UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PUBLIC CITIZEN, INC., *et al*.,	)	
	)	
Plaintiffs,	)	Civil No. A-00-CA-218 JRN
	)	
v.	)	
	)	
ELTON BOMER, Secretary of State,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Public Citizen, Inc., the Gray Panthers Project Fund, Larry Daves, Larry J. Doherty, Mike Martin, D.J. Powers, and Virginia Schramm hereby move for summary judgment and request a declaration that Texas' current system for financing judicial elections violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs do not seek an injunction at this time but may do so if a constitutional system is not in place prior to the next election cycle. The basis for this motion is stated below and supported by the summary of facts, declarations, and exhibits in the Appendix in Support of Plaintiffs' Motion for Summary Judgment, filed herewith.

INTRODUCTION

This action challenges the system for financing elections for judgeships in the State of Texas. Under that system, any individual may contribute to a candidate's campaign for judicial office up to $5,000 for a primary election, another $5,000 for any runoff, and another $5,000 for the general election. And the individual may do so for as many candidates as he or she chooses. A law firm and its members may contribute $30,000 to a candidate for each election, and a political action

committee ("PAC") may contribute up to $300,000. Judges are permitted personally to solicit contributions. Once elected, judges are not required or even encouraged to recuse themselves from presiding over cases in which the lawyers and/or parties contributed to their campaigns or where the particular interests of a PAC that has made a large contribution are at issue.[1]

Under these circumstances, the campaign financing system for Texas judgeships fails to provide non-contributing parties tribunals that are fair and impartial, in appearance and in fact. Indeed, nearly one-half of Texas *judges* agree, as they themselves think that campaign contributions influence judicial decisionmaking. Moreover, because judges must raise money both to obtain their seats and to hold on to them, no judge can break free of the appearance of being beholden to contributors. Because the Texas system lacks in appearance, and perhaps in fact, the neutrality and impartiality required by the United States Constitution, it violates the Due Process Clause of the Fourteenth Amendment.

Since proof of actual bias is almost impossible to obtain other than in specific cases, this case focusses on the *appearance* of impropriety. Although plaintiffs believe that some judges do in fact favor contributors, they concede that they cannot make such a showing on a system-wide basis. Accordingly, they concede that their claim fails if the Constitution requires proof of actual bias.

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[1] The same election system is used to select judges who sit on criminal cases. Although similar questions about impropriety are present in the context of those cases, the evidence in this lawsuit focusses on judges hearing civil cases.

ARGUMENT

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 & Products 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 (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 & Products*, 508 U.S. at 618 (citing *Marshall v. Jerrico*, 446 U.S. at 243).[2]

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[2] *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") (continued...)

Whether or not a judge allows campaign contributions to affect his or her treatment of 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, for example, in *Tumey v. Ohio*, 273 U.S. 510 (1927), the Supreme Court reversed a conviction adjudicated by a town mayor who received payment of fees and costs from fines he assessed when acting in a judicial capacity, although no showing of actual bias was made.

Furthermore, "the [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 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 in private practice could not preside over hearing against competing optometrists employed by business corporations); *Marshall v. Jerrico*, 446 U.S. at 243 & n.2 (citing

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[2](...continued)
(citing *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 860-61 (1988)).

cases); *cf. Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 906 & n.5 (2000) (listing cases that recognize preventing appearance of corruption as compelling interest); *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 compel the conclusion that the Texas system violates the Due Process Clause. 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. The Courts and The Legal Profession in Texas—The Insider's Perspective, at 19 (May 1999) ("Insider's Perspective").[3] 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.

