

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 00-50139

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS,
and MICHAEL J. MAZZONE,

Plaintiffs-Appellants,

v.

TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION; RICHARD TATE,
in his official capacity as Chairman of the Texas Equal Access to Justice
Foundation; THOMAS R. PHILLIPS, Chief Justice, NATHAN R. HECHT,
Justice, CRAIG T. ENOCH, Justice, PRISCILLA R. OWENS, Justice,
JAMES A. BAKER, Justice, GREG ABBOTT, Justice,
DEBORAH G. HANKINSON, Justice, and HARRIET O'NEILL, Justice,
in their official capacities as Justices of the Supreme Court of Texas,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION**

SUPPLEMENTAL BRIEF OF APPELLEES

John Cornyn, Attorney General of Texas
Andy Taylor, First Asst. Attorney General
Gregory Coleman, Solicitor General
Rande K. Herrell
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

**COUNSEL FOR APPELLEES JUSTICES OF
THE SUPREME COURT OF TEXAS**

Darrell E. Jordan
David J. Schenck
Beth W. Bivans
HUGHES & LUCE, LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201

**COUNSEL FOR APPELLEES
TEAJF AND ITS CHAIRMAN**

(Additional counsel are listed on the
signature page.)

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. THE TEXAS COURT OF APPEALS' DECISION IN <i>PAULSEN</i> REINFORCES KEY FINDINGS MADE BY THE DISTRICT COURT IN THIS CASE.....	4
II. THE PARTICULAR PASSAGE IN <i>PAULSEN</i> QUOTED BY THIS COURT IN ITS SUPPLEMENTAL BRIEFING ORDER DOES NOT RESOLVE THIS LITIGATION.....	8
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>Erie Railroad Co. v. Tompkins</i> , 304 U.S. 64 (1938).....	14
<i>FDIC v. Abraham</i> , 137 F. 3d 264, 268 (5th Cir. 1998)	14
G.C.M. 38374, 1980 WL 131409 (IRS).....	13
<i>Hoover v. Morales</i> , 164 F. 3d 221, 224 (5th Cir. 1998)	15
IRS Rev. Rul. 81-209, 1981-2 C.B. 16	10
P.L.R. 199909,032, 1999 WL 113103 (IRS PLR).....	13
<i>Paulsen v. State Bar of Texas</i> , ___ S.W.3d ___, 2001 WL 23180 (Tex. App.- Austin Jan. 11, 2001).....	1
<i>Paulsen v. Texas Equal Access to Justice Foundation</i> , 23 S.W.3d 42, 48 (Tex. App.-Austin 1999)	4
<i>Phillips v. Washington Legal Foundation</i> , 524 U.S. 156 (1998).....	4
Rev. Rul. 87-2, 1987-1 C.B. 18.....	13
Tex. Disciplinary R. Prof. Conduct 1.14(b).....	13
Tex. Disciplinary R. Prof. Conduct 1.14(b), reprinted in Tex. Gov’t Code Ann., tit. 2, subtit. G app. A (West 1998) (State Bar Rules art. X, § 9).....	4
<i>Washington Legal Foundation v. Texas Equal Access to Justice Foundation</i> , 86 F. Supp. 2d 624, 638-42 (W.D. Tex. 2000)	6
<i>Word of Faith World Outreach Center Church, Inc. v. Morales</i> , 986 F.2d 962, 969 (5th Cir. 1993).....	15

INTRODUCTION

In response to this Court's direction to the parties, communicated in a letter from the Clerk dated February 26, 2001, Appellees Texas Equal Access to Justice Foundation (TEAJF), its chairman, and the Justices of the Texas Supreme Court submit this supplemental brief addressing *Paulsen v. State Bar of Texas*, ___ S.W.3d ___, 2001 WL 23180 (Tex. App.–Austin Jan. 11, 2001).¹

The decision of the Texas Court of Appeals in *Paulsen* strongly reinforces the key findings on which the federal District Court below relied in rejecting Appellants' constitutional challenge to the IOLTA program in this case. Specifically, in its *Paulsen* opinion, the Court of Appeals confirms what the trial record in this case indisputably shows:

- As a result of IOLTA, money flows to TEAJF that would otherwise be captured *by the banks*, not by the clients whose funds generate that interest;
- The IOLTA program does not cause clients like Mr. Summers to suffer any economic loss. On the contrary, client funds deposited in IOLTA accounts are incapable of generating any economic benefit for the client because, without the use of TEAJF as a sole charitable beneficiary, accounting and tax reporting costs would exceed any interest earned;

¹ Pursuant to this Court's direction, this brief is submitted on behalf of all Appellees, including the Justices of the Supreme Court of Texas. It would be inappropriate, however, for the Justices of the Supreme Court of Texas to express any opinion as to the meaning or correctness of an intermediate state appellate court decision in pending litigation that may come before them, and they express no such opinion here.

