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**Anti-Environmental Record of Texas Supreme Court Justice Priscilla Owen--  
Renominated to a Lifetime Seat on the U.S. Court of Appeals for the Fifth Circuit**

Texas Supreme Court Justice Priscilla Owen has been re-nominated to a lifetime seat on 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.

As described in detail below, court opinions that Justice Owen has written would:

- elevate the rights of polluters over the rights of neighbors and the public,
- unjustifiably bar State law claims that are often 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; and
- restrict the public's access to public information about pollution.

Editorial boards, columnists, and Judiciary Committee Senators have supported environmental concerns with Justice Owen's record. At her hearing, Justice Owen compounded the problems with her nomination by giving testimony that is incompatible both with the language of a dissenting opinion that she authored and with its context.

***Water Pollution, Special Interests and the Rights of Neighbors and the Public***

The result, and even more so, the context and the language and reasoning urged by the dissent that Justice Owen wrote in *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 43 Tex. Sup. J. 835 (2000) have especially disturbing implications for water pollution, for the ability of special interests to exempt themselves from environmental, land use and other vital safeguards, and for the property and other rights of neighbors and the public.

The majority opinion of the Supreme Court of Texas, written by Justice Baker and joined by Chief Justice Phillips, Justice Enoch, Justice Hankinson, Justice O'Neill and Justice Alberto Gonzales (currently White House counsel), stated that: "Most of Justice Owen's dissent is nothing more than inflammatory rhetoric, and thus merits no response. We note only that the two legal arguments Justice Owen does make are both based on a flawed premise." 22 S.W.2d at 877 (emphasis added).

The Court majority held that a special interest State statute unconstitutionally delegated to certain large private landowners legislative power, including “the power to regulate water quality on their property and in waterways located on their property.” *Id.* at 875. The majority recognized that “delegation of legislative power is both necessary and proper,” especially “to local governments” and “administrative agencies. . . . But because delegations to private entities raise more troubling constitutional issues than public delegations, they are subject to more stringent requirement and less judicial deference than public delegations. Legislative delegations to private entities can compromise ‘the basic concept of democratic rule under a republican form of government’ because private delegates are not elected by the people, appointed by a public official or entity, or employed by the government. And on a more practical basis, private delegations may allow private interests to adversely affect the public interest.” *Id.* at 874 (citations omitted).”<sup>1</sup>

The *FM Properties* statute allowed certain large landowners to exempt themselves from a variety of otherwise applicable municipal regulations, including water quality safeguards, “land use ordinances, nuisance abatement, platting and subdivision requirements, pollution control and abatement programs or regulations, and ‘any environmental regulations.’” The Supreme Court of Texas majority found that:

there is no meaningful governmental review of the landowners’ actions, there is inadequate representation of those affected by the landowners’ actions, the landowners have pecuniary interests that may conflict with their public function, and the delegation is broad in duration and extent. . . . [The statute] allows the landowners to *create* part of the regulatory scheme that they choose.

*Id.* at 878-79.

The Court recognized that, under the statute it found to be unconstitutional, the landowners would even have the power to draw up plans that do not comply with municipal regulations and to give themselves authority to decide which municipal regulations can be enforced on their property. These powers would not be “subject to *any* TNRCC [State agency] review. . . . [The statute] *prohibits* the TNRCC from requiring a public hearing on a water quality plan. . . . The statute expressly provides landowners the right to appeal TNRCC *denial* of a water quality plan to a court of competent jurisdiction. . . . But the statute does not confer any party the right to appeal TNRCC *approval* of a plan or zone designation. . . . In addition, the landowners alone decide which municipal regulations cannot be enforced in their zones.” *Id.* at 884-85 (emphasis in original). The

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<sup>1</sup> Recently, the U.S. Supreme Court properly rejected an attempt to impose unworkable limits on Congress’s power to delegate authority within the government, to the EPA and other expert administrative regulatory agencies. Whitman v. American Trucking Assns. 531 U.S. 457 (2001). This sound result offers no support for the very different -- and deeply troubling -- notion that governmental authority can be broadly delegated outside government, to the regulated entities themselves.

majority found that “Because these powers affect the public interest, the landowners do have a public function. Undeniably, the landowners' pecuniary interest in maximizing profit and minimizing costs may conflict with this public function.” Id. at 885 (emphasis added.)

