IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-51009

PUBLIC CITIZEN, INC.,
GRAY PANTHERS PROJECT FUND,
LARRY DAVES, LARRY J. DOHERTY,
MIKE MARTIN, D.J. POWERS, and
VIRGINIA SCHRAMM,

Appellants,

v.

ELTON BOMER, Secretary of State of Texas,

Appellee.

Appeal from the United States District Court
for the Western District of Texas

BRIEF FOR APPELLANTS
PUBLIC CITIZEN, ET AL.

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November 27, 2000

Public Citizen, Inc., *et al*., v. Bomer, No. 00-51009

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed people have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

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Neither Public Citizen, Inc. nor the Gray Panthers Project Fund, Inc. has a parent corporation or publicly-held stock.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants request oral argument. The issue in this case—whether a systemic challenge to the Texas system for financing the election of state-court judges states a claim under 42 U.S.C. § 1983 for violation of the Due Process Clause—is one of first impression and of considerable importance. Resolution of the issue depends on a proper understanding of Plaintiffs' claim and relevant case law. Oral argument will aid the Court in evaluating the case.

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Appellants,

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Appellee.

Appeal from the United States District Court
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BRIEF FOR APPELLANTS

INTRODUCTION

This case presents a systemic challenge to Texas' system for financing the election of state-court judges. Under that system, a person may contribute up to $5,000 to a candidate's campaign for judicial office for a primary election, another

$5,000 for any runoff, and another $5,000 for the general election; a law firm and its members may contribute $30,000 to a candidate for each election; and a general purpose political committee ("PAC") may contribute up to $300,000 to a single candidate. Judges are permitted personally to solicit contributions from parties and lawyers with cases pending before them. Once elected, judges are not required to recuse themselves from presiding over cases in which the lawyers and/or parties have contributed to their campaigns, no matter how large or how recent the contribution. The complaint alleges that, under these circumstances, the Texas system fails to provide judges who appear to be impartial, as guaranteed by the Due Process Clause of the Fourteenth Amendment.

Plaintiffs are five Texas lawyers and two non-profit organizations, who brought this action on behalf of themselves, their clients, and their members who have litigated and will litigate in Texas courts. Some of the Plaintiffs contribute to judicial elections because they believe that not contributing threatens their clients' access to impartial judges. Others do not contribute either because they cannot afford to make substantial contributions, they are opposed to the Texas system for financing judicial elections, and/or, in the case of the organizational plaintiffs, they are prohibited by law from contributing. In addition, the clients of the lawyer plaintiffs are generally appearing in court for the first time and are often financially unable to contribute.

Plaintiffs all believe that the current system of financing judicial elections creates the appearance, if not the reality, of partiality and impropriety of Texas state judges, to the detriment of the legal profession, the lawyer-plaintiffs' law practices, and their clients' and/or members' interests. The complaint asks for a declaration that the current system is unconstitutional, leaving to the State of Texas the decision of what constitutional system should be adopted in its place.

STATEMENT OF JURISDICTION

This appeal is from an order of the district court granting Defendant-Appellee's motion to dismiss. The district court had jurisdiction under 28 U.S.C. § 1331 and § 1343(3). RE 5 (R 24).[1] The district court's judgment was entered on September 29, 2000, and disposed of all claims of all parties. RE 3 (R 35). Appellants filed this appeal on September 29, 2000. RE 2 (R 34). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether a complaint alleging that a state system for financing the election of judges does not provide judges who appear to be impartial, as required by the Due Process Clause, states a claim for relief under 42 U.S.C. § 1983.

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[1] Documents included in the record excerpts are indicated by "RE," followed by the number of the tab behind which the document appears. Entries on the district court docket sheet are indicated by "R," followed by the entry number.

STATEMENT OF THE CASE

Factual Background

The following factual statement is based on the allegations of the first amended complaint, RE 5 (R. 24), and the evidence cited in Plaintiffs' summary judgment motion (R 9). Although this appeal is from an order granting a motion to dismiss, the summary judgment motion was filed prior to the motion to dismiss and the facts cited in the summary judgment motion were never contradicted by Defendant. Because the facts asserted in the motion for summary judgment bear directly on the crucial question whether Plaintiffs could prove any set of facts to support their claim, this statement includes the most salient of those facts.

Under the Texas Constitution, all state judgeships are elected offices. The nine supreme court justices and the 79 courts of appeals justices serve six-year terms. The approximately 400 judges of the district courts and the 447 judges of the county-level courts (constitutional county courts, county courts at law, and probate courts) serve four-year terms. Tex. Const. art. 5, §§ 2, 6, 7, 15 (terms of office); <<www.courts.state.tx.us/publicinfo/AR98>> (Office of Court Admin. website, visited Apr. 18, 2000) (number of courts as of Sept. 1, 1998).

Any "person" other than labor unions and most corporations may make financial contributions for the election of judges in Texas. Tex. Elec. Code Ann.

§ 253.091, § 253.094 (Vernon 1994 & Supp. 1999). Corporate shareholders, officers, employees, and union members are free to give on their own behalf. Prior to June 16, 1995, when the Judicial Campaign Fairness Act became effective, *see id*. § 253.151 *et seq*., the amount a judicial candidate could accept from any contributor—including a lawyer or other person with a direct interest in a matter pending before a sitting judicial candidate—was unlimited. Since June 1995, a judicial candidate may not accept more than $5,000 from any one person per election for a campaign for statewide judicial office or judicial office in a judicial district where the population exceeds one million. *Id*. § 253.155.[2] If the judicial district population is between 250,000 and one million, the candidate may not accept more than $2,500 from one person per election. *Id*. If the judicial district population is less then 250,000, the limit is $1,000 from one person per election. *Id*.[3]

The contribution limits are calculated separately for each election, not for each election cycle. Thus, a contributor may give $5,000 to a candidate for a seat on the

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[2] To put that amount in perspective, it is five times the amount that any individual may contribute to a candidate for president of the United States. *See* 2 U.S.C. § 441a(1)(A).

[3] Of Texas' 14 court of appeals districts, seven have populations in excess of one million people; and seven have populations of between 250,000 and one million people. *See* <<www.sos.state.tx.us/function/elec1/laws/JudgePopulation97.htm>> (visited Nov. 15, 1999). The populations of Texas' district court districts range from as small as 11,723 to as large as 2,818,199. *Id*.

supreme court for the primary election, $5,000 for any runoff election, and $5,000 for the general election. Tex. Ethics Comm'n Advisory Op. No. 302 (1996). The total amount of contributions that an individual may make to all judicial candidates and PACs combined is not limited.

Texas law establishes separate limits for contributions from law firms and their members. Once the combined contributions of the firm and its members to a single candidate for a single election reach six times the limit imposed on individuals—for example, $30,000 in the case of a statewide judicial office—a candidate may not accept contributions of more than $50 from other members of the firm for that election. *Id*. § 253.157.

Limitations on PAC contributions are calculated differently than limitations on contributions by individuals. The Act sets voluntary expenditure limits for candidates for each judgeship, *id*. § 253.164, § 253.168, and a candidate may accept from PACs a combined total of up to 15 percent of the applicable voluntary expenditure limit. That combined total may come from one PAC or from many. For example, in the case of an election for a statewide judicial office, for which the voluntary expenditure limit is $2,000,000, one or more PACs may contribute a combined total of up to $300,000 per candidate. *Id*. § 253.160.

If a candidate does not abide by the applicable voluntary expenditure limit, the contribution and expenditure limits are suspended for that candidate's opponents. *Id.* § 253.165. Thus, for example, if a challenger chooses not to abide by the voluntary limit, the incumbent candidate may accept unlimited contributions from a person or law firm, even one with a case pending in his or her court.

Contributions by litigants or lawyers to the judicial candidacy of judges before whom they have matters pending are not subject to any additional prohibition or limitation. In fact, as noted in a 1999 report prepared for the Supreme Court of Texas, "nothing in the Act would bar a judge who has accepted an excessive, illegal contribution to preside over a case involving the contributor." R 9 (Appendix Tab K, Exh. 23 at 18).

Judicial candidates may begin solicitation approximately seven months (210 days) before the deadline for filing an application to have one's name placed on the ballot and for approximately four months (120 days) after the last election (primary, runoff, or general) in which the candidate has an opponent. 15 Tex. Elec. Code Ann. § 253.153 (a). The filing deadline is January 2 of the election year. *Id.* § 172.023(a). Thus, a sitting judge may solicit contributions for 21 months (seven months before filing deadline, ten months from deadline through general election, four months after general election) of each four- or six-year term.

Canon 2 of the Texas Code of Judicial Conduct requires each judge to "avoid[] impropriety and the appearance of impropriety in all of the judge's activities." Notwithstanding this general admonition, the Texas Code omits Canon 5(C)(2) of the ABA Model Code of Judicial Conduct, which prohibits candidates from personally soliciting or accepting campaign funds and requires that a campaign committee perform these tasks. As a result, Texas is one of only four states in which judges may personally solicit campaign contributions. R 9 (Appendix Tab K, Exh. 22 at 40-41 n.73). In fact, Canon 4D(1) of the Texas Code of Judicial Conduct expressly permits judges and candidates for judicial office personally to solicit funds for their campaigns for judicial office, with no prohibition or limitation on soliciting from people who have current business before them or who are likely to come before them if they become judges. Although Texas Rule of Civil Procedure 18b and Texas Rule of Appellate Procedure 15a require recusal when a judge's "impartiality might reasonably be questioned," under Texas case law, a judge need not disqualify him or herself from a case where one party or its lawyer has been a contributor to the judge's election campaign, no matter how recent or large that person's contribution, alone or in combination with the contributions of others with similar interests in the outcome of the case. Indeed, motions to recuse a judge based on campaign contributions of

an opposing party or counsel to the campaign of that judge have been, so far as reported cases show, uniformly unsuccessful. *See* cases cited *infra* at 32.

Not surprisingly, individuals and groups with substantial interests in litigation, including lawyers, litigants, and groups with interests in cases pending before the courts, regularly contribute large amounts of money to judges and candidates for judicial office. For example:

• The parties and lawyers involved in the 12 cases heard by the Texas Supreme Court in January 2000 had contributed $788,638 to the nine justices. The parties and lawyers involved in the six cases heard in February 2000 had contributed $826,770 to the justices. R 9 (Appendix Tab K, Exh. 30).

• Lawyers and law firms accounted for 50 percent or more of the contributions received by each of the four supreme court justices who ran in 1998. R 9 (Appendix Tab K, Exh. 31 Part VI at I-2). Business and PAC contributions accounted for another 15 to 17 percent of the money raised by each candidate. *Id*. Three of the justices faced no serious opposition in the primary, and each raised many times the amount raised by his or her general election opponent. *Id*. (Part IV at 2). One justice raised 82 percent of a total $1,153,747 from lawyers, businesses, and PACs and raised 68 times as much money as the general election opponent. *Id*.

- Of the $9.2 million raised by seven supreme court justices during the 1993-94 and the 1995-96 election cycles, contributors closely linked to parties on the court's docket for the period January 1994 through October 1997 gave at least 40 percent. R 9 (Appendix Tab K, Exh. 21 at 9).

The huge amounts of money collected by judicial candidates cannot be dismissed as necessary to pay for the costs of campaigning. In fact, the absence of a strong opponent does not seem to correlate with decreased fundraising. For instance, in the 1997-98 election cycle, three incumbent supreme court justices ran in primaries that were uncontested or practically uncontested (one challenger raised $134). They raised 7.6 to 68 times the amounts raised by their general election opponents, R 9 (Appendix Tab K, Exh. 31, Part IV at 2), and each won easily. *See* <<204.65.104.19/elchist.exe>> (visited March 7, 2000) (results posted by Secretary of State). In the 1995-96 election cycle, the four incumbent justices running for re-election each ran in uncontested primaries and raised between 14 times and 1,425 times what their main general election opponent had to spend. R 9 (Appendix Tab K, Exh. 21 at 25).

The Texas system for financing judicial elections undermines Texans' respect for their judicial system. A 1999 survey conducted by the Texas Office of Court Administration and the State Bar of Texas found that 83 percent of the respondents

believed that campaign contributions have a "very significant" or "somewhat significant" influence on judges' decisions. R 9 (Appendix Tab K, Exh. 23 at 4); *see also id*. (Exh. 9) ("a fair system of justice demands not only a judiciary that is independent but also a judiciary that promotes public confidence in its independence and integrity, and both those requirements are jeopardized by a virtually unrestricted campaign finance system.").[4]

Many Texas judges agree. *See id.* (Exh. 26 at 19) (study prepared by Texas Supreme Court and Texas State Bar in May 1999 found that 48 percent of judges think contributions have significant influence on decisionmaking; only 14 percent think no influence). Chief Justice Phillips and former-Justice, now Attorney General, Cornyn have testified that the "appearance of impropriety" caused by multimillion dollar judicial campaigns is "a cancer" on the state judiciary. *Id.* (Exh. 12). Indeed, Justice Phillips has repeatedly acknowledged that the existing system compromises the appearance of fairness. *See, e.g., id.* (Exh. 24 at 3) (Justice Phillips' March 1999 State of the Judiciary Address)), *id*. (Exh. 13) (quoting Justice Phillips as saying "I do think the system lends itself to eroding public confidence."); *see also id.* (Exh. 10)

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[4] A national survey reported similar findings: "A full 78 percent [of those surveyed] believe that elected judges are influenced by having to raise campaign funds." R 9 (Appendix Tab K, Exh. 27 at 3).

(reporting Judge Carroll's statement that "the current system of judicial campaign finance has led to the appearance of impropriety . . . on the Texas Supreme Court.").

Judges outside the state also recognize the improper appearance created by judges accepting and soliciting contributions from lawyers and parties appearing before them. *See Stretton v. Disciplinary Bd.*, 944 F.2d 137, 145 (3d Cir. 1991) ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court"); *In re Mason*, 916 F.2d 384, 387 (7th Cir. 1990) (noting "difficult case" presented if attorney gave significant financial support to judge's campaign committee while judge presiding over case in which attorney involved).

Lawyers also believe that contributions influence decision-making. A 1999 survey prepared by the Supreme Court of Texas, in conjunction with the Texas State Bar and the Texas Office of Court Administration, showed that 79 percent of Texas lawyers think the influence is "significant." R 9 (Appendix Tab K, Exh. 26 at 54). Only one percent think that contributions do not affect decisionmaking at all. *Id.*

Similarly, newspapers throughout Texas recognize the appearance of impropriety caused by the current system of judicial elections. *See*, *e.g.*, *id*. (Exh. 18) ("In 1987, [then-Justice] Hill told [*60 Minutes*' Mike] Wallace the problem was in

how the court was perceived by the public. 'They look and see amounts of money that have been given by litigants. They wonder why. They get confused. They read stories. It breaks down confidence,' Hill said. Truer words were never spoken."); *id*. (Exh. 16) (under existing system, "danger of corruption and favoritism at all levels of the judiciary is obvious"); *id*. (Exh. 15) ("Judges raising money from lawyers and other parties with an interest before the court raises an appearance of impropriety. Few would disagree."); *id*. (Exh. 14) ("At issue is the system, not the justices themselves. . . . It's time to . . . remove the 'for sale' sign from our Supreme Court.").

Parties

Plaintiffs in this case are five lawyers and two non-profit organizations. Plaintiffs, their clients, and/or their members appear before Texas courts. Some Plaintiffs are lawyers who contribute to judicial campaigns because they feel that they must to ensure that they or their clients receive equal or preferential treatment in the courts. They appear here on behalf of themselves and their clients, most of whom do not or can not contribute significantly to judicial election campaigns. These Plaintiffs believe that the system for financing judicial elections impinges on their clients' right to decisionmakers in the Texas courts who both are impartial and appear to be impartial. RE 5 at 2-5 (R 24).

Other Plaintiffs do not contribute to judicial campaigns, either because they are prohibited from doing so, cannot afford to do so, or are opposed to the Texas system of financing judicial elections. They appear here on behalf of themselves and their clients or members, most of whom do not or can not contribute significantly to judicial election campaigns. Under Texas law, *see infra* p. 32, these Plaintiffs are unable to compel recusal of judges to whom their opponents have contributed. They believe that their inability or refusal to make contributions threatens the access to an impartial decisionmaker in the Texas courts to which they, their clients, and/or their members are entitled. RE 5 at 2-5 (R 24).

Defendant Elton Bomer is sued in his capacity as the Secretary of State of Texas. He is the chief election officer of the state. Tex. Elec. Code Ann. § 31.001. He is charged with delivering the county returns to the governor and tabulating the votes received in each county so that the governor can certify the results for the offices of supreme court justice, court of appeals justice, and district court judge. *Id.* § 67.013(a) & (b).

Procedural History

On April 3, 2000, Plaintiffs filed a complaint in the United States District Court for the Western District of Texas, stating a single cause of action under 42 U.S.C. § 1983. They alleged that the Texas system for financing judicial elections, in

combination with the solicitation rules, the absence of a recusal requirement, relatively short terms of office, and other elements outlined above, violates the Due Process Clause of the Fourteenth Amendment. According to the complaint, the Texas system for financing the election of state-court judges creates a systemic appearance of partiality and impropriety that violates litigants' due process rights. Plaintiffs do not request a specific remedy to correct the system, such as low contribution limits, publicly-financed elections, an appointment system of choosing judges, new recusal rules, or some other option. The only remedies sought are a declaration that the current system violates the Due Process Clause and an injunction preventing that system from continuing to operate until such time as the State of Texas adopts a constitutional system. *See generally* RE 5 (R 24).

On May 5, 2000, Plaintiffs filed a summary judgment motion, and on May 22, 2000, Defendant filed a motion to dismiss. R 9; R 15. The court allowed Defendant 45 days after a decision on the motion to dismiss in which to oppose Plaintiffs' summary judgment motion. R 20. Plaintiffs opposed the motion to dismiss and filed an amended complaint on June 19, 2000, solely to augment the description of the parties. R 24; R 25. Despite the procedural posture of the case, Defendant insisted that discovery go forward throughout the summer, *see* R 19, which it did.

On September 26, 2000, in a brief opinion, the district court granted Defendant's motion to dismiss on two grounds. RE 4 (R. 33). The court stated that, to prove a due process violation, Plaintiffs were required to show that "a judge who receives campaign contributions from parties with active cases in his court or by attorneys who frequently appear before him has a direct personal, substantial, and pecuniary interest in the outcome of their cases." *Id*. at 3. The court held that due process requires disqualification of a judge only in the most extreme circumstances and that the receipt of campaign contributions does not present such a circumstance, even under the facts alleged in the complaint. *Id*. at 3-4.

Alternatively, the district court held that the complaint posed a non-justiciable political question. In their opposition, Plaintiffs had pointed out that the political question doctrine focuses on "the relationship between the judiciary and the coordinate branches of the Federal government, and *not* the federal judiciary's relationship with the *States*." *Baker v. Carr*, 369 U.S. 186, 210 (1962) (emphasis added). Nonetheless, based on its belief that the political question doctrine is "rooted in the concept of federalism protecting the separate spheres of federal and state government," RE 4 at 4 (R 33), the court held the doctrine applicable to this case.[5]

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[5] Defendant also contended that all seven Plaintiffs lacked standing. The court did not address that argument, and neither does this brief. Because Defendant (continued...)

SUMMARY OF ARGUMENT

The Texas system allows any person—including lawyers who regularly appear before the judges, individuals who are frequent parties to judicial proceedings, or special interest political action committees—to contribute thousands of dollars to the campaigns of judicial candidates. RE 5 at 1 (R 24). No judge is precluded from sitting on a case in which a contributor has an interest, regardless of the amount that contributor gave to the judge's campaign or how recently the contribution was made. *Id*. Plaintiffs' complaint is based on the appearance of impropriety inherent in this system. As alleged in the complaint, "recent surveys conducted by the Texas Supreme Court showed that 83 percent of the Texas public, 79 percent of Texas lawyers, and 48 percent of Texas state judges believe that campaign contributions have a significant influence on judicial decisions. Only one percent of lawyers and 14 percent of judges believe that campaign contributions have *no* influence." *Id*.

Plaintiffs' theory of the case challenges the system as a whole. It does not, as Defendant argues, ask whether a particular judge in a particular case should recuse him or herself because of a particular campaign contribution. The system includes

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[5](...continued)
conducted substantial discovery related to standing while the motion to dismiss was pending, the district court should be given the initial opportunity to address the issue on the basis of the complete record.

high contribution limits, personal soliciation by judges of lawyers and parties with cases pending in their courtrooms, and no mechanism for a party to obtain recusal in the Texas courts when the opposing side has made substantial contributions to the judge's campaign. *See id*. ¶¶ 1, 14, 16-21. The complaint alleges that this system creates an unconstitutional appearance of impropriety, widely recognized by Texas state judges, lawyers, and members of the public, in violation of the Due Process Clause.

Plaintiffs' claim does not raise a political question. The political question doctrine forecloses federal court review of issues properly decided by a coequal branch of the *federal* government. Because the political question doctrine does not apply to questions of the constitutionality of *state* law, that doctrine is inapplicable here.

The complaint states a claim for which relief can be granted. In holding to the contrary, the district court failed to apply the strict standard for dismissal under Rule 12(b)(6), which requires denial of a motion to dismiss if the plaintiffs can prove any set of facts in support of the claim that would entitle them to relief. Instead, the court looked to Defendant's theory of the case, which is based on the mistaken view that Plaintiffs' claim alleges that the receipt of campaign contributions requires recusal of judges in individual cases. Plaintiffs' case, however, does not focus on recusal in

individual cases, but on the systemic problems inherent in the Texas scheme for financing judicial elections. Contrary to the conclusion of the district court, the fact that Texas state courts have held that recusal was not required in specific cases in which a judge received campaign contributions from a party or lawyer does not dispose of the due process issue here. Rather, the fact that a majority of judges, lawyers, and the public in Texas think that campaign contributions influence judicial decisions demonstrates a systemic appearance of impropriety that is prohibited by the Due Process Clause.

STANDARD OF REVIEW

The district court's ruling is subject to de novo review. *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5th Cir. 2000) (rulings on dispositive motions reviewed de novo); *Shipp v. McMahon*, 199 F.3d 256, 260 (5th Cir. 2000) (dismissal based on Rule 12(b)(6) reviewed de novo).

ARGUMENT

I. CONSTITUTIONAL PRINCIPLES

Parties to civil cases have a constitutional right to a fair trial. *Latiolais v. Whitley*, 93 F.3d 205, 207 (5th Cir. 1996); *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988). And "[t]rial before an 'unbiased judge' is essential to due process." *Johnson v.*

Mississippi, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (citation omitted). As the Supreme Court has observed:

> The requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. *See Carey v. Piphus*, 435 U.S. 247 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). "[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Concrete Pipe & Prods.*, 508

U.S. at 618 (citing *Marshall v. Jerrico*, 446 U.S. at 243).[6] Whether or not campaign contributions actually affect a judge's conduct in a case, the Due Process Clause forbids even the "possible temptation to the average man as judge" not to be neutral and detached. *Concrete Pipe & Products*, 508 U.S. at 617 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)); *see also Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977) ("The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect."). Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927), the Supreme Court reversed a conviction adjudicated by a town mayor who was paid for his service as a judge from fines he assessed when acting in a judicial capacity, although no showing of actual bias was made.

"[T]he [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). For example, in *Ward v. Village of Monroeville*, the Supreme Court invalidated a scheme whereby a mayor who was responsible for revenue production also adjudicated traffic and ordinance violations. The fines and other money derived from proceedings in the

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[6] *Cf. United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995) (standard for recusal under 28 U.S.C. § 455(a) is whether "reasonable and objective person, knowing all of the facts, would harbor doubts concerning the judge's impartiality"; goal "is to avoid even the appearance of partiality") (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988)).

mayor's court accounted for a substantial portion of the village's revenues, although the mayor's salary was not directly affected by that money. 409 U.S. at 58-59. The Court concluded that "possible temptation" exists "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id*. at 60; *see also Gibson v. Berryhill*, 411 U.S. at 579 (administrative board composed of optometrists could not preside over hearing against competing optometrists); *Marshall v. Jerrico*, 446 U.S. at 243 & n.2 (citing cases); *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

These principles establish the parameters of a cause of action under section 1983 for violation of the Due Process Clause, and Plaintiffs' complaint describes a system that fails to meet the constitutionally minimum standard. Indeed, a 1999 survey prepared by the Texas Supreme Court found that 48 percent of the judges themselves think that contributions have a significant influence on judicial decisionmaking. *See* R 9 (Appendix Tab K, Exh. 26 at 19). Seventy-nine percent of lawyers and 69 percent of court personnel agree. *Id*. at 36 & 54. Only one percent of lawyers, nine percent of court personnel, and 14 percent of judges believe that

campaign contributions have *no* influence. *Id*. at 19, 36, & 54. As these surveys confirm, whether or not judicial decisions in Texas are in fact affected by a party's or lawyer's contribution to the judge's campaign, such contributions inevitably create an appearance that judicial decisionmaking is not impartial and thus violate due process.

