

I.
INTRODUCTION

Trying a case in front of an unbiased and impartial judge is a cornerstone of the American system of jurisprudence, particularly in this case involving Texas' public school finance system, which potentially affects nearly every student, teacher, parent, property owner and taxpayer in the state. Further and perhaps even more importantly, all court proceedings should be open to the public; hearings should not be conducted in secret, non-public, backrooms. Recently, upon the court's order, Plaintiff's counsel provided to Defendants' counsel a series of emails between March 19, 2014 and May 14, 2014 between the judge in this case or his staff and counsel for Plaintiffs. The emails relate to the merits of the litigation, particularly the entry of judgment and findings of fact and conclusions of law. That the record in this matter is still open, that Defendants' counsel was not notified of the communications or given an opportunity to respond, and that some of the emails' content suggest that the judge is coaching the Plaintiffs' counsel in order to improve their case, raise a reasonable question regarding the judge's impartiality.

Because of the question of the judge's impartiality, the Office of the Attorney General, on behalf of the State of Texas respectfully requests that the Honorable John K. Dietz, judge presiding over the 250th Judicial District Court and the ongoing school finance case be immediately recused.

II.
SUMMARY OF THE ARGUMENT

The Office of the Attorney General, on behalf of the State of Texas, files this motion to recuse the Honorable John K. Dietz pursuant to Texas Rules of Civil Procedure 18b(b)(1), on the basis that "the judge's impartiality might reasonably be questioned." The specific factual allegations supporting this motion are set out in paragraphs 1 through 29 and contained in the

exhibits set out below. The Plaintiffs’ May 15, 2014² disclosure of more than 30 *ex parte* communications between the Plaintiffs’ counsel and the judge or the judge’s staff attorney—that occurred between March 19 and May 14, while evidence was still open—leave little question that the judge must be recused from further hearing or trial of this case because his impartiality might now be reasonably questioned.

III. EXHIBITS³

Below is a list of exhibits the OAG relies on for purposes of this motion. The OAG incorporates them by reference into this motion as support for many of the factual statements contained herein. The judge has treated much of the evidentiary basis of the motion as for “Attorneys Eyes Only” and/or ordered it to be filed in the official court record under seal. To avoid violating any oral court order, the OAG requests that upon referral of this motion to the regional judge, TEX. R. CIV. P. 18a(f)(1)(b), the judge or court responsible for reviewing this motion receive the supporting exhibits *in camera* to initially determine whether they must be filed under seal. If the judge or court determines these exhibits must be filed under seal, the OAG requests the court to consider the exhibits *in camera*.

EXHIBIT NUMBER	DESCRIPTION
1	August 2, 2013 email re: off-record work session
2	“Thesis”
3	Transcript of August 20th work session
4	Transcript of September 12, 2013 hearing
5	Transcript of October 4, 2013 hearing

² One of Plaintiffs’ counsel disclosed 30 email communications between Plaintiffs’ counsel and the judge or his staff attorney to the State on May 15, 2014, at 6:27 p.m. Those email communications reference additional telephonic *ex parte* communications between Plaintiffs’ counsel and the Court. The sealed March 19, 2014, transcript also indicates other *ex parte* communications that took place between Plaintiffs’ counsel and the Court before the date of that hearing, which to date have not been disclosed to the State Defendants.

³ Again, this Amended Motion to Recuse does not include any substantive changes and the exhibits listed herein are the same exhibits previously offered with the original Motion. Pursuant to a prior request of the Presiding Judge, these exhibits have already been transmitted to this reviewing Court and all parties of record.

