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.

HENRY CUELLAR, Secretary of State of Texas,

Appellee.

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

REPLY BRIEF FOR APPELLANTS PUBLIC CITIZEN, ET AL.

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January 31, 2001

Public Citizen, Inc., *et al*., v. Cueller, 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

Gray Panthers Project Fund, Inc.

Public Citizen, Inc.

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

_____
Allison M. Zieve
Attorney of Record for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Pages

STATUTES

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REPLY BRIEF FOR APPELLANTS

INTRODUCTION

Defendant's brief makes two principal arguments. First, defendant argues that campaign contributions made by a party or a party's counsel to a judge sitting on that party's case can never raise due process concerns, no matter how large the

contribution or when the contribution was made. Second, he argues that such a due process challenge can be raised only in a pending state-court case. As a result, defendant contends, the federal courts are powerless to decide in an action under section 1983 whether Texas' system of financing judicial elections, coupled with the systematic refusal of the Texas courts to require recusal of judges who receive significant contributions from parties and lawyers with cases before them, violates the due process rights of litigants in the Texas state courts.

As support for his first proposition, defendant correctly points out that no Supreme Court or Fifth Circuit case holds that contributions to a judicial campaign result in a due process violation. That point is hardly dispositive. The rationale of the Supreme Court's due process cases is that the Constitution prohibits not only actual impropriety, but also the appearance of it. No case, of course, creates a bright-line exclusion of judicial campaign contributions from the reach of the Due Process Clause, nor would such a line make sense.

Defendant asserts that judicial campaign contributions cannot create an unconstitutional appearance of partiality because the contributions do not go directly into judges' bank accounts. However, as defendant must acknowledge, the money at issue did not go to the judge but to the city's treasury in *Ward v. Monroeville,* 409 U.S. 57 (1972), in which the Supreme Court found a due process violation.

Moreover, as discussed below, the realities of financing judicial campaigns are such that the distinction that defendant draws is wholly untenable, as the contributions clearly inure to the judges' benefit.

Defendant's second theme, which appears in both the merits and the standing portions of his brief, is that this challenge can be brought, if at all, only in state court. Plaintiffs acknowledge that a party to an action in the Texas state courts could move to recuse a judge based on contributions by an opposing party or counsel on the ground that the judge's continued participation in the case violated due process. However, Texas law makes clear that such a motion would be futile. *See* Opening Br. 32. Indeed, under Texas law, such a motion might be considered frivolous. In any event, the issue defendant has raised is whether a challenge in the context of pending state court litigation is the *only* way that the due process claim can be presented.

Although defendant does not use the term, he effectively argues for a form of state court exhaustion, which the Supreme Court has held is not required in section 1983 actions. *See Patsy v. Board of Regents*, 457 U.S. 496 (1982). Exhaustion is particularly inappropriate here because plaintiffs' challenge is not based on one contribution to one judge in one case, but on the widely-held view that money pervasively influences judicial decisionmaking at all levels of the state judiciary. Defendant's case-by-case approach ignores the reality that every time plaintiffs, their

members, or their clients walk into a Texas courtroom, whether as plaintiffs or as defendants, the question arises whether their opponents have an advantage because of their contributions—past or future—to the judge or judges.

Defendant also argues that plaintiffs' claim is not justiciable. Although he refers to the political question doctrine relied on by the district court, he offers no argument to support application of the doctrine here. Instead, he asserts that federalism principles render the due process claim non-justiciable. Defendant's theory, however, would preclude the federal courts from hearing a broad range of section 1983 claims that they routinely have considered and resolved. In addition, because defendant's argument, if accepted, would apply to the United States Supreme Court, as well as to the lower courts, defendant's insistence that this case proceed in state court is little more than a snare since, after that futile exercise, the Supreme Court would be required to decline to consider the claim. Defendant's remaining justiciability arguments address only plaintiffs' request for injunctive relief. Even if valid, those arguments present no reason why the district court could not issue a declaratory judgment that the present system does not satisfy due process.

