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

2006 APR -6 P 4:32

ALFRED E. EHM, *pro se*

Plaintiff

V.

BOARD OF TRUSTEES of the METROPOLITAN RAPID TRANSIT AUTHORITY OF SAN ANTONIO

Defendant

Civil Action: SA 06 CA 0103 RF

BRIEF CONCERNING JUDICIAL SCRUTINY OF FRANCHISE-DENIAL

Plaintiff has attempted to ascertain the procedure that trial courts, pursuant to U.S. Supreme Court edict, should or must employ in scrutinizing the *denial* of a citizen's equal and constitutionally guaranteed right to vote, and respectfully submits the results to this Court for its consideration.

1. The U.S. Supreme Court stated in *Harper v. Virginia Board of Elections* that any statute that apparently invades or restrains a fundamental right or liberty assertable under the Equal Protection Clause of the Fourteenth Amendment must be closely scrutinized and carefully confined by the courts. 383 U.S. 663, 670, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169, 174 (1966); also *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655, 1660 (1964), *Reynolds v. Sims* 377 U.S. 533, 561, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506, 526 (1964), *Carrington v. Rash*, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 15 L.Ed.2d (1965), *Baxstrom v. Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966).

2. If an infringement of the citizens' basic right to vote is involved, the Supreme Court held that, before this right can be restricted, the *purpose* of the restriction and the assertedly overriding *state interests* served by the restriction must undergo close constitutional scrutiny. *Evans v. Cornman*, 398 U.S. 419, 422, 90 S.Ct. 1752, 1755, 26 L.Ed.2d 370 (1970), *Dunn v. Blumstein*, 405 U.S.

330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274, 280(1972), *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92, 99 (1972). "[S]ince the right to exercise the 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." *Reynolds*, 377 U.S. at 562, 84 S.Ct. at 1362, 12 L.Ed.2d at 527 (1964), *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481, 492 (1964), *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10 (1968), *Kramer v. Union School District*, 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583, 589 (1968).

3. The major question before the Court, and probably the only one that requires an answer, is whether § 502, Subch. K, Ch. 451, of the Texas *Metropolitan Rapid Transit Authorities Act* of 1973 (MRTAA), contravenes the principles set out in *Reynolds v. Sims* and subsequent pertinent decisions, such as *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), and consequently constitutes a denial of the equal protection of the laws, as guaranteed every citizen by § 1 of the Fourteenth Amendment. As the Supreme Court stated in *Cooper v. Aaron*, 358 U.S. 1, 17, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 45 (1958), "The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny any person within its jurisdiction the equal protection of the laws."

4. In order to determine whether or not a particular state law violates the Equal Protection Clause of the Fourteenth Amendment, the courts must consider (1) the facts and circumstances behind the pertinent law, (2) the interests which the state claims to be protecting by denying the franchise, and (3) the interests of those who are disadvantaged by the classification. *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10 (1968), *Kramer v. Union School District*, 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583, 589 (1968). The facts and circumstances behind §502 of the MRTAA may be stated in the legislative history of the original law, V.A.C.S. Art. 1118x, Acts 1973, 63rd Leg., p. 302, ch. 141, but this document probably does not give the reason for the lawmakers' decision to deprive the voters of every rapid transit tax district (RTTD) of their fundamen-

tal right, as United States citizens, to vote for the members of the respective governing board, the reason being that the bill's sponsors were not actually aware of the existence of and their duty under the U.S. Supreme Court's *One-Person, One-Vote Doctrine* of 1964.

5. The purpose of § 502 is apparently to fix the mode of selection of the transit boards, which mode is appointment by three groups of grand electors, and to specifically designate the local governmental bodies and particular officials who are to make the appointments. It should be noted that one of the three statutorily designated appointment authorities, the Association of Suburban Mayors, is *not* a government agency under Texas law, but merely a voluntary, unincorporated association of elected senior municipal officials. (Only the Texas Legislature has the power to create an independent local governmental body. Local government agencies can *not* get together and lawfully create an independent governmental body that would be answerable to these agencies.)