6	Transcript of January 16, 2014 hearing
7	Transcript of Trial February 4, 2014
8	Transcript of Trial February 7, 2014
9	Transcript of Post-Trial Hearing March 19, 2014
9A	Transcript of Post-Trial Hearing March 19, 2014 "Attorneys' Eyes Only" portion
10	April 29, 2014 email
11	Attachment to May 12, 2014 email
12	May 12, 2014 email
13	Transcript of May 14, 2014 "meeting"
14	April 1, 2014 email from Plaintiffs' counsel to judge re: 1.C.1 FOF
15	April 2, 2014 email from judge to Plaintiffs' counsel re: 1.C.1 FOF
16	April 2, 2014 email 4:14 p.m. from judge to counsel re: "Responsive Edits to I.C.1 (state property tax.)"
17	April 2, 2014 4:16 p.m. email from Plaintiffs' counsel to judge re: "Responsive Edits to I.C.1 (state property tax)"
18	April 7, 2014 email from judge to Plaintiffs' counsel re: "Responsive Edits to I.C.1 (state property tax)"
19	April 7, 2014 email 9:08 a.m. from Plaintiffs' counsel to judge re: "Responsive Edits to I.C.1 (state property tax)"
20	April 7, 2014 9:10 a.m. email from judge to counsel re: "Responsive Edits to I.C.1 (state property tax)"
21	April 7, 2014 email 9:14 a.m. judge to Plaintiffs' counsel re: "Responsive Edits to I.C.1 (state property tax)"
22	April 8, 2014 email 9:35 a.m. judge to Plaintiffs' counsel re: "2-28-FOF"
23	April 8, 2014 email 11:26 a.m. from Plaintiffs' counsel to judge (attaching Adequacy & Tax FOF & COL)
24	April 10, 2014 email 10:45 a.m. from Plaintiffs' counsel to staff attorney re: "revised equity draft" (attaching Equity FOF COL 4/10)
25	April 15, 2014 email 7:38 a.m. from Plaintiffs' counsel to staff attorney re: "Responsive Edits to I.C.1 (state property tax)"
26	April 15, 2014 email 8:42 a.m. from Plaintiffs' counsel to staff attorney re: "Responsive Edits to I.C.1 (state property tax)" (attaching Response edits to Exec)
27	April 15, 2014 email 9:56 a.m. from staff attorney to Plaintiffs' counsel
28	April 15, 2014 email 1:09 pm from Plaintiffs' counsel to staff attorney re: "Responsive Edits to I.C.1 (state property tax)"
29	April 17, 2014 email 3:30 pm from judge to Plaintiffs' counsel re: "The latest section" and attaching "Adequacy and Tax FOF & COL" and "Holly McIntush"

30	April 18, 2014 email 6:57 am from judge to Plaintiffs' counsel re: "Turning to 1.C.3"
31	April 24, 2014 12:49 p.m. email from judge to Plaintiffs' counsel re: 1.C.3
32	April 24, 2014 1:13pm email from Plaintiffs' counsel to judge re: 1.C.3
33	April 25, 2014 2:31pm email from Plaintiffs' counsel to staff attorney
34	April 26, 2014 3:28 p.m. email from staff attorney to Plaintiffs' counsel re: "Markup question"
35	April 26, 2014 5:59 p.m. email from Plaintiffs' counsel to staff attorney re: "Markup question"
36	April 26, 2014 8:18 p.m. email from staff attorney to Plaintiffs' counsel re: "Markup question"
37	April 26, 2014 9:09 p.m. email from Plaintiffs' counsel to staff attorney re: "Markup question"
38	April 28, 2014 7:13 a.m. email from Plaintiffs' counsel to staff attorney re: "Markup question"
39	April 28, 2014 7:17 a.m. email from Plaintiffs' counsel to staff attorney re: "Markup question"
40	May 9, 2014 email from court clerk to Plaintiffs' counsel re: "School Finance meeting on May 14, 2014 at 1:30pm" (attaching "Adequacy and Suitability")
41	May 12, 2014 email from court clerk to <i>all</i> Plaintiff's counsel re: "School Finance meeting on May 14, 2014 at 1:30pm" (attaching "Adequacy and Suitability")
42	Defendants' Request for Record
43	Court's Ruling signed February 4, 2013
44	Trial Transcript 45.RR.173 (omnibus order with findings and conclusions to come).
45	January 23, 2014 Order denying Defendants' Rule of Evidence 104 Motion and overruling relevancy objections.
46	June 19, 2013 Order Reopening the Evidence

IV. STATEMENT OF FACTS

On information and belief, the Office of the Attorney General, on behalf of the State of Texas, states the following facts in support of this motion:

1. On October 22, 2012, the bench trial began in the school finance case.

2. On February 2, 2013, the judge orally ruled from the bench that the school finance system is unconstitutional. Ex. 43. The judge did not enter judgment. Exs. 0A (indicating “omnibus” order with findings of fact and conclusions of law to come); Ex. 3 at 40, 56 (statements regarding anticipation of entry of judgment).

