10-0372-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NEW YORK CIVIL LIBERTIES UNION,

Plaintiff-Appellee,

—against—

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICI CURIAE* SUPPORTING PLAINTIFF-APPELLEE'S BRIEF

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Table of Contents

Table of Authorities

Cases

Statutes

INTEREST OF AMICUS CURIAE

Amicus is the Association of the Bar of the City of New York (the "Association"). The Association submits this brief in support of the district court's Opinion and Order granting the New York Civil Liberties Union's request for permanent injunction against the New York City Transit Authority's access policy, *see* Stipulation and Order Concerning Permanent Injunction, *New York Civil Liberties Union v. New York City Transit Authority*, No. 09-cv-03595 (RJS) (S.D.N.Y., January 22, 2010) (the "Order") (incorporating the Opinion and Order, *New York Civil Liberties Union v. New York City Transit Authority*, No. 09-cv-03595 (RJS) (S.D.N.Y., December 23, 2009) (the "Opinion"; together, the "Opinion and Order")), and Plaintiff-Appellee's brief requesting affirmation of the same, *see* Brief of Plaintiff-Appellee, *New York Civil Liberties Union v. New York City Transit Authority*, No. 10-cv-0372 (2d Cir., filed September 27, 2010).

The Association is a nongovernmental professional association with a membership of more than 23,000 persons, including lawyers, judges, and legal professionals. The Association members have dedicated their professional careers to participating in the administration of justice across the broadest swath of adjudicatory settings—including not just Article III courts, but also the multitudinous administrative adjudicatory proceedings conducted in the New York City area each year. As officers of court in all manner of adjudicatory settings

within New York City, the Association's membership has a distinct interest in ensuring that all such adjudicatory proceedings are conducted fairly, transparently, and justly.

The Association itself is dedicated to examining a wide range of legal topics, many of which closely intersect with the issue of public access to the type of administrative proceedings considered in this appeal. For example, the Committee on Civil Rights—the Association's Committee offering this amicus brief today—addresses both civil rights (including issues affecting racial, ethnic and religious minorities) and civil liberties (including First Amendment and Due Process rights).[1] Perhaps more than any other single organization in New York City, the Association is committed to examining the various legal issues implicated by the right of public access to administrative adjudicatory proceedings.

Even before this case was filed, the Association specifically examined the legal contours and policy implications of the public right of access to administrative adjudicatory proceedings. In a published article, the Association formally adopted the position that all adjudicatory proceedings before neutral decision makers must be subject to the First Amendment's mandate for a robust

[1] For a list of the Association's committees, and a synopsis of each committee's mission, *see* http://www.abcny2.org/source/members/C_list.cfm (last visited October 1, 2010).

public right of access.[2] Although this position paper was particularly concerned with rebutting the closed-access arguments offered by the Department of Justice in the context of post 9/11 immigration proceedings, the paper made clear that both applicable case law and sound public policy require an expansive right of public access to any adjudicatory proceeding implicating important liberty and property rights—including administrative proceedings held outside the judicial branch. The Association believes that public access to governmental adjudicative proceedings helps ensure the procedural integrity of such proceedings, permits attorneys to make better-informed decisions for their clients, allows the public to access information about the adjudicatory processes to which they are subject, and helps foster robust public debate about issues of social and political significance. It is the Association's commitment to the sound policy reasons supporting the First Amendment right of public access across all adjudicatory settings that directed the Association's attention to the appeal before this Court today.

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[2] "'If it Walks, Talks and Squawks…' The First Amendment Right of Access to Administrative Adjudications: A Position Paper," 60 The Record of the Association of the Bar of the City of New York 343 (2005), *See also* "The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper," 57 The Record of the Association of the Bar of the City of New York 94 (2002).