II. PLAINTIFFS' DUE PROCESS CLAIM DOES NOT RAISE A POLITICAL QUESTION.

Plaintiffs agree that Texas has the right to decide for itself how to choose its judges. As is true, however, of all matters left to the states—zoning, for example, *see, e.g.*, *FM Props. Operating Co. v. City of Austin*, 93 F.3d 167 (5th Cir. 1996), or public schools, *see, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954)—the state's authority must be exercised in accordance with the United States Constitution, including the Due Process Clause of the Fourteenth Amendment. And "the federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

The district court did not dispute this bedrock tenet of our federal system of government. Similarly, Plaintiffs do not take issue with the district court's statement that "[f]ederal courts should not unduly interfere with the responsibilities of the states to conduct their own elections so long as the Constitutional rights of its citizens are not infringed." *See* RE 4 at 5 (R 33). As the Supreme Court has stated, "it is

normally within the power of the State to regulate procedures under which its laws are carried out. . . ." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). However, when a state's conduct "offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental," it is "subject to prescription under the Due Process Clause." *Id*. Plaintiffs' claim is consistent with these statements, as it is based on the allegation that their constitutional rights are being infringed. Nonetheless, the district court held that the federal courts could not resolve Plaintiffs' claim because the case presented a non-justiciable political question. RE 4 at 4 (R 33).

The political question doctrine arises from "the relationship between the judiciary and the coordinate branches of the *Federal* Government, and not the federal judiciary's relationship to the *States*." *Baker v. Carr*, 369 U.S. 186, 210 (1962) (emphasis added). For example, the Supreme Court has held that cases questioning the duration of hostilities, the validity of federal enactments, the status of Indian tribes, and the federal government's obligation to guarantee the states a republican form of government raise political questions. *Id*. at 213-25. Such cases present "common characteristics" including (1) issues decided by a political branch coequal with the Supreme Court, (2) issues whose resolution by a federal court would risk embarrassment of the government abroad or grave disturbance at home, or (3) issues

that require the federal court to make policy determinations as to which there are no judicially manageable standards. *Id*. at 226.

This case does not present any such issues. Rather, as in *Baker v. Carr*, in which the Supreme Court held that a section 1983 challenge to a state statute reapportioning members of the state assembly did *not* raise a political question, "[t]he question here is the consistency of state action with the federal constitution." *Id*. And nothing in the political question doctrine bars federal court review of allegedly unconstitutional state laws. Thus, the court below erred in stating that the political question doctrine "is rooted in the concept of federalism protecting the separate spheres of federal and state government." RE 4 at 4 (R 33). As *Baker v. Carr* makes clear, the political question doctrine is by definition inapplicable to questions of the constitutionality of state governmental action. *See* 369 U.S. at 210, 216.

Moreover, although "[i]t is correct that this controversy may, in a sense, be termed 'political' . . . the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine." *INS v. Chadha*, 462 U.S. 919, 942-43 (1983). Federal court resolution of a constitutional controversy cannot be "evaded by courts because the issues have political implications." *Id*. at 943.

The district court listed three reasons for its holding that this case presents a political question. None is sufficient to transform the constitutional question presented by the complaint into a political question. First, the court stated that the election of state government officials has historically been a function of state government. RE 4 at 4 (R 33). That statement is true but irrelevant. The federal courts regularly decide cases involving functions traditionally performed by state or local governments when the performance of those functions allegedly violates a federal right. *See*, *e.g.*, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.) (challenge to state university's admissions policy), *cert. denied*, 518 U.S. 1033 (1996); *Bush v. Vera*, 517 U.S. 952 (1996) (challenge to Texas legislature's congressional redistricting); cases cited *supra* at 23.

Second, the court stated that it lacked judicially manageable means of resolving the issue. RE 4 at 4-5 (R 4). However, constitutional challenges to state or local election systems are well within the purview of the federal courts. *See, e.g.*, *Nixon v. Shrink Missouri Government PAC*, __ U.S. __, 120 S. Ct. 897 (2000) (§ 1983 challenge to state limits on contributions to state political candidates). Accordingly, this Court has decided, on their merits, numerous cases challenging aspects of state election systems, including judicial election systems. *See, e.g.*, *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (challenge under § 1983 to use of single-

member districts to elect city council members), *petition for cert. pending*, No. 99-1946 (filed June 5, 2000); *Prejean v. Foster*, 227 F.3d 504 (5th Cir. 2000) (challenge under § 1983 and Voting Rights Act to Louisiana's judicial redistricting); *League of United Latin Am. Citizens v. Clements*, 999 F.3d 831 (5th Cir. 1993) (challenge under Voting Rights Act to Texas' single-district system of electing state trial judges), *cert. denied*, 510 U.S. 1071 (1994).