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 lead to questions about the impartiality of judicial decisionmaking and thus taint the judicial process. For example, in 1996, a large Texas company, HEB Grocery Co., had a case pending before the supreme court. The company's chief executive officer and his family had contributed more than $53,000 to the campaigns of the seven justices who ran for re-election in 1994 and 1996. Texans for Public Justice, Payola Justice: How Texas Supreme Court Justices Raise Money From Court Litigants, at 13, 15 (Feb. 1998) ("Payola Justice"). The court reversed the court of appeals decision against the company,

[3] True and correct copies of all reports, articles, and other miscellaneous sources cited herein are attached at Tab K of the Appendix.

thereby saving it hundreds of thousands of dollars. *H.E. Butt Grocery Co. v. Jefferson County Appraisal District*, 922 S.W.2d 941 (Tex. 1996).[4] In 1997, while the corporation had another case pending before the court, the CEO contributed the statutory maximum of $5,000 to the campaign of one justice and hosted a fundraiser for that justice at his home. Payola Justice, at 13. Although the court ruled against HEB Grocery in that case, the justice dissented. *See H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998).

Similarly, the executives of Enron Corporation contributed $78,700 to the seven justices who ran for re-election in 1994 and 1996. Payola Justice, at 14-15. When the court reversed a lower court ruling against Enron, it saved the corporation approximately $15 million. *See Enron Corp. v. Spring Independent School District*, 922 S.W.2d 931, 933 (Tex. 1996). *See also Tenneco, Inc., et al. v. Enterprise Products Co.*, 925 S.W.2d 640 (Tex. 1996) (reversing court of appeals and finding for petitioners, including Enron). The campaign contributions of HEB Grocery and Enron may or may not have affected the outcomes of their cases; however, a system that allows for such contributions and the specter of impropriety go hand in hand.

When *unopposed* judicial candidates receive campaign contributions from individuals or law firms with cases pending before them, the appearance of impropriety is particularly strong. For example, in the fall of 1993, an incumbent district court judge raised $23,200 for an unopposed race. Of the 13 people and partnerships from whom he received $500 or more, 12 had cases pending in his court. *Lawyers give, judges take, ethics experts worry*, Ft. Worth Star Telegram, June 11, 1994. Judges' soliciting of contributions from lawyers who practice before them "certainly gives the

[4] In addition to the contributions of HEB Grocery's CEO, the company's lawyers had contributed $17,379 to the justices. Opposing counsel, Jefferson County's lawyers, had contributed $11,061. Payola Justice, at 15.

appearance of impropriety," the judge reportedly stated. *Id*. Similarly, although judges appointed to fill vacancies may have a legitimate interest in raising money for officeholder activities, *see* 15 Tex. Elec. Code Ann. § 253.1541 (appointed judges may accept contributions for 60 days), ordinary citizens may question whether contributors donate to those judges in an attempt to curry favor.

The system is especially susceptible to impropriety or perceived impropriety when judges rule in favor of contributors on matters as to which judges have significant discretion, such as whether to grant petitions for supreme court review or for rehearing in the supreme court or a court of appeals. In such cases, the appearance of impropriety may be especially pernicious since judges do not have to explain those decisions, which insulates them from objective public assessment. For instance, from 1984 to 1987, lawyer Joe Jamail and his son contributed $238,600 to the election campaigns of nine supreme court justices. Thus, when the supreme court refused to review the $10 billion *Texaco v. Pennzoil* judgment in favor of Jamail's client Pennzoil, questions about the impartiality of the Texas bench were inevitable. *See*, *e.g.*, Editorial, *In Texas, Contempt by Court*, New York Times, Nov. 5, 1987, at A34; *Quality of Justice: Texaco Case Spotlights Questions on Integrity of the Courts in Texas*, The Wall Street Journal, Nov. 4, 1987, at 1; *Jamails Donated $238,000 for Judicial Campaigns*, Houston Chronicle, Nov. 3, 1987, Business: Finance and Markets, at 1. The combined contributions of Pennzoil's lawyers in the case to supreme court justices exceeded $300,000 in 1986 alone. *Is Texas Justice for Sale?*, Time, Jan. 11, 1988, at 74. As Time magazine stated, although "[s]uch cozy bench-polishing tactics are not illegal . . . . [i]t can certainly look unseemly." *Id*.[5]

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[5] Jamail's contributions at the district court level are also noteworthy. Jamail contributed $10,000 to the campaign of the trial court judge just two days after the judge had been assigned to the (continued...)