ARGUMENT

The Association believes the Transit Adjudication Bureau's ("TAB") public access policy—which closes access to potential public observers upon a TAB respondent's unilateral request[3]—is unduly restrictive given the strong policy arguments supporting openness. First, from prospective TAB respondents' point of view, TAB's public access policy dampens respondents' right to the due process of law. Specifically, without the transparency of these adjudications that is offered by robust public access, there is little check on whether TAB hearing officers are applying transit rules of conduct and TAB hearing procedures fairly and equitably across TAB adjudications, a problem that is exacerbated by the fact that many TAB respondents are not represented by counsel. Further, TAB's public access policy prevents attorneys representing TAB respondents from gathering information on TAB adjudication procedures and hearing officers prior to a

[3] In March 2009, TAB memorialized its "Procedures for Accessing the TAB Facility and Admission to Hearing Rooms on the Part of Visitors." This "access policy" requires the hearing officer to ask the TAB respondent on two separate occasions if he or she has any objection to the observer being present, and require the observer to be excluded if objection is made either time. An observer who is allowed into a hearing must leave at its conclusion, rather than being permitted to stay for the next hearing. At no point do TAB's "access procedures" require, or even permit, the TAB court to make a finding on the record that closing the proceedings is necessary to protect a compelling governmental interest. Further, TAB respondents need not offer any explanation or justification for objecting to public access in their particular proceeding. Observers are also required to leave the hearing room at the conclusion of a single hearing. *See* the Opinion and Order for more information on the operation of TAB's access policy.

particular adjudication, making it unreasonably difficult for attorneys to provide TAB respondents with fully-informed legal advice. Second, from an observer's point of view, TAB's access policy runs contrary to the First Amendment values articulated by the Supreme Court in favor of a broad right of public access to adjudicatory proceedings. Specifically, TAB's access policy seriously curtails the transparency of a governmental process in which respondents' liberty and property interests are at stake, and stifles public debate and data collection concerning social and political topics that intersect with the enforcement of transit authority regulations. Because TAB's access policy severely diminishes the Due Process and First Amendment values that are otherwise fostered by robust public access—constitutional values which are of particular real-world import for New York City lawyers and their clients—the Association offers this amicus brief in support of affirmation of the lower court's Order and Opinion.

I. FIRST AMENDMENT PRINCIPLES APPLY TO TAB ADJUDICATORY PROCEEDINGS.

As a threshold matter, the Association believes it is beyond dispute that the First Amendment mandates a public right of access of administrative proceedings, including TAB adjudications. As detailed more fully in the district court's Order and Opinion, as well as the Brief for Plaintiff-Appellee, *New York Civil Liberties Union v. New York City Transit Authority*, No. 10-cv-0372 (2d Cir., filed September 27, 2010), federal courts have interpreted the First Amendment as

providing a broad right of public access to trials and adjudicatory proceedings alike. *See, e.g. Richmond Newspapers, Inc. v. Virginia* ("*Richmond*"), 448 U.S. 555, 581 (1980) (plurality opinion) ("[a]bsent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public. . . ."); *Globe Newspaper Co. v. County of Norfolk ("Globe")*, 457 U.S. 596, 606-607 (1982) (affirming that the First Amendment provides a right of public access to criminal trials, which may be limited only when "necessitated by a compelling governmental interest, and . . . narrowly tailored to serve that interest."); *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984) ("*Press Enterprise I*") (extending the *Richmond-Globe* doctrine to criminal voir dire proceedings); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16 (2nd Cir. 1984) (extending the *Richmond-Globe* doctrine to civil trials); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 698 (6th Cir. 2003) (applying the *Richmond-Globe* legal framework and finding that immigration proceedings closed to protect national security interests violates the Constitution, further observing that "[d]rawing sharp lines between administrative and judicial proceedings would allow the legislature to artfully craft information out of the public eye"); *North Jersey Media Grp. v. Ashcroft*, 308 F.3d 198, 204-5 (3rd Cir. 2002) (permitting closure of immigration proceedings from public observation in order to protect national security interest,

but acknowledging that the First Amendment provides a presumption of public access to even administrative proceedings in the first instance).

As such, it is clearly important that TAB's access procedures be considered and assessed within the framework of First Amendment and related Due Process values articulated by the Supreme Court. The Association, which is dedicated to protecting the fairness, transparency, and justness of adjudicatory proceedings of all varieties, believes that TAB's public access policy runs contrary to the First Amendment and related Due Process values that weigh in favor of robust public access, and must therefore be enjoined.

