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

APPELLANTS' PETITION FOR PANEL REHEARING

INTRODUCTION

On November 26, 2001, this Court affirmed the district court's dismissal of this case. However, whereas the district court had dismissed the case on the merits and as presenting a political question, this Court upheld the dismissal on the ground that

plaintiffs had not adequately alleged standing. *See* Slip Op. at 2 (attached hereto). Because the deficiency the Court identified was a fault in the pleading of the case, and because the Court overlooked the availability of Federal Rule of Civil Procedure 15(a) to cure such defects, the Panel should grant rehearing pursuant to Federal Rule of Appellate Procedure 40(a) and remand the case to the district court to allow plaintiffs an opportunity to amend their complaint to add the specificity the Court found lacking.

ARGUMENT

The Court's opinion identifies several related shortcomings in the complaint. The opinion states: "[N]one of the Plaintiffs has alleged that one or more of the Plaintiffs, or any member of the two plaintiff organizations, or any client represented by one of the five plaintiff lawyers has ever been involved in a case in which an opposing party or lawyer has contributed money to the presiding judge." Slip Op. at 9. It further states: "[Plaintiffs] point to no past case in which a judgment was tainted by contributions; they mention no current litigation in which an opposing party or lawyer contributed to the judge's campaign; and they merely speculate as to the future." Slip Op. at 13.

Plaintiffs do not agree that this level of detail is required in a complaint. For purposes of this petition for rehearing, however, plaintiffs do not contest the Court's

ruling that the pleading was insufficiently detailed. Rather, plaintiffs' point here is that the Court overlooked the fact that, had the district court dismissed this case on the grounds identified by the Court, plaintiffs could have requested an opportunity to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a). Absent a showing of undue delay, dilatory motive, repeated failure to cure deficiencies, prejudice to defendant, or futility, the district courts must liberally grant such requests. *Matter of Southmark Corp.*, 88 F.3d 311, 314 (5th Cir. 1996) (citing *Winn v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993)); *see Foman v. Davis*, 371 U.S. 178, 182 (1962) (opportunity to amend complaint "should, as the rules require, be 'freely given'") . None of these factors is present here. Plaintiffs should not be denied an opportunity to cure the pleading defect identified by this Court simply because the district court ruled on other grounds.[1]

Moreover, if the case were remanded, plaintiffs could amend the complaint to add the sort of allegations identified by the Court. They would amend to provide specificity about cases in which a plaintiff was involved and in which the opposing party or lawyer was a contributor to the judge's campaign. They would add

[1] Because the district court dismissed the complaint on grounds other than standing, this Court's order remanding the case should make clear that the original grounds for dismissal were in error, so that the remand and amendment will not be futile.

allegations that judicial proceedings in one or more of their past cases were tainted by campaign contributions, as well as allegations identifying current litigation in which an opposing party or lawyer contributed to the judge's campaign. In fact, the declarations that plaintiffs submitted with their summary judgment motion—and which the Court declined to consider, *see* Slip Op. at 7 n.3—contained such information. For example, one plaintiff described a specific case in which he believed a decision appeared to be influenced by campaign contributions. R9 (Appx. E ¶¶ 9-11). Others stated more generally that they regularly litigate against law firms that make large contributions, that they make much smaller contributions or none at all, and that they believe that the disparity in contributions adversely influences judicial proceedings. *Id.* (Appx. B ¶¶ 7-9; Appx. C ¶¶ 6, 8). On remand, plaintiffs would add allegations of those facts and other specific examples to the complaint. *See Warth v. Seldin*, 422 U.S. 490, 501-02 (1975) (court may allow or require plaintiff to supply, by amendment to complaint or declarations, particularized factual allegations in support of standing).

Plaintiffs do not contend that campaign contributions have an influence in every case in which a party or lawyer contributed to the presiding judge or judges. Their claim, as the Panel correctly states, Slip Op. at 6-7, is that the taint of large contributions and the resulting cloud over those cases are sufficient to create an

appearance of partiality in violation of due process, even without the proof—virtually impossible to establish—of actual improper influence in a particular case. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *see also Republic of Panama v. American Tobacco Co.*, 217 F.3d 343 (5th Cir. 2000) (abuse of discretion not to recuse where judge's impartiality reasonably in question). Accordingly, plaintiffs seek an opportunity to allege that the appearance of partiality existed in cases in which they have been involved and exists in cases in which they are involved today.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing and remand this case for further proceedings in accordance with its opinion.

Dated: December 6, 2001

Respectfully submitted,

Allison M. Zieve
Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Fred Lewis
2812 Hemphill Park
Austin, Texas 78705
(512) 472-1007

Counsel for Appellants