

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION

KAREN McPETERS, individually, and on §
 behalf of those individuals, persons and entities §
 who are similarly situated §
 Plaintiff §

vs.

§ CIVIL ACTION NO. 4:10-CV-01103

§
 §
JURY

THE HONORABLE FREDERICK E. §
EDWARDS; BARBARA GLADDEN §
ADAMICK, DISTRICT CLERK; §
MONTGOMERY COUNTY, TEXAS, and §
REED ELSEVIER, INC. d/b/a LexisNexis §
 Defendants §

PLAINTIFF’S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF RECONSIDERATION

TO THE HONORABLE KEITH ELLISON, UNITED STATES DISTRICT JUDGE:

Karen McPeters files her Supplement to her Motion for Reconsideration, and would show:

Overview

1. The Memorandum and Order (Doc. No. 100) cites one case to establish that access to courts is a fundamental right and three cases which establish a limitation of that right. Simply put, it appears that denial of access in matters of fundamental interest is unconstitutional, but not all matters are fundamental interests. The Memorandum raises four issues that warrant reconsideration.

(1) What is the difference in treatment of a denial of access and a barrier to access?

- (2) What is the difference in treatment of statutory filing fees and additional, non-statutory charges for access?
- (3) Does the underlying state court suit address a fundamental interest?
- (4) If one reaches a rational basis test, is that so obviously satisfied in this case such that dismissal is required?

Access To Courts Is A Fundamental But Limited Constitutional Right

2. As a preliminary matter, the cases establish a fundamental constitutional right of access to courts. “Access to the courts is a constitutionally protected fundamental right and one of the privileges and immunities awarded citizens under Article IV and the Fourteenth Amendment.” *Bayou Fleet Inc. v Alexander*, 234 F.3d 852, 857 (5th Cir. 2000), citations omitted. “The First Amendment right to petition the government has as one aspect the right of access to the courts.” *Ibid.*, citations omitted. This right may not be denied to litigants asserting fundamental interests based upon a litigant’s ability to pay. *See M. L. B v. S. L. J.*, 519 U.S. 102, 103, 117 S. Ct. 555 (1996). But, the “constitutional requirement to waive court fees in civil cases is the exception, not the general rule,” e.g. welfare benefits. *Id.*

What is the difference in treatment of a denial of access and a barrier to access?

3. This case involves additional charges that form a barrier to access rather than inability to pay filing fees as a denial of access. The issue of a barrier to access was addressed in *Bounds v. Smith*, which also expressly described “access to courts” as a “fundamental constitutional right.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977); Memorandum at p. 7.

4. *Bounds* did not involve a denial of access but turned upon a barrier to access in the form of limited prison libraries and assistance to inmates, holding such barriers to be unconstitutional.

“In *Bounds v. Smith*, 430 U.S. 817 (1977), we held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” *Id.* at 828.”

Lewis v. Casey, 518 U.S. 343, 346, 116 S. Ct. 2174 (1996)(limiting *Bounds* to cases involving actual injury)

5. *Bounds* and *Lewis* stand for the proposition that the state may not create or allow a barrier to access when that barrier causes actual injury. Karen McPeters has suffered actual injury in the form of non-statutory charges for each filing in her case. Each charge is thus a barrier to access.

6. *Bounds* is significant for two reasons. First, it is a Supreme Court case declaring an obstruction to meaningful access to courts to be unconstitutional. Other cases deal with the easier issue of outright denial of access to indigent litigants who cannot afford fees.

7. Second, *Bounds* (and numerous other opinions from the Court) uphold a right of access to courts as applied to our least deserving class of citizens: convicted and imprisoned felons. These citizens are already denied basic constitutional rights—to keep and bear arms, to vote, to be free. Yet the fundamental right of access to courts is of such importance that it will be provided to even the least deserving citizen and barriers to access will be declared unconstitutional when actual harm results, even when other

constitutional rights have been taken away forever. Not even reasonable statutory filing fees set by the legislature may deny access to indigent inmates.