II. TAB'S ACCESS POLICY UNDULY LIMITS THE DUE PROCESS VALUES FOSTERED BY PUBLIC ACCESS TO ADJUDICATORY PROCEEDINGS.

Although case law considering the issue of public access to adjudicatory proceedings is generally phrased in terms of First Amendment freedom of speech principles, one of the most important reasons for permitting access to proceedings is to ensure that TAB respondents' Due Process rights are protected. For example, as the Supreme Court articulated in *Richmond*, the long and uninterrupted history of public access to trials "gave assurance that the proceedings were conducted fairly to all concerned . . . [and] discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond*, 448 U.S. at 569 (*citing* M. Hale, *The History of the Common Law of England* 343-45 (6th

ed. 1820)); *see also id.* at 596 (Brennan concurring) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.") (internal citation omitted); *Globe*, 457 U.S. at 606 ("[P]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."). What is perhaps counterintuitive in this appeal is that, while the TAB access policy depends on the consent of a particular respondent to open the proceeding to the public, that unilateral decision can, itself, damper the due process rights of respondents more generally.

First, without the transparency provided by robust public access, there is little check on whether TAB hearing officers are applying transit rules of conduct and TAB adjudicatory procedures fairly and equitably across proceedings. From a Due Process standpoint, the only way to ensure that TAB hearing officers are applying TAB procedures and NYCTA Rules and Regulations fairly and without caprice or animus is if observers are permitted to observe a critical mass of TAB proceedings. TAB's access policy does not permit such frequent observations by members of the public, and thus makes it nearly impossible to assure that TAB hearing officers are always acting dutifully and without animus.

This problem is compounded by the fact that, although TAB respondents are entitled to be represented by counsel in TAB proceedings, the reality is that very

few respondents choose to obtain (or can afford) legal representation.[4] As such, most TAB proceedings will involve only the TAB hearing officer, the charging police officer, and the respondent. The mere presence of a third party in a TAB proceeding would likely discourage the TAB hearing officer from acting in an unfair or inequitable manner. TAB respondents may not realize they are relinquishing this important check on their Due Process rights when they decide not to let third parties observe their particular proceedings.[5]

Without an expansive right of public access to TAB proceedings, there is effectively no way to ensure that TAB respondents are being afforded their full Due Process rights. For example, in New York City, translators are often required in state and federal courts, and so would often be needed in TAB proceedings as well. Without free access to TAB proceedings, the Association's members have no means to determine whether adequate translation services are being provided. Indeed, the NYCLU has recently initiated proceedings against the NYCTA regarding the lack of translation services available in TAB proceedings, a systemic deprivation of basic constitutional rights to TAB respondents that would not be

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[4] *See* Schnabel Dep. at 122:14-16 (those participating in TAB hearings are entitled to be represented by counsel); Horan Aff. at ¶7 (few TAB respondents are represented by counsel).

[5] Indeed, nothing in the record suggests that TAB respondents are informed by TAB hearing officers or TAB personnel of any positive or negative consequences that a respondent's refusal of public access may entail.

known to the public or legal action entities without, first, there being a broad opportunity for the public to continually observe a variety of such proceedings.[6]

Second, the TAB access policy makes it exceedingly difficult for New York City attorneys to attend TAB proceedings in advance of representing a particular TAB respondent. As such, the typical information a diligent attorney may gather in advance of representing a client in an adjudicatory setting—information that is often obtained by sitting in on hearings before the same decision maker or judge, and examining the operation of procedural and substantive rules in practice—are significantly curtailed by TAB's access policy. As such, when New York City attorneys are retained to represent a TAB respondent, there is little that attorney may do to prepare for the representation in terms of gathering data about the TAB hearing officer, the operation of the substantive NYCTA Rules and Regulations (*e.g.*, ascertaining what sort of evidence can satisfy the "clear and convincing" standard for rule violations), or the operation of quasi-judicial procedural rules. As such, TAB's access policy effectively denies New York City attorneys the ability

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[6] Karen Zraick, *Transit Court Should Have Translators, Group Says*, New York Times, Sept. 23, 2010, http://www.nytimes.com/2010/09/24/nyregion/24translate.html?_r=1 (last visited Oct. 1, 2010) (note that the alleged lack of translation services in TAB was made known to the NYCLU *only after* entry of Judge Sullivan's Opinion and Order, which enjoined operations of TAB's access policy and permitted the NYCLU the opportunity to observe a critical mass of TAB proceedings.)

to cultivate an institutional knowledge, inhibiting legal representation before the TAB, and thus jeopardizing respondents' Due Process rights.