ARGUMENT

I. THE COMPLAINT STATES A CLAIM UNDER SECTION 1983.

Defendant's argument begins and ends on the same point—that campaign contributions made by a party or lawyer appearing before a judge do not automatically require disqualification of that judge. *See* Def. Br. 11, 25-26. First, plaintiffs have never argued that all contributions, no matter the size, create an appearance of impropriety. Rather, plaintiffs have focused on the size of lawful contributions in Texas, the frequency with which contributions are given to judges by the litigants and lawyers who appear before them, and the circumstances under which they are given, including the timing and the solicitation by judges from parties and their counsel. In the absence of a strict recusal rule, Texas' system of judicial election financing creates an appearance of partiality that violates due process.

Second, defendant characterizes the claim here as one for "mandatory, global recusal," Def. Br. 31, but the relief sought here does not focus on recusal rules. Opening Br. 30. Although the appearance of partiality inherent in the Texas system could be alleviated by recusal rules requiring judges to disqualify themselves from presiding over cases in which they have received significant campaign contributions from interested parties, such rules are not the only means of satisfying due process, nor the means on which this lawsuit focuses. The constitutional violation could be

remedied, for example, by drastically lowering the statutory contribution limits, precluding personal solicitation by judges and judicial candidates, and banning solicitations and contributions by a party or lawyer who has a pending case before a judge or who reasonably anticipates that the judge will be called upon to act in the case. Thus, to the extent that defendant's brief presents an argument against requiring disqualification of judges in circumstances that draw into question whether a judge or judges can be impartial, it argues at the edges of this case.

Defendant's main argument is that contributions to a judge can never provide the basis for a due process violation because the contributions are given to a campaign, not to the judge personally. According to defendant, if, as was true in Texas until 1995, the state placed no limits on contributions to judicial races and if, at the judge's personal request, a party appearing before that judge donated $1 million to the judge's campaign the day before trial started, due process would present no basis for objection.

To support that proposition, defendant claims that cases such as *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), are distinguishable from this case because the underlying decision in *Aetna* directly resulted in a personal monetary benefit to the judge who sat on the case. That distinction fails to make defendant's case, as defendant is simply wrong to suggest that campaign contributions do not

inure to the personal benefit of judges. First, the donations at issue here may make the difference between a judge keeping (or obtaining) his or her job and losing it. Second, Texas law places no limit on a judicial candidate's use of contributions to repay bank loans for which the candidate is personally liable. Texas Ethics Comm'n, Ethics Advisory Op. 389 (Jan. 1998). When the contributors whose donations repaid those personal debts appear in the judge's courtroom, the judge's "direct, personal, substantial, pecuniary interest[s]," Def. Br. 11 (citing *Aetna*, 475 U.S. at 821-22), surely are implicated. Third, if the candidate does not receive contributions, he or she would have to spend personal funds to be able to mount the expensive campaigns typical of Texas judicial elections. In this way, the contributors save the candidates from spending their own money.

Moroever, defendant's theory fails to account for the Supreme Court's decision in *Ward v. City of Monroeville*, 409 U.S. 57 (1972). As discussed in plaintiffs' opening brief, in *Ward* the Court found a due process violation based on the fact that the mayor, who assessed fines in a mayor's court, had an interest in generating revenue for the city, although the fines collected did not personally benefit mayor. *Id.* at 61. The personal interest of state-court judges in Texas—where contributions affect judges' ability to obtain and keep their jobs and affect their personal

finances—is indisputably greater and more direct here than the interest of Monroeville's mayor in the fines he assessed.

Defendant cites *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1052 (5th Cir. 1997), and *Baran v. Port of Beaumont Navigation District*, 57 F.3d 436 (5th Cir. 1995), for the proposition that due process is not implicated absent a "direct, personal, substantial pecuniary interest." Def. Br. 14-15. Although defendant wrongly suggests that those cases stand for the proposition that due process cannot be implicated in other situations as well, *see Baran*, 57 F.3d at 444 ("Such situations include . . ."), as explained above, plaintiffs' claim meets the standard stated by defendant—Texas judges do have a "direct, personal, substantial pecuniary interest" in obtaining campaign contributions. Of further significance here, those cases reiterate that the law does not prohibit only actual bias, but also seeks to prevent "even the probability of unfairness." *Id*.; *Valley*, 118 F.3d at 1053.