- If there is any way for lawyers to generate positive net interest for their clients, they are not only permitted but required to do so as a matter of professional ethics and by the IOLTA Rules; and
- The IOLTA program in many cases provides a benefit to clients, because for the 46-47% of IOLTA accounts where bank fees actually *exceed* interest earned, TEAJF pays the fees rather than passing them on to law firms and clients.

The Court has directed the parties to address in particular whether a passage immediately preceding the conclusion of the *Paulsen* opinion “resolve[s] this litigation.” Appellees submit that it does not, because that passage is of uncertain meaning, and does not in any event represent a final resolution of the state-law issues it addresses. Appellees understand that Mr. Paulsen has filed a motion for rehearing with the Texas Court of Appeals that addresses several issues, including the specific passage to which this Court has directed the parties’ attention. In addition, Appellees understand that the State Bar of Texas, as appellee in the *Paulsen* case, intends to seek clarification of the passage quoted in this Court’s letter of February 26 in its response to Mr. Paulsen’s motion for rehearing. Even after those post-decision filings have been addressed by the Texas Court of Appeals, the parties to the *Paulsen* litigation may seek review by the Texas Supreme Court.

The ultimate constitutional issues in this case are, of course, questions of federal law. It is likely, however, that a final decision in the *Paulsen* case will have a significant bearing on the issues in this case, both because the Texas Court

of Appeals strongly reaffirmed the essential findings of the District Court in this case, and because the quoted passage, however it is read, supports the conclusion that the IOLTA program does not involve the element of compulsion necessary to make out a violation of the Takings Clause or the First Amendment. If this Court concludes that the quoted passage, or any other aspect of the *Paulsen* litigation, could shed light on the constitutional issues in this case, Appellees respectfully suggest that this Court stay its hand until the state-court litigation has run its course.

In the end, however, Appellees submit that the most straightforward way to resolve this litigation is on the basis of the facts developed at trial and found by the District Court, and well-settled legal principles articulated in numerous decisions of this Court and the United States Supreme Court. As Appellees' prior brief in this appeal explains, in light of those factual findings and legal principles, it is clear that Appellants have simply failed to prove their case. Appellees therefore urge this Court to affirm judgment of the District Court and hold that there has been no violation of Mr. Summers' rights under either the Takings Clause or the First Amendment.

I. THE TEXAS COURT OF APPEALS' DECISION IN *PAULSEN* REINFORCES KEY FINDINGS MADE BY THE DISTRICT COURT IN THIS CASE

The *Paulsen* litigation arises out of a Texas lawyer's refusal to participate in the IOLTA program. Mr. Paulsen claims that in light of the United States Supreme Court's decision in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the IOLTA program conflicts with his ethical obligations to his client as embodied in the Texas Disciplinary Rules of Professional Conduct. Specifically, he contends that maintaining an IOLTA account violates the requirements of notification, delivery, and accounting imposed on lawyers who receive client property. Tex. Disciplinary R. Prof. Conduct 1.14(b), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (West 1998) (State Bar Rules art. X, § 9).

Initially, Mr. Paulsen sought a declaratory judgment that he was not subject to professional discipline for failing to participate in the program; the Texas Court of Appeals dismissed that action for want of a justiciable controversy. *Paulsen v. Texas Equal Access to Justice Foundation*, 23 S.W.3d 42, 48 (Tex. App.-Austin 1999). Mr. Paulsen subsequently withdrew from participation in the IOLTA program. The Bar's IOLTA review committee, and later the Bar's Board of Directors, refused to grant Mr. Paulsen a good-cause exemption from mandatory participation. The state district court upheld that administrative action and, in the

decision that is the subject of this supplemental brief, the Texas Court of Appeals affirmed.