Contrary to the majority opinion’s recognition the “this case is not about . . . private property rights,” id. at 878, and in contrast with the legal analysis of Justice Abbott’s dissenting opinion (which Justice Owen also joined), Justice Owen’s dissent repeatedly attempted to portray the majority decision as a sweeping assault on property rights. In her view, “The importance of this case to private property rights . . . cannot be overstated,” the Court’s decision is an “unprecedented restriction on property rights. I am at a loss to understand what is driving the Court's opinion, since it clearly is not reasoned decision-making. . . . The Court strikes a severe blow to private property rights,” that, if applied, “will impair all manner of property rights.” Id. at 889 (emphasis added).

Unfortunately, Justice Owen’s dissent focused on protecting the special interests of large landowners who wanted to write their own ticket, at the expense of the property and other rights of neighbors and those downstream. As the majority opinion found, “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.” Id. at 879.

In other words, it is Justice Owen’s dissent, not the majority opinion, which would have struck a severe blow to genuine private property rights-- of downstream water users and the landowners' neighbors. The rationale and language of her dissent display an extreme and unsupportable view that large landowners have property rights to exempt themselves from water pollution and development safeguards at the expense of adverse impacts on “the public interest, and more specifically, the interests of downstream water users and the landowners' neighbors.”

Justice Owen’s one-sided, extremist view that large landowners have property rights to profit by avoiding pollution, nuisance and other laws is even more troubling than the specific result she would have reached. The context is also extremely disturbing. She was not content to join Justice Abbott’s dissenting opinion, but felt compelled to write separately to stress her draconian view of property rights at the expense of neighboring and downstream property owners and clean water.

### ***Preemption of State Common Law Health and Safety Remedies***

State common law tort, nuisance and other civil remedies often provide invaluable supplementation of limited federal safety, health and environmental statutes. Court rulings that State common-law claims are barred or preempted by federal laws can preclude the most effective or only avenue of relief and incentive to prevent many injuries, deaths, and threats to the air we breathe and the water we drink.

Justice Owen's opinion dissenting from the Supreme Court of Texas majority in *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 41 Tex. Sup. J. 947 (1998) is a very disturbing example. This case involved gross negligence and other State common-law claims that paralyzing injuries resulted from Hyundai's failure to equip a car manufactured in 1988 with lap seat belts and failure to provide adequate warnings and instructions. An 18-year old passenger argued that he was wearing the only seat belt the car was equipped with, a shoulder belt, but was ejected through the sunroof and paralyzed from the chest down when the car skidded off the road and rolled over. Justice Owen's dissent would have ruled that the case was barred by minimum federal motor vehicle safety requirements, which were compatible with State common-law claims.

The majority opinion by Justice Spector, joined by Justice Raul Gonzalez, Justice Baker, Justice Abbott, and Justice Hankinson, found that Congress intended to further the goal of motor vehicle safety, that these common-law claims regarding lack of lap belts would in fact help ensure greater safety than the minimum federal standards, and that the resulting duties were not in conflict.

Justice Owen agreed with the majority that the manufacturer could "comply both with federal law and with a State common-law duty to include lap belts." *Id.* at 30, 95. She also agreed with the majority that "common-law liability for design defects and negligence would advance" the Safety Act's goal "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents" because such liability "may spur the automotive industry to develop safer designs." *Id.* at 95.

Nevertheless, Justice Owen would have barred such State law claims based upon an analysis that would undermine a wide range of corporate responsibility and liability for actions that violate State common-law health, safety and environmental duties. The majority held that "In light of the language of the Safety Act's express preemption clause, the savings clause and the statute's legislative history," the Court did not perceive the "clear and manifest intent" by Congress that would be necessary to preempt these State law claims regarding lack of lap belts. *Id.* at 24. In contrast, Justice Owen refused to give proper effect both to the language of the statute and to the relevant "clear and manifest intent" standard that would be required to find that the State laws claims were barred. In addition, she relied upon the very disturbing conclusion that State law claims would be an obstacle to the Safety Act because the State law claims would "impose higher safety standards." *Id.* at 95. Justice Owen refused to acknowledge the fundamental fact that there is no conflict when a federal statute establishes only a floor, a minimum safety (or environmental) standard, and State common-law claims would impose additional, compatible safeguards.

