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SUPREME COURT OF TEXAS
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NO. 16-0773

IN THE SUPREME COURT OF TEXAS

WALLACE L. HALL, JR., IN HIS OFFICIAL CAPACITY
AS A REGENT FOR THE UNIVERSITY OF TEXAS SYSTEM,

Petitioner,

V.

WILLIAM H. MCRAVEN, IN HIS OFFICIAL CAPACITY
AS CHANCELLOR FOR THE UNIVERSITY OF TEXAS SYSTEM,

Respondent.

On Petition for Review from the
Third Court of Appeals at Austin, Texas

BRIEF OF *AMICUS CURIAE* TEXAS PUBLIC POLICY FOUNDATION IN SUPPORT OF PETITIONER

Robert Henneke
Texas Bar No. 24046058
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728
rhenneke@texaspolicy.com

Counsel for Amicus Curiae
Texas Public Policy Foundation

IDENTITY OF PARTIES AND COUNSEL

The parties and their counsel are correctly identified in the Petition for Review. *Amicus Curiae* Texas Public Policy Foundation is represented by the following counsel:

Robert Henneke
Texas Bar No. 24046058
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728
rhenneke@texaspolicy.com

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Texas Public Policy Foundation (the "Foundation") is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach.

Since its inception in 1989, the Foundation has emphasized the importance of limited government, private enterprise, private property rights, and the rule of law. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Specifically, the Foundation seeks to further higher education policymaking within the scope of its mission through its Center for Higher Education led by the distinguished Dr. Thomas Lindsay.

It is with this background and experience that the Foundation files this Brief in support of Petitioner Wallace L. Hall, Jr., in his Official Capacity as Regent for the University of Texas System. The Foundation's Brief supplements Petitioner's legal arguments and contextualizes the case within the larger policy network and supports this Court's granting the Petition for Review.

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[1] No fee was paid for the preparation and filing of this *amicus* brief. *See* Tex. R. App. P. 11(c). All Parties have consented to the filing of this *amicus* brief.

TO THE HONORABLE SUPREME COURT OF TEXAS:

ISSUES PRESENTED

The case before this Court centers on two questions, the answers to which yield a third. Through this *amicus*, the Foundation presents the following issues.

1. Under Texas law, does a university regent have a legitimate interest in viewing student admission files provided by the University to an outside body tasked with investigating the University?
2. If legitimate, does such viewing nonetheless violate the Federal Educational Rights and Privacy Act of 1974 (FERPA) (20 U.S.C. §1232g)?
3. If a university regent has both a legitimate interest in viewing student records and such viewing is not precluded by FERPA, can such a regent be denied such information by a majority vote of the other board members and, if so, what would be the legal implications regarding the oversight responsibilities of not only the University of Texas System Board, but also, other state-authorized governing boards?

ARGUMENT

I. DUTIES AND POWERS OF TEXAS PUBLIC UNIVERSITY REGENTS

Under the Texas Education Code, the University of Texas System "board is authorized and directed to govern, operate, support, and maintain each of the component institutions that are now or may hereafter be included in a part of The University of Texas System." Tex. Edu. Code §65.31(a) ("General Powers and Duties"). In addition, regents are tasked with the duty to "set campus admission standards consistent with the institution's role and mission." Tex. Edu. Code §51.352(d)(4) ("Responsibility of Governing Boards").

Section 3 of the University of Texas System's "Duties and Responsibilities of Each Regent" states: ". . . [I]t is the responsibility of each Regent to be knowledgeable in some detail regarding the operations, management, finances, and effectiveness of the academic, research, and public service programs of the U. T. System, and each member of the Board of Regents has the right and authority to inform himself/herself as to the duties, responