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In Defense of Confidential Votes on Petitions for Review at the Texas Supreme Court

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INTRODUCTION

The Supreme Court of Texas has a long tradition of keeping confidential its internal votes on the composition of its docket—its “docket votes.”¹ This custom of confidentiality has been followed by the Court since at least 1916. *See El Paso & S.W. Co. v. La Londe*, 108 Tex. 67, 68, 184 S.W. 498 (1916) (per curiam) (Hawkins, J., concurring with overruling of motion for rehearing of denial of application for writ of error) (explaining—in the first public comment on the issue—that, while “the rule in this court has been not to write in granting or refusing applications for writs of error[,] . . . I feel duty bound to state my individual views herein . . .”).

FN 1: The authors credit former Chief Justice Thomas R. Phillips with the inspiration for the label, “docket vote.” In his 1992 concurrence to the Court’s overruling of a motion for leave to file a petition for writ of mandamus, Phillips aptly called the resulting order “regarding decisions as to the composition of [the Court’s] docket” a “docket order.” *Dallas Morning News, Inc. v. Fifth Ct. of Appeals*, 842 S.W.2d 655, 661 (Tex. 1992) (orig. proceeding) (Phillips, C.J., concurring with overruling motion for leave to file petition for writ of mandamus) (substituted separate op.). The votes leading to such orders can naturally be referred to as “docket votes.”

Of late, proponents urging judicial transparency and accountability have argued in favor of making public these docket votes. Specifically, during the last legislative session, Senator Kirk Watson (D-Austin) introduced Senate Bill 780 (“SB 780”). TEXAS LEGISLATURE ONLINE HISTORY, BILL: SB 780, <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=81R&Bill=SB780> (last visited Sept. 29, 2010). The bill proposed to add section 22.0071 to the Government Code,² which would have required that:

In an order granting, refusing, dismissing, or denying a petition for review, the . . . court shall state how each member voted on the petition or application.

Tex. S.B. 780, 81st Leg., R.S. (2009).

FN 2: Section 22.007 of the Government Code governs applications for writ of error. TEX. GOV'T CODE § 22.007. Applications for writ of error were administratively supplanted when the Court promulgated new rules of appellate procedure, effective September 1, 1997, instituting petitions for review as the method by which a case is presented to the Court. TEX. R. APP. P. 53.1 (“statutes pertaining to the writ of error in the . . . Court apply equally to the petition for review”), *reprinted in Texas Rules of Appellate Procedure*, 60 TEX. B.J. 878, 930 (Oct. 1997) (the “petition for review procedure replaces the writ of error procedure”). Accordingly, no writ of error has been granted by the Court in over twelve years. *See MacGregor Med. Ass'n v. Campbell*, 985 S.W.2d 38, 41 (Tex. 1998) (per curiam) (granting the last applications for writ of error—both the petitioner and respondent’s—on October 29, 1998).

In the one public hearing on the bill, Senator Watson indicated he filed SB 780 in response to Chief Justice Wallace B. Jefferson’s 2009 State of the Judiciary speech, in which the Chief Justice revealed that 80% of Texans believe “contributions influence a judge’s decision.” Hearing on Tex. S.B. 780 Before the Senate Comm. on Jurisprudence, 81st Leg., R.S. (Mar. 18, 2009), *available at* SENATE JURISPRUDENCE COMMITTEE: VIDEO/AUDIO ARCHIVES, <http://www.senate.state.tx.us/avarchives/ramav.php?ram=00003948>, at 4:02-4:50 (last visited Sept. 29, 2010) (RealPlayer® video file) [hereinafter *Senate Hearing*] (referencing Chief Justice Wallace B. Jefferson, *The State of the Judiciary in Texas* (Feb. 11, 2009), *available at* <http://www.supreme.courts.state.tx.us/pdf/2009StateoftheJudiciary.pdf> (last visited October 25, 2010) [hereinafter *State of the Judiciary*]). The Senator further expressed his belief that “votes on petitions for review constitute decisions of [the] court,” and, as such, should be available to the Justices’ constituents, who elect their Justices. *Senate Hearing* at 2:49-2:55. Greater transparency, Senator Watson believes, will help the voting public better evaluate Justices who are up for reelection. *See Senate Hearing* at 3:40-4:02.

The idea that disclosure of docket votes might increase accountability has been advanced within the judiciary too. In a dissent from the denial of an application for writ of error, Justice Nathan L. Hecht acknowledged that, if “votes on applications were always public, some would change,” and thus, he was “forced to conclude that the time has come for the Court to make public its votes on applications.” *See Maritime*

Overseas Corp. v. Ellis, 977 S.W.2d 536, 541 (Tex. 1996) (Hecht, J., dissenting from denial of application for writ of error).

Since Justice Hecht's advocacy for disclosure, however, the Court has reaffirmed—by rule—the confidentiality it has historically—by practice—afforded its internal votes. See TEX. R. JUD. ADMIN. 12.5. A federal court has also denied any constitutional or common law right of access to these votes. *Aguirre v. Phillips*, No. SA-03-CA-0038-OG, 2005 U.S. Dist. LEXIS 32355, at *9 (W.D. Tex. Sept. 30, 2005) (order granting defendants' motion to dismiss). And SB 780 itself never passed the Senate.³

FN3: SB 780 suffered a quick fate. The Senate Jurisprudence Committee, after hearing public testimony, reported the bill favorably to the Senate by unanimous vote. See TEXAS LEGISLATURE ONLINE: ACTIONS, BILL: SB 780, <http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=81R&Bill=SB780> (last visited Sept. 29, 2010) [hereinafter *SB 780 Legislative Action*]; TEXAS SENATE JURISPRUDENCE COMMITTEE: MINUTES, MARCH 18, 2009, available at <http://www.legis.state.tx.us/tlodocs/81R/minutes/html/C5502009031813301.HTM> (last visited Sept. 29, 2010). Though recommended for the Local and Consent Calendar, SB 780 was placed on the Senate Intent Calendar to be discussed on the Senate floor on March 31, 2009. *SB 780 Legislative Action*. It was not heard on the floor that day and was never again placed on the intent calendar during the 81st Session. *Id.*

Some may view the issue of disclosure of docket votes, then, as bereft of life. Yet, any legislative session offers another chance of breath. And even if similar legislation is not pursued in the upcoming session, SB 780 offers the appellate bar the opportunity to weigh the issue, particularly in light of its general absence at the one public hearing on the bill.

Publishing docket votes would be a dramatic departure from the Court's current practice of noting an individual Justice's vote or participation on a cause only after it has granted review and issued an opinion. Proposals to remove the confidentiality historically afforded docket votes, such as SB 780, perpetuate the jurisprudential fallacy that a vote to deny review has any precedential effect or can even constitute a comment upon the merits of the intermediate appellate opinion. They also risk removing a level of political insulation from the judicial process and, as a result, muddling Texas's jurisprudence with separate writings explaining votes. This hazard might be acceptable, perhaps, if such disclosures would actually advance any of the values its proponents claim are the motivating factors behind the disclosure. But, as discussed below, it would not. For these reasons, the disclosure of docket votes is not good judicial policy. Thus, the proposal embodied in SB 780 should not be pursued any

further, and, to the extent it is, the appellate bar should rally in support of protecting the confidentiality of docket votes.

I. The Sheer Volume and Mechanics of Disposing of Petitions for Review Must Be Considered in Determining the Value of Disclosing Docket Votes

SB 780 purported to enact a simple change requiring the Court to disclose the docket votes of its Justices. The bill, however, does not fully comprehend either the scope of the votes it would have made public or the internal operating procedures of the Court. Providing this context is necessary to determine whether SB 780 can achieve the express goals its proponents advance.

A. The Court processes roughly 1,000 petitions annually on a “conveyor belt” system

First, it is worth noting the sheer quantity of petitions the Court disposes of in a given year. On average, about 900 petitions were filed with the Court each year between 2000 and 2009. ANNUAL REPORT FOR THE TEXAS JUDICIARY, THE SUPREME COURT 27 (FY 2009), available at <http://www.courts.state.tx.us/pubs/AR2009/AR09.pdf> (last visited Oct. 25, 2010) [hereinafter FY 2009 JUDICIARY ANNUAL REPORT]; see also Pam Baron, *Texas Supreme Court Docket Analysis September 1, 2010*, State Bar of Tex. Prof. Dev. Program, 24th Annual Advanced Civil Practice Course ch. 3, p. 3 (2010) [hereinafter *Docket Analysis*]. In many years, the Court even disposes of more petitions than are filed. See, e.g., FY 2009 JUDICIARY ANNUAL REPORT 27 (showing that, between FY 2000-09, an average of 340 petitions for review are still pending at the end of a given fiscal year because not all petitions are disposed of within the same fiscal year they are filed). The vast majority of these dispositions are denials, as the Court grants only 11-13% of petitions each year. See *Docket Analysis*, at 3.

To process efficiently this volume of petitions, the Court employs what appellate practitioners commonly call a “conveyor belt” system.⁴ Under this system, a petition is forwarded to the Court the first Tuesday thirty days from the date it was filed or, if a waiver of response is filed by the respondent, the first Tuesday after the waiver is filed. See Blake Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, State Bar of Tex. Prof. Dev. Program, Practice Before the Texas Supreme Court ch. 1, pp. 10-11 (2009) [hereinafter *SCOTX Internal Ops*]. Once a petition is distributed to the Justices on a given Tuesday, it begins moving along the conveyor belt. *Id.* at 9. Unless “it is affirmatively removed from the belt by one or more of the Justices, the petition is automatically denied on the Court’s Friday orders,⁵ thirty-one days after the Justices first received it.” *Id.* (emphasis added). This automatic denial arises from the Court’s practice of treating a Justice’s failure to record a vote on a petition as a vote to deny it.

Id. at 9, 11. Thus, a petition may be (and most often is) denied without a single Justice ever having formally voted on it. See *id.* at 9, 11.

FN 4: A petition flowchart, including a summary of the requisite number of votes for a given action, is attached at **Appendix A**. Douglas W. Alexander & Lori Ellis Ploeger, *Petition Practice Before the Supreme Court of Texas*, State Bar of Tex. Prof. Dev. Program, Nuts and Bolts of Appellate Practice ch. 1, p. 45 (2009) [hereinafter *Petition Practice*].

FN 5: The Court issues its regular orders each Friday morning. *SCOTX Internal Ops* at 9, 12; THE SUPREME COURT OF TEXAS: ORDERS & OPINIONS, <http://www.supreme.courts.state.tx.us/historical/recent.asp> (last visited Oct. 6, 2010). These “Friday orders” dispose of petitions, motions for rehearing, some writs of mandamus, and other miscellaneous matters, as well as contain the Court’s written opinions. *SCOTX Internal Ops* at 9.

While on the conveyor belt, preliminary votes may be recorded for each petition at three different stages—on a pink, purple, or yellow vote sheet. *SCOTX Internal Ops*, at 9-10. First, each petition package—which contains the petition, and, if filed, a response and reply—includes a pink vote sheet. *Id.* at 9. This sheet allows a Justice to record his or her preferred action on the petition:

[D]eny; request response; request record; discuss at conference; request study memo; issue per curiam opinion; grant; dismiss for want of jurisdiction; refuse petition; hold; dismiss petition on motion of party.

Id. In addition to recording these preliminary votes, Justices use these pink sheets to take “notes” on a petition.

Each Justice is also provided a purple vote sheet every Tuesday, the purpose of which is to record votes not only on pending petitions (taken from initial votes recorded on the pink sheets), but on all matters forwarded to the chambers that week. *Id.* (including petitions for writ of mandamus, petitions for writ of habeas corpus, motions for rehearing, etc.). The deadline to return the purple vote sheet to the Court’s administrative assistant is by noon of the Tuesday four weeks after the petition was first forwarded to the Justices. *Id.*

Finally a yellow vote sheet is circulated to the Justices a week in advance of a scheduled conference. These yellow sheets allow Justices to view how their colleagues have voted on pending petitions, which may influence their preliminary vote. *Id.* at 10.

With the Court’s increasing use of technology however, Justices are now able to vote electronically, and many—if not most—choose to do so. *See Petition Practice*, at 3. The effect of this technological change upon the Court’s docket deliberations has been to allow each Justice to, in effect, “look over the shoulders of his or her colleagues to see how the voting is going on a particular matter.” *Id.* This enables the Justices to determine much earlier in the process whether a “particular matter has attracted the interest of several [other] Justices,” which sometimes results in the reviewing Justice taking a “harder look at the petition package.” *Id.*

B. The Court has a private conference each month at which votes are finally and formally recorded

Each petition that has survived automatic denial is placed on an agenda to be discussed at the Court’s next judicial conference, at which the fate of the petition is formally determined. *SCOTX Internal Ops*, at 11. The Court currently holds its judicial conferences roughly once a month beginning on Monday morning and often carrying over to the following Tuesday. *Id.* at 11. At conference, each petition on the agenda is called by the Chief Justice in numeric order beginning with the oldest cases. *Id.* The Justices who have either voted to discuss a petition or recommended a specific disposition are customarily called upon first by the Chief Justice—in order of seniority, if necessary—to discuss their views. *Id.* at 12.

The votes taken at conference depend on where a petition falls in the two-stage process for granting review. That is, unlike the United States Supreme Court, the Texas Supreme Court typically does not decide whether to grant a case based exclusively on the 15-page petition for review. *Compare* TEX. R. APP. P. 55.1, *with* R. SUP. CT. U.S. 10. Instead, the Court’s general practice, if it is interested in a case, is to order full briefs on the merits and, once these 50-page briefs are received, to decide—based in part on the recommendation in a law clerk’s study memo—whether to grant the petition. The most common dispositions of unbriefed petitions are to deny the petition, request full briefing and assign a study memo, or dismiss the petition for want of jurisdiction. *SCOTX Internal Ops*, at 12. After merits briefing has been filed, the most common dispositions are to grant, deny, or to assign a Justice to draft a per curiam opinion. *Id.* at 16.

The Court’s administrative assistant is present at these conferences and formally records the deciding votes on each matter discussed. *See id.* at 11. The entire conference—including the votes taken up to and during conference—is closed to the public. This confidentiality serves an important purpose in the function of the court. As the late Chief Justice William H. Rehnquist explained about the U.S. Supreme Court:

T]h[e] candor [resulting from confidentiality] undoubtedly advances the purpose of the Conference in resolving the cases before it. No one feels at

all inhibited by the possibility that any of his remarks will be quoted outside of the Conference Room or that any of his half-formed or ill-conceived ideas, which all of us have at times, will be later held up to public ridicule.

William H. Rehnquist, *Sunshine in the Third Branch*, 16 WASHBURN L.J. 559, 565 (1977) [hereinafter *Sunshine in the Third Branch*].

II. The Court as an Institution—Its Jurisprudence, Output, and Independence—Would Be Harmed if Docket Votes Were Required To Be Disclosed

A. Votes to deny do not “constitute decisions of th[e] court” because, absent jurisdiction, votes regarding review of a particular case are precedentially null

During his opening remarks introducing SB 780 in the Senate Jurisprudence Committee, Senator Watson asserted, as justification for the bill, that “votes on petitions for review constitute decisions of that court.” *Senate Hearing* at 2:49-2:55. But votes on Court decisions are not always publically disclosed. By the vote of six Justices, a case may be decided without oral argument, see TEX. R. APP. P. 59.1, typically by a per curiam opinion. Most often, the Court issues these unsigned opinions—used in Texas for over a century—to correct errors in less complicated cases or to resolve matters involving narrow legal questions. See Scott A. Brister, *Per Curiam Opinions*, State Bar of Tex., Practice Before the Texas Supreme Court ch. 10, pp. 2, 5 (2009). Thus, the basic premise underlying the bill—that characterizing a vote as a decision of the Court *necessarily* means the vote should be disclosed—is itself flawed.

In any event, Senator Watson’s proclamation reveals a fundamental misunderstanding of the jurisprudential function docket votes serve.

Indeed, it is not the first time the misunderstanding has been mistakenly championed. In 2005, one of the advocacy groups supporting SB 780—among others—sued the Court in federal court alleging their First Amendment rights were infringed by the Court’s policy of not disclosing its docket votes. *Aguirre*, 2005 U.S. Dist. LEXIS 32355, at *4-15 (order granting defendants’ motion to dismiss) (noting Texans for Public Justice as a plaintiff); TEXAS SENATE JURISPRUDENCE COMMITTEE: WITNESS LIST FOR MARCH 18, 2009, BILL: SB 780, available at <http://www.legis.state.tx.us/tlodocs/81R/witlistmtg/html/C5502009031813301.HTM> (last visited Sept. 29, 2010) (listing Texans for Public Justice as supporting SB 780). One of the *Aguirre* plaintiffs’ chief arguments before the federal court was that “votes to deny review have the effect of establishing law.” *Aguirre*, 2005 U.S. Dist. LEXIS 32355, at *8.

But votes to deny review are not “decisions of the Court.” The Court must first possess jurisdiction for it to act. *Republic of Tex. v. Laughlin*, Dallam 412, 412, 1841 WL 3099, at *1 (Tex. 1841) (“Before we are permitted to decide the several points made in this case, we feel it to be our duty first to dispose of a preliminary question; and that is, ‘whether the record and proceedings before us make out a proper case for the interposition and decision of this Court.’”). Without jurisdiction, any opinion issued would be an impermissible advisory opinion. See *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 590 (Tex. 2003).

When the Court denies a petition, it declines to invoke its discretionary jurisdiction under the Texas Government Code. See Elaine A. Carlson & Roland Garcia, Jr., *Discretionary Review Powers of the Texas Supreme Court*, 50 TEX. B.J. 1201, 1201-02 (Dec. 1987) (Texas Government Code section 22.001(a)(6) confers to the Court the ability to decline to invoke jurisdiction it may otherwise possess under subparagraphs (a)(1)-(5)). Thus, its denial of review *cannot* provide “any indication of this Court’s decision on the merits of the issue.” *Loram Maint. of Way, Inc. v. Ianni*, 210 S.W.3d 593, 596 (Tex. 2006).

Put another way, “by denying a petition for review[,] the . . . court makes no adjudication on the merits, but [instead] merely lets stand the adjudication of the lower courts, which have considered and ruled on the merits of the case.” *Aguirre*, 2005 U.S. Dist. LEXIS 32355, at *9 (order granting defendants’ motion to dismiss). In fact, the “only implication to be derived from a denial of review is that there were not four justices who felt that the errors in the lower court’s opinion, if any, were ‘of such importance to the jurisprudence of the state as to require correction.’” *Id.* (citation omitted); see also *Dallas Morning News*, 842 S.W.2d at 661 (Phillips, C.J., concurring with overruling motion for leave to file petition for writ of mandamus) (substituted separate op.) (Because “this Court’s decision to decline to hear a case is not an adjudication on the merits,” the “only meaning of the ruling is that the case will not be heard.”).

Of course, if a denial is not a decision on the merits of the denied case, the votes of the individual Justices regarding review cannot carry any precedential weight either. See Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89, 102, 108-09 (Winter 2007) [hereinafter *Citation Writ Large*]. Indeed, even opinions issued by one or more Justices dissenting from or concurring with a docket order (which make public that Justice’s docket vote) are merely accorded the same precedential weight as any other dissent or concurrence from an authored opinion. See *id.* at 108-09.

Thus, the publication of docket votes only serves to confuse their precedential value, which is null. SB 780’s underlying premise is legally unfounded. For this reason

alone, its proposal to strip the confidentiality historically afforded dockets votes should be rejected. But, as shown below, this is not the only jurisprudential confusion a mandate for disclosure, as proposed in SB 780, would create.

B. The practical effect of revealing docket votes would be to hopelessly clog the Court's already crowded docket and to obfuscate the state's jurisprudence

Disclosure of docket votes runs a significant risk that Justices would feel pressure to publically explain any votes that might appear controversial. *See Senate Hearing*, at 15:45-16:04. These written explanations would undoubtedly slow the Court's work and, as history teaches, dilute Texas's jurisprudence. *See id.*

These inefficiency concerns prompted Chief Justice Wallace B. Jefferson to publically oppose SB 780. *See* Chuck Lindell, *Watson Bill Mandates More Openness in Texas Supreme Court Decision-making*, AUSTIN AM.-STATESMAN, May 4, 2009, available at <http://www.statesman.com/news/content/region/legislature/stories/05/04/0504court.html> (last visited Oct. 28, 2010) [hereinafter *Watson Bill*]. "If you are forced to disclose your vote, then I think it would be incumbent upon you to explain in a written opinion the vote you cast." *Id.* Doing so, he explained, "would harm efficiency," due to the vast number of petitions filed each year. *Id.*

The lone witness testifying in opposition to SB 780 expanded on this concern with a hypothetical in which a case presented a "compelling fact pattern that cried out for justice . . . but where the party had clearly waived the issue." Don Cruse, *Last Week's Hearing on SB780*, SCOTX BLOG (Mar. 27, 2009), <http://www.scotxblog.com/news-and-links/last-weeks-hearing-on-sb780/> (last visited Oct. 6, 2010) [hereinafter *Last Week's Hearing*]; *Senate Hearing*, at 16:04-16:30. In such a situation, Justices might end up writing short opinions—"epistles" as the witness called them⁶—"not for the parties or to clarify the law (since petition denials are not precedential) but for their political audiences." *Last Week's Hearing*.

FN 6: *Senate Hearing*, at 16:04-16:30.

This hypothetical has played out in practice numerous times over the past several decades at the Court. In fact, for well over a century, Justices have been writing separately from docket orders, even without the votes on such orders being made public. *Mut. Life Ins. Co. of New York v. Hayward*, 88 Tex. 315, 30 S.W. 1049 (1895) (per curiam) (Alexander, Special Assoc. J., dissenting from grant of application for writ of error). These opinions are not always short. *See, e.g., Terrell v. Middleton*, 108 Tex. 14, 16-39, 191 S.W. 1138 (1917) (Hawkins, J., concurring with refusal of application for writ of error) (issuing a twenty-three-page concurrence to the per curiam refusal of an

application for writ of error). And certain Justices have even made frequent use of the practice. See Dylan O. Drummond, *A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review at the Texas Supreme Court*, APP. ADVOC., Spring 2006 at 9-15 [hereinafter *Vote By Any Other Name*].

Former Chief Justice Phillips outlined the choices a Justice currently faces when a colleague dissents from review, which would only be magnified if every docket order vote was made public:

- (a) say nothing and potentially be counted with the majority,
- (b) join the dissent and assent to the dissenter's reasoning, or
- (c) dissent separately from the first dissenter with a separate opinion, thus revealing his or her conference vote and writing another unnecessary opinion.

Dallas Morning News, 842 S.W.2d at 661-62 (Phillips, C.J., concurring with overruling motion for leave to file petition for writ of mandamus) (substituted separate op.). As a result, Justices would be encouraged "to persuade the public" instead of "trying to persuade their colleagues."⁷ *Sunshine in the Third Branch*, at 568. The "practical and pernicious effect" of such separate writings would be to allow a "determined dissenter to alter the Court's agenda." *Dallas Morning News*, 842 S.W.2d at 662 (Phillips, C.J., concurring with overruling motion for leave to file petition for writ of mandamus) (substituted separate op.). Conversely, a "justice in the majority is put to a similar election of having his or her views portrayed solely by the dissenting justice or justices, joining another responding opinion, or preparing a separate writing;" all of which results in "forcing one or more writings on a case the Court has, pursuant to its own rules, decided to decline." *Id.* Because of this perverse effect, requiring disclosure of docket votes "would largely destroy its usefulness." *Sunshine in the Third Branch*, at 569.

FN 7: In his dissent in *Maritime Overseas*, even Justice Hecht acknowledged that "publicly announcing votes on denied applications could lead an unscrupulous Justice to posturing for ulterior reasons." *Maritime Overseas*, 977 S.W.2d at 541 (Hecht, J., dissenting from denial of application for writ of error).

Proponents of disclosure are skeptical of this concern, suggesting that it would not take long to draft these narrowly focused opinions. See *Senate Hearing*, at 16:30-17:43. While writing one opinion would likely not greatly impinge upon the Court's business, writing 1,000 such opinions could take appreciably longer. *Id.* Moreover, even if only one or a handful of Justices wrote separately to explain their vote, the time it

would take for the remaining Justices to agree or disagree with—or abstain from—each of these separate writings would result in even more of the Court’s workload being consumed by “what is ultimately a political exercise.” *Last Week’s Hearing*.

Finally, the prospect of flooding the Southwestern reporter with a towering influx of separate writings raises serious questions as to what effect these opinions—which are inherently nonprecedential—would have on the state’s jurisprudence. This inquiry is not a theoretical one. Intermediate courts of appeal and federal courts have already mistakenly cited to at least one separate writing dissenting from denial of review over the past decade. See *Citation Writ Large*, at 108 n.221; Charles G. Orr, *Appellate Oddities*, State Bar of Tex. Prof. Dev. Program, Advanced Civil Appellate Practice Course ch. 19, pp. 9-13 (2002) [hereinafter *Appellate Oddities*]. Specifically, in 1999, Justice Hecht dissented from the denial of review in *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999) (Hecht, J., dissenting from denial of review). Since that time, and although it is clearly marked as being a dissent from denial of review, *Vickery* has nonetheless been cited as a majority Court opinion by no less than the Fifth Circuit Court of Appeals, the Northern, Southern, and Western federal district courts, the Texas Review Tribunal, and every Texas intermediate appellate court save for the Eastland Court of Appeals. See, e.g., *In re Soza*, 542 F.3d 1060, 1073 (5th Cir. 2008); *Dillard v. Mortg. Elec. Registration Sys.*, No. 3:10-CV-0091-N, 2010 U.S. Dist. LEXIS 86808, at *8 (N.D. Tex. Apr. 16, 2010); *Gilliland v. Cornell Cos.*, No. H-07-1655, 2008 U.S. Dist. LEXIS 91191, at *28 (S.D. Tex. Nov. 10, 2008); *Birk v. Hub Int’l Sw. Agency, Ltd.*, No. EP-08-CA-259-FM, 2009 U.S. Dist. LEXIS 50221, at *37 n.178 (W.D. Tex. Apr. 1, 2009); *In re Rose*, 144 S.W.3d 661, 676 (Tex. Rev. Trib. 2004, no appeal); see also *Appellate Oddities*, at 9-13.

C. Disclosure of docket votes removes a layer of political insulation that allows the Court to efficiently process the large number of petitions filed each year without unnecessary external pressure

Perhaps the most significant impact disclosure of docket votes would have is the removal of a layer of political insulation from the Court’s deliberative process. Political insulation is critical to our judiciary’s independence. See TEX. CODE OF JUD. CONDUCT, Canon 1 (“An independent and honorable judiciary is indispensable to justice in our society.”). A judge should be free from any outside influence or control. Holding true to these ideals is, no doubt, difficult in a state with an elected judiciary. By maintaining an elected, rather than appointed, judiciary, the people of Texas have presumably concluded that their judges should be accountable to the electorate. But, as the guardian of certain core principles—particularly those embodied in our state and federal constitutions—there can be no doubt that the public good is greatly served when our judges are generally isolated from politics.

Judges are intended to be insulated from political pressure so that they can declare the meaning of the law without regard to outside influences. This freedom from public pressure is also necessary in the Texas Supreme Court's process for selecting which issues are "important to the jurisprudence of the state" and, equally so, in determining which cases best present those issues for decision. The Court, as an institution, is accountable for granting or refusing a particular case. But the work of the Court would be greatly impeded if this public pressure extended to each individual Justice's vote to grant or deny a case, particularly where it is not feasible for the judge to explain his or her decision for doing so to the public.