In addition, defendant never comes to grips with, indeed, never mentions, the evidence (RE 5 at ¶ (R 24) (First Amended Complaint)) that a majority of judges, lawyers, court personnel, and members of the public surveyed believed that campaign contributions influence decisionmaking. *See* R 9 (Appendix Tab K, Exhs. 23 & 26). Indeed, the Chief Justice of the Texas Supreme Court has repeatedly acknowledged the appearance of impropriety in the current financing system. *See* Opening Br. at 11

(citing record). In the face of such evidence, defendant's claim that the Constitution does not recognize an appearance of partiality unless the facts present a direct trail of money into a judge's wallet must fail.[1]

Finding no solace in the Supreme Court's jurisprudence, defendant turns to dicta in a district court decision from a different circuit, *Shepherdson v. Nigro*, 5 F. Supp. 2d 305 (E.D. Pa. 1998). The plaintiff in *Shepherdson* alleged that the judge who had presided over a prior state-court case, which the plaintiff had lost on summary judgment, should have recused himself because opposing counsel had donated more than $21,000 to the judge's campaign in the months prior to his decision in the case. The plaintiff did not raise the issue in the state-court proceeding. Instead, she filed a federal court action under section 1983 seeking money damages from the state-court judge. Dismissing the claim, the court rejected the notion that

[1] Defendant contends that evidence submitted in connection with plaintiffs' summary judgment motion should not be considered on this appeal from the district court's decision to grant a Rule 12(b)(6) motion to dismiss. In granting that motion, the court found that plaintiffs could not prevail because it "appear[s] to a certainty that the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief." RE 4 at 2 (R 33). Given this standard, the set of facts that plaintiffs would use in support of their claim is necessarily relevant to the determination of whether the court properly granted the motion to dismiss. Moreover, if the Court believes that the evidence should have appeared in the complaint, the Court could allow plaintiffs to amend their complaint to add such detail.

a state-court litigant who is denied an impartial tribunal has an independent claim under section 1983 for money damages against a judge. *Id.* at 308.

The district court in *Shepherdson*, discussing the question of whether due process requires recusal of a state-court judge who accepts campaign contributions from an attorney appearing before him, interpreted *Aetna* to require that the judge have a personal interest in the outcome of the plaintiff's initial lawsuit. *Id.* at 310. In fact, although *Aetna* presented those facts, the analysis and holding in that case do not establish such a requirement for all due process challenges. A judge's personal interest in the outcome of a lawsuit can take many forms. For example, the adjudicator may have an interest in the financial well-being of his or her jurisdiction, *see Ward*, 409 U.S. at 61, or in eliminating competition. *See Gibson v. Berryhill*, 411 U.S. 564 (1973); *see also In re Murchison*, 349 U.S. 133, 138-39 (1955) (due process violated where judge also acted as grand juror). The principle behind all these cases, from which *Aetna* derives, is that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). To the extent that *Shepherdson* (or the unpublished Southern District of Ohio case cited by defendant, *Georgeadis v. County of Franklin*), suggests that the principle does not apply to contributions to judicial election campaigns, it is mistaken.

Defendant also points to *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990), for the proposition that a "financial connection between the judge and a party . . . does not raise due process concerns." Def. Br. 14. In *Couch*, the defendant moved to vacate his conviction and sentence on the ground that the trial judge had invested in an unsuccessful oil drilling venture with the *defendant* and that he shared leasehold rights with the *defendant's* children in an oil and gas lease.[2] The question on appeal was whether the conviction and sentence should be vacated because the judge had not disqualified himself. The court found no due process violation on the facts of the case, and its statement that public perception did not rise to constitutional proportions was made in the context of considering those specific facts. *Id*. at 82 ("Turning now to the case at bar . . .").

Finally, defendant suggests that plaintiffs' claim is not viable because it assumes that Texas judges will not follow state recusal law. Def. Br. 25. That approach hardly supports defendant, since state recusal law makes clear that judges are not required to recuse themselves based on the campaign contributions they have received from parties and counsel appearing before them. *See* Opening Br. 32-33.

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[2] A judge later assigned to the case found that there had been no actual bias, that the defendant had known of the situation prior to trial, and that the defendant had received a fair trial. He nonetheless vacated the sentence and resentenced the defendant to avoid the appearance of impropriety. 896 F.2d at 79-80.