Third, the court stated that "it is impossible to decide the issue without an initial policy determination calling for non-judicial discretion." RE 4 at 5 (R 33). The court offered no explanation for the assertion, and it is not supportable by reference to the facts and cause of action pled in the complaint. Had Plaintiffs requested the court to order a specific remedy—for example, to impose an appointment system or a public financing system for judicial elections—the court's concern about policy decisions might be apt. However, the complaint does not request the court to impose specific changes to the Texas system as a remedy for the constitutional violation. *See* RE 5 at 9-10 (R 24).

The court's opinion reflects Defendant's argument, presented in the motion to dismiss, that the federal courts are powerless to address constitutional violations by states acting in areas of traditional state concern. That theory would drastically undermine federal constitutional protections by insulating state actors from federal

court review and, indeed, would eviscerate 42 U.S.C. § 1983. Fortunately, a great many federal court cases prove the fallacy of that theory. *See*, *e.g.*, *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897; *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (§ 1983 challenge to city ordinance banning residential signs, on petition for certiorari from Eighth Circuit); *Estelle v. Gamble*, 429 U.S. 97 (1976) (§ 1983 challenge to medical treatment in state prison, on petition for certiorari from Fifth Circuit); *Baker v. Carr*, 369 U.S. at 198-200 (§ 1983 challenge to state statute reapportioning members of state assembly, on appeal from M.D. Tenn.); *id*. at 201-03 (citing Supreme Court cases sustaining federal courts' subject matter jurisdiction over federal constitutional claims regarding state election-related statutes).

Indeed, if accepted, Defendant's political question theory would preclude even the United States Supreme Court from hearing cases on certiorari from state courts. This result is obviously not the law, as *Tumey* and *Ward*—both of which began in state courts—plainly demonstrate. *See also*, *e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 821 (1986) (on certiorari from the Supreme Court of Alabama) (discussed *infra* at 30-31).

Accordingly, the district court's holding that this case presents a non-justiciable political question should be reversed.

III. THE COMPLAINT STATES A CLAIM UNDER SECTION 1983.

Dismissal for failure to state a claim upon which relief can be granted is a disfavored means of disposing of a case. *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d at 365; *Shipp v. McMahon*, 199 F.3d at 260. In considering a motion to dismiss under Rule 12(b)(6), the complaint must be liberally construed in favor of the plaintiff and all facts pleaded in the complaint taken as true. *Id*. (citing *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir.1986)). The district court may not dismiss a complaint under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Plaintiffs, in their complaint and in the summary judgment motion filed prior to the filing of the motion to dismiss, cited a variety of sources to show that judges, lawyers, and the public in Texas believe that judicial decisions are influenced by campaign contributions. For example, the complaint cites a study prepared on behalf of the Supreme Court of Texas and the State Bar of Texas that supports this allegation. RE 5 ¶ 1 (R 24). The summary judgment papers cite statements by the chief justice of the state supreme court, the current state attorney general, and newspapers from around the state to support this allegation. R 9 (Appendix Tab K). Therefore, the court was simply wrong to hold that Plaintiffs could not offer any set of facts to support their claim.

Because the studies and statements presented by Plaintiffs were not contested before the district court, the court must have believed them to be irrelevant. According to the court, the key inquiry was whether a judge who receives a campaign contribution from parties or attorneys appearing before him or her "has a direct personal, substantial and pecuniary interest in the outcome of their cases." RE 4 at 3 (R 33). Citing *Aetna Life Insurance Co.*, 475 U.S. 821, the court stated that due process requires disqualification only in the most "extreme" cases. The court then concluded that Texas' system of campaign contributions to sitting judges and judicial candidates does not create the sort of extreme circumstances necessary to implicate due process. RE 4 at 3-4 (R 33).

The court's approach adopts Defendant's mistaken view that the question in this case is whether the Constitution mandates recusal of judges who have accepted campaign contributions from parties or their counsel. As set forth in the complaint and further explained in Plaintiffs' motion for summary judgment, Plaintiffs' claim is not that due process requires recusal in all cases where the judge has accepted any campaign contribution from interested parties. Rather, this case challenges a *system*, which includes very large financial contributions, solicitations by judges of current and future litigants, and state law that makes recusal based on campaign contributions virtually impossible. A new recusal standard might be one way to fix the

unconstitutional system; it is surely not the only way, nor was it the focus of the complaint before the district court.[7]

Although relied on by the court below, *Aetna Life Insurance* is of no help to Defendant here. In that case, the Supreme Court considered claims that specific judges sitting on a specific case were not impartial. The case below involved the standard for a bad faith claim against an insurance company. At the time that case was decided by the Alabama Supreme Court, one of the state supreme court justices had a class action lawsuit pending against another insurance company, alleging bad faith failure to pay claims. The United States Supreme Court's statement that only in extreme cases do allegations of bias or prejudice require disqualification of a judge was part of its discussion of the facts before it and was not a comment on the viability of a systemic challenge, such as that presented here.