3. The 83rd Legislative Session concluded on May 27, 2013. During the session, the Legislature adopted over 100 bills related to public education. Many of the new laws directly and materially impacted the Plaintiffs’ complaints about Texas’s public education system. The changes rendered much of the evidence adduced during the months long trial irrelevant.

4. On June 19, 2013, the judge reopened the evidence and set trial for January 6, 2014. Ex. 46.

5. On August 2, 2013, the judge emailed all parties to the suit and ordered counsel to appear for an off-the-record “work session” to discuss the judge’s judgment and findings of fact and conclusions of law. Ex. 1.

6. Concerned about the implications of holding closed-court proceedings and the legality of any such action, the Defendants filed a Request for a Court Reporter in which they asserted the right to have all remaining proceedings and communications be recorded in an official transcript.

7. On August 20, 2013, all parties appeared at the “work session.” During the session, the judge handed out a type-written document, which he has referred to as his “Thesis,” outlining the judge’s thoughts on the case. Ex. 2. The document has been ordered “sealed.” Statements in the “Thesis” show the judge serving as advocate to the Plaintiffs’ before the trial’s continuation.

8. The Defendants’ counsel raised the issue of the transparency of the proceedings and the judge’s thesis at the August 20th work session. The judge found that the memo and the colloquy between the judge, his staff and the parties were his work product and subject to

judicial privilege. The judge, in an effort to shield the memo and the proceedings from the public, ordered the State to withhold the memo and the transcript of the proceedings from any potential request under the Public Information Act. He further ordered the memo and transcript would be placed under seal and filed with the record on appeal. Ex. 3. During that work session, the judge expressly acknowledged that *ex parte* communications were prohibited. Ex. 3.

9. The Defendants provided the judge with a proposed order, consistent with the judge's oral rulings sealing the transcript and memo. That order required that "[u]pon entry of final findings of fact and conclusions of law, transcripts and all documents associated with the proceedings will be made part of the appellate record." The Plaintiff school districts sought to strike that portion of the proposed order. *Intervenor's Objection to the Teas School District System Plaintiffs' Attempts to Seal Records* at Ex. 3.

10. On September 6, 2013, the Intervenor filed an Objection to the Texas School District System Plaintiffs' Attempts to Seal Records. *Id.*

11. On September 12, 2013, the judge held another hearing during which he expressly ordered that: (a) all future communications should be with his clerk, stating "[y]ou are not to communicate through my attorney or through the court reporter."; and (b) that all proceedings would be held on the record. Ex. 4 at 5. The judge overruled the Intervenor's motion and ruled that the memo was not a "court record." Ex. 4 at 6.

12. The judge further ordered his "Thesis" sealed. *Id.*

13. On October 4, 2013, during a pretrial hearing, the judge asked:

THE COURT: "How are the findings of fact coming? . . ."

MS. JACOBS: ". . . Still a work in progress. I know we provided a copy of that outline to Your Honor and we'll work in accordance with that outline unless you had any specific feedback on anything that you'd like us to vary from what we set out in that outline.

THE COURT: I've given all the guidance that I can.

Ex. 5. at 52.

14. During a January 16, 2014 pretrial hearing, the judge stated “we need to be look at – at the findings of fact and conclusions of law and the judgment while this is going on in order to, depending on what happens at the end of this case, then talk to y'all a little bit about what going there. . . .” Ex. 6 at 48.

15. The continuation of trial started on January 21, 2014.

16. While the trial was ongoing, the judge indicated his intention to confer with the parties' counsel regarding the findings of fact and conclusion of law, and that his staff attorney was working on the judgment. Ex. 7 at 129.

17. The Defendants' counsel requested a copy of that communication. The judge orally ordered that the draft findings of fact and conclusions of law was work product, and to disclose it to the Defendants would disclose the Plaintiffs' trial strategy. The judge indicated that the communication would eventually be sealed and made part of the record on appeal.

18. Before the conclusion of trial, the judge ordered that the record would remain open several weeks following the parties' closing arguments; Defendants still had (and do have) exhibits pending. Ex. 8 at at 73.

19. The parties' closed on February 7, 2014.

20. The judge held a hearing on the State's still-pending exhibits on March 19, 2014. The judge ordered additional briefing regarding the basis for admitting or excluding some of the exhibits. Ex. 9.