In its opinion, the Texas Court of Appeals confirmed many of the key propositions that have been pressed by Appellees, proven at trial, and relied upon as factual findings by the District Court in this case. *First*, the Texas Court of Appeals recognized that, far from “taking” anything of economic value from clients like Mr. Summers, “[i]n practice, IOLTA took from the banks.... Clients [are] no worse off than when banks used their funds interest-free....” *Paulsen*, 2001 WL 23180 at *7. See also *id.* at *1 (noting that before Congress authorized the creation of NOW accounts, “financial institutions enjoyed free use” of interest on client demand deposit accounts); *id.* at *2 (describing non-interest-bearing demand deposit accounts as “benefiting only financial institutions”); *id.* at *3 (“The practical effect of implementing these programs is to shift a part of the economic benefit from depository institutions to tax-exempt organizations. There is no economic injury to any client.”) (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982), reprinted in ABA/BNA Lawyer’s Manual on Professional Conduct 801:114 (1986)). As the District Court found in this case, the only entities that suffer an economic loss as a result of IOLTA are the banks, because they voluntarily forgo the interest-free use of client

funds that they would otherwise enjoy, and because many banks regularly waive fees on IOLTA accounts.

Second, the Texas Court of Appeals recognized that, absent the IOLTA program, it is “impossible to generate net interest for the benefit of individual clients.” *Paulsen*, 2001 WL 23180 at *2. The court explained in clear terms why net interest cannot be generated for individual clients:

Assigning fractions of the interest to individual clients would cost more than the interest earned. First, in addition to bank charges, clients would have to pay for the accounting services needed to calculate the interest attributable to various sums on deposit for staggered periods of time. Second, interest remitted to clients is includible in the clients’ gross income and is subject to income tax. The costs of calculating and remitting IOLTA account interest due to individual clients would thus eliminate any theoretical gain.

Id. This analysis mirrors precisely the factual findings of the District Court in this case. See *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 86 F. Supp. 2d 624, 638-42 (W.D. Tex. 2000). See also *Paulsen*, 2001 WL 23180 at *2 (“Income taxes are eliminated [under the IOLTA program] because no income is realized if clients have no control over the disposition of the interest.”). In short, the Texas Court of Appeals acknowledged the simple yet fundamental point that dooms Appellants’ constitutional challenges in this case: “If client funds cannot generate net interest for the client, the client has suffered no

loss, and thus no compensation is due.” *Id.* at *7 (citing *Washington Legal Foundation*, 86 F. Supp. 2d at 643).²

Third, the Texas Court of Appeals recognized that if any opportunity arises that would allow client funds to generate net interest for the client, the Disciplinary Rules and the IOLTA Rules not only permit but *require* the lawyer to pursue that opportunity on behalf of the client. See *Paulsen*, 2001 WL 23180 at *9 (“At any point in time, if in the exercise of his good faith judgment, Paulsen can invest client funds in such a manner that every client is ‘entitled to receive’ interest, he is free, indeed obligated, to do so.”).

Fourth, the Texas Court of Appeals, like the District Court in this case, recognized that many clients in Texas actually derive a benefit from participating in IOLTA, because “many banks waive all fees for IOLTA accounts,” *id.* at *2 n.1 (citing *Washington Legal Foundation*, 86 F. Supp. 2d at 641)—fees that might otherwise be passed on to the client. Moreover, the Texas IOLTA

² Contrary to the suggestion of Appellants’ counsel at oral argument, there is no constitutionally significant difference, for the purpose of ascertaining net interest, between costs incurred by the banks or TEAJF on the one hand and costs incurred by the lawyer on the other. Neither the Takings Clause nor the cases interpreting it have ever drawn such a fine-spun distinction. Moreover, the record in this case contains no evidence that Mr. Summers, the only client whose rights are at issue, could have earned interest had his lawyer absorbed “internal” costs. In any event, the IOLTA Rules *allow* lawyers to absorb internal costs without factoring them in to the net interest equation. If there was ever any doubt about this, it has been eliminated for the future by a clarification of the IOLTA guidelines, thus making injunctive relief particularly inappropriate. See R.E. 8 at 5.

program provides a significant benefit for clients by paying the costs of maintaining IOLTA accounts when those costs *exceed* the interest earned, as they do for nearly half of all such accounts. See *id.* (citing District Court’s finding of fact that bank fees exceed interest earned in 46-47% of IOLTA accounts).

