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 HEARING BRIEF No. 3 -
EQUAL PROTECTION, DUE PROCESS AND OPEN COURTS

Plaintiff Karen McPeters submits the attached brief as the law and evidence in support of her request that Defendants' Rule 12(b)(6) motions be denied.

Date: December 9, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I hand delivered a copy of this "Plaintiff's Hearing Brief No. 3 – Equal Protection, Due Process and Open Courts" on December 9, 2010 to each counsel for Defendant present at the hearing.

Robert L. Mays, Jr.

Equal Protection, Due Process and Open Courts

These constitutional issues must be analyzed together because they are intertwined in this case as a basis for liability under 42 U.S.C. §1983. In its initial motion to dismiss, Defendant LexisNexis, a division of Reed Elsevier, Inc. ("Reed Elsevier"), advances several arguments which are circular, overly broad statements of constitutional review, or legally incorrect.

First, Defendant Reed Elsevier argues that the 2003 Order signed by Defendant Judge Edwards creates different treatment of individuals. The different treatment disproves the "alike in all relevant respects" test for equal protection, so the Order is therefore valid. Such a circular argument validates *any* state action that wrongfully creates differences in treatment. In this case Karen McPeters belongs to the class of individuals seeking access to the courts.

Second, Defendant Reed Elsevier notes that the general rule applied in the review of equal protection claims is that a classification which does not target a suspect class need only be rationally related to a legitimate state interest. A "general rule" standard is often so broad that it is no standard at all. The rationally related test is not reached when one violates a fundamental right, because the correct standard is *strict judicial scrutiny.*

As an example, since we acknowledge a legitimate state interest in public education, may we order the summary dismissal from the school system of the slowest 1/3 of all students (not a "suspect class") in order to lower class sizes, improve average test scores, reduce costs and encourage scholarship? This policy, when challenged, would fail, because it violates a fundamental right.

The general rule advanced as the correct test in this case is too general to be of use and, as is shown below, is incorrect because it is incomplete.

Third, Defendant's "general rule" argument misstates the law. Defendant Reed Elsevier repeatedly asserts that if a classification scheme does not involve a suspect class, the scheme is *prima facia* lawful if it is merely related to a legitimate state interest. Of course, this is an easy standard to meet.

However, equal protection and strict scrutiny applies to classifications affecting a suspect class *or* a fundamental right. The application of equal protection to fundamental rights is established by Defendant Reed Elsevier's cited Supreme Court authority.

> Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right **or** categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
> *Nordlinger v. Hahn, 505 U.S. 1, 10* (1992), citations omitted, emphasis added.

The Supreme Court has affirmed the application of equal protection to fundamental rights on numerous occasions.

> Unless a statute provokes "strict judicial scrutiny" because it interferes with a "fundamental right" **or** discriminates against a "suspect class," it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.
> *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457, 108 S.Ct. 2481 (1988), citations omitted, emphasis added.

> We have repeatedly held that "a classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose.
> *Central State University v. American Ass'n of University Professors*, 526 U.S. 124, 127-28, 119 S.Ct. 1162 (1999), citations omitted.

The Texas Court of Criminal Appeals has applied the same standard:

> A statute is evaluated under "strict scrutiny" if it interferes with a "fundamental right" **or** discriminates against a "suspect class." Otherwise, the challenged classification in a statute need only be "rationally related to a legitimate governmental purpose" to survive the equal protection challenge (the "rational basis" test).
> *Cannady v. State*, 11 S.W.3d 205, 215 (Tex. Crim. App. 2000), emphasis added.

Our first relevant inquiry thus becomes whether or not access to open courts is a fundamental right. The Texas Supreme Court has answered this question.

> The provision's [Article I, sec. 13] wording and history demonstrate the importance of the right of access to the courts. The provision's wording indicates the high value the drafters and ratifiers placed on the right of access to the courts. First, the language is mandatory: " *shall* be open" and " *shall* have remedy by due course of law." Further, it is all-inclusive: "*all* courts" are to be open; "for *every* person"; for *all* interests, "lands" (real property), "goods" (personal property), "person" (body and mind), and "reputation" (good name); *at all times,* since there is no emergency exception. This all-inclusive language contrasts with the qualifying language used in other sections.
> *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex.1986), citations omitted, emphasis in original.