21. During the March 19 hearing, the judge indicated that the State would be included in the Plaintiffs *future* communications with the judge. Ex. 9A at 27-31.

22. Between March 19 and May 14, 2014, Defendants' counsel was not copied or included on any email, telephonic communication, or other type of communication between the Plaintiffs' counsel and the judge.

23. On April 29, 2014, the court's clerk emailed the parties counsel requesting the parties' to provide a date for another work session. Ex. 10.

24. On May 12, 2014, the court's clerk sent an email to Defendants' counsel, requesting that they review the judge's attached "remarks regarding Adequacy and Suitability." Exs. 11, 12. The email further provided: "The transcript and memo will be sealed. It will be conducted in chambers if any public shows up." Ex. 12.

25. On May 14, 2014, the judge held another "work session." The session was closed to the public. The judge and Plaintiffs' counsel discussed the proposed findings of fact and conclusions of law, their concerns regarding the judge's approach to the evidence in his latest memo, and possible solutions to allow for the strongest, most favorable opinion and judgment. Neither the Plaintiffs nor the judge provided the State's counsel with a copy of the proposed findings, conclusions, and judgment that the judge and Plaintiffs' counsel were reviewing and discussing at that meeting. The discussion at that session made clear that the judge had not yet decided the basis of its ruling on various claims. Ex. 13.

26. At that session, Plaintiffs' counsel sought clarification from the judge regarding the disclosure to the Defendants of *ex parte* communications between the court and Plaintiffs' counsel. The judge clarified that all such communications made since March 19, 2014 should be disclosed to the Defendants' counsel. *Id.* at 31.

27. The Defendants' counsel, again, requested that the judge enter a ruling on the offered exhibits. *Id.* at 51.

28. After 5:00 p.m. on May 15, the Defendants received copies of *ex parte* communications between the court and counsel for the Fort Bend Plaintiffs. Exhibits 14, 29, and 30 contain some of the statements the OAG relies on for this motion.

29. As of June 2, 2014, the judge had yet to rule on numerous exhibits that the State offered during trial, the record is still open, and no judgment has been entered in the matter.

V.
ARGUMENT AND AUTHORITIES

A. Prohibited *ex parte* communications undermine the public's confidence in our judicial system and thwart due process rights.

“Our adversarial system of justice, grounded in the principle of an impartial judiciary, becomes compromised when one-sided, closed-door, in-chambers discussions with trial judges are encouraged.” *In re S.A.G.*, 403 S.W.3d 907, 914 (Tex. App.—Texarkana 2013, pet. filed). For this reason, all attorneys are prohibited from engaging in *ex parte* communications, and judges “shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party [or] an attorney . . . concerning the merits of a pending or impending judicial proceeding.” Tex. Code Jud. Conduct, Canon 3(B)(8), reprinted in TEX. GOV’T CODE, tit. 2, subtit. G, app. B; see Tex. Disciplinary Rules Prof’l Conduct R. 3.05, reprinted in TEX. GOV’T CODE, tit. 2, subtit. G, app. A (West 2013). The Texas Supreme Court is very reticent to permit *ex parte* communications, allowing them in limited, extraordinary emergency situations. *Barnes v. Whittington*, 751 S.W.2d 493, 495 n. 1 (Tex. 1988) (finding unserved, *ex parte* affidavits no evidence to support privilege assertion) (citing TEX. R. CIV. P. 592 (Writ of Attachment); TEX. R. CIV. P. 658 (Writ of Garnishment); TEX. R. CIV. P. 696 (Writ of Sequestration); TEX. R. CIV. P. 800 (Proof in trespass to try title action when defendant fails to appear after notice by publication)).

Our justice system's prohibition of *ex parte* communications is purposeful. *In re S.A.G.*, 403 S.W.3d at 914.

Private adjudications fly in the face of our judicial system's abiding commitment to providing public access to civil and criminal proceedings and records. Our form of government is rooted in a recognition of the importance of open and public proceedings. Subjecting judicial proceedings to public scrutiny accomplishes two important goals. First, it provides the public with an opportunity to exercise its right to monitor and evaluate its judicial system. Second, and equally important, a judge's knowledge that his or her actions are not shrouded in secrecy fosters a stronger commitment to strict conscientiousness in the performance of judicial duties. Our courts have recognized that secret tribunals exhibit abuses that are absent when the public has access to judicial proceedings and records. The judiciary has no special privilege to suppress or conduct in private proceedings involving the adjudication of causes before it. In fact, such secrecy frustrates the judiciary's responsibility to promote and provide fair and equal treatment to all parties. Individual judges are charged with the task of adjudicating claims in a manner that protects the rights of both parties. A judge's private communications with either party undermine the public's right to evaluate whether justice is being done and removes an important incentive to the efficient resolution of cases.

