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February 11, 2005

The Honorable Bill Frist,
Majority Leader
United States Senate
509 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Harry Reid,
Minority Leader
United States Senate
728 Hart Senate Office Building
Washington, D.C. 20510

RE: Nomination of Priscilla Owen to the
United States Court of Appeals for the Fifth Circuit

Dear Senators Frist and Reid:

On behalf of the Society of American Law Teachers (SALT), we write to express our strong opposition to the nomination of Justice Priscilla Owen to a seat on the United States Court of Appeals for the Fifth Circuit.

SALT is the largest organization of law professors in the United States. Representing more than 900 law professors from over 160 law schools, SALT has a keen interest in assuring that the United States has a judiciary both committed to the enforcement of laws guaranteeing civil and personal rights and responsive to under-served individuals and communities. Justice Owen's record on the Texas Supreme Court raises troubling questions about her ability to enforce such laws and displays an extreme bias in favor of business interests and against protecting the interests of ordinary citizens. In light of this record, SALT opposes the nomination of Justice Priscilla Owen to the United States Court of Appeals for the Fifth Circuit.

This is the third time that President Bush has attempted to elevate Justice Owen to a seat on the Fifth Circuit. Justice Owen originally was nominated in May 2001, but was rejected by the Senate Judiciary Committee. The President renominated her, following the Republican takeover of the Senate, in January 2002. Her nomination was filibustered on the floor of the Senate, where four cloture votes failed. This history demonstrates strong opposition to the nomination of Justice Owen, whose record shows that she is outside the mainstream of legal thought. On a Republican-dominated state court considered one of the nation's most conservative supreme courts, Justice Owen has dissented frequently, in opinions that display her commitment to right-wing activism. Rather than interpret the law, she often has tried to rewrite or disregard the law in order to achieve particular results. It is especially troubling and divisive that Justice Owen has again been nominated for a seat on the Fifth Circuit. Based on her record, she should again be denied confirmation.

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Justice Owen's hostility to civil rights, employee rights, and reproductive rights is illustrative of her radical political agenda:

A. Employment Discrimination and Employee Rights

Justice Owen's dissents in several cases concerning individual employee rights have attempted to rewrite statutes and ignore legislative intent in order to support employers at the expense of individual employees.

A case involving age discrimination in employment, *Quantum Chemical Corp. v. Toennies*, is the clearest example of Justice Owen's hostility toward civil rights claims, and the extent to which she is willing to rewrite statutes to achieve her desired result.¹ The Texas Human Rights Act provides that employment discrimination is established when a plaintiff proves that discrimination was *a motivating factor*, even though other factors also motivated the employer.² Justice Owen joined the dissent of Justice Hecht, which would have adopted a more stringent standard requiring a plaintiff to prove that discrimination was *the determinative factor* in the employment decision. The majority opinion said that the plain meaning of the statute clearly established as the standard of causation "a motivating factor" -- not, as advocated by Justice Owen, the "determinative" factor, which would have made it harder for an employee to prove discrimination based on any of the characteristics covered by the statute (such as race, sex, or age). The Texas Human Rights Act is patterned after Title VII of the 1964 Civil Rights Act. The United States Supreme Court and subsequent federal legislation both establish that the standard to be applied in similar mixed motive cases is "a motivating factor." Thus, Justice Owen ignored both the plain meaning of the Texas statute and the definitive interpretation of Title VII by both the Supreme Court and Congress in her determination to make it harder for plaintiffs to prove employment discrimination.

In other employment rights cases, Justice Owen's dissents would have rewritten the Education Code to the detriment of the rights of teachers, ignored the legislature's limits on the court's jurisdiction in order to hear prematurely a case in which an employee sued school district officials, allowed a worker's compensation carrier to contest a worker's right to compensation in spite of the fact the carrier had violated the statutory requirement that it notify the employee within seven days of its refusal to pay, and held unconstitutional state laws requiring insurance carriers to contribute unclaimed death benefits to a fund to encourage employers to hire people with disabilities or preexisting injuries.³

¹*Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2001).

²Tex. Lab. Code Ann. § 21.125(a) (Vernon 1997) (emphasis added).

³See, *Montgomery Indep. Sch. Dis. v. Davis*, 34 S.W.3d 559 (Tex. 2000); *Collins v. Ison-Newsome*, 73 S.W.3d 178 (Tex. 2001); *Continental Cas. Co. v. Downs*, 81 S.W.3d 803 (Tex. 2002); *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377 (Tex. 2002).

Justice Owen's opinions concerning employment rights show a judge with an extreme ideology of protecting business and employer interests at the expense of employees, even when doing so requires that she strike down state legislation and ignore the express meaning of statutes.

B. Personal Rights

In 1999, the Texas legislature enacted a law requiring that a minor's parents be notified before she could obtain an abortion.⁴ The Parental Notification Act provides a judicial bypass procedure enabling a minor to obtain a court order, permitting an abortion without parental notification where the minor is mature and sufficiently well-informed. In several cases involving the bypass provision, Justice Owen dissented from the court's rulings. Justice Owen advocated extremely restrictive interpretations of the bypass law that would have rewritten the statute and placed insurmountable barriers in the way of a minor attempting to obtain an abortion. For example, in *In re Jane Doe*,⁵ the Texas Supreme Court established the factual showing that a minor must make in order to satisfy the bypass requirement that she be "sufficiently well informed" to have an abortion without parental notification. In a case in which the majority of the court reversed the lower court, finding that the minor had satisfied the statutory requirement for a bypass, Justice Owen dissented, focusing on her view that the minor had to be adequately informed about abortion alternatives. She argued that a minor must demonstrate that she was aware of and had considered "philosophic, social, moral and religious arguments" concerning abortion, as well as a specific "understanding of the impact the procedure will have on the fetus."⁶ Then-Justice Alberto Gonzales criticized the dissents for presenting a narrow construction of the bypass provision that amounted to "an unconscionable act of judicial activism."⁷

⁴Tex. Fam. Code Ann. § 33.003(i) (Vernon 1999).

⁵19 S.W.3d 249 (Doe 1(I)) (Tex. 2000).

⁶Id. at 264-65 (Owen, J., concurring opinion).

⁷In re Jane Doe 1(II), 19 S.W.3d 346, 366 (Tex. 2000) (Gonzales, J., concurring opinion).

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In two other decisions, lower court judgments denying bypass applications were set aside by the Texas Supreme Court and remanded because they had been decided within a few days of, and therefore without the benefit of, the above case in which the Texas Supreme Court had set out the standards governing bypass applications.⁸ Justice Owen dissented from the court's rulings remanding the cases, although it was clear that the litigants had presented their cases without the benefit of the Texas Supreme Court's instruction.

In these cases and others, Justice Owen has evidenced an extreme hostility to legislatively established personal rights, and a willingness to advance her own ideological views by rewriting the bypass statute, ignoring the intent of the legislature and the plain meaning of the statute, and denying minors their right to present their cases with the benefit of the court's interpretation of the bypass statute.

* * *

Throughout her judicial career, Justice Owen has demonstrated a willingness to distort the law to promote an ideological agenda that is hostile to civil rights, personal rights, and the rights and interests of individuals. SALT therefore urges the Senate to reject the nomination of Priscilla Owen to a seat on the United States Court of Appeals for the Fifth Circuit.

Yours very truly,

Professor José Robert (Beto) Juárez, Jr.
Professor Holly Maguigan
Co-Presidents

⁸In re Jane Doe 3, 19 S.W.3d 300 (Tex. 2000); In re Jane Doe 4, 19 S.W.3d 322 (Tex. 2000) (Owen, J., dissenting).