III. TAB'S ACCESS POLICY UNDULY LIMITS THE FIRST AMENDMENT VALUES FOSTERED BY PUBLIC ACCESS TO ADJUDICATORY PROCEEDINGS.

In *Richmond-Globe* and its progeny, the Supreme Court articulated distinct First Amendment values that were promoted by the right of public access to adjudicatory proceedings. Those First Amendment values are as salient and applicable in the context of TAB administrative proceedings are they were in the context of the criminal trials and proceedings that were at issue in *Richmond-Globe*, and those values thus weigh in favor of a strong presumption of openness in TAB proceedings.

First, a right of public access to adjudicatory proceedings informs and enhances the public's belief in the fairness of such proceedings. As articulated by the U.S. Supreme Court in *Richmond*, "the trial is a means of meeting 'the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably." 448 U.S. at 594-5 (internal citations omitted). Further, "people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id*. at 572. With over

19,000 hearings a year adjudicating allegations of quasi-criminal transit violations, TAB is a significant municipal institution that must meet the public's expectations of fairness.[7] Without affording robust public access to TAB proceedings, there is simply no way for the public to know whether these proceedings are administered fairly. New York City legal professionals have an acute interest in ensuring that adjudicative proceedings in which they have provided or may provide counsel—including TAB proceedings—are equitably administering justice and are viewed by the public as such.

Second, the right of public access to adjudicatory proceedings ensures that the government has not unduly limited the public's access to information regarding government affairs stemming from those proceedings. *See, e.g.*, *Richmond*, 448 U.S. at 575-76 ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.") TAB respondents are individuals accused of quasi-criminal transit violations by Officers of the Transit

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[7] *See* Opinion at *5 ("TAB conducts approximately seventy-two hearings per day. In 2008, TAB conducted over 19,000 in-person hearings, and during the first three months of 2009, there were an average of 1,736 in-person hearings per month.") (citations omitted). New York City Transit Authority Rules and Regulations cover criminal infractions ranging from fare evasion, vandalism, gambling, and the carrying of weapons or other dangerous instruments, to other civil infractions such as solicitation, campaigning on transit property, and riding on the subway platform between subway cars. *See* N.Y. Comp. Codes R. & Regs. tit. 21, § 1050 *et seq*..

Bureau of the New York City Police Department.[8] The conduct and enforcement techniques of transit officers are matters of social and political significance to the public at large, and specifically to New York City attorneys charged with defending criminal cases, or bringing or defending allegations of police misconduct. The public has a right to examine whether New York City Transit Authority rules and regulations are equitably applied across racial groups. For example, the NYPD's "Lucky Bag" program for randomly searching the personal possessions of commuters might be abused, or used to target minority groups for additional scrutiny.

Additionally, TAB's unduly restrictive access policy impedes the ability of academic institutions or legal-interest organizations such as the NYCLU and the Association to collect and analyze valuable sociological and political data. These social and political issues arising in and intersecting with TAB proceedings are not just important to public discourse generally, but are particularly the province of New York City attorneys, who monitor criminal charges, fines, and police misconduct. If, for example, a services organization devoted to immigrants' rights sought to examine the availability and function of translators in TAB proceedings,

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[8] *See* Opinion at *4 (citing that Officers of the Transit Bureau of the New York City Police Department are primarily responsible for enforcing the New York City Transit Authority Rules of Conduct, though all New York City police officers are statutorily empowered to enforce the rules).

its ability to gather the necessary data would be severely curtailed. Such empirical analyses are of interest not only to the public at large, but also to those New York City attorneys and members of the Association interested in understanding how immigrants are treated in adjudicatory settings.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Association of the Bar of the City of New York respectfully requests that the Court affirm the lower court's Order granting Plaintiff's request for permanent injunction against enforcement of TAB's "access policy."

Dated: New York, New York
October 4, 2010

Respectfully submitted,

By: /s/ Marjorie Press Lindblom

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This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3,139 words.

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Dated: October 4, 2010 Respectfully submitted,

/s/ Evan Saucier

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10-0372-cv NYCLU v. NYCTA

I hereby certify that I caused the foregoing Brief for The Association of the Bar of the City of New York as *Amici Curiae* Supporting Plaintiff-Appellee's Brief to be served on counsel for Plaintiff-Appellee, Defendant-Appellant and Movant via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

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