Texans need *less* politics, not *more* politics within their state judiciary. Disclosing docket votes moves Texans away from this goal by inserting more politics into the deliberative process at the Texas Supreme Court. *Senate Hearing*, at 14:27-14:40 (exhorting the committee not to "tak[e] an already political process and introduce[e] another political element when we should be going the other way.").

III. Disclosure of Docket Votes Will Do Little To Increase Transparency, Accountability, or Predictability

As shown above, there are institutional costs associated with disclosure of docket votes. Doing so risks further confusion about the precedential value of the Court's decision to deny review in a case, dilution of Texas's jurisprudence with nonprecedential separate writings, and increased political pressure unrelated to the merits of the Court's substantive work. These costs, it appears, come with insignificant benefit to the public. The lofty goals of more transparency, accountability, or predictability that proponents of disclosure assert motivate the change in policy, *see Senate Hearing* at 5:21-8:58, 22:14-26:12, simply will not come to fruition without also requiring the reasons for the disclosed disposition.

This is because docket votes, in and of themselves, disclose nothing but the actual docket order tally. Indeed, a "vote to grant or deny review may be made for a variety of reasons having nothing to do with the individual Justice's opinion regarding the merits of the case." *Aguirre*, 2005 U.S. Dist. LEXIS 32355, at *15.

For example, the Court might decline to hear a case for any number of reasons:

- An issue cannot be reached because it has been waived, the lower courts' treatment of the issue results in a harmless error, or a lesser issue prevents the Court from reaching it;
- There is a critical gap in the record;

- The Court may decide to wait for a case in which the issue is better developed or briefed; or
- The issue is unlikely to recur because of unique facts.

Elizabeth V. Rodd, *What is Important to the State's Jurisprudence?*, State Bar of Tex. Prof. Dev. Program, Practice Before the Texas Supreme Court ch. 6, p. 4-5 (2003); see also *State of Md. v. Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950) (Frankfurter, J., op. respecting denial of certiorari) (identifying a variety of similarly technical reasons upon which the U.S. Supreme Court may deny certiorari “having nothing to do with the individual Justice’s opinion regarding the merits of the case”).

Likewise, petitions granted may raise a number of issues, any one of which might have prompted an individual Justice to want to review the case. The recently granted cause in 09-0941, *Service Corporation International v. Guerra* serves as a fine example. THE SUPREME COURT OF TEXAS: ORDERS PRONOUNCED OCTOBER 22, 2010, available at <http://www.supreme.courts.state.tx.us/historical/2010/oct/102210.htm> (last visited Oct. 31, 2010) (granting review of No. 13-07-707-CV, 2009 WL 32190940 (Tex. App.—Corpus Christi, Oct. 8, 2009, pet. granted) (mem. op.)). The petitioner’s first point of error in this cause claims the jury’s punitive damages award was tainted by the admission of irrelevant evidence of other lawsuits against the company. Admission of these lawsuits, the company asserts, violates its constitutional due process rights and Texas laws on admission of prior acts. In announcing the Court’s grant, the Court’s staff attorney for public information—who notes in his summaries that he speaks only on his own behalf, not on the Court’s—highlighted the due process issue. Email from Osler McCarthy to Subscriber List (Oct. 22, 2010, 09:50 CST) (on file with the Court). But the petitioners presented several other issues, including whether jury argument that any punitive damages award would be placed in a public trust is erroneous, clarification of the legal and factual sufficiency standards for mental anguish, and whether a broad form jury-instruction was appropriate. Any one of these issues may have been the reason an individual judge voted to hear the case. Disclosing which Justices provided the four votes required to add the case to the Court’s docket offers no insight into which issue or issues those Justices found compelling to Texas’s jurisprudence.

In short, even if docket votes were required to be disclosed, the justification of an individual Justice’s docket vote would remain hidden. And, as explained in further detail below, only the reasoning motivating these votes—not their mere tally—would truly achieve the aims of SB 780.

A. Greater transparency will not be realized by the disclosure of docket votes because the reasons behind such votes would remain opaque

Proponents of publicizing docket votes argue doing so will make the Court's deliberations more transparent. *See Senate Hearing, at 22:14-26:12.* This argument appears to make cursory logical sense: greater disclosure must equal greater transparency. But, as shown above, Justices favor denying review for a myriad of jurisdictional or prudential reasons having nothing to do with the denied case's freestanding merits. And Justices may have differing reasons for agreeing to review a particular case. Without knowing the justifications for docket votes, the Court is no more transparent than it would be without knowing these votes.

Moreover, the substantive work of the Court is already transparent.⁸ The public knows a great deal about how the Court operates because Justices issue opinions divulging their reasoning. Unlike the other branches of government, whose internal deliberations may never be reflected in any public document, all of the business of the court "comes in the front door and leaves by the same door." *Sunshine in the Third Branch, at 564.* Once cases have been argued, Justices draft opinions in support of their decisions, enshrining their relative positions and the logic from which the decision resulted. As former Chief Justice Phillips explained: "The work of lasting importance is in the opinions the court writes, not in the cases it chooses to take or not take. We don't cite that 30 years ago the court refused to take Case X." *Watson Bill.*

FN 8: In fact, transparency has increased significantly in recent years. The public now has access to live webcasts of oral arguments at the Supreme Court, as well as access to all of the briefs filed in each case. *State of the Judiciary; see also ST. MARY'S UNIV. SCHOOL OF LAW: SUPREME COURT WEBCASTS, <http://www.stmarytx.edu/law/index.php?site=supremeCourtWebcasts> (last visited Oct. 25, 2010); THE SUPREME COURT OF TEXAS: SUBMISSION OF ELECTRONIC BRIEFING, <http://www.supreme.courts.state.tx.us/ebriefs/ebriefs.asp> (last visited Oct. 25, 2010).*