Individuals who recognize the appearance of impropriety created by contributing to the campaigns of judges before whom they appear may nonetheless feel that the system requires them to contribute. For example, although Texaco's lawyers challenged the propriety of Jamail's $10,000 contribution to the trial court judge in *Pennzoil v. Texaco*, once Texaco appealed, they themselves contributed $72,000 to five Texas supreme court justices, including two who were not up for reelection that year. *Justice for Sale*, 13 Common Cause Magazine 29 (May/June 1987).

In another case, an individual defendant unsuccessfully sought recusal of the district judge assigned to his case based on the fundraising of his opponents' counsel for the campaign of that judge. *Manges v. Martinez*, 683 S.W.2d 137 (Tex. App. 1984). Although the individual apparently recognized the impropriety of the situation, he himself had contributed $200,000—over 90 percent of the candidate's total contributions—to one successful supreme court candidate in the early 1980s. Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 84 (1986). In at least one other case, the individual's opponent unsuccessfully moved for recusal based on the individual's and his lawyer's own campaign contributions to judges. *River Road Neighborhood Ass'n v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. App. 1984) (21.7% of total campaign contributions of one justice came from appellee's lawyer; 17.1% of contributions to another justice came from appellee).

Perhaps the best example of critics of campaign contributions responding with their own large contributions stems from the 1988 supreme court elections. At that time, the Supreme Court

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[5](...continued)
Pennzoil lawsuit. The judge's conduct in the case, by all accounts unfavorable to Texaco, reinforced the appearance of impropriety. The nationwide publicity generated by the contribution attests to the strength of the improper appearance. *See*, *e.g.*, *Texaco Presses for Pennzoil Retrial*, Chicago Tribune, Mar. 24, 1987, Business at 3; *The Lawyer Who Beat Texaco*, The New York Times, Nov. 21, 1985, at D4.

of Texas was viewed as pro-plaintiff. *See, e.g.*, Column, *Texas justice for sale? Judge for yourself,* Houston Chronicle, Sept. 13, 1992, Outlook at 2; *Quality of Justice: Texaco Case Spotlights Questions on Integrity of the Courts in Texas*, Wall Street Journal, at 1. After the press generated by the *Texaco v. Pennzoil* case and the campaign contributions associated with that case, the Texas business and medical communities went on the offensive. TEXPAC, the PAC of the Texas Medical Association, spearheaded a campaign to elect new justices to the supreme court. *See, e.g.*, *PAC for Texas doctors gives to court hopefuls*, Beaumont Enterprise, Oct. 14, 1988. TEXPAC raised and donated a tremendous amount of money to judicial candidates. That year, five of the six justices running for reelection lost their seats to candidates supported by TEXPAC. Today, the supreme court's decisions favor physicians and hospitals 86 percent of the time. Court Watch, The Food Chain: Winners and Losers in the Texas Supreme Court 1995-99, at Chart 1 (May 1999). For over a decade, commentators and critics have often attached the phrase "justice for sale" to the Texas judiciary. *See, e.g.*, *Texas justice for sale? Judge for yourself*, Houston Chronicle, Outlook at 2; *Justice for Sale*, 13 Common Cause Magazine 29. The outcome of the 1988 supreme court elections, however, shows that "justice for rent" may be the more accurate description.