Moreover, to the extent that defendant is arguing that plaintiffs must first exhaust their claim in state court, his argument is incorrect. *See Patsy v. Board of Regents*, 457 U.S. 496 (1982) (section 1983 does not require state-court exhaustion).

II. PLAINTIFFS HAVE STANDING TO BRING THIS DUE PROCESS CHALLENGE.

In various places, defendant's brief argues that the due process claim presented here can be adjudicated only through a motion made by a party to a state-court case in which the judge has accepted contributions from the other side or its lawyers. In Part IV, his brief makes that argument under the rubric of lack of standing. He argues that the two organizational plaintiffs have no standing because neither they nor their members have any cases in state court in which allegedly improper contributions have been made, and that the five lawyer plaintiffs have no interest of their own and cannot represent the interests of their clients who might have such a claim (which in any event they would have to raise in state court). This argument should be rejected because this section 1982 challenge is properly brought by these seven plaintiffs.

The organizational plaintiff Public Citizen sues on its own behalf, as a litigant in Texas state courts, and on behalf of its members, approximately 4,700 of whom reside in Texas. The Gray Panthers Project Fund sues on behalf of its approximately 655 Texas members. And the five lawyers sue on behalf of themselves and their

clients, the majority of whom are not repeat players in the state courts and, like the lawyers themselves, do not have the financial resources to compete in terms of contributions with the law firms and parties against whom they litigate. Each of these seven plaintiffs has standing.[3]

A. Public Citizen has standing to sue on its own behalf. The complaint alleges that Public Citizen has been and will in the future be a litigant in Texas state courts and that it cannot lawfully contribute to judicial election campaigns. As a litigant in the state courts, Public Citizen has a right to a "neutral and detached judge in the first instance," *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993), one that is not subject to the "temptation . . . not to hold the balance nice, clear, and true." *Ward,* 409 U.S. at 60. Yet every time Public Citizen appears in state court, it knows for a certainty that its adversary has a greater capacity to support the judge's reelection efforts than it does. Given the system for financing judicial elections—coupled with the fact that a majority of Texas judges, lawyers, and others believe that campaign contributions affect judges' decisionmaking, *see* R 9

[3] "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

(Appendix Tab K, Exh. 26)—Public Citizen believes an appearance of partiality exists in each case in which it appears.

Furthermore, this Court may consider the challenge raised here without direct proof of specific harm because the wrong alleged is "structural." In cases involving structural injury, such as separation of powers issues raised in Appointments Clause cases, "it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss." *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 1999). Accordingly, in such cases, no direct proof of injury is required. *See, e.g.*, *Freytag v. Commissioner*, 501 U.S. 868 (1991); *Tumey v. Ohio*, 273 U.S. 510 (1927); *see also Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (harmless-error analysis does not apply where proceedings contain "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself"). The injury alleged in this suit is of a similar sort. For an individual plaintiff to prove that a judge's decision, whether at the trial or appellate level, would have been different but for the campaign contributions of the opposing party and/or counsel will almost always be impossible.

Defendant seeks to dismiss this line of cases on the ground that the cases do not address "standing." First, defendant states that plaintiffs cannot rely on these cases because they have no claim. Def. Br. 38. In this way, defendant uses his assumption

that plaintiffs have not stated a claim as an argument against standing. But asserting that plaintiffs have no standing because they have no claim is not argument, but a means of sidestepping the standing issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998) (standing is jurisidictional issue, "not defeated . . . by the possibility that the averments might fail to state a cause of action").

Second, defendant argues that the cases addressing structural injury are inapplicable here because they are harmless error cases, not standing cases. This approach allows defendant to avoid addressing the standing issue head-on; as a result, defendant never in fact responds substantively to plaintiffs' argument. Moreover, contrary to defendant's suggestion, the fact that the Supreme Court in *Tumey* and *Ward* did not address standing supports plaintiffs here. In *Tumey* and *Ward*, the Court did not require the moving party to show that, but for the judge's financial interest, he would have prevailed. *See also Metropolitan Area Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991) (plaintiffs have standing to attack structural separation of powers defect in congressional review board without showing that particular issue had been decided adversely to them). As in those cases, the "structural" injury here is so fundamental as to deprive state-court litigants, such as Public Citizen, of the appearance, if not the reality, of impartial

decisionmakers in Texas courts. Public Citizen may therefore raise that challenge without pointing to a specific instance in which its rights were violated.