What is the difference in treatment of statutory filing fees and additional, non-statutory charges for access?

8. The parties agree that the existing law is that the State is free to charge reasonable filing fees to help finance judicial services. This case involves additional charges, not set by any statute, but set and collected by a private corporation as an additional cost of access to courts. These charges have been described in the Memorandum. Even without the benefit of discovery and evidence, the Court has raised significant concerns regarding the charges levied and collected by LexisNexis as a condition for access to particular state courts in Texas.

(a) It is not clear that the E-filing system and fees were properly adopted within the bounds of applicable Texas law. The fees were not specifically approved by the Texas Supreme Court, and the Government Code requires that the Court approve rules and procedures for E-filing. (Memorandum, p. 19).

(b) It is not clear that a district clerk may delegate fee-setting authority to a private company. Instead, the Government Code provides that the district clerk shall collect a reasonable fee for services when no fee is set by statute. (Memorandum, pp. 19-20).

(c) It is not clear that there is any limit to the rates LexisNexis could charge. (Memorandum, p. 20).

(d) It is a bedrock principle of federal and state courts that they should be accessible to persons seeking remedies for their grievances. (Memorandum, p. 20).

(e) Charging litigants more than is necessary to subsidize the operation of the courts and other vital government functions is contradictory to the basic idea of access to courts. To give a private company the authority to profit by setting rates and charging litigants for each court filing seriously endangers that principle and sets forth on a dangerous path. (Memorandum, p. 20).

9. The unregulated charges of a private corporation appear to be at least as significant, in the context of a fundamental constitutional right, as the libraries and assistance provided to prisoners in *Bounds*. The barrier, formed by the unregulated mandatory charges, is unconstitutional as to any litigant seeking access to assert a fundamental interest.

Does the underlying state court suit address a fundamental interest?

10. Fundamental interests do not include mere privileges such as a discharge in bankruptcy or welfare benefits. See *M.L.B.*, *supra*, and Memorandum, pp. 7-8.

11. Karen McPeters, however, does not seek a privilege. She seeks to assert a claim of discrimination on the authority of Title VII, enacted by the Congress, as well as state statutes. It is difficult to imagine that Title VII does not establish fundamental interests or rights, especially in the area of discrimination. *Bounds* addresses such claims.

“By contrast, in this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this Court has “constantly emphasized,” habeas corpus and civil rights actions are of “fundamental importance . . . in our constitutional scheme” because they directly protect our most valued rights. *Johnson v. Avery*, 393 U.S. at 485; *Wolff v. McDonnell*, 418 U.S. at 579.”

Bounds v. Smith, 430 U.S. 817, 827, 97 S. Ct. 1491 (1977)

12. Put differently, if the rights asserted by Karen McPeters in her underlying lawsuit are not fundamental interests, what are they? Are states free to erect non-statutory barriers to the assertion of federal statutory rights? The obvious answer is in the negative,

even if the state claims a rational basis for doing so, but this justification should be evaluated as well.

Even if one reaches a rational basis test, is that so obviously satisfied in this case such that dismissal is required?

13. First, the parties agree that the state has a rational basis for imposing filing fees, but filing fees are not involved here.

14. Second, the state has a rational basis for seeking efficiency, but the majority of courts in Montgomery County do not require electronic filing. Are they irrational?

15. Third, the burden of the extra charges levied for E-filing is randomly determined in Montgomery County by whether a case is assigned to a particular court, not rationally determined based upon any objective factor.

16. Fourth, can a county deny or obstruct the exercise of a fundamental constitutional right for the sake of efficiency? If so, a host of unconstitutional procedures are authorized, such as randomly dismissing half of the cases appearing on a crowded docket sheet or tripling the statutory fees for filing complex cases.

17. Lastly, the Court has no evidence that efficiency has resulted from the E-filing policy of the 9th District Court. The exhibits thus far presented, without the benefit of discovery, reveal a host of notices, phone calls and motions—in this one case—caused by the E-filing requirement in the 9th District Court as opposed to the other district courts in Montgomery County. While it is the Plaintiff's burden to negate a claim of rational basis (efficiency) if this test is reached, it is potentially unfair to deny discovery and then dismiss the case for lack of evidence.