Justice Owen's dissent is undermined by the views of every Justice of the U.S. Supreme Court in a subsequent decision, *Geier v. American Honda Motor Co.*, 529 U.S. 870 (2000). In that case, a bare majority found that State tort actions alleging negligence for failure to install a driver's side air bag were preempted because they were in actual "conflict with federal regulations" that required manufacturers to place air bags in some

but not all 1987 automobiles. The dissenting Justices would have ruled that “neither the text of the statute nor the text of the regulation contains any indication of an intent to preempt petitioners’ cause of action . . .” Id. at 912-13 (Stevens, Souter, Thomas, & Ginsburg, JJ. dissenting).

Justice Owen’s analysis and result is inconsistent not only with that U.S. Supreme Court dissent but also with the U.S. Supreme Court majority opinion’s explicit recognition that:

[t]he savings clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate--for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. . . . the saving provision still makes clear that the express pre-emption provision does not of its own force preempt common-law tort actions. And it thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor.

Id. at 868, 870.

Indeed, the *Geier* U.S. Supreme Court majority recognized that: “In 1967, DOT, understanding that seatbelts would save many lives, required manufacturers to install seatbelts in all automobiles.” Id. at 875. In *Hyundai*, the Supreme Court of Texas majority found that State common-law claims regarding lack of lap seat belts (on a car manufactured in 1988) would in fact help ensure greater safety than the minimum federal standards and that the resulting duties were not in conflict.

In contrast, the *Geier* result was based upon the majority’s finding of an actual conflict because the federal regulation

sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argue would stand as an "obstacle" to the accomplishment of that objective. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.

529 U.S. at 886.

### ***Public Information***

Public disclosure provisions of the Freedom of Information Act and other federal and State statutes play key roles in environmental, health, safety, and other vital safeguards.

Justice Owen's opinion for a majority of the Supreme Court of Texas overruled the Texas Attorney General and a State trial court and denied the media and the public access to a city consulting expert's report on a wastewater treatment plant that had been the subject of lawsuits arising from discharges. *In re City of Georgetown*, 53 S.W.2d 328, 2001 Tex. LEXIS 10, 44 Tex. Sup. J. 434 (2001).

Justice Abbott's dissent, joined by Chief Justice Phillips and Justice Baker, stressed that:

When enacting Chapter 552 of the Public Information Act, the Legislature enunciated a clear and unambiguous policy statement: "[I]t is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees." Tex. Gov't Code § 552.001(a). The Act 'forcefully articulates a policy of open government.' *A & T Consults., Inc. v. Sharp*, 904 S.W.2d 668, 675 (Tex. 1995). To effectuate this policy, the Legislature mandated that the Act 'shall be liberally construed in favor of granting a request for information.' Tex. Gov't Code § 552.001(b). . . .

[T]he Court should be guided by the legislative policy underlying the Act. That policy instructs us to strictly construe the language 'expressly made confidential under other law' to ensure disclosure to the full extent envisioned by the Legislature. The more broadly the Court construes this language, the more information may be withheld from disclosure, and the more the legislative policy of public access to information is thwarted.

2001 Tex. LEXIS at \*27, \*29.

The dissent recognized that its interpretation "places an extra burden on governmental entities because it requires them to disclose in a litigation context certain documents that private parties would not be required to produce. But it is within the Legislature's province to make that call. We are bound to apply the statute's words as written . . . Subsection (b)'s mandate that public information cannot be withheld unless expressly made confidential under other law is clear. Today, the Court abandons strict construction and rewrites the statute to eliminate subsection (b)'s restrictions." *Id.* at \*44-\*46.

In contrast, Justice Owen's majority opinion essentially ignored the Legislature's express, forceful policy of open government and requirement that the Act be liberally construed in favor of disclosure. Instead, her opinion relied heavily upon the disclosure's "profound impact on governmental bodies" to justify a very strained statutory interpretation. *Id.* at \*14.

