

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

HUMBERTO AGUIRRE, JAMIE BARNES,
EULALIO CALDERON JR., ROMELIA
CARDONA, TERRY HOGWOOD, BRAD
ROCKWELL, TEXANS FOR PUBLIC JUSTICE,
COMMON CAUSE, LEAGUE OF UNITED
LATIN AMERICAN CITIZENS, TEXAS
OBSERVER, and TEXAS CIVIL RIGHTS
PROJECT

Plaintiffs,

v.

CHIEF JUSTICE THOMAS R. PHILLIPS,
JUSTICE NATHAN L. HECHT, JUSTICE
CRAIG T. ENOCH, JUSTICE PRISCILLA R.
OWEN, JUSTICE JAMES A. BAKER, JUSTICE
DEBORAH G. HANKINS, JUSTICE HARRIET
O'NEILL, JUSTICE WALLACE JEFFERSON
and JUSTICE XAVIER RODRIGUEZ, in their
official capacities as Chief Justice and Serving
Justices of the Texas Supreme Court, JOHN T.
ADAMS, in his official capacity as
Clerk of the Texas Supreme Court,
Court, NADINE SCHNEIDER, in her official
capacity as Administrative Assistant to the
Texas Supreme Court, OSLER MCCARTHY, in
his official capacity as Staff Attorney for the
Texas Supreme Court, and JERRY BENEDICT,
in his official capacity as Director of the Texas
State Office of Court Administration,

Defendants.

**FIRST AMENDED
COMPLAINT**

Civil Action No. DR 02CA26

Introduction

1. This action challenges the practice of the Texas Supreme Court (“Court”) of maintaining in secrecy the votes of its justices on petitions for review, in violation of the First Amendment to the U.S. Constitution and the federal common law.
2. The plaintiffs, who are voters, voter organizations, a magazine, candidates for the Supreme Court, and an attorney, desire access to this information in order to understand and report on the workings of the judiciary, to make informed decisions in judicial elections, and to campaign effectively for a seat on the Court.
3. The Court disposes of the great majority of its cases by denying review. Thus votes on petitions for review constitute the majority of the final decisions made by the justices. Nevertheless, the court’s practice of secrecy prevents the public from learning how the justices voted in these cases.
4. The justices are elected in privately funded, partisan elections. Contributors to the justices’ campaigns are regularly among the litigants and attorneys seeking review by the Court. The plaintiffs and the public have no way of knowing how each justice has voted on petitions for review filed by his or her contributors. The failure to disclose this information prevents the public from holding justices accountable for their actions in public office.

Jurisdiction and Venue

5. This is an action for declaratory and injunctive relief pursuant to Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, the First and Fourteenth Amendments to the United States Constitution, and the federal common law.

6. Jurisdiction is provided by 28 U.S.C. §§ 1331 and 1343 (a). Venue is proper under 28 U.S.C. § 1391 (b) because the defendants reside in this judicial district and a substantial part of the events or omissions giving rise to the claims in this lawsuit occurred in this judicial district.

Parties

7. Plaintiff Humberto Aguirre is a registered voter in Val Verde County, Texas. He regularly votes in elections for Supreme Court Justice and wishes to monitor the records of incumbent justices.

8. Plaintiff Jamie Barnes is a registered voter in Denton County, Texas. She regularly votes in elections for Supreme Court Justice and wishes to monitor the records of incumbent justices.

9. Plaintiff Eulalio Calderon, Jr. is a registered voter in Val Verde County, Texas. He regularly votes in elections for Supreme Court Justice and wishes to monitor the records of incumbent justices.

10. Plaintiff Romelia Cardona is a registered voter in Maverick County, Texas. She regularly votes in elections for Supreme Court Justice and wishes to monitor the records of incumbent justices.

11. Plaintiff Terry Hogwood is a registered voter in Harris County, Texas. He regularly votes in elections for Supreme Court Justice and monitors the records of incumbent justices. Mr. Hogwood is planning to seek the Republican nomination for a seat on the Texas Supreme Court in 2004. To this end, he has begun to approach potential funders for his campaign.