In re Thoma, 873 S.W.2d 477, 496-97 (Tex. Rev. Trib. 1994) (citations omitted). For these reasons, the Texas Supreme Court strives for judicial transparency in our legal system. *In re Columbia Med. Ctr. of Las Colinas Subsidiary, L.P.*, 290 S.W.3d 204, 213 (Tex. 2009). "*Ex parte* communications do not promote that transparency," *In re S.A.G.*, 403 S.W.3d at 914, and in a case such as this, where they implicate the interest of all Texas public school children, their parents, teachers, taxpayers and other stakeholders, private communications cannot be tolerated. To suggest otherwise would undermine the integrity of courts, breed skepticism and distrust, and thwart principles on which our judicial system is based. *Matter of J.B.K.*, 931 S.W.2d 581, 584 (Tex. App.—El Paso, 1996) (citing *In re Thoma*, 873 S.W.2d at 496).

B. *Ex parte* communications call into question a court's impartiality.

When a judge engages in *ex parte* communications, his impartiality is subject to question.

The preamble to the Texas Code of Judicial Conduct Provides:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

Tex. Code Jud. Conduct, Preamble. Canons 1 and 2 establish a high standard of conduct for judges in order to promote the integrity of the judiciary and require judges to comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Tex. Code Jud. Conduct, Canon 1, 2(A).

Texas Rule of Civil Procedure 18b(b)(1) protects the integrity and impartiality of the judiciary by requiring a judge to recuse in any proceeding where “the judge’s impartiality might reasonably be questioned.” “The standard is ‘whether an objective, fully informed lay observer would entertain significant doubt about the judge’s impartiality.’” *In re Walker*, 532 F.3d 1304, (11th Cir. 2008) (citing 28 U.S.C. § 144, 455(a) (judge’s “impartiality might be reasonably questioned) and *Christo v. Padgett*, 233 F.3d 1324, 1333 (11th Cir. 2000)). The judge’s intentions or motivations for engaging in the *ex parte* communications are irrelevant to the inquiry; rather, the inquiry is an objective one which asks whether the judge’s exchange of *ex parte* communications with Plaintiffs’ counsel would raise in the mind of a fully informed lay observer questions regarding his impartiality. The answer to that question here can only be “yes.”

C. The Judge’s conduct in this case demonstrates that “the judge’s impartiality might reasonably be questioned.”

In this case, the judge’s lack of impartiality became evident during the summer of 2013, after the judge reopened the record. The record was reopened and the case was reset for trial,

without any clear limitations other than to determine what impact, if any, the 83rd Legislature's recently passed laws would have on the Plaintiffs' claims. Ex. 45. The effect of reopening the evidence was to bring into question the viability of the judge's previous ruling, effectively causing that ruling to be overruled or withdrawn. Even though the ruling was withdrawn and the public school system's constitutionality was an open question, the judge's subsequent action, away from public scrutiny, shows he presumed that the legislative changes had no impact on his previous determination. On August 2, 2013, counsel for Defendants received an email requiring the parties to attend a closed meeting with the judge to discuss the Plaintiffs' proposed findings of fact and conclusions of law. Ex. 1. Concerned by the closed nature of the meeting, the Defendants filed a request that all future proceedings and communications be held on the record. Ex. 42. At the August 20, 2013 meeting, the judge issued a "Thesis" which coached the Plaintiffs' counsel about arguments and evidence the judge believed necessary to the school districts' success on appeal. Exs. 2, 3. Many of these legal theories pertained to legislative enactments that occurred years before the trial and had no relevance to enactments of the 83rd Legislative Session, which was the judge's stated reason for re-opening the evidence.⁴ Ex. 2.