The right to open courts is fundamental:

> The open courts provision's history also reflects its significance. It originates from Chapter 40 of Magna Carta, the great charter of English liberties obtained from King John in 1215: "To none will we sell, to none deny or delay, right or justice."
> *LeCroy* at 339, citation omitted.

> This right is a substantial state constitutional right. Because a substantial right is involved, the legislature cannot arbitrarily or unreasonably interfere with a litigant's right of access to the courts. Thus, the general open courts provision test balances the legislature's actual purpose in enacting a law against that law's interference with the individual's right of access to the courts. The government has the burden to show that the legislative purpose outweighs the interference with the individual's right of access.
> *LeCroy* at 341, internal citations omitted.

The right to open courts has never been abridged:

> Every Texas Constitution has contained an open courts provision with the identical wording. Other Bill of Rights sections, in contrast, have been amended over the years. *LeCroy* at 339, internal citation omitted.

Our second inquiry is whether or not extra-statutory filing fees violate the rights to equal protection and open courts. Unlike the charges levied by the Defendant Reed Elsevier (a private corporation) in this case, *LeCroy* involved a district court filing fee that was set by the Legislature. The fee at issue was held to violate the fundamental right of access to open courts because part of the fee did not go to the judiciary but to the general revenue fund (surely a legitimate state interest).

> The question here is whether a filing fee that goes to state general revenues is an arbitrary and unreasonable interference with the right of access to the court. Section 32's purpose in allocating $40 of the $75 filing fee to the state general revenue fund is "to generate revenue and to help finance state services. *LeCroy* at 341, internal citation omitted.

The holding was unequivocal.

> The major defect with the filing fee is that it is a general revenue tax on the right to litigate: the money goes to other statewide programs besides the judiciary. Nearly all states with similar open courts provisions have held that filing fees that go to fund general welfare programs, and not court-related services, are unconstitutional. *LeCroy* at 341, citations omitted.

The explanation was also unequivocal.

> The state argues that a tax on individual litigants is reasonable as long as the amount raised for general revenues is less than the amount spent from general revenues on the judiciary. This argument, however, uses the wrong perspective: a societal perspective. When individual rights guaranteed by the state constitution are involved, an individual rights perspective is used. From that perspective, litigants must pay a tax for general welfare programs as a condition to being allowed their right of access to the courts. This the open courts provision prohibits. *LeCroy* at 342.

In *LeCroy,* not even a legislative enactment, collection by a district clerk, and sharing of the revenues with the state general revenue fund could save the fees and charges from a successful open courts challenge. In the instant case, there is no legislative enactment, collection by a district clerk or sharing of revenues with the state. The charges in question are levied and collected by Defendant Reed Elsevier, a private corporation, and retained by it, in whole or in substantial part.

Defendants have cited no case, and Plaintiff has found none, authorizing a private entity to set and collect fees and charges normally set by the Legislature or holding that such fees and charges do not squarely implicate a fundamental right. Accordingly, we do not reach the issue of "suspect class," rationality, or legitimate state interest.

In fact, this issue was litigated in Texas after *LeCroy* and with the same result. In *Dallas County v. Sweitzer*, 881 S.W.2d 757 (Tex. App.-Dallas 1994, writ denied), a litigant sued the County alleging it overcharged and collected fees at filing not authorized by law. The court of appeals correctly followed *LeCroy.*

> It [the fee] is unreasonable and arbitrary because it is a general revenue tax on the right to litigate. The money collected can go to programs other than the judiciary. It is immaterial that the State spends money from the general revenue fund on the judiciary. *Dallas County* at 765, internal citations omitted.

> The Fifth Circuit has also held that the right to open courts is a fundamental right.

> Nevertheless, it is now a fundamental principle of due process and equal protection that once avenues of appellate review are established, they must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.
> *Miracle v. Estelle*, 592 F.2d 1269, 1272, n. 6 (5th Cir. 1979), citations omitted.