6. The State interests, if any, that the Texas Legislature desired to advance by denying the voters of every to be established RTTD of their fundamental and constitutionally protected right to elect the members of their respective transit board are not stated in § 502, as they must be pursuant to *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274, 285 (1972), *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 341, 9 L.Ed.2d 405, 421 (1963), *United States v. Robel*, 389 U.S. 258, 265, 88 S.Ct. 419, 424, 19 L.Ed.2d 508, 515 (1967). Plaintiff believes that it is the duty of Defendant, as the public defenders of the franchise denial, to show the Court that this exclusion is *necessary* to promote a *compelling* interest of the State. *Kramer*, 395 U.S. at 627, 89 S.Ct. at 1889–90, 23 L.Ed.2d at 589, *Dunn*, 405 U.S. at 337, 92 S.Ct. at 1890, 31 L.Ed.2d at 281. The 11-member Transit Board of San Antonio, and not the Texas Legislature, is, after all, the governmental entity that is actually *denying* the affected 850,000 local voters of their equal and constitutionally secured right to elect the 11 Trustees on the basis of voting precincts that are substantially equal in population.

7. The interests of those who are disadvantaged by the discriminatory classification in question, § 502 of the Texas MRTAA, are as follows: The Transit Board makes a number of

decisions that have a broad range of impact on all the citizens who reside and do business within the RTTD. The Board levies and collects $ 150 mill. per year in taxes, of which sum it hands $ 30 mill. over to the Texas Department of Transportation and to the City of San Antonio, respectively. By adopting two separate budgets each year, the Board makes, first, long-range judgments about the way the RTA and the Advanced Transportation Tax District should develop and, secondly, immediate choices among competing needs. The Board makes rules and policies that directly affect all those who use the Authority's public mass transportation and special services, estimated to be about 300,000 in number, and probably also non-users. The 11 Board members also collectively adjudicate complaints and claims against the two agencies that they head under two different names. Most importantly, the Board determines, with negligible input from the directly impacted citizens, the RTA's long-range policies concerning all aspects of public mass transit services within Bexar County, including all kinds of fixed-rail service, which progressive and most productive mode of rapid mass-transit service the Board openly eschews.

8. The Transit Board is furthermore directly involved in the management of the Austin–San Antonio Intermunicipal Commuter Rail District, a multi-county independent railway construction and operating authority headquartered in San Marcos, and of the Bexar County Metropolitan [Highway] Planning Organization, a Federally mandated, local roadway and street planning entity that possesses broad decision-making powers. (Neither agency is answerable to the directly affected voters.) Since mid-2004 the Transit Board has also been concerning itself directly with the planning, design, financing, and construction of additional Federal interstate highways and other high-volume, high-speed roadways within the County, and also supervises and controls the manner in which the City of San Antonio spends the $ 15 mill. in transit taxes that the Authority now annually remits to that entity. The 850,000 voters who reside within the RTTD, all of them substantually affected and directly interested citizens, have *no* effective means to influence the Transit Board's policies and decisions because they are prevented by legislative fiat from electing the 11 individuals who comprise the Authority.

9. The U.S. Supreme Court held that whenever a state statute places a condition on the exercise of the right to vote, a more exacting test than the "equal-protection standard" must be applied by the courts. *Dunn v. Blumstein*, 405 U.S. 330, 337, 92 S.Ct. 995, 1000, 31 L.Ed.2d 274, 281 (1972), *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 855–6, 31 L.Ed.2d 92, 99 (1972). This strict review of a statute that restricts the franchise requires the court "[to] determine whether the exclusions are necessary to promote a compelling state interest." *Dunn*, 405 U.S. at 337, 92 S.Ct. at 1000, 31 L.Ed.2d at 281, *Kramer v. Union Free School District*, 395 U.S. 621, 627, 89 S.Ct. 1886, 1890, 23 L.Ed.2d 583, 589 (1968).

10. The Court also ruled that a state statute that structures a "local government unit," such as § 502, Ch. 451 of the Texas Transportation Code, should receive an exacting judicial examination even if the state legislature that enacted it is fairly elected, as the Texas Legislature of 1973 probably was. *Kramer*, 395 U.S. at 628, n. 10, 89 S.Ct. at 1890, n. 10, 23 L.Ed.2d at 589 (1968), *Avery v. Midland County*, 390 U.S. 474, 481, n. 6, 88 S.Ct. 1118, n. 6. 20 L.Ed.2d 51, n. 6 (1968). Plaintiff hopes that Defendant will tell the Court what, in their opinion, the *compelling* state interest is that justifies the outright denial of the affected voters' fundamental and constitutionally protected right to elect the Board of Trustees. " 'The right ... to choose,' *United States v. Classic*, 313 U.S. 299, 314 61 S.Ct. 1031, 1037, 85 L.Ed. 1368 (1965), means, at the least, that states may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state." *Carrington v. Rash*, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 15 L.Ed.2d (1965), *Oyama v. California*, 338 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948).