12. Mr. Hogwood has been licensed to practice law in Texas since 1973, is certified by the Texas Board of Legal Specialization in oil, gas and mineral law and has published nationally on legal issues in his field. He regularly files petitions for review before the Texas Supreme Court on behalf of his clients.

13. Plaintiff Brad Rockwell is a registered voter in Travis County, Texas.. He regularly votes in elections for Supreme Court Justice and wishes to monitor the records of incumbent justices. He is also an attorney with a litigation and appellate practice.

14. Mr. Rockwell is currently seeking election to the Texas Supreme Court. He expects the Green Party to nominate him for Place 2 on the Court at its June 6, 2002 nominating convention, where he will be unopposed. He will thus be assured of a place on the ballot in November 2002 because the Green Party gathered sufficient votes in the 2000 elections to automatically qualify its candidates for statewide office for the ballot in 2002. Mr. Rockwell has appointed a campaign treasurer and opened a campaign account pursuant to Chapter 252 of the Texas Election Code

15. Plaintiff Texans for Public Justice (TPJ) is a non-partisan, non-profit policy and research organization, which tracks the influence of money in politics and advocates for equal access to justice. TPJ has published research on campaign finance practices in Texas Supreme Court elections.

16. Plaintiff Common Cause is a thirty-year-old nonprofit, nonpartisan citizen's lobbying organization promoting open, honest and accountable government. Based in Washington, D.C., the organization has approximately 200,000 members nationally and approximately 4,100 in Texas.

17. Plaintiff Texas League of United Latin American Citizens (LULAC) is the founding branch of the oldest and largest continually active Latino political association in the United States. With over 4,000 members in Texas, LULAC seeks to protect the voting rights of Latinos, to educate Latino voters on issues in Texas political campaigns, and to promote equal access to courts for Latinos.

18. Plaintiff Texas Observer is a bi-weekly publication which reports on government and politics in Texas, including coverage of judicial elections and decisions taken by the Texas Supreme Court.

19. Plaintiff Texas Civil Rights Project ("TCRP"), founded in 1990, is a non-profit public interest law foundation that promotes racial, economic, and social justice, as well as civil liberty under the Bill of Rights of the Texas and United States Constitutions. TCRP, with a membership base of approximately 1200 Texans, works toward these goals primarily through education and litigation assistance to low-income people and communities in Texas. Thus, TCRP has a strong interest in ensuring that individuals' civil rights and civil liberties under the state and federal constitutions are not abridged or modified, whether through legislation, improper enforcement, or judicial action.

20. Defendant Thomas R. Phillips is Chief Justice of the Supreme Court of Texas. Defendants Nathan L. Hecht, Craig T. Enoch, Priscilla R. Owen, James A. Baker, Deborah G. Hankins, Harriet O'Neill, Wallace Jefferson, and Xavier Rodriguez are Serving Justices of the Supreme Court of Texas. The Chief Justice and Serving Justices are all sued in their official capacities. They may be served at the Supreme Court Building, 201 West 14th Street, Room 104, Austin Texas 78701.

21. Defendant John T. Adams is currently Clerk of the Court for the Supreme Court of Texas. Defendant Nadine Schneider is Administrative Assistant to the Court.

Defendant Osler McCarthy is Staff Attorney for Public Information for the Court. Mr. Adams, Ms. Schneider, and Mr. McCarthy are all sued in their official capacities. They may be served at the Supreme Court Building, 201 West 14th Street, Room 104, Austin Texas 78701.

22. Defendant Jerry Benedict is the Administrative Director of the State Office of Court Administration. He is sued in his official capacity. He may be served at 205 West 14th Street, 6th Floor, Austin, Texas 78711.

Factual Allegations

Texas Supreme Court Practices

23. The Texas Supreme Court accepts review of only a small proportion of cases submitted to it. The nine justices vote on whether to accept petitions for review, with four votes needed to grant a petition. Of the petitions for review submitted between 1994 and 1998, the Court accepted approximately eleven percent. Thus in the majority of cases, the Court's decision to deny review is dispositive.

24. It is the policy of the Court not to disclose the votes of the justices on petitions for review. Any justice may choose to reveal his or her vote, but this happens very rarely. Thus, the public never knows the decisions taken by each justice on most of the cases that come before the Court.