In sum, the Texas Court of Appeals’ *Paulsen* opinion confirms and reinforces the District Court’s opinion in this case. Like the District Court, the Texas Court of Appeals recognized that clients like Mr. Summers are no worse off with IOLTA than without it. No more is needed to reject the constitutional challenges in this case.

II. THE PARTICULAR PASSAGE IN *PAULSEN* QUOTED BY THIS COURT IN ITS SUPPLEMENTAL BRIEFING ORDER DOES NOT RESOLVE THIS LITIGATION

The Court specifically requested the parties to address whether the following excerpt from the *Paulsen* decision “resolve[s] this litigation”:

[T]hese rules permit lawyers to make full disclosure to clients regarding the use of IOLTA accounts and clients’ property interest therein. ... [L]awyers must invest client funds as directed by their clients. If a client directs his lawyer to withdraw his funds from an IOLTA account, the lawyer should do so and inform the Bar that he takes such action at his client’s insistence. The IOLTA Rules provide that lawyers cannot be compelled to take any action in violation of the Disciplinary Rules. Because client funds are unquestionably client property, investing such funds in a manner contrary to a client’s instructions

would be a violation of the Disciplinary Rules and the lawyer's fiduciary duties.

Paulsen, 2001 WL 23180 at *10.³ Appellees submit that this excerpt does not “resolve” the present litigation, both because it is of uncertain meaning and because it does not in any event represent a definitive resolution of the issues of state law that it addresses. There is reason to believe, however, that the final resolution of the state-law issues in the *Paulsen* case—including the issues addressed in the above excerpt—may shed light on the federal constitutional questions at issue in the instant appeal. If this Court concludes that the *Paulsen* case may provide guidance, it should stay its hand until the state-court litigation has run its course.

The Texas Court of Appeals has yet to issue its final judgment in the *Paulsen* case, its mandate having been automatically stayed pending resolution of (1) a motion for rehearing filed by Mr. Paulsen and (2) an anticipated request for clarification, styled as a response to Mr. Paulsen's motion for rehearing, to be filed by the State Bar of Texas. Appellees understand that the State Bar's responsive brief will focus on a crucial ambiguity in the above-quoted passage. The passage

³ As the Texas Court of Appeals was careful to add, “lawyers would be remiss if they led clients to believe they will actually receive interest on nominal or short-term funds. Clients must be made aware that exercising any control over investment of these funds (*i.e.*, directing their lawyer to never deposit their funds in an IOLTA account, rather than allowing the lawyer to exercise his good faith judgment) subjects the client to bank fees, accounting costs, and possible income taxation. This may actually result in a net loss to the client.” *Paulsen*, 2001 WL 23180 at *10 n.9.

begins with the unremarkable observation that the IOLTA Rules permit lawyers “to make full disclosure to clients regarding the use of IOLTA accounts and clients’ property interest therein.” *Paulsen*, 2001 WL 23180 at *10. The remainder of the quoted passage, however, could be read to mean that Texas IOLTA Rules provide that the client may at any time direct the lawyer to withdraw his or her money from IOLTA and place it in a non-interest-bearing account. It is implausible that the quoted passage—which comes at the end of an opinion upholding IOLTA participation against ethical challenge—should be read in this fashion, for such a reading could jeopardize the tax status of all IOLTA accounts. Moreover, appellees submit that this interpretation, if it was indeed intended by the Texas Court of Appeals, finds no support in pertinent authority or sound analysis.

The Internal Revenue Service’s ruling that interest on IOLTA accounts is not includible in the clients’ gross income is based on the assumption that “clients cannot compel attorneys to invest the advances on the clients’ behalf.” IRS Rev. Rul. 81-209, 1981-2 C.B. 16; see also *Phillips*, 524 U.S. at 162. If the IRS were to conclude that a client has the power to direct his lawyer whether to place his funds in an IOLTA account or elsewhere, it might well follow that interest on IOLTA accounts would be deemed taxable income to the clients whose funds are deposited in them—even those clients who choose not to exercise that power. In that circumstance, the prohibitive accounting costs that are avoided by

the use of TEAJF as a single beneficiary would be incurred again at a stroke, as the income attributable to each client would have to be ascertained and reported to the IRS.