Although state law no longer permits the amounts contributed by individual large donors in the 1980s, *see* Summary of Facts, at 1, the improper appearance associated with campaign contributions remains pervasive. Interested parties still constitute a significant funding source for judicial candidates. For example, the parties and lawyers involved in the 12 cases heard by the supreme court in January 2000 had contributed $788,638 to the nine justices, and the parties and lawyers involved in the six cases heard in February 2000 had contributed $826,770 to the justices. *Id.* at 5. In July 1995, 14 members of one law firm made same-day contributions totaling over

$20,000 to the reelection campaign of one justice. Payola Justice, at 22. In November 1995, members of another firm sent $14,000 in same-day contributions to a single justice and later sent the justice another $3,050. *Id*. Thus, "[t]he names, faces and labels may have changed since the *60 Minutes* cameras first focused on the Texas judiciary [in 1987], but the same perception—that some people may be trying to buy and sell justice in Texas—persists. Perceptions can't replace integrity, but they can destroy the public confidence that integrity deserves." Column, *Perception persists Texas justice is for sale*, Houston Chronicle, July 12, 1998.

Many Texas judges agree. *See* Insider's Perspective, at 19 (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. *Judges offer opposing views on campaign-donation limits*, The Dallas Morning News, Mar. 2, 1995, at 29A. Indeed, Justice Phillips has repeatedly acknowledged that the existing system compromises the appearance of fairness. *See, e.g.,* Phillips, State of the Judiciary, Address to the 76th Legislature, at 3 (Mar. 29, 1999); *Study faults justices for business ties*, The Dallas Morning News, Feb. 24, 1998 (quoting Justice Phillips as saying "I do think the system tends itself to eroding public confidence."). *See also 2 more enter race for high court, Hopefuls say public lacks confidence in justices*, Dallas Morning News, Dec. 3, 1993, at 30A (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 of judges accepting and soliciting contributions from lawyers and parties appearing before them. *See Stretton v. Disciplinary*

Board, 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 deciding case in which attorney involved).

Similarly, newspapers throughout Texas recognize the appearance of impropriety caused by the current system of judicial elections. *See*, *e.g.*, *Camera-Shy Justices Remember Lesson Learned in 1987*, Texas Lawyer, Aug. 24, 1998 ("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."); Editorial, *Is justice still for sale?*, Austin-American Statesman, June 25, 1998 (under existing system, "danger of corruption and favoritism at all levels of the judiciary is obvious"); Editorial, *High court contributions show reforms are needed*, San Antonio Express-News, Mar. 1, 1998 ("Judges raising money from lawyers and other parties with an interest before the court raises an appearance of impropriety. Few would disagree."); Editorial, *Not for sale*, Texarkana Gazette, Feb. 26, 1998 ("At issue is the system, not the justices themselves. . . . It's time to . . . remove the 'for sale' sign from our Supreme Court.").

The appearance of impropriety could be avoided if judges did not sit on cases involving the interests of their contributors. However, judges rarely recuse themselves from such cases, no matter the size of the contribution or how recently it was made. Texas Rule of Civil Procedure 18b and Texas Rule of Appellate Procedure 15a require recusal when a judge's "impartiality might reasonably be questioned." Notwithstanding this mandate, *see Rogers v. Bradley*, 909 S.W.2d 872 (Tex. 1995),

and notwithstanding the wealth of surveys, articles, and statements showing that judges' impartiality is in fact questioned, motions to recuse a judge based on campaign contributions of an opposing party or counsel to the campaign of that judge are, so far as reported cases show, uniformly unsuccessful. *See*, *e.g.*, *Apex Towing Co. v. Tolin*, 997 S.W.2d 903 (Tex. App. 1999); *Aguilar v. Anderson*, 855 S.W.2d 799 (Tex. App. 1993); *J-IV Investments v. David Lynn Machine, Inc*., 784 S.W.2d 106 (Tex. App. 1990); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987); *River Road Neighborhood Ass'n v. South Texas Sports, Inc*., 673 S.W.2d 952 (Tex. App. 1984); *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. App. 1983); *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).