25. Justices on the Supreme Court are selected through partisan elections. Candidates may solicit and accept campaign contributions of up to \$5,000 per election (or \$15,000 per cycle, if there is a contested primary and a primary run-off) from individuals and

organizations other than labor unions and corporations. Texas Code of Judicial Conduct Canon 4D(1); Tex. Elec. Code Ann §§ 253.091, 253.094. This limit does not apply to candidates whose opponents exceed voluntary spending limits. *Id.* § 253.165.

26. Law firms, lawyers, and other donors who have made campaign contributions regularly submit petitions for review to the Court. The fact that a litigant or attorney has contributed to a justice does not disqualify the justice from that case or mandate recusal. Fifty two percent of the money raised by the ten justices who faced an election from 1994 through 1998 came from lawyers, law firms and litigants who filed petitions for review during this period, according to a recent study by Texans for Public Justice. That study found that in the aggregate, petitions from large donors were approximately ten times more successful than those of non-donors or small donors.

27. Votes on petitions for review constitute judicial decisions. Judicial decisions have traditionally been available to the public in both published and unpublished form. Published and unpublished opinions and dissents indicate the positions taken by each judge in a case, while per curiam opinions imply the concurrence of all judges not explicitly dissenting. Therefore a presumption of openness attaches to the decisions of each justice on petitions for review, as it does to all other judicial decisions.

28. Pursuant to Texas Rule of Appellate Procedure 56.1(b)(3), the Texas Supreme Court can “refuse” a petition for review. This elevates the lower appellate court opinion to the level of Supreme Court precedent. It takes the votes of six justices to refuse a petition for review. By means of this “refusal” process the Texas Supreme Court can and has effectively issued a Supreme Court opinion without any disclosure as to which of the 6 or more justices have voted for the refusal.

29. Public access to judicial decisions, including votes on petitions for review, plays a significant positive role in the functioning of the judiciary. The public interest in disclosure is heightened by the selection of judges through privately funded elections. Secrecy prevents voters and the public from holding the justices accountable for their record in office. Because the law permits the justices to accept large campaign contributions, disclosure of the justices' votes on petitions for review is necessary for voters and the public to monitor the treatment given to large contributors and thereby deter the appearance or reality of unfair influence by those contributors.

30. The Court has no valid interest in keeping the votes secret, given that the votes themselves do not reveal internal deliberations of the justices or confidential information about parties to a case. Many state courts of last resort disclose the votes of their justices on whether to accept review of cases, including Alabama, Alaska, California, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, New Mexico, Ohio, Oklahoma, Utah, and West Virginia. Thus the policy of secrecy cannot be necessary to the functioning of the Texas Supreme Court.

Injuries to Plaintiffs

31. The plaintiffs share an interest in gaining access to the Supreme Court Justices' votes on petitions for review in order to better understand the working of the judiciary. The plaintiffs additionally wish to monitor the votes of the Justices on petitions for review brought by large campaign contributors as compared to non- or small contributors. Regardless of whether or not the contributions have any effect on the votes of the justices, the plaintiffs wish to obtain the information and draw their own conclusions, which the current policy of secrecy prevents them from doing.

32. The voter plaintiffs, Romelia Cardona, Eulalio Calderon, Jr., Humberto Aguirre, Jamie Barnes, Terry Hogwood, and Brad Rockwell, need to know the Justices' records on petitions for review in order to better understand the workings of the judiciary and to make informed choices at the polls.

33. Plaintiffs Texans for Public Justice (TPJ) and Common Cause seek to monitor the influence of money in elections and to promote the accountability of public officials.

These organizations need access to the votes of the justices in order to monitor how each of the justices perform their duties, and the potential impact of campaign contributions.

34. TPJ has published research showing that large campaign contributors to the Texas Supreme Court are far more likely to have their petitions for review accepted than small or non-contributors. In order to further its public education, TPJ needs to examine how individual justices have voted on petitions filed by or on behalf of large contributors and on other petitions.

35. Common Cause seeks to educate its members and the public on judicial elections, and to promote more open and democratic electoral practices. The organization needs to know how the justices vote on petitions for review in order to fully assess the record of each incumbent justice on issues of concern to Common Cause members, and to advise its members accordingly.