The meeting was recorded, but its transcript as well as the "Thesis" the judge provided to the meeting attendees have been designated "for attorney's eyes only" and "sealed." Ex. 3. It is clear from this transcript that the judge understood the Defendants' concerns regarding the open nature of the proceedings and the prohibition against *ex parte* communications. Ex. 3 at 57.

At a hearing on September 12, 2013, the judge confirmed that: all future proceedings would be made part of the court record; all future communications must be to his court clerk; and

⁴ The transcript from January 23, 2014, reflects the Plaintiffs offering and the Court admitting, over the State's objection, testimony about the "structural deficit" that supposedly occurred in 2006. R.R. 1.23.14 at pp. 189-203. The witness's testimony and lengthy colloquy between Mr. Thompson and the judge, tracks the arguments/issues set forth by the judge in the "Thesis." The State objected that the testimony was outside the scope of rehearing (and the witness's deposition testimony) and the judge overruled that objection. R.R. 1.23.14 at 189-190, 203.

the parties were expressly prohibited from communicating with the judge's staff attorney or the court reporter. Ex. 4. For the time being, these clear, unequivocal statements from the judge satisfied the Defendants' concerns.

After the second evidentiary portion of the trial started, it became apparent that the Plaintiffs' counsel had nevertheless engaged in *ex parte* communication with the judge when it provided the judge with proposed findings of fact and conclusions of law. Defendants' counsel requested a copy of those findings. *See* TEX. R. CIV. P. 305 (requiring service on opposing party of proposed judgment). Although the judge had previously ordered that all proceedings and communications would be made available to the public, he changed course when he overruled the Defendants' request because the proposed findings and conclusions were attorney work-product privileged and/or confidential as part of the judicial deliberative process (despite their circulation between the judge and counsel). The judge indicated however that, once the evidentiary portion of the trial had concluded, any risk of disclosing trial strategy would no longer exist, entitling the Defendants to receive, albeit after the fact, any exchanges between the judge and the Plaintiffs.

Consistent with his previous indication, the judge indicated at the post-trial March 19, 2014 hearing that counsel for the State would receive copies of the proposed findings and conclusions. Ex. 9. The State did not, in fact, receive those proposed finding and conclusions until May 15, 2014. The State was unaware, and was never made aware prior to the May 15, 2014 disclosure, that the Plaintiffs' counsel and the judge were having conversations about these drafts via both email and telephone. Furthermore, once Defendants' counsel received the previously-redacted transcript of the March 19 hearing, it became clear that the judge and the Plaintiffs' counsel had engaged in *ex parte* communications before that date. Ex. 9A. The

judge's appearance of impartiality is undoubtedly questionable based upon the May 15 disclosure of dozens of *ex parte* communications that occurred after the judge repeatedly assured the State that no such communications would take place.

The May 15, 2014 disclosure of *ex parte* communications between the judge and Plaintiffs, even after the judge indicated that the State would be included on all communications between the parties and the judge, demonstrates a violation of Canon 3B(8),⁵ and manifest impartiality against the State Defendants in this case. The *ex parte* communications between the judge and counsel for the Fort Bend Plaintiffs show requests from the judge to plaintiff's counsel to communicate via telephone. Exs. 21, 31, 33. Various emails show that the judge continued to coach the Plaintiffs' attorneys regarding the merits of the litigation and the judge's interest and investment in the case's outcome. Ex. 29, 30. Based on the content of the emails and the "Thesis", it is reasonable to surmise that the judge has improperly taken on the role of advocate in this litigation. *Burks v. State*, 693 S.W.2d 747, 750 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd)(judge should never assume role of litigant).

The communications include the proposed judgment with supporting legal conclusions and factual findings, and thus serve "as an additional opportunity [for the plaintiffs] to brief and argue [their] case. . . ." *In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987). Not only did this exchange create the potential for abuse, it was patently unfair to the Defendants, who have been excluded from the ongoing colloquy between the Plaintiffs' counsel and the judge and have not had "ample opportunity" to argue for or against the findings. *Id.*; see *In re Walker*, 532 F.3d at 1311; *In re Colony Square Co.*, 819 F.3d at 275 ("When an interested party is permitted

⁵ See e.g. COMM. ON JUD. CONDUCT, CJC No. 12-0846-DI (the matter of the Honorable Juergen (Skipper) Koetter (issuing a public admonition against the judge based on violation of Canon 3B(8) prohibiting *ex parte* communications on contested matters pending before the court.

to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming.”).