Justice Owen's reliance on this one-sided analysis to overturn a Texas Attorney General written ruling and a trial court decision raises serious questions about her willingness to enforce statutory policies and language in favor of public disclosure.

### ***These Concerns Were Supported by Editorial Boards and Commentators***

Environmental concerns with Justice Owen's Fifth Circuit nomination were supported by major editorial boards, including *The New York Times*, *The San Francisco Chronicle*, *The Los Angeles Times*, *The Atlanta Journal-Constitution*, and *San Antonio Express-News*. For example, *The Los Angeles Times*' July 23, 2002 editorial concluded that Justice Owen was 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 from Justice Owen's home State that supported her election to the Supreme Court of Texas subsequently opposed her Fifth Circuit nomination. The *San Antonio Express-News* strongly urged the Senate to reject her nomination based upon her "results-oriented" record on the State high court: "When a nominee has demonstrated a propensity to spin the law to fit philosophical beliefs, it is the Senate's right - and duty - to reject that nominee." Editorial, *Bush court choice should be rejected* (July 21, 2002). The *San Antonio Express-News* subsequently concluded that the decision to re-nominate Justice Owen "is a major disappointment." Editorial, *Judicial nominees' return is baffling* (Jan. 10, 2003). The *Houston Chronicle* recently editorialized that Justice Owen joined a court ruling that "is exactly the sort of tortured jurisprudence that caused Democrats on the U.S. Senate Judiciary Committee to reject President Bush's nomination of Owen to be a justice on the 5th U.S. Circuit Court of Appeals. Texas may be saddled with justices who elevate partisan ideology above law and logic, but justice and reason should discourage their infliction on the nation." Editorial, *Partisan Injustice* (Jan. 4, 2003).

*Houston Chronicle* columnist Cragg Hines explained that Justice Owen is "a very, very conservative judicial activist who appears willing to attempt to twist the law to fit her very, very conservative political views. . . . Owen has been a conservative activist in overturning jury awards, belittling consumers and driving a hole in the State's freedom of information law." *Why Justice Owen should stay in Austin* (July 16, 2002). A Dallas/Fort Worth *Star-Telegram* guest column by Craig McDonald, director of Texans for Public Justice, concluded that Justice Owen's "record is one of a judicial activist who seeks to make laws from the bench . . . [and] established her as one of two ideological extremists who are out of the mainstream - even on the all-conservative Texas Supreme Court." *Owen doesn't fit criteria for federal benches* (July 15, 2002).

### ***Environmental Concerns Were Supported by Judiciary Committee Senators***

Several Judiciary Committee Members in their September 5, 2002 formal statements explaining why they voted against confirming Justice Owen also reflected environmental concerns. The Honorable Herb Kohl, Senator, Wisconsin, explained that: "She is clearly

and consistently outside of the mainstream in many cases. In an environmental case, *FM Properties*, she was criticized for basing her arguments on ‘flawed premises’ and ‘inflammatory rhetoric.’” The Honorable Edward M. Kennedy, Senator, Massachusetts, stated that:

In several of her dissents, Justice Owen appears to substitute her views for the plain meaning of statutory language, or ignores evidence that fails to support her position, prompting criticism from her colleagues for doing so. For instance, in *FM Properties Operating Co. v. City of Austin*, Justice Owen dissented from the majority's ruling that a state law that had been designed to allow a developer to bypass the City of Austin's municipal water-quality laws was unconstitutional. Justice Owen's dissent, in which she faulted the majority for restricting property rights, was so harsh that it was criticized by the majority as “nothing more than inflammatory rhetoric [which] merits no response.”

The following detailed excerpt from the Statement of then-Chairman Patrick Leahy, Senate Judiciary Committee, explains how the serious concerns raised by Justice Owen’s dissent in the *FM Properties* case were compounded by her testimony at her Judiciary Committee hearing in response to questions about the case.

Justice Owen's activism and extremism is noteworthy in a variety of cases, including those dealing with business interests, malpractice, access to public information, employment discrimination and Texas Supreme Court jurisdiction, in which she writes against individual plaintiffs time and time again, in seeming contradiction of the law as written.