B. The two organizational plaintiffs also have standing on behalf of their members because "(a) [their] members would otherwise have standing to sue in their own right, (b) the interests [the organizations] seek to protect are germane to [each] organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

As to the first prong, the complaint alleges that the organizations have members who litigate in state court, that some of their members do not or cannot afford to contribute to judicial election campaigns, and that those members believe that the current system creates an appearance that the judiciary is not impartial. RE 5 at ¶¶ 1, 3-5, 23 (R 24). Under Texas' system for financing judicial elections, this appearance of bias is present in every case, even cases before judges who ran unopposed or were appointed, since they too may accept "campaign" contributions. *See* Tex. Elec. Code Ann. § 253.1541. Defendant seems to concede this prong, as his theory is that the individuals themselves should be the ones to challenge the Texas system. Def. B. 37, 41, 43. Thus, the organizations meet the first *Hunt* prong.

As to the second prong, defendant does not contest that the interests the organizations seek to protect are germane to each organization's purpose. The complaint adequately pleads this element. *See* RE 5 at 3, 5 (R 24).

The third *Hunt* prong is also satisfied. In fact, plaintiffs have already moved for summary judgment without the need for involvement of individual members. *See* R 9. Although defendant asserts that individuals' participation is required, he makes no attempt to demonstrate why that is so, aside from his refrain that the claim can be adjudicated, if at all, only through a motion in a pending state-court lawsuit.

Defendant's reliance on *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982), for the proposition that an individual's participation is required for assertion of due process claims seeking recusal, is misplaced. Def. Br. 41. In *O'Hair*, this Court found that the organizational plaintiff did not have standing to raise claims related to one member's challenge to court proceedings brought against her specifically and to her related individual claims. *Id.* at 692. More pertinent here, however, the Court found that the organizational plaintiff *did* have standing to seek redress for the alleged violation of its members' voting rights. *Id*. at 691-92.

C. As to the lawyer plaintiffs, the complaint alleges that their clients as a group litigate in state court and do not or cannot contribute significantly to the election of judges. RE 5 at ¶¶ 6-10 (R 24). Even where the opposing party and counsel have

made substantial contributions to the presiding judge, Texas law makes recusal on such grounds virtually impossible. Therefore, the clients as a group are forced to litigate in circumstances where judges appear to lack impartiality, where the "possible temptation to the average man as judge" not to be neutral and detached, *Concrete Pipe & Prods.*, 508 U.S. at 617 (quoting *Ward.* 409 U.S. at 60), is so strong that not even the judges themselves deny it. RE 5 at ¶ 1 (R 24); *see also* R 9 (Appendix Tab K, Exh. 24 at 3) (Chief Justice Phillips' March 1999 State of the Judiciary Address).

Defendant argues that, if clients' due process rights to a decisionmaker that both is and appears to be impartial are violated, the clients themselves must raise that claim in the state-court cases in which the judges' impartiality was called into question by campaign contributions made by the opposing side. However, like the physician plaintiffs in *Singleton v. Wulff*, 428 U.S. 106, 112-18 (1976), and *Doe v. Bolton*, 410 U.S. 179 (1973), although the constitutionally protected right at issue belongs to the clients, the lawyers are appropriate plaintiffs. *See also Secretary of State of Maryland v. J.H. Munson Co*., 467 U.S. 947, 956 (1984) (fundraiser may assert rights of clients). As these Supreme Court cases recognize, third party standing is proper "[w]here practical obstacles prevent a party from asserting rights on behalf of itself." *Id*.

In *Singleton*, for example, doctors had standing to sue to assert a woman's right to an abortion. The Court found that women may be chilled from asserting their own rights by the desire to protect the privacy of the abortion decision. The Court also noted the imminent mootness of any claim, since after a few months, the woman's right to an abortion would effectively be lost. Although these obstacles were not insurmountable, the Court nonetheless found "little loss in terms of effective advocacy from allowing" a physician to assert the women's rights. 428 U.S. at 117-18.