The email exchanges, on their face, would cause any fully-informed lay person to at least question the judge’s impartiality.

D. Harm is presumed here, and given the nature of the *ex parte* communications, that presumption cannot be rebutted.

No showing of harm from the judge’s lack of impartiality is required; it is presumed. TEX. R. CIV. P. 18 (no express requirement of harm); Tex. R. Civ. P. 327 (expressly requires showing of harm arising from *jury* misconduct); *see Remmer v. United States*, 347 U.S. 227, 230 (1954) (in criminal matter, private communication, direct or indirect, with juror after the beginning of trial is deemed presumptively prejudicial, if not made with full knowledge of all parties and pursuant to court order or rule). As one state court has noted:

[A] prejudice standard is not always appropriate. There are certain attorney-juror contacts which happen during trial “which if permitted to stand would shake the confidence of laymen in the fairness of judicial proceedings.” In such circumstances we must find reversible error regardless of a showing of actual prejudice. In cases of such gross impropriety, our concern is not with the contact’s potential influence on a discrete verdict; rather we seek to protect against the “confidence-shaking effect upon future cases, which would result from appellate disregard of such events.”

Colosimo v. Pennsylvania Elec. Co., 486 A.2d 1378, 1381, 337 Pa.Super 363, 369 (1984)(citations omitted).

Here, the recusal rule does not require a showing of harm. Certainly, the Texas Supreme Court could have included such a requirement in the rule, but it chose not to, presumably because the appearance of impartiality is so important to the public’s confidence in the legal system. Moreover, communications such as those at issue here shake the confidence of any layman in the fairness of the process. The appearance of impropriety is alone sufficient to warrant recusal.

Because the judge is the fact finder, serving in the capacity as a jury otherwise would, the presumption of prejudice when jurors and either counsel or the judge confer *ex parte* should apply to the communications here. *See State v. Washington*, 626 So.2d 841 (La.App. 2d Cir.1993); *State v. Bates*, 508 So.2d 1346 (La.1987) (per curiam). First, the current record shows that there were other *ex parte* communications before March 19, 2014, but because they have not been disclosed, their timing and substance are unknown. Second, Defendants' counsel was not made aware of the *ex parte* communications until months after the trial was completed, and the Plaintiffs' counsel and the judge or his staff had engaged in dozens of *ex parte* communications. The Defendants, therefore, were never given notice and an opportunity to respond, as they typically would in an open, adversarial proceeding. Under these particular facts, and with the inherent risk to the propriety of judgments when a court and one side to the litigation work toward a certain result, a court considering a recusal motion must assume prejudice.

Even in those cases where courts have reviewed whether questions regarding a judge's impartiality affected the litigation's outcome, they have only required the complaining party to show "probable prejudice." *Silcott v. Oglesby*, 721 S.W.3d 290, 293 (Tex. 1987); *Pitt v. Bradford Farms*, 843 S.W.2d 705, 708 (Tex. App—Corpus Christi 1992, no pet.)(citing *Andrews v. Dewberry*, 242 S.W.2d 685, 690 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.). In each case where the courts have applied a "probable prejudice" analysis, one essential fact to the analysis was whether the judge whose impartiality had been questioned had reached a final or at least firm decision on the case. For instance, in *In re Colony Square Co.*, where the judge had used "ghostwritten" findings prepared by the creditor's counsel, the reviewing court condemned the process holding "[t]he bankruptcy judge's actions in preparing these orders have little to commend them. Nevertheless, *since the judge had already reached firm, final decisions* and

since these decisions were determined to be correct as a matter of law by the district court and appellate courts, we conclude that the process by which the orders were prepared did not prejudice the appellant and was not fundamentally unfair.” 819 F.2d at 277.