One of the cases where this trend is evident is *FM Properties v. City of Austin*, 22 S.W. 3d 868 (Tex. 1998). I asked Justice Owen about this 1998 environmental case at her hearing. In her dissent from a 6-3 ruling, in which Justice Alberto Gonzales was among the majority, Justice Owen showed her willingness to rule in favor of large private landowners against the clear public interest in maintaining a fair regulatory process and clean water. Her dissent, which the majority characterized as, "nothing more than inflammatory rhetoric," was an attempt to favor big landowners. In this case, the Texas Supreme Court found that a section of the Texas Water Code allowing certain private owners of large tracts of land to create "water quality zones," and write their own water quality regulations and plans, violated the Texas Constitution because it improperly delegated legislative power to private entities. The Court found that the Water Code section gave the private landowners, "legislative duties and powers, the exercise of which may adversely affect public interests, including the constitutionally-protected public interest in water quality." *Id.* at 876-77. The Court also found that certain aspects of the Code and the factors surrounding its implementation weighed against the delegation of power, including the lack of meaningful government review, the lack of adequate

representation of citizens affected by the private owners' actions, the breadth of the delegation, and the big landowners' obvious interest in maximizing their own profits and minimizing their own costs.

The majority offered a strong opinion, detailing its legal reasoning and explaining the dangers of offering too much legislative power to private entities. By contrast, in her dissent, Justice Owen argued that, "[w]hile the Constitution certainly permits the Legislature to enact laws that preserve and conserve the State's natural resources, there is nothing in the Constitution that requires the Legislature to exercise that power in any particular manner," ignoring entirely the possibility of an unconstitutional delegation of power. *Id.* at 889. Her view strongly favored large business interests to the clear detriment of the public interest, and against the persuasive legal arguments of a majority of the Court.

When I asked her about this case at her hearing, I found her answer perplexing. In a way that she did not argue in her written dissent, at her hearing Justice Owen attempted to cast the FM Properties case not as, "a fight between and City of Austin and big business, but in all honesty, . . . really a fight about . . . the State of Texas versus the City of Austin." Transcript at 69. In the written dissent however, she began by stating the "importance of this case to private property rights and the separation of powers between the judicial and legislative branches. . .", and went on to decry the Court's decision as one that, "will impair all manner of property rights." 22 S.W. 3d at 889. At the time she wrote her dissent, Justice Owen was certainly clear about the meaning of this case - property rights for corporations.

(Emphasis added).

### ***Justice Owen's Testimony Compounded the Problems With Her Nomination***

Thus, Justice Owen compounded the problems with her nomination by giving testimony at her hearing that is incompatible both with the language of the dissenting opinion that she authored and with its context.

In response to Senator Leahy's detailed question 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, 2002, 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 later attributed to “some” others and dismissed out of hand in her testimony. Indeed, her repeated characterizations of the case as involving a fight between the City of Austin and the “property rights” of big landowners was the focus of her dissent and was exactly what distinguished it from the views of both the majority and Justice Abbott’s lengthy separate dissenting opinion.

It was the extreme language and focus of Justice Owen’s dissent on large landowner “property rights” that compelled the majority opinion to explain how “this case is not about . . . private property rights.” 22 S.W.2d at 878. Justice Abbott’s lengthy separate dissenting opinion (which Justice Owen joined) began by claiming that “This case is not so much about water quality as it is about the power of local governments to regulate in the extraterritorial jurisdictions (ETJs).” *Id.* at 898.

Even if Justice Abbott’s opinion could be reconciled with Justice Owen’s testimony, the fact remains that Justice Owen was not content to join that dissent. Instead, she wrote a separate lengthy dissenting opinion that focuses on repeated attempts to portray the majority decision as a sweeping assault by the City of Austin on the property rights of large landowners. *Id.* at 889.

Justice Owen’s decision to write her separate dissenting opinion is in conflict with the language of her testimony that attempted to cast the *FM Properties* case not as, “a fight between and City of Austin and big business, but in all honesty, . . . really a fight about . . . the State of Texas versus the City of Austin.” Transcript at 69.

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