him. All that Plaintiff is trying to accomplish through this action is to vindicate his fundamental and constitutionally protected right as a United States citizen, and that of the approx. 350,000 voters who reside within the Rapid Transit Tax District, to vote for the 11 individuals who collectively head the District.

4. Plaintiff also disagrees with Defendant's claim that, because the RTA is statutorily desig-

nated a corporate body in addition to being defined as a governmental entity, it must be treated like a private corporation. It is entirely correct that Subsec. 52(a)(1), Subch. B, Ch. 451, Texas Transportation Code, designates every rapid transit authority within the State a "corporate body," but the provision does not say what kind of corporate body the MRTAs actually are, what corporate powers such bodies possess, who their legal owners are, and ~~under~~ to which specific corporation law they are subject. The RTA of San Antonio does *not* currently hold a corporate charter or a certificate of incorporation and would not be able to legally obtain one, even if it wanted to.

5. In regard to Defendant's insistance that the Plaintiff lacks standing to challenge the constitutionality of §§ 501 and 502, Subch. K, Ch. 451, of the Texas Transportation Code, under 42 U.S.C. § 1983, Plaintiff would point out that the U.S. Supreme Court ruled already 44 years ago that *any* person whose right to vote is being impaired in some fashion possesses the standing to sue. *Baker v. Carr*, 369 U.S. 186, 206, 82 S.Ct. 691, 704, 7 L.Ed.2d 663 (1962); also *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 663 (1944).

6. Defendant's claim that Plaintiff may not name them individually as defendants in an action under 42 U.S.C. § 1983 is also baseless because the Supreme Court ruled in 1978 that not only municipalities and "other local government units," but also local government officials, constitute "persons" for purposes of the *Civil Rights Act of 1871*, the only restriction being that the governmental entity in question, in this case the Rapid Transit Authority, must be suable. *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). Plaintiff had consequently two choices: He could sue all 11 Trustees individually, in which case he would be attempting to impose personal liability on each Trustee for the action he or she

has taken under color of §§ 501 and 502, Ch. 451, Texas Transportation Code, and long-standing Board custom, or he could plead an action against the collegial body that heads the agency, which is the Board collectively. *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985). Because Plaintiff is interested in nothing more than vindicating his fundamental and constitutionally protected right as a United States citizen to vote for the VIA-Board candidate of his choice and have his vote properly counted, an official-capacity suit appeared to be the simpler and much more practical choice.

7. Also baseless is Defendant's argument that the Plaintiff cannot name the Board as the Defendant. The U.S. Supreme Court held in *Kentucky v. Graham* that an official-capacity suit represents only an other way of pleading an action against the entity of which the officer is an a-gent, for which reason a suit against the Board is a suit against the agency. *Kentucky*, 473 U.S., at 166, 109 S.Ct., at 3105, 87 L.Ed.2d, at 121. The Board of Trustees and the Metropolitan Rapid Transit Authority are in a sense one and the same, because all of the agency's power and authority is vested entirely in the Board.

8. The Supreme Court also ruled that to establish the personal liability of a public official under the *Civil Rights Act of 1871*, it is *enough* to show that the official, acting under color of state law, in this instance the *Metropolitan Rapid Transit Authorities Act*, caused the deprivation of a Federal civil right, but that more is required in an official-capacity action, because the governmen-tal entity can be held liable under a 42 U.S.C. § 1983 action only when the entity is the major "mo-ving force" behind the alleged deprivation. *Kentucky*, 473 U.S., at 166, 105 S.Ct., at 3105, 87 L.Ed.2d, at 121 (1985). The Defendant Board is undeniably the "major moving" force behind the

deprivation of Plaintiff's and the affected citizens' fundamental right to elect the members of the Board because they formally agreed on February 13th to continue to disregard the Supreme Court's *Right-to-Vote Doctrine*. Even if several of the Trustees are personally in favor of complying with the *Reynold's* decision, they can still be held liable, because it was undeniably the Board collectively that decided by majority vote to continue to deny the qualified voters who reside within the RTTD the elective franchise.