Because such an interpretation could be the death-knell of the Texas IOLTA program, and in the light of the Texas Court of Appeals' apparent confidence in the soundness of IOLTA as reflected elsewhere in its opinion, it is more likely that the court intended to convey a different, more limited meaning: that the client retains the ability to retrieve his money from his lawyer at any time (consistent with the client's contractual obligations to the lawyer or to third parties), or to make any of a wide variety of arrangements that do not bring the IOLTA Rules into play (augmenting the deposit so that it becomes large enough to earn net interest, or switching to a different lawyer who does not require a deposit or retainer, or the like). Those options are consistent with both the IOLTA Rules and the lawyer's ethical obligations to the client and do not throw into question the taxable nature of the income earned on all IOLTA accounts statewide.

If the Texas Court of Appeals truly intended to state that a client may direct that his or her money be transferred from an IOLTA account to a non-interest-bearing account, Appellees TEAJF and its Chairman believe that statement to be in error. The Texas Court of Appeals focused on IOLTA Rule 21, which permits lawyers to set up interest-bearing accounts or other investments "with the

interest or dividends earned on the accounts or investments payable as directed by clients for whom funds are not deposited in accordance with these Rules.” When IOLTA Rule 21 is read in conjunction with IOLTA Rules 4 and 6, it is clear that Rule 21 is intended to apply only to funds that are *neither* “nominal in amount” nor “reasonably anticipated to be held for a short period of time,” *i.e.*, funds that *could* “reasonably be expected to earn interest for the client ... sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain interest on such funds for the client.” IOLTA Rules 4, 6. In other words, Rule 21 comes into play only *after* the lawyer has made a good-faith determination that the client’s principal can generate positive net interest for the client outside of the IOLTA program; hence Rule 21’s reference to “clients for whom funds are not deposited in accordance with these Rules.” Once the lawyer has made that determination, it goes without saying that a client may direct payment of interest or dividends in any fashion he or she wishes.⁴

⁴ The passage in *Paulsen* under consideration here states broadly that under the Texas Disciplinary Rules “lawyers must invest client funds as directed by their clients,” and that “investing such funds in a manner contrary to a client’s instructions would be a violation of the Disciplinary Rules and the lawyer’s fiduciary duties.” *Paulsen*, 2001 WL 23180 at *10. Insofar as the Texas Court of Appeals intended to state that a client may direct the manner of investing his or her funds in every instance—for instance, that a client may order that his or her funds be commingled with the lawyer’s funds—it appears to go well beyond the black-letter text of the Disciplinary Rules, and may well be materially modified upon reconsideration.

An interpretation of Rule 21 that permits clients to direct that funds be transferred from IOLTA accounts to non-interest-bearing accounts is also implausible because it is potentially self-defeating. The IOLTA programs currently in force in 50 States and the District of Columbia were founded on the notion that legal representation for the indigent could be funded without violating the ethical obligations of lawyers or the constitutional rights of clients, but they were also developed in careful reliance on IRS revenue rulings, general counsel memoranda, and private letter rulings declaring that interest on IOLTA accounts is not taxable income to the client. See, e.g., Rev. Rul. 81-209, 1981-2 C.B. 16; Rev. Rul. 87-2, 1987-1 C.B. 18; G.C.M. 38374, 1980 WL 131409 (IRS); P.L.R. 199909,032, 1999 WL 113103 (IRS PLR). It is unlikely that the IOLTA Rules are properly interpreted to make the program itself potentially unworkable.⁵

⁵ In any event, the quoted passage is unnecessary to the Texas Court of Appeals' decision. The passage appears in a portion of the *Paulsen* opinion designed to establish the proposition that "the IOLTA Rules and the Disciplinary Rules can be harmonized." *Paulsen*, 2001 WL 23180 at *10. However, the Texas Court of Appeals already makes clear earlier in its opinion that "there is no conflict with the Disciplinary Rules." *Id.* at *9. As the opinion explains, the only relevant obligation codified in the Disciplinary Rules is that the lawyer "deliver to the client any funds he is entitled to receive," Tex. Disciplinary R. Prof. Conduct 1.14(b), and "[t]here is no authority for the assertion that clients are 'entitled to receive' IOLTA interest. After deductions are made for bank fees and the lawyer's internal accounting costs, the client may be 'entitled to receive' only an IRS 1099 form indicating that income tax is due on the interest he never actually received." *Paulsen*, 2001 WL 23180 at *9. Thus the excerpt from *Paulsen* quoted by this Court in its supplemental briefing order is dicta.