B. Disclosing docket votes will not increase accountability, but will increase political mischief

Another justification for revealing an individual Justice's docket votes is that it will increase accountability. *See, e.g., Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 TEX. L. REV. 1307, 1337 (May 1995) [hereinafter Prudential Theory].* Because disclosing docket votes will not increase transparency, doing so likewise cannot increase political accountability

SB 780's bill analysis complained that "secrecy prevents the voting public from holding the Justices accountable for their voting record while in office." SENATE COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 780, 81st Leg., R.S. (2009) [hereinafter *Bill Analysis*]; see also *Senate Hearing*, at 22:14-26:12 (former Justice Gammage relying on this reasoning in support of SB 780). And, in his *Maritime Overseas* dissent, Justice Hecht stated he was advocating disclosure of votes "[t]o ensure *accountability* in our decisions." 977 S.W.2d at 541 (emphasis added).⁹

FN 9: Even though Justice Hecht's opinion excoriates his colleagues for purportedly voting a certain way only because their vote would not be publicly revealed, he makes clear that it is the *explanation* of a Justice's vote that he believes would have caused them to vote differently, not the vote itself. *Maritime Overseas*, 977 S.W.2d at 540-41 (Hecht, J., dissenting from denial of application for writ of error) ("[I]f each of the eight Justices participating in the decision had been constrained to *explain* his or her position publicly, the vote would have been different Confidentiality is intended to facilitate the work of an appellate court, not determine the outcomes of cases. The decision in a case ought never to turn on the fact that individual Justices are not obliged to *explain* their positions [W]hen it allows decisions in cases which would not be made if public *explanations* were required, confidentiality becomes indefensible." (emphasis added)). Accordingly, Justice Hecht's concerns would not be addressed by SB 780.

Intuitively, "accountability provides a wonderfully seductive justification for candor," because it "evokes sentiments of political idealism." *Prudential Theory*, at 1337-38. But—again—without the *reasoning* behind a given docket vote, the public is no more *educated* about a Justice's vote, and, consequently, that Justice is no more *accountable* to the public.

This is particularly true given that—because the internal operating procedures at the Court *automatically* deem a Justice's failure to record a vote on a petition as a vote to deny it—most petitions are denied without a formal vote ever having been taken. *SCOTX Internal Ops*, at 9, 11.

Examples illustrating that the disclosure of docket votes would not provide any increase in accountability are not difficult to find. Take the Court's decision last year to deny review in No. 08-0755, *City of Del Rio v. Clayton Sam Colt Hamilton Trust*. THE SUPREME COURT OF TEXAS: ORDERS PRONOUNCED SEPTEMBER 25, 2009, *available at* <http://www.supreme.courts.state.tx.us/historical/2009/sep/092509.htm> (last visited Oct. 25, 2010). In this case, the century-old "rule of capture" governing withdrawal of

groundwater was at issue. The case appeared to present a fairly attractive set of facts upon which the Court could make its first major pronouncement governing groundwater law since before the turn of the millennium. See Dylan O. Drummond, *Groundwater Ownership in Place: Fact or Fiction?*, in UTCLE, Texas Water Law Institute 19 (2008). So contentious was the case that half a dozen amici submitted briefing to the Court. DOCKET DB: 08-0755, <https://www.docketdb.com/docket/08-0755> (last visited Oct. 6, 2010). The Court's denial surprised many observers. Had the votes to deny been disclosed, the voting public would still have been just as uninformed as to *why* each Justice voted the way he or she did. Therefore, both those seeking to "hold[] the justices accountable for their voting record," see *Bill Analysis*, as well as "potential contributors" attempting to "cast their resources" most favorably, see *Senate Hearing, at 22:14-26:12*, would have been equally frustrated by the mere disclosure of the Justices' docket votes.

Moreover, as Chief Justice Rehnquist cautioned, "the 'public's right to know' . . . is not always coterminous with the public good." *Sunshine in the Third Branch*, at 562. This warning is particularly apt on this issue. As one Texas Supreme Court commentator recognized:

[I]t's easy to see the political value of disclosing individual votes. If this bill passes, then over a six-year term, a typical Justice's exposure to attack ads would go from *dozens* of opinions with their name as author to *thousands* of individual petition dispositions with their name attached. Find a particularly juicy set of facts in a petition denial, run a political ad about how Justice So-and-So voted against it, wash, rinse, repeat.

Don Cruse, *Bill to Open Up the Court's Internal Votes*, SCOTX BLOG (Feb. 23, 2009), <http://www.scotxblog.com/news-and-links/bill-to-open-up-the-courts-internal-votes/> (last visited Oct. 6, 2010) (emphasis added) [hereinafter *Bill to Open Internal Votes*]. It is precisely this political mischief in Texas judicial races that the state needs to eliminate, not facilitate.

C. Disclosure of docket votes will not provide the Bar more significant predictive benefit than is currently available

Yet another reason put forward as to why docket votes should be disclosed is that doing so purportedly will enable the Bar at large to better predict how the Court may act on pending matters. See *Senate Hearing*, at 5:21-8:58; see also *Last Week's Hearing*. Disclosure, proponents speculate, would allow attorneys to better gauge their chances of success on appeal, resulting in fewer appeals and saving both clients and the judiciary time and money. *Id.*

The predictive value in releasing the individual votes leading to docket orders is surely negligible. Again, as detailed above, petitions may be denied for a host of unknowable reasons. Likewise, petitions granted may raise a number of issues. Thus, the disclosure of a docket vote, standing alone, provides no more information to an appellate attorney than does the vote itself. *See Senate Hearing, at 13:33-21:34; see also Sunshine in the Third Branch, at 561* (“With respect to the decisions to grant or deny certiorari, or to summarily affirm or dismiss appeals, the result but not the reasoning is available to the public.”). As such, the much-ballyhooed “wealth of new data” that disclosure of votes supposedly would offer is “far more noise than signal.” *Bill to Open Internal Votes.*