Similarly here, properly-advised clients with cases pending in state court will be extremely reluctant to challenge the Texas system for financing judicial elections in their pending state court cases because of the wholly justified fear of alienating the judges in those cases by accusing them of appearing to be partial. Although judges are sworn to uphold the law, even when a party questions their impartiality, the possibility that judges' will be swayed or appear to be swayed by facts outside of the merits of a case is at the heart of this challenge. *Cf. J.H. Munson Co*., 467 U.S. at 796 (third party has standing to bring First Amendment challenge because existence of unconstitutional statute chills speech of potential plaintiffs).

Insofar as defendant's theory is that standing requires a plaintiff to have a pending case in state court to bring a systemic challenge under section 1983, the

position of the clients is similar to that of the pregnant women in *Singleton*—any single client with standing today might find his or her due process challenge moot tomorrow, when the underlying case is resolved, particularly because the clients at issue generally are not repeat players in the state courts. RE 5 at ¶¶ 6-8 (R 24). *See also Singleton*, 428 U.S. at 112-18; *Doe v. Bolton*, 410 U.S. at 188; *Eisenstadt v. Baird*, 410 U.S. 438, 443-46 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510, 535-36 (1925). Finally, as in *Singleton*, there will be "little [if any] loss in terms of effective advocacy from allowing" these lawyers to assert their clients' rights.

Defendant contends that the lawyer plaintiffs nonetheless lack standing because injury in fact is a prerequisite to asserting third-party rights. Again, defendant is conflating its merits argument with its standing argument. These plaintiffs have alleged that their clients suffer injury in fact. Whether that injury violates due process is a merits question, not a basis for rejecting plaintiffs' standing. Moreover, defendant wrongly places a bright-line restriction on lawyers' standing to sue on behalf of their clients. Thus, he suggests that lawyers have such standing only when clients' ability to enter into a relationship with the lawyer plaintiffs is impaired by the alleged wrong. Def. Br. 44 (citing *Department of Labor v. Triplett*, 494 U.S. 715 (1990)). The cases on which defendant relies, however, do not state such a limitation.

In any event, because defendant's discovery in this case revealed that several of the lawyer plaintiffs represent clients on a contingency fee basis, *see also* RE 5 at ¶¶ 6-9 (R 24), these plaintiffs have their own property interest in their clients' cases. Moreover, the clients' perceptions about the partiality of the judiciary may affect their willingness to bring cases at all, as well as their willingness to hire the lawyer plaintiffs who do not contribute to judicial election campaigns. *See id*. ¶¶ 6-7, 9. In this way, the widely-held view that judicial decisions are influenced by campaign contributions affects the ability of these lawyer plaintiffs to enter into attorney-client relationships and earn fees for their work in representing those clients. The loss of those relationships is an injury in fact suffered by these lawyer plaintiffs, if such an injury is required. To be sure, the injury is of a different kind than the injury suffered by the clients, but that fact was true in the abortion cases brought by doctors. Like the doctors, the claims of these lawyers will not become moot so long as the current system is in place. *See also J.H. Munson Co. v. Secretary of State of Maryland*, 448 A.2d 935, 941 (Md. 1982) ("[W]here a statute is directed at persons with whom the plaintiff has a business or professional relationship, and impairs the plaintiff in that relationship, plaintiff normally is accorded standing to challenge the validity of the statute") (citing *Craig v. Boren*, 429 U.S. 190, 194-97 (1976)), *aff'd* 467 U.S. 947 (1984).

Accordingly, plaintiffs have standing to bring this action.

III. PLAINTIFFS' DUE PROCESS CLAIM IS JUSTICIABLE.

Glossing over the fact that the political question doctrine applies only to issues properly decided by a coequal branch of the *federal* government, *see Baker v. Carr*, 369 U.S. 186, 210 (1962), defendant asks this Court to hold that this case presents a non-justiciable political question. Def. Br. 28, 32. Tellingly, defendant offers no argument that the doctrine is applicable here. Instead, defendant argues that principles of federalism require dismissal of this case. However, defendant fails to distinguish the facts presented here from those of other section 1983 cases, and in particular the many cases cited in plaintiffs' opening brief. Put simply, principles of federalism no more require dismissal of this case than of any section 1983 case.