36. Plaintiff LULAC needs access to the information in order to better advise its members on the records of incumbent Supreme Court Justices seeking re-election. LULAC additionally needs the information in order to assess how each justice voted on petitions in cases affecting the Latino population of Texas, such as racial profiling by law

enforcement agents, the drawing of state legislative districts, health, education and criminal justice.

37. The Texas Observer needs to report on the votes of the justices on petitions for review in order to fulfill its mission to cover stories crucial to the public interest and to provoke dialogue that promotes democratic participation and open government. The Observer also wishes to fully report on the judicial records of incumbent justices seeking re-election. The policy of secrecy prevents the Observer from informing the public in all of these ways.

38. Plaintiffs Rockwell and Hogwood need to know the votes of the justices in order to campaign for election to the Texas Supreme Court. They need to know how incumbents voted on decisions establishing and upholding the decisional law of the state. Rockwell and Hogwood both intend to emphasize in their campaigns that the large private campaign contributions given to the incumbent justices have created the appearance of unfair influence by large campaign contributors. In order to make their case to the voters, Rockwell and Hogwood need to know how individual incumbent justices voted on petitions for review submitted by large contributors and others. The policy of secrecy thereby hinders Rockwell and Hogwood in their campaigns and reduces their chances of success.

39. Plaintiff Hogwood additionally desires to know the votes on petitions for review in order to better serve his clients as an attorney. By learning the votes of the justices when a petition is denied, he will be able to assess whether to file a petition in a similar case after the composition of the court has changed.

40. Hogwood filed an amicus brief in the case of *Rogers v. Ricane Enterprises, Inc.*, 930 S.W.2d 157 (Tex. Civ. App. 1966). Hogwood believed the Court of Appeals had ruled contrary to legal authority and that under the applicable standards the case should be reviewed by the Texas Supreme Court. When the Court refused to grant a writ of error, Hogwood attempted to learn how the various justices had voted. He telephoned the Clerk's office and was told that under no circumstances would that information then or ever be released. Subsequently, he represented the plaintiffs in a similar case, *Hutchinson v. Union Pacific Resources Co.*, No. 03-01-00196-CV (Tx. Civ. App. 2001), in which he also believed the Court of Appeals had ignored controlling precedent, and the Supreme Court again denied review. Again, because of the Court's policy of secrecy, Hogwood could not learn how individual justices had voted.

41. Plaintiff Texas Civil Rights Project (TCRP) desires to know the justices' votes on petitions for review in order to better serve its legal clients. Full disclosure of the votes will enable the TCRP to evaluate the positions of the justices on areas of litigation that TCRP engages in, and the strength of the legal positions that TCRP asserts on behalf of its clients. It will also enable the TCRP to assess whether or not to file a petition for review in cases that are similar to previous cases where review was denied.

42. For the reasons stated above, all of the plaintiffs are injured by the Court's policy of secrecy, which prevents the full exercise of the right to vote, the right to campaign for office, and the right to inform the public of events of public interest.

COUNT I
(First Amendment)

43. Plaintiffs hereby repeat and re-allege paragraphs 1-40 as if fully set forth herein.

44. The Supreme Court of Texas' policy of maintaining in secrecy the votes of its members on petitions for review violates plaintiffs' right of access to this information as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983.

COUNT II
(Federal Common Law)

45. Plaintiffs hereby repeat and re-allege paragraphs 1-42 as if fully set forth herein.

46. The Supreme Court of Texas' policy of maintaining in secrecy the votes of its members on petitions for review violates plaintiffs' right of access to this information under federal common law.

Prayers for Relief

WHEREFORE, the Plaintiffs respectfully request that this court:

- A. Declare that the Texas Supreme Court's failure to make public its votes on petitions for review violates the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983;
- B. Declare that the Texas Supreme Court's failure to make public its votes on petitions for review violates the plaintiffs' rights under the federal common law;
- C. Enter an injunction compelling the Texas Supreme Court to make public its votes on petitions for review;
- D. Award attorney fees and costs to the plaintiffs;
- E. Provide such other relief, as justice and equity require.

By their attorneys,

Date: June 18, 2002

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* Motion for admission *pro hac vice*
pending.

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