Indeed, the current system already provides much more insight into the amount of interest *which* Justice accords to *which* case. Presently, while opinions dissenting from denial of review are comparatively rare, they provide explicit signals as to which issues an individual Justice or Justices are particularly interested. *See Vote By Any Other Name, at 8, 11-12, 16; On Dissents.* So valuable are these opinions that they may lay out both a prospective jurisprudential roadmap as well as a potential partial vote tally on a given issue. *See Vote By Any Other Name, at 11-12.* For example, in 1986 the Court—with then-Justice Raul A. Gonzalez, Jr. and Justice Hecht in the majority—adopted the reasoning championed by both Justices in a 1994 dissent from the Court’s denial of leave to file a petition for writ of mandamus. *Compare Crown Cent. Petroleum v. Garcia, 904 S.W.2d 125, 127-28 (Tex. 1995) (orig. proceeding), with Monsanto Co. v. May, 889 S.W.2d 274, 276 (Tex. 1994) (orig. proceeding) (Gonzalez, J., joined by Hecht, J., dissenting from denial of leave to file petition for writ of mandamus).* Thus, the system today arguably offers better predictive information to litigants than raw data might. *See On Dissents* (“As an appellate advocate, I would rather have a system in which the Justices can signal that they are *particularly* interested in an issue instead of a raw report of all their ‘yes’ and ‘no’ votes.”).

IV. Public Access at the Texas Supreme Court Is No Less Than at the Legislature

Finally, though not directly related to the merits of any proposal to mandate disclosure of docket votes, a comparison of the public access the Texas Legislature provides the public to its own inner workings with that available at the Texas Supreme Court is illuminating.

Historically, most floor votes in the Texas Legislature were informal voice votes, *i.e.*, “call for the yeas and nays.” *See Enrique Rangel, Lawmakers to Debate Record Vote Legislation, AMARILLO GLOBE NEWS (Apr. 15, 2007), available at http://amarillo.com/stories/041507/new_7312705.shtml.* This practice of passing legislation by an unrecorded vote was much criticized. *See TEXAS LEGISLATIVE COUNCIL,*

ANALYSIS OF PROPOSED CONSTITUTIONAL AMENDMENTS: NOVEMBER 6, 2007 ELECTION 88 (Sept. 2007), available at <http://www.tlc.state.tx.us/pubsconamend/analyses07/analyses07.pdf> (last visited Oct. 29, 2010) [hereinafter *Lege Council Analysis*]. It deprived the public of the right to know how its elected representatives stand on important legislation and thus prevented legislators from being fully accountable to their constituents. *Id.* at 89.

Under significant public pressure, the Legislature finally passed a constitutional amendment in 2007 requiring that a record vote be taken on final passage of most bills. See H.J.R. 19 (amending TEX. CONST. art. 3, § 12). Texans overwhelmingly approved the measure. See, e.g., INITIATIVE & REFERENDUM INSTITUTE, BALLOTWATCH: ELECTION RESULTS 2007 3 (Nov. 13, 2007), available at <http://www.iandrinstute.org/BW%202007-2%20Election%20results.pdf> (last visited Oct. 31, 2010) (noting that Proposition 11—as H.J.R. 19 was presented to the voters—passed by an 85 to 15 margin).

Upon first glance, then, it would appear that the Legislature is demanding no more of the Texas high court than it is of itself. But actual experience proves otherwise. As opponents of the 2007 constitutional amendment noted, many of the most important legislative actions on a bill or resolution take place before the final vote on the measure occurs, as the scope and details of the measure are being debated and developed. *Lege Council Analysis*, at 90. Any rule that does not require the recording of all votes on preliminary approval of a bill deprives citizens of information about the heart of a bill's passage. *Id.* This omission applies equally to procedural decisions that are often critical to the fate of a given bill. *Id.*

Comparing the openness of the two branches is, of course, imperfect on many levels. One witness testifying in favor of SB 780 analogized docket votes on a petition for review in the judicial branch with committee votes on a bill in the legislative branch. See *Senate Hearing* at 8:59-13:25. This analogy, however, is not the most apt one. A significant amount of legislative work—if not the vast majority of the work—is done outside of committees and floor debates in informal conferences that are not announced or open to the public. Indeed, as any legislative insider can attest, what happens in public committee hearings and during floor debate is often the *result* of that behind-the-scenes work, much like the final decisions of the Court—in particular, the Court's opinions—are the *result* of the Court's judicial conference and its attendant docket votes. Here lies the appropriate analogy, if there is one. In both circumstances, it may be argued, the public can evaluate the governmental entity's work product and, with such evaluation, hold accountable the elected official who participated in that work. And, in both circumstances, the governing entity has weighed the public good advanced by disclosure against the institutional costs for disclosure and made the determination—each appropriately doing so for itself—that the limited disclosure provides the public the information it needs to hold the entity accountable.

CONCLUSION

No branch of government operates in *full* sunshine. The public can always demand more access. The policy questions, then, become: Is the public good better served by increased openness? Or are there overpowering institutional justifications for limiting access? See *Sunshine in the Third Branch*, at 570. When it comes to mandating disclosure of docket votes, these questions are easily answered. The harm to the Court's deliberative process and jurisprudence far outweighs any illusory increase in accountability the public might derive from this disclosure.

For all these reasons, the authors urge Senator Watson not to refile SB 780 or similar legislation. Docket votes should remain confidential, as they have always been.

Appendix A

APPENDIX 1

FLOWCHART FOR PETITION FOR REVIEW FILINGS