A. Defendant's argument is essentially that states have the right to choose how to fill judgeships and that judicial review of that choice is foreclosed. Defendant asserts that any federal-court challenge to a state-law system within an area of historic state concern constitutes an "affront to Texas's sovereignty." Def. Br. 29. That suggestion is so broad that, if accepted, it would effectively eliminate all constitutional challenges in areas such as reapportionment, thereby overruling *Baker v. Carr* and numerous other cases. Defendant's only response is that the state has not violated the Constitution under the facts presented here. Again, defendant's response

assumes that he will prevail on the merits of the case and is not relevant on the question of justiciability.

Plaintiffs agree that the method of selection of state government officials is a historic function of state government. That fact, however, does not lead to defendant's conclusion that "federal courts ordinarily should not decide cases of the sort at issue" here. Def. Br. 27-28. Section 1983 is directed precisely at cases of this sort—cases in which state action is alleged to infringe on individuals' federal constitutional rights. Thus, defendant has no answer to the schooling, zoning, prison reform, and other section 1983 cases cited by plaintiffs, in each of which a federal court reviewed allegedly unconstitutional state action in an area of traditional state concern. *See* Opening Br. at 23, 26, 27-28.

As defendant states, "it is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle so rooted in the traditions and conscience of our people as to be ranked as fundamental." Def. Br. 31 (quoting *Aetna,* 475 U.S. at 821). Again, plaintiffs agree. And the fundamental principle of justice at stake here, protected by the Due Process Clause, is the right to a decisionmaker that both is and appears to be impartial. *See Offutt*, 348 U.S. at 14 ("justice must satisfy the appearance of justice"); *United States*

v. Brown, 539 F.2d 467, 469 (5th Cir. 1976) ("For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality.") (citation omitted); *see also Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137, 142 (3d Cir. 1991) ("The fact that a state chooses to select its judges by popular election . . . does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly."). Plaintiffs do not contest that Texas has a right to select the method by which it chooses its judges. However, if it chooses to elect them, it must employ a means of election financing that assures that judges are not so tainted by their campaign contributions that they appear to be biased, whether or not they in fact are partial to their contributors.

Thus, defendant is wrong to equate the state election procedures discussed in *Holley v. Askew,* 583 F.2d 728 (5th Cir. 1978), with the question at issue here. In *Holley*, this Court addressed limitations on federal court review of challenges to state regulation of election procedures, such as balloting methods and accessibility of the polls. *See id.* at 730; s*ee also Duncan v. Polythress*, 657 F.2d 691, 701-02 (5th Cir. Unit B 1981) (distinguishing cases that rejected section 1983 claims challenging conduct of elections from cases that accepted claims challenging integrity of electoral process). Here, plaintiffs are *not* challenging election procedures; for example, they

neither assert that the ballots were tainted or miscounted, nor question the administration of an election, let alone Texas' decision to elect its judges. The claim here, although related to judicial elections, does not challenge the election process; it challenges the rules of financing the elections and the consequences of those rules. *Cf. Nixon v. Shrink Missouri Gov't PAC*, _ U.S. __, 120 S. Ct. 897 (2000) (election-related challenge); *Buckley v. Valeo*, 424 U.S. 1 (1976) (same). In fact, the injury alleged is experienced through the judicial system—not the election system. Thus, the limitation on judicial intervention into state elections stated in *Holley* is beside the point.

Moreover, neither *Holley* nor *Duncan* questions the propriety of section 1983 actions; neither questions the principle that state action is subject to federal court review where that action allegedly violates federal constitutional rights. Thus, the court in *Holley* did not dismiss that case as non-justiciable but decided it on the merits. 583 F.2d at 729 (rejecting 14th amendment challenge to Florida law providing for merit retention of state judges). Similarly, in *Duncan,* the court reached the merits of a section 1983 due process challenge to the appointment of a judge to a state supreme court vacancy allegedly in violation of state law procedures. *Duncan*, 657 F.2d at 708. *See also Morial v. Judiciary Comm'n*, 565 F.2d 295, 298 (5th Cir. 1977) (federalism principles do not bar federal court from protecting federal rights

from invasion by state officials). Accordingly, *Holley* and *Duncan* are relevant here, if at all, in that they confirm that federal courts can and should consider section 1983 challenges to state action within areas of traditional state authority where those actions are alleged to violate federal constitutional rights.