In 1999, the ABA amended its Model Code of Judicial Conduct to provide that an elected judge should disqualify him or herself in cases where the judge has accepted campaign contributions from a party or a party's lawyer that exceed the jurisdiction's contribution limit. ABA Model Code of Judicial Conduct, Canon 3E(1)(e). In June 1999, the Supreme Court of Texas indicated its intent to adopt a similar proposal. Opinion and Order, Misc. Docket No. 99-9112, at 4 (Tex. June 25, 1999); *see* Supreme Court of Texas, 1999 Judicial Campaign Finance Study Committee, Report and Recommendations, at 19-25 (Feb. 23, 1999) ("Judicial Campaign Finance Study"). However, neither the ABA's Canon nor the Texas proposal would cure the constitutional violation present in the Texas system. Texas' $5,000 limit—five times the limit for contributions to presidential candidates—is so large that a judge's acceptance of a contribution at or even below the limit may suggest impropriety, particularly in a case where several members of a law firm or several officers and

employees of a corporate party appearing before a judge have made contributions that, considered together, total far more than $5,000.[6]

Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), the question of what process is due under the Constitution requires consideration of three factors: (1) the private interest at stake, (2) the risk of erroneous deprivation of the private interest through the procedures used and the likely value of different or additional procedures, and (3) the government's interest. *Id*. at 335. Although these factors are typically used to assess other aspects of due process, such as the adequacy of notice or the opportunity for a hearing, consideration of the factors in this due process challenge further highlights the unconstitutionality of the Texas system.

First, the private interest at stake is significant and of a constitutional dimension: the interest in a "neutral and detached judge," *Concrete Pipe & Products*, 508 U.S. at 617, which protects litigants against erroneous deprivations of life, liberty, and property. *Marshall v. Jerrico*, 446 U.S. at 242. This interest goes to the heart of our judicial system; safeguarding the fact and the appearance of impartiality enables courts to do justice and gives the public confidence that justice is being done.

Second, the risk of erroneous deprivation and the probable value of additional procedures are both high. The risk of erroneous deprivation is evidenced by the surveys and examples discussed throughout this motion, which establish that the appearance, if not the fact, of impropriety created by the current system of electing Texas judges is strong and widely recognized by the public at large, lawyers, the press, and even judges themselves. Additional procedures, in this context, are the

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[6] The Texas proposal, unlike Canon 3E(1)(e), would provide for recusal based on either contributions or independent expenditures used to benefit the judge. Judicial Campaign Finance Study, at 22.

available constitutional alternatives to the present system. The State could require a judge's recusal in cases where that judge accepted campaign contributions from a lawyer or litigant that exceeded a small percentage of the judge's total contributions. The State could impose lower limits on individual contributions, thereby minimizing the importance to the judge of any one contribution. The State could attempt to develop ways to insulate judges from knowledge of who contributed to their campaigns. Publicly financed judicial campaigns or an appointment system are also options that would solve the due process problem.

The burden on the government of enacting one or more of the possible constitutional alternatives is non-existent. Most states do not use the Texas system. In fact, the Texas system of partisan elections financed by individual contributors is used by only 16 states, only 11 of which have partisan elections at the court of appeals or supreme court levels.[7] ABA Task Force Report, at 7 n.9 & Appendix 2. In contrast with Texas, none of those states allows judges personally to solicit contributions. *Id*. at 41 n.73. Although the State would have to go through the process of enacting a change, the State cannot claim that a different system would be burdensome, once that system had been instituted.

CONCLUSION

Under Texas' current system of financing judicial elections, a strong appearance of impropriety and lack of neutrality, if not actual impropriety and bias, pervades the judicial system. The due process jurisprudence of the United States Supreme Court forbids both actual impropriety

[7] Included in the tallies of 16 and 11 are Michigan and Ohio, where, although the ballots are non-partisan, "the judicial candidates are selected in party primaries or conventions, and usually run as partisans." ABA, Report and Recommendations of the Task Force on Lawyers' Political Contributions, Part Two, at 6-7 n.8 (July 1998) ("ABA Task Force Report").

and the appearance thereof. Accordingly, Texas' current system violates plaintiffs' due process rights by denying them "the appearance of justice," *Offutt*, 348 U.S. at 14, and possibly justice itself. Accordingly, plaintiffs' motion for summary judgment should be granted.

Dated: May 3, 2000

Respectfully submitted,

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