Although the outcome of the State Bar’s anticipated request for clarification of the *Paulsen* opinion is important to the future of the IOLTA program, the Texas Court of Appeals’ decision is fully consistent with Appellees’ argument in this case on *either* reading of the quoted passage. The passage helps to elucidate a point that Appellees have pressed in this case: that the IOLTA program does not involve the element of compulsion necessary for a violation of the Takings Clause or the First Amendment. See TEAJF Brief at 37-38, 41-42. Whether the client’s option is (as we submit) to make a different arrangement with a lawyer, or more broadly (and, we submit, unsoundly) to direct that his money, though IOLTA-eligible, be deposited in a non-IOLTA account, that option is a voluntary one, and cannot amount to an unconstitutional taking or a “forced contribution.”

If this Court concludes, however, that a final decision on the state-law issues raised in *Paulsen* is likely to shed significant light on the constitutional issues in this case, it should await a final decision in the state court litigation before deciding this case. Even when deciding ordinary questions of state law under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court has been reluctant to treat a single holding of one intermediate state appellate court as the basis for its own determination of the probable meaning of state law. See, e.g., *FDIC v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998). Moreover, as explained

above, any reading of the Texas Court of Appeals' opinion that would vest in the client the power to dictate that IOLTA-eligible funds be deposited in a non-IOLTA account is unsound as a matter of state law, in light of the plain language of the IOLTA Rules and of the potential impact of such a holding on the viability of the IOLTA program.

This Court's usual reluctance to rely on the judgment of a single intermediate state appellate court is amplified in the context of federal constitutional adjudication, for it is well-settled that "federal courts should not determine the federal constitutional implications of state law when that law has not yet been authoritatively construed by the state courts, and the law could be given a construction by the state courts which would avoid the constitutional dilemma." *Hoover v. Morales*, 164 F. 3d 221, 224 (5th Cir. 1998) (citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)). Additionally, "[a] factor that will tip the scales in favor of abstention is if there is already pending a state court action that is likely to resolve the state questions without the delay of having to commence proceedings in state court." *Word of Faith World Outreach Center Church, Inc. v. Morales*, 986 F.2d 962, 969 (5th Cir. 1993) (quoting 17A Charles A. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 4242, at 60 (2d ed. 1988)).

CONCLUSION

Appellees urge the Court to affirm the judgment of the District Court based on the detailed factual record and sound legal principles presented in this case. Alternatively, if this Court concludes that the *Paulsen* litigation may ultimately shed light on the constitutional issues in this case, it should allow that litigation to run its course.

Respectfully submitted,

HUGHES & LUCE, LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
(214) 939-6100 (fax)

By: _____

Darrell E. Jordan
State Bar No. 00000064
David J. Schenck
State Bar No. 17736870
Beth W. Bivans
State Bar No. 00797664

Richard A. Johnston
Francine Rosenzweig
HALE AND DORR, LLP
60 State Street
Boston, MA 02109

Robert A. Long
David L. Franklin
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington D.C. 20004

**COUNSEL FOR APPELLEES
TEXAS EQUAL ACCESS TO
JUSTICE FOUNDATION AND ITS
CHAIRMAN**

John Cornyn, Attorney General of Texas
Andy Taylor,
First Asst. Attorney General
Gregory Coleman, Solicitor General
Rande K. Herrell
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

**COUNSEL FOR APPELLEES
JUSTICES OF THE SUPREME
COURT OF TEXAS**

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned attorney certifies that this Appellees' Brief contains 4,027 words of 14 point type in Times New Roman typeface prepared on Microsoft Word 2000, and, therefore, complies with the type-volume limitations set forth in Rule 32(a)(7).

CERTIFICATE OF SERVICE

The undersigned certifies that two hard copies and an electronic copy of the foregoing instrument were served upon the attorneys of record of all parties to the above cause in accordance with Rule 25 of the Federal Rules of Appellate Procedure and Local Rule 28.3(m) on this 7th day of March, 2001, by FEDERAL EXPRESS as follows:

Richard A. Samp WASHINGTON LEGAL FOUNDATION 2009 Massachusetts Ave., NW Washington, DC 20036	Charles Fried 1525 Massachusetts Ave. Cambridge, MA 02138
---	---

Michael J. Mazzone Nine Greenway Plaza, Suite 2300 Houston, TX 77046	Ms. Rande Herrell Office of the Attorney General 300 W. 15th Street, 8th Floor Austin, Texas 78701
--	---