The communications here clearly involve the merits of the litigation before the judge. Tex. Code Jud. Conduct, Cannon 3(B)(8). Moreover, they involve fewer than all the parties legally entitled to be present, *In re Thoma*, 873 S.W.2d at 496, the record is still open, and no judgment has been entered. *But see Tex. Extrusion Corp. v. Lockheed Corp.*, 844 F.2d 1142, 1164 (5th Cir. 1988) (because court took active role in preparing findings and *already made* lengthy oral findings, no prejudice to appellants); *In the Interest of T.D.M.C.*, No. 12-03-00300-CV, 2005 WL 1000578, *4 (Tex. App.—Tyler, April 29, 2005, no pet.) (finding that *ex parte* communication did not involve merits, entry of findings *after* the order at issue, and *matter no longer pending* showed that merits decision was not dependent on *ex parte* communications). And although it may be said that the judge has made up his mind with respect to the case’s outcome, it is clear that he has not yet determined *how* he will arrive at his rulings. Exs. 44, 45. There is clearly dissent among the Plaintiffs’ counsel regarding what “input” evidence is relevant to the constitutional questions, which “outputs” the judge should rely on, and whether the judge will find that “inputs” alone can support a finding that the system is unconstitutional. Exs. 13, 19. Indeed, the judge has ordered additional briefing from the Plaintiffs on this very issue, signaling that he has not reached a final, firm decision. *Id.* at 13.

V.
CONCLUSION AND PRAYER FOR RELIEF

Because the *ex parte* communications and the judge’s other actions show that the judge’s impartiality can be reasonably questioned, as well as give rise to the specter that he improperly

assumed the role of advocate for the Plaintiffs, the Office of the Attorney General respectfully requests the following:

- A. (1) the Honorable John Dietz recuse from this case, or that this matter be referred to the regional presiding judge for consideration, TEX. R. CIV. P. 18a(f)(1)(B); and
- B. that the Office of the Attorney General be granted leave of court to seek discovery related to any *ex parte* communications, as defined in Tex. Code Jud. Conduct, Canon 3(B)(8), reprinted in TEX. GOV'T CODE, tit. 2, subtit. G, app. B, between Plaintiffs' counsel or their agents and Judge Dietz and his court staff that refer in any way to the merits of this litigation.

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

/s/ Daniel T. Hodge

DANIEL T. HODGE
Texas Bar No. 24048548
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

JAMES "BEAU" ECCLES
Chief-General Litigation Division

SHELLEY N. DAHLBERG
Assistant Attorney General
Texas Bar No. 24012491
General Litigation Division
Texas Attorney General's Office
P. O. Box 12548, Capitol Station
Austin, Texas 78711
Phone: (512) 463-2121
Fax: (512) 320-0667

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2014, the foregoing document was served via electronic mail:

Richard E. Gray, III
Toni Hunter
GRAY & BECKER
900 West Ave.
Austin, Texas 78701

Multicultural, Education, Training And
ADVOCACY, INC.
Roger L. Rice
240a Elm St., Ste. 22
Somerville, Ma 02144

Randall B. Wood
Doug W. Ray
RAY & WOOD
2700 Bee Caves Rd., Suite 200
Austin, Texas 78746

J. David Thompson, III
Philip Fraissinet
THOMPSON & HORTON LLP
Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027

Mark R. Trachtenberg
HAYNES AND BOONE, LLP
1 Houston Center
1221 McKinney Street, Suite 2100
Houston, Texas 77010

Holly G. McIntush
400 West 15th Street, Suite 1430
Austin, Texas 78701

John W. Turner
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219

J. Christopher Diamond
THE DIAMOND LAW FIRM, P.C.
17484 Northwest Freeway, Suite 150
Houston, Texas 77040

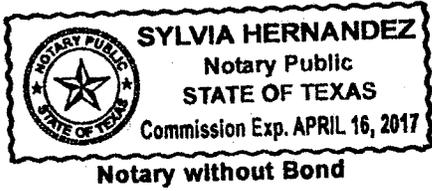
MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATION FUND, INC.
David G. Hinojosa
Marisa Bono
110 Broadway, Ste. 300
San Antonio, Texas 78205

Craig T. Enoch
ENOCH KEVER PLLC
600 Congress, Suite 2800
Austin, Texas 78701

Robert A. Schulman
Joseph E. Hoffer
Leonard J. Schwartz
SCHULMAN, LOPEZ & HOFFER, L.L.P.
517 Soledad Street
San Antonio, Texas 78205-1508

/s/ Shelley N. Dahlberg
SHELLEY N. DAHLBERG
Assistant Attorney General

Sworn to and subscribed before me by Shelley N. Dahlberg on June 18, 2014.



Sylvia Hernandez
Notary Public in and for
The State of Texas

My commission expires: April 16, 2017

Unofficial copy Travis Co. District Clerk Velva L. Price