

AMERICAN PLANNING ASSOCIATION ♦ CLEAN WATER ACTION  
COAST ALLIANCE ♦ DEFENDERS OF WILDLIFE  
EARTHJUSTICE ♦ ENDANGERED SPECIES COALITION  
FRIENDS OF THE EARTH ♦ OCEANA  
PHYSICIANS FOR SOCIAL RESPONSIBILITY  
LOUISIANA ENVIRONMENTAL ACTION NETWORK  
IBERVILLE PARISH CONCERNED CITIZENS

April 30, 2003

Re: Opposition to Justice Priscilla Owen's Fifth Circuit Re-Nomination

Dear Senator:

Texas Supreme Court Justice Priscilla Owen has been re-nominated to the United States Court of Appeals for the Fifth Circuit despite the very serious environmental and other concerns with her record that led to the Senate Judiciary Committee's September 5, 2002, vote that defeated her prior nomination to this important court.

On behalf of our organizations and their members, we strongly urge that you exercise independent judgment pursuant to the Senate's constitutional advise and consent responsibility and decline to confirm Justice Owen to a lifetime seat on an appeals court that is critical to the fate of federal environmental safeguards in Texas, Louisiana, and Mississippi.

In a July 16, 2002, letter to the Senate Judiciary Committee, environmental groups expressed serious concerns with Justice Owen's nomination because the opinions that she has written "would elevate the rights of polluters over the rights of neighbors and the public, restrict the public's access to public information, and limit common law remedies for injured consumers." In particular,

- Justice Owen wrote an extreme dissenting opinion in which she argued that property rights justified giving large landowners the power to exempt themselves from water pollution controls and land use safeguards. The majority, including Justice Alberto Gonzales (currently White House counsel), stated that: "[m]ost of Justice Owen's dissent is nothing more than inflammatory rhetoric, and thus merits no response." As the majority opinion found, it was Justice Owen who would have undermined genuine property rights, as "the landowners' powers over water quality protection and their power to exempt themselves from the enforcement of municipal ordinances could adversely affect the public interest, and more specifically, the interests of downstream water users and the landowners' neighbors." (*FM Properties Operating Co. v. City of Austin*).
- Justice Owen wrote a dissenting opinion that would have prevented a teenager who was paralyzed after being thrown from a car that rolled over from going to court to recover from the car manufacturer under State law for alleged gross

negligence in failing to install a lap seat belt. The State common-law claims were compatible with the minimum federal requirements and furthered the explicit intent of the federal law to reduce traffic injuries and fatalities. Justice Owen's broad analysis in dissent would preclude the most effective or only avenue of relief and incentive for corporations to prevent many injuries, deaths, and threats to the air we breathe and the water we drink. (*Hyundai Motor Co. v. Alvarado*).

- Justice Owen wrote a majority opinion that overruled the State Attorney General and denied the media and public access to government documents relating to a wastewater treatment plant that had been the subject of lawsuits arising from pollution discharges. Justice Owen ignored the express intent of the State Public Information Act, instead emphasizing that disclosure would burden governmental entities. (*In re City of Georgetown*).

Environmental concerns regarding Justice Owen were supported by major editorial boards, including *The New York Times*, *The San Francisco Chronicle*, *The Los Angeles Times*, and *The Atlanta Journal-Constitution*. For example, *The Los Angeles Times*' July 23, 2002, editorial concluded that Justice Owen is an ideologue who "often side[s] with business in disputes involving employee rights, consumers and the environment [and] a record of indifference to the problems of most Americans." In a July 23, 2002, editorial urging that it was "vital" that the nomination be rejected, *The San Francisco Chronicle* concluded that Justice Owen has "tried to finesse laws that protect public information rights, the environment, and jury findings. The point is, Owen has created a strong record of 'rewriting' the law when it does not match her conservative convictions." Major newspaper editorial boards (the *Houston Chronicle* and *San Antonio Express-News*) from Justice Owen's home State that supported her election to the Supreme Court of Texas also subsequently opposed her Fifth Circuit [re]nomination.

These concerns were compounded by Justice Owen's testimony at both of her Judiciary Committee hearings, which is incompatible both with the language of the major dissenting opinion that she authored in the *FM Properties* case and with its context. In response to Senator Leahy's detailed question at her July 23, 2002, hearing about the dissenting opinion that she wrote in the *FM Properties* case, Justice Owen testified that "I know that some have tried to characterize this case as involving a fight between the City of Austin and big business, but in all honesty, when you get down and look at it, what this was really a fight about was the State of Texas versus the City of Austin . . . ." Transcript at 69. Similarly, at Justice Owen's March 13, 2003, hearing, Sen. Hatch asked about *FM Properties*: "This . . . was not a case about big business interests or polluters of the environment. What this case came down to was State versus local regulation. Am I correct in that?" Justice Owen replied: "That is correct." Transcript at 120.

In fact, however, Justice Owen wrote a separate dissent in *FM Properties* that was based upon precisely the same characterization of the case that she attributed to "some" others and dismissed out of hand in her July 23, 2002, testimony. Indeed, the focus of Justice Owen's written dissent in *FM Properties* was her extreme and repeated characterizations of the case as involving a fight between the City of Austin's

requirements (which controlled water pollution) and the “property rights” of big landowners; this focus was exactly what distinguished the Justice Owen’s dissent from the views of both the majority opinion and Justice Abbott’s lengthy separate dissenting opinion.

*Conclusion*

In light of the current record of very serious environmental concerns, we strongly urge you to exercise independent judgment pursuant to the Senate’s constitutional advise and consent responsibility and decline to confirm Justice Owen to this critical lifetime court of appeals position.

Sincerely,

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