18. Karen McPeters respectfully asserts that proof of no rational basis is not required because denial of a fundamental constitutional right is actionable with or without a rational basis for denying that right.

Was McPeters Effectively Decided by the 5th Circuit in 1997?

19. In *Norton v. Dimazana*, 122 F.3d 286 (5th Cir. 1997) a convicted felon (Norton) sought to file a civil suit against a physician for denial of medical care and challenged the fee requirement under the PLRA (Prison Litigation Reform Act).

20. The Act requires a prisoner to pay only 20% of a civil filing fee if an *in forma pauperis* application is denied. The fee provision of the PLRA provides:

(b)(1) ... [I]f a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a filing fee.

The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

Id. at 290.

21. The Fifth Circuit examined the access to courts issue in detail, beginning with the Act.

The obligation to pay filing fees, over time if necessary, is not an unconstitutional denial of access to the court system. As we have noted before, "there is no absolute 'right' to proceed in a civil action without paying a filing fee; this is a procedural privilege that Congress may extend or withdraw." *Strickland v. Rankin County Corr. Facility*, 105 F.3d 972, 975 (5th Cir.1997); *Startti v. United States*, 415 F.2d 1115, 1116 (5th Cir.1969). Furthermore, section 1915(b)(4) contains an explicit guarantee that no prisoner will be barred from pursuing a civil action, or

from appealing a civil or criminal judgment, because he or she does not have enough money. 28 U.S.C. § 1915(b)(4). This saving provision sufficiently guarantees that all prisoners will have access to the courts, regardless of their income. *Nicholas*, 114 F.3d at 21.

Id. at 290-91.

22. The holding was instructive on the issue of equal access to courts: a level playing field is required, even when indigency is not at issue.

The fee provisions of the PLRA, in a sense, level the playing field between incarcerated i.f.p. litigants and other litigants in the federal courts. Non-i.f.p. litigants must generally consider the cost of filing when deciding whether to bring a civil action or appeal in federal courts. The PLRA changes the rules of i.f.p. litigation, requiring indigent prisoners for the first time to make the same prudential decisions about the merits of their lawsuits that everyone else makes before filing. *Adepegba v. Hammons*, 103 F.3d 383, 386 (5th Cir.1996). This limits the access of indigent prisoners to the courts no more than the filing fee restricts non-i.f.p. litigants. To the contrary, the PLRA provisions allowing repayment over time allow impecunious prisoners to bring actions even when they are unable to pay filing fees up front. This allows them more access to the courts than most non-prisoners receive. We therefore find that the fee provisions of the PLRA do not unconstitutionally limit the access of indigent prisoners to the courts.

Id. at 291.

23. The LexisNexis charges in *McPeters* are unconstitutional for the same reason the PLRA fee provisions were upheld: an unlevel playing field is created by the E-filing system. The term “unlevel playing field” is, in this context, the same as the “denial of equal protection.” The LexisNexis charges burden only those litigants assigned to certain courts, thus producing an unlevel playing field as compared with all other litigants in all other courts. The PLRA fees provisions provided a level playing field for both incarcerated felons and free citizens. The unlevel playing field created by E-filing

charges is an unconstitutional burden that obstructs the fundamental right to access to courts when indigence is not a factor.

24. *Norton* was not a case of first impression. In *Johnson v. Atkins*, 999 F.2d 99 (5th Cir. 1993), the plaintiff challenged the constitutionality of a \$600 prepayment in state court that was not refunded after the case was removed to federal court and no further services were required of the recipient of the prepayment. *Id.* at 99-100.

25. After finding that filing fees are generally “necessary to pay the administrative costs of litigation and, in part, to discourage baseless suits” the Court addressed the equal protection (“level playing field”) issue. *Id.* at 100.