More importantly, through its reaffirmation of the right to an impartial judge, *Aetna Life Insurance* offers further support for Plaintiffs' claim. The opinion reiterates that due process prohibits situations "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Aetna Life Ins.*, 475 U.S. at 822 (ellipsis in original) (quoting *Ward*, 409

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[7] In any event, the Supreme Court has found due process violations based on an appearance of partiality in circumstances arguably far less "extreme" than those presented here. *See, e.g.*, *Ward*, 409 U.S. 57, discussed *supra* at 21.

U.S. at 60). The facts alleged by Plaintiffs show that judges in Texas receive many thousands of dollars in campaign contributions from individuals, law firms, and PACs with interests before the courts. Those facts are more than sufficient to trigger due process concerns over lack of impartiality, as formulated by the Supreme Court in *Aetna Life Insurance* and *Ward*, among other cases. Indeed, in *Aetna Life Insurance*, the judge's interest held to violate due process was the possibility of recovery in a pending lawsuit that, it turned out, amounted to $30,000. *Id.* at 824. Here, the interests are far more significant, quantifiable both in terms of judges attaining and keeping their jobs and in terms of the enormous sums contributed to judicial candidates (totaling millions of dollars to supreme court candidates) each election cycle.

Moreover, as the district court acknowledged, in all of the reported cases involving recusal based on campaign contributions, the Texas courts upheld the lower court judges' refusal to recuse themselves. *See Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. 1999) (no recusal required where judge received "substantial political donations from counsel and from one of the parties"); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) (judge solicited and lawyer contributed while case pending but recusal not required); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106 (Tex. App. 1990) (no recusal where $500 contributed to judge after verdict but

before decision on motion jnov); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 842 (Tex. App. 1987) (no recusal although plaintiff's counsel contributed $10,000 to trial judge soon after filing lawsuit); *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. App. 1984) (no recusal although 21.7% of total campaign contributions of one justice came from appellee's lawyer; 17.1% of contributions to another justice came from appellee); *see also Lueg v. Lueg*, 976 S.W.2d 308 (Tex. App. 1998) (recusal denied where opposing counsel had acted as judge's campaign manager). Thus, the question whether significant campaign contributions are grounds for recusal is essentially a closed question in the Texas state courts. Far from supporting dismissal of Plaintiffs' complaint, as the district court suggested, the absence of any meaningful remedy on a case-by-case basis in state court powerfully illustrates the systemic nature of the problem that this lawsuit seeks to remedy and the need for federal court redress.[8]

The decision below reflects Defendant's suggestion that Plaintiffs' claim can be adjudicated only in the context of a recusal motion brought in an individual state-

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[8] *Shepherdson v. Nigro*, 5 F. Supp. 2d 305 (E.D. Pa. 1998), cited by the court below, is not on point, let alone controlling in this Circuit. The plaintiff in that case brought a section 1983 action for damages against a state-court judge who had refused to recuse himself in a specific case. The plaintiff did not raise and the court did not consider a systemic challenge. Moreover, a claim of an appearance of impropriety, while at the heart of this case, was not mentioned in that opinion.

court case in which a specific contribution to the judge before whom the case is pending is alleged to violate due process. First, that suggestion conflicts with the Supreme Court's decision in *Ward v. City of Monroeville*. There, the petitioner, who had been fined in a mayor's court, made a "broad challenge to the mayor's court . . . in respect to all prosecutions there in which fines may be imposed" on the ground that the mayor was not an impartial judge because of his interest in generating revenue for the city. *Id*. at 61. The Supreme Court found a state statute regarding judicial disqualification an insufficient protection of constitutional rights because it required objections to be made "*in a specific case* where the circumstances in that [jurisdiction] might warrant a finding of *prejudice in that case*." *Id*. (emphasis in original). "If this means that an accused must show special prejudice in his particular case, the statute requires too much and protects too little," the Supreme Court stated. *Id*.

Second, the difference between the case presented here and the state-court challenge posited in Defendant's motion is reflected in the very different evidence that would be used in each. Whereas evidence about the system as a whole is at the heart of Plaintiffs' case here, such evidence would very likely not be admitted in connection with a motion to recuse in a state-court action, where the only issue would be whether the proceeding before that judge in the circumstances of that case violated

due process. Plaintiffs agree that the circumstances of an individual case will often support such a motion, but that theory is not the one that Plaintiffs are raising in this case.

Third, compelling reasons counsel against requiring a client (or a lawyer) to raise these issues in the context of litigating in state court, given the Texas law on recusal and the almost certain adverse reaction that a motion to recuse would bring from the judge hearing the case. In addition, it would be impossible for a state-court litigant to bring the issue to the United States Supreme Court until very late in the case, after entry of a final judgment. *See Jefferson v. City of Tarrant*, 522 U.S. 75 (1997) (U.S. Supreme Court lacks jurisdiction over interlocutory appeal from state court). For all these reasons, the contention that this claim can be brought only in the context of a motion to recuse in a Texas state court case, and not in federal court under section 1983, is erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and this case remanded for further proceedings.

Dated: November 27, 2000 Respectfully submitted,

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