Defendants cannot discriminate against Karen McPeters and similarly situated civil litigants by requiring them to E-file and pay money, while others need not E-file, abridging the fundamental right of access to open courts. Note also that existing case law concerning equal rights (equal protection) relates to either the application of legislative enactments, or administrative agency actions.

Rational Basis

Because the right of access to open courts is a fundamental right, a violation is determinative of entitlement to remedy under 42 USC §1983. The court need not proceed to the rational basis argument. Thus, *Allred's Produce v. U.S. Dept. of Agriculture*, 178 F.3d 743, 748 (5th Cir. 1999), *Romer v. Evans*, 517 U.S. 620, 631 (1996); *M.L.B. v. S.L.J.*, 519 U.S. 102, 115-116 (1996); and *Nordlinger v. Hahn*, 505 U.S. 1, 15, 112 S.Ct. 2326 (1992), cited by Defendants, are not on point. Even if one examines the rational basis test, Judge Edwards' actions fail because there was no legislative delegation of administrative authority to Judge Edwards.

Allred's Produce was the review of an administrative agency's choice of sanctions. Allred's Produce claimed selective (discriminatory) enforcement under the Perishable Agricultural Commodities Act (for failure to make prompt payment).

In *Romer*, the specific quotation at 517 U.S. at 631, is: "We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." (citations omitted)

In *M.L.B. v. S.L.J.*, the equal protection scrutiny applied to the $25.00 filing fee (enacted by the Oregon legislature). The court found the applicable equal protection standard "is that of rational justification," a requirement we found satisfied by Oregon's need for revenue to offset the expenses its court system." *M.L.B.* at 115-116. The focus is on the legislative enactment or a delegation of its authority.

Defendant Judge Edwards may not classify any person, such as divorce actions to be resolved within 90 days or adoption actions. The judiciary may simply determine whether or not a classification impermissibly violates equal protection. One may not determine the classification (legislation) and then rule on its validity (judicial).

Finally, in *Nordlinger*, 505 U.S. at 15, the Supreme Court actually wrote:

> To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decision maker actually articulate at any time the purpose or rationale supporting its classification. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S., at 179, 101 S.Ct., at 461. See also *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969) (legitimate state purpose may be ascertained even when the legislative or administrative history is silent). Nevertheless, this Court's review does require that a purpose may conceivably or "may reasonably have been the purpose and policy" of the relevant governmental decision maker. *Allied Stores of Ohio, Inc. v. Bowers*, 16 358 U.S. 522, 528-529, 79 S.Ct. 437, 442, 3 L.Ed.2d 480 (1959). See also ***2335* *Schweiker v. Wilson*, 450 U.S. 221, 235, 101 S.Ct. 1074, 1083, 67 L.Ed.2d 186 (1981) (classificatory scheme must "rationally advanc[e] a reasonable and *identifiable* governmental objective" (emphasis added)).

Ironically, the *Nordlinger* opinion emphasizes McPeter's argument as to separation of powers.

> As a general rule, legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). Accordingly, this Court's cases are clear that, unless a

> classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *Nordlinger* at 10.

The denial of equal protection in this case was not by an act of the legislature, but by an administrative act coupled with unilateral delegation of purported power to a non-governmental entity to set and collect unlawful charges.

Karen McPeters has found no case, and knows of no case, in which the rational relationship test for classification is discussed in anything other than the context of a legislative enactment. The courts indeed may consider whether or not an administrative enactment is actionable. But, Judge Edwards' 2003 Order is not a legislative enactment, does not set any fee, and is not directed to Defendant Reed Elsevier.

Due Process

The Defendant Reed Elsevier's own authority is once again dispositive in favor of the Plaintiff's position. Its initial motion to dismiss cites authority (*Karr v. Schmidt*, 460 F.2d 609, 615 (5th Cir. 1972); *Perez v. Jim Hogg Co.*, Civil Action No. L-05-00019, 2006 U.S. Dist. LEXIS 51406 at 12 (S.D. Tex. July 26, 2006) for the proposition that a due process claim must be premised upon the violation of a fundamental right. The right to unimpeded access to open courts is a fundamental right. LexisNexis requires litigants to pay charges – violating their unimpeded access to open courts.