26. The Court found that the requirement of equal protection was satisfied. “It is difficult to see how the fees paid by Johnson were ‘unequal,’ because they were determined by a schedule applicable to all litigants.” *Id.* at 101.

27. In contrast, the E-filing charges inflicted upon Karen McPeters and other litigants assigned to the 9th District Court in Montgomery County are not applicable to all litigants. The tariff applies only to those who are randomly assigned to a particular court. Equal protection is thus denied with respect to a fundamental constitutional right.

28. It is important to note that the Memorandum acknowledges that “there may be circumstances in which the charges would violate the U.S. Constitution.” Memorandum, p. 10. In this connection, Plaintiff submits a copy of an affidavit, attached as Exhibit D, recently submitted by LexisNexis as a basis for establishing federal jurisdiction of McPeters’ claims under the Class Action Fairness Act. (Civil Action 5:11-CV-00154-FB, *Karen McPeters, individually, and on behalf of those individuals, persons and*

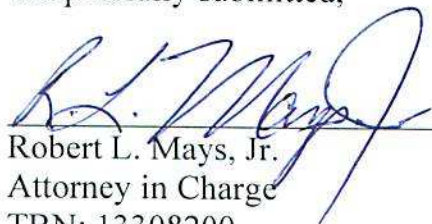
entities who are similarly situated v. LexisNexis, a division of Reed Elsevier, Inc., Western District of Texas, San Antonio Division). The affidavit confirms that, in only two counties (Montgomery, Jefferson), litigants assigned to courts requiring mandatory E-filing have had to pay \$7,000,000 more than all other litigants in all other courts in those two counties.

29. Given this Court's concerns about the amount and legitimacy of the charges, Plaintiff respectfully requests reconsideration of the dismissal of her due process and equal protection claims under 42 U.S.C. §1983.

30. Plaintiff Karen McPeters respectfully requests that the January 27, 2011 *Memorandum and Order* be withdrawn, that her §1983 claims, her motion to certify a class, motion for extension of time to join other class members and her claims for injunctive relief be reinstated, that her RICO claims be severed, and that she be permitted to pursue her state court claims, or, in the alternative, that the other grounds be addressed, with leave to amend granted for any matter that might be cured by pleading additional facts.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that the foregoing requested relief be granted.

Respectfully submitted,

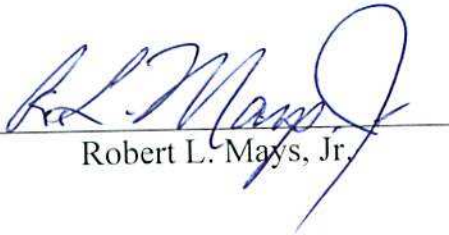


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CERTIFICATE OF SERVICE

I certify that on March 28, 2011, after filing this Supplemental Memorandum, each counsel for Defendants will be served via the court's ECF system.

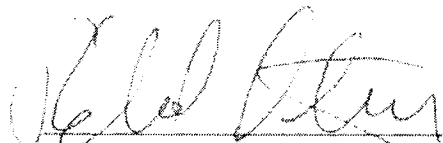

Robert L. Mays, Jr.

4. Prior to signing this declaration, I reviewed File and Serve data including Filing and Service revenues¹ and Optional Service revenues². This data identifies litigants who have used the File and Serve system for filings in Montgomery County, Texas and Jefferson County, Texas since 2002.

5. After reviewing this data, I calculated that the total amount of fees paid by litigants using the File and Serve system for filings in Montgomery County, Texas and Jefferson County, Texas since 2002 likely exceeds \$7,000,000.

I declare under penalty of perjury under the laws of the United States and the State of Ohio that the foregoing is true and correct.

Executed this 24th day of February, 2011, at Miamisburg, Ohio.


Richard Steiner, Declarant

¹ Filing and Service revenues include fees associated with submitting documents electronically to a court or serving those document on parties.

² Optional Service revenues include fees associated with services not directly related to e-filing or e-service, such as search and reports of cases or transactions on our system.