11. The U.S. Supreme Court also ruled that all state statutes affecting a constitutionally protected activity must be drawn with "precision," *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 341, 9 L.Ed.2d 415, 421 (1963), *United States v. Robel*, 389 U.S. 258, 265, 88 S.Ct. 419, 424 19 L.Ed.2d 515 (1967), and, secondly, must be "tailored" to serve their legitimate objectives, *Shapiro v. Thompson*, 394 U.S. 618, 629, 89 S.Ct. 1322, 1328, 22 L.Ed.2d 600, 612 (1969), *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972). If other reasonable ways

to achieve the state's goals with a lesser burden on the constitutionally protected activity can be found, the state may not choose the way of greater interference, but must choose the "less drastic means." *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237 (1960), *Dunn*, 405 U.S. at 343, 92 S.Ct. at 1003, 31 L.Ed.2d at 285 (1972). Because the reason for the franchise denial is not stated in § 502 and can not be surmised from the enacted provision, it would appear that this section constitutes "state action" that is not only based on *no* policy, but is, moreover, arbitrary and capricious in nature. *Baker v. Carr*, 369 U.S. 186, 226, 82 S.Ct. 691, 715, 7 L.Ed.2d 663, 691 (1962), *Reynolds v. Sims* 377 U.S. 533, 557, 84 SCt 1362, 1379, 12 L.Ed.2d 506, 524 (1964).

12. The first case, or one of the first cases, in which the Supreme Court held that the *Equal Right to Vote Doctrine* also applies to local government units, as well to special-purpose units of all sorts, including school and hospital tax districts, is *Avery v. Midland County*, 390 U.S. 474, 480, 88 S.Ct. 1114, 1118, 20 L.Ed.2d 405 (1968). Other cases building upon *Avery* probably exist, but Plaintiff has to date not been able to locate any, owing to the large number of franchise-related Supreme Court decisions.

13. The U.S. Supreme Court held that the prohibitions contained in § 1 of the Fourteenth Amendment extend to all "state actions" that deny the equal protection of the laws, regardless of the agency of the state that is taking the action. *Cooper v. Aaron*, 358 U.S. 1, 17, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 45 (1958). The 11 members of the local Transit Board, like the members of the Bexar Commissioners' Court and every local municipal council, as well as the members of the governing board of school and other "special" districts, constitute in the opinion of the Court "local government officials." *All* local government officials are for purposes of the Fourteenth Amendment "agents of the state." *Cooper*, 358 U.S. at 17, 78 S.Ct. at 1409, 3 L.Ed.2d at 45 . "Whoever, by virtue of public position under a State government, ... denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Ibid.* A local governmental body to whom the state has delegated certain authority, such as the Defendant Board, can no more cir-

cumvent the restraints imposed by the Constitution on the states, than can the state. *Cooper v. Aaron*, 358 U.S. 1, 17, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5 (1958), *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571, 577 (195?) .

14. Every state legislator and executive and judicial officer of every state, including every local government official, is solemnly committed by oath taken pursuant to Article VI, Clause 3, of the Federal Constitution to "support this Constitution." Defendant conceded in its answer of Feb. 27th that every member of the Board had indeed taken an oath of office in which he swore to support and obey the Constitution and laws of the United States. In spite of that solemn oath, however, the Board's current members, like those before them, seem to bent on denying the people who reside within the RTTD of the rights, privileges, and immunities granted them by the Fourteenth Amendment to the Federal Constitution and the U.S. Supreme Court's *Equal Right to Vote Rule* of 1964.

Respectfully submitted,

Alfred E. Ehm

April 6, 2006 Alfred E. Ehm

Certificate of Service

I hereby certify that I served a true and correct copy of the foregoing "Brief Concerning Judicial Scrutiny of Franchise-Denial" 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 6th day of April, 2006.

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