B. Looking to one consideration underlying the political question doctrine, defendant asserts that the court below lacked judicially manageable standards to adjudicate plaintiffs' claim. Def. Br. 32. Defendant further argues that the remedy requested would require the court to exercise non-judicial discretion by allowing it to review the legislature's new plan and allowing the court to issue orders to effectuate a remedy. Def. Br. 33. Again, defendant is mistaken.

As in *Tumey*, *Ward*, *Aetna*, and other cases cited in plaintiffs' opening brief, *see* Opening Br. at 20-22, the standard is whether the current adjudicatory system results in decisionmakers who are and appear to be impartial. The systemic nature of plaintiffs' claim does not alter this standard, although it affects the type of proof plaintiffs must present. That is, the proof here cannot focus on the facts presented in one particular case but must establish that the appearance of partiality is pervasive. Citing the huge amounts of money donated to Supreme Court candidates and the perceptions of judges, lawyers, the public, and the media regarding the influence of contributions on judicial decisionmaking, among other evidence, *see* R 9 (Appendix

Tabs A-K), plaintiffs have presented sufficient evidence to enable the court to apply this standard.

Furthermore, even if the proper focus were the remedy sought, plaintiffs' summary judgment motion sought only declaratory relief as to the legality of the system, *see* R.9, which defendant cannot seriously argue would require the court to exceed the proper bounds of judicial discretion. Moreover, the injunctive relief requested would not require a federal court to engage in the kind of legislative activity that defendant's brief suggests. Plaintiffs' complaint asks the district court to enjoin defendant, the Secretary of State, from delivering the county returns to the governor and from tabulating for each judicial candidate the number of votes received, for any election for judicial office held after January 1, 2001, unless a constitutional system is in place. RE 5 at 9 (R 24). Defendant is correct that, if plaintiffs prevail in the lawsuit, the district court would be called on to review whatever new system the legislature enacted. That result, however, is hardly novel. Indeed, in a wide range of section 1983 cases, the federal courts have reviewed the constitutionality of remedies, and even participated in fashioning remedies, following their own determinations that a prior state or local law or practice was

unconstitutional.[4] If, in reviewing a state plan adopted in response to this lawsuit, the district court overstepped its authority, defendant could certainly raise federalism concerns at that time. *See Missouri v, Jenkins*, 495 U.S. 33, 51 (1990) (in school desegregation case, district court exceeded authority by imposing specific remedy without first giving local government opportunity to devise its own). At this stage, however, there is no reason to assume that the lower court will not respect the limitations on its authority conferred by the Constitution, as it exercises the right of oversight granted to it by Article III and section 1983. [5]

Judicial review of allegedly unconstitutional state action is neither a political question nor a threat to states' rights. The federal courts regularly exercise

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[4] *See*, *e.g.*, *Bush v. Vera*, 933 F. Supp. 1341, 1352 (S.D. Tex. 1996) (congressional districts drawn by court to be used as interim measure until legislature adopts new districting plan); *Bush v. Vera*, 980 F. Supp. 251, 253 (S.D. Tex. 1997) (state to continue to use court's redistricting plan for 1998 and 2000 election cycles); *Coleman v. Wilson*, 912 F. Supp. 1282, 1323 (E.D. Cal. 1995) (special master to oversee state's compliance with remedial tasks required by magistrate judge's recommendations and to advise court regarding issues relevant to court's assessment of defendants' compliance with constitutional obligations in regard to treatment of mentally ill prisoners); *Brown v. Board of Educ.*, 349 U.S. (1955) (lower courts to retain jurisdiction during remedy stage to fashion and effectuate school desegregation decrees).

[5] Defendant suggests that the fact that plaintiffs have not asked the court to impose a specific system "is part of the problem." Def. Br. 33. Surely, it cannot be that the court could properly choose a plan for the state, but cannot take the lesser step of reviewing the constitutionality of the plan the state itself chooses to adopt.

jurisdiction over such cases. Accordingly, defendant's contentions that this Court, or any court, including the United States Supreme Court, cannot decide the due process issue presented by this case should be rejected.

CONCLUSION

For the foregoing reasons and the reasons stated in Appellants' opening brief, the judgment of the district court should be reversed and this case remanded for further proceedings.

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Respectfully submitted,

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