Open Courts

In applying the Texas Constitution, Texas courts have held that even the legislature may not restrict access to the courts. Co-Defendant Montgomery County

misquotes *Federal Sign*. In *Cronen v. Davis*, 2007 WL 765453 at *3 (Tex. App.-Corpus Christi 2007) the court stated:

> The Open Courts provision provides that "[a]ll courts shall be open, and every person for any injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.* The Texas Supreme Court has held that the Open Courts provision affords individuals three distinct protections. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 410 (Tex.1997).
> First, courts must actually be open and operating. *Id.* (citing *Runge & Co. v. Wyatt*, 25 Tex. 291, 294 (1860)).
> Second, citizens must have access to the courts unimpeded by unreasonable financial barriers. *Id.* (citing LeCroy v. Hanlon, 713 S.W.2d 335, 342 (Tex.1986)).
> Third, the law must afford meaningful legal remedies to our citizens, so the Legislature may not abrogate the right to assert a well-established common law cause of action. *Id.* (citing Tex. Ass'n of Bus. v. Air Control Bd., 852 S.W.2d 440, 448 (Tex.1993); Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 355-57 (Tex.1990)). In addition, the Texas Supreme Court has held that the Open Courts provision "applies only to statutory restrictions of a cognizable common law cause of action." *Id.* (quoting Peeler v. Hughes & Luce, 909 S.W.2d 494, 499 (Tex.1995); Moreno, 787 S.W.2d at 355-56).

The claims in this case are based on the second distinct protection, not the third that Defendant Montgomery County discusses.

Increases to filing fees have previously been limited under Article I, Sect. 13 of the Texas Constitution. *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986). Citizens must have access to those courts unimpeded by unreasonable financial barriers, so that the legislature cannot impose a litigation tax in the form of increased filing fees to enhance the state's general revenue. *Tex. Assoc. of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993). The prepayment requirement ... like the filing fees ... constitutes an unreasonable interference with access to the courts. *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 485 (Tex. 1993).

The "All Relevant Aspects Alike" Requirement

According to the Supreme Court, the Equal Protection Clause "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger* at 10. The imposition of charges and fees by LexisNexis violates equal protection within Montgomery County in three respects.

First, not all district courts require litigants to use the expensive E-filing process required by Judge Edwards in the 9th District Court under the terms of the 2003 Order. *See* Exhibit "A." Those subjected to the E-filing expenses are determined by a random assignment by the office of the District Clerk of cases to 2 of the 7 district courts in Montgomery County – Judges Mayes and Edwards.

Second, lawsuits filed under the Texas Family Code are treated differently than lawsuits filed under other statutes or common law. The 2003 Order results in an arbitrary discriminatory classification of litigants who are in all *relevant* aspects alike because all seek access to the courts.

Finally, litigants in lawsuits filed in the 250 Texas counties, other than Montgomery and Jefferson, are not subjected to LexisNexis charges.

Equal Protection and Access to Courts

The Supreme Court has never held that states are constitutionally required to provide a right to appellate review. E. g., Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891 (1955). Nevertheless, it is now a fundamental principle of due process and equal protection that once avenues of appellate review are established, they must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Chaffin v. Stynchcombe*, 412 U.S. 17, 24 n.11, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973); *North Carolina v. Pearce*, 395 U.S. 711, 724-725, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Rinaldi v. Yeager*, 384 U.S. 305, 310-11, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966); See *Douglas v. California*, 372 U.S. 353, 356-57, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

Miracle v. Estelle, 592 F. 2d 1269, 1272 fn. 6 (5th Cir. 1979)

While there is no per se constitutional right to appeal, this Court has frequently held that once a State establishes an appellate forum it must assure access to it upon terms and conditions equally applicable and available to all. *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969); *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Rinaldi v. Yeager,* 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966). See also *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969).

Chaffin, supra.