9. Defendant's claim that the U.S. Supreme Court's *Right-to-Vote Doctrine* is not categorical and absolute is contradicted by the caselaw. Plaintiff has not found a single decision in which the Court exempted local government agencies from strict compliance with the rule, but knows that some lower courts have tried to narrow the sweep of the Supreme Court's decision. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 521 (1964) , the landmark-case generally cited as the authority in support of the people's fundamental right to vote for all kinds of local government agencies, mentions the right to suffrage several times within the decision. Other cases in which the Supreme Court reiterated the people's fundamental right to vote for a local governmental body are, among others, *Evans v. Cornman*, 398 U.S. 419, 422, 90 S.Ct. 1752, 1754, 26 L.Ed.2d 374 (1970), and *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 1752, 1754, 31 L.Ed.2d 92 (1972).

10. The earliest instances of the Supreme Court stating that all qualified voters in a state have a constitutionally protected right to vote were *Neal v. Delaware*, 103 U.S. 370, 2 S.Ct. 567, 568, 26 L.Ed. 370 (1881), and *Ex parte Yarbrough*, 110 U.S. 651, 652, 4 S.Ct. 152, 153, 28 L.Ed. 274, 277 (1884). In *United States v. Mosley*, 238 U.S. 383, 386, 35 S.Ct. 904, 905, 59 L.Ed. 1355, 1356 (1915), the Court stated that it is "as equally unquestionable that the right to have one's vote counted is as open to protection ... as is the right to put a ballot in a box." The Court ruled more

categorically in *Guinn v. Unites States*, 238 U.S. 347, 35 S.Ct. 926, 928, 59 L.Ed. 1340 (1915), and in *Lane v. Wilson*, 307 U.S. 268, 272, 59 S.Ct. 872, 875, 83 L.Ed. 1281 (1939), that the right to vote *cannot* be denied outright. In *Unites States v. Classic*, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368 (1941), an other often cited case, the Court said, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted ... ." Finally, in *Reynolds v. Sims* the Court stated that "the right to suffrage is undoubtedly a fundamental matter in a free and democratic society, and, furthermore, that since the right to exercise the elective franchise in a free and unimpaired manner is preservative of other basic civil and political rights, *any* alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized by the court." *Reynolds*, 377 U.S., at 562, 84 S.Ct., at 1381, 12 L.Ed.2d, at 527.

11. Defendant petitioned the Court to dismiss this action on the procedural ground that the Plaintiff had not properly served the process on the Defendant Board, but at the same time demanded a trial by jury. If the Court lacks jurisdiction over Defendant, as they insist, the Court would not be able to consider any of their arguments, including the one that they are entitled to a jury trial. Because no significant issue of fact actually exists, Plaintiff does not even understand why Defendant would demand a trial by jury. The question of whether or not the pertinent statute, §§ 501 and 502, Subch. K, Ch. 451, Texas Transportation Code, constitutes a "state action" that discriminates against a specific group of Unites States citizens, in violation of § 1 of the Fourteenth Amendment to the Federal Constitution and the Supreme Court's *Right-to-Vote Doctrine* is entirely for the Court to decide. Most of the other objections that Defendant raised are probably also only questions of law.

Some issues of fact probably exist, such as whether or not the RTA actually received the several notices, remonstrances, and petitions that the TUA sent to it, but these are of minor or no relevance to the constitutional question that Plaintiff has raised.

Respectfully submitted,

Alfred E. Ehm

March 10, 2006

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Certificate of Service

I hereby certify that I served a true and correct copy of the foregoing "Brief in Opposition to Defendant's Motion to Dismiss with Prejudice" upon Defendant by hand-delivering the same to the firm of Cox, Smith, Matthews, Inc., at 112 E. Pecan Street, Suite 1800, San Antonio, Texas 78205, this 10th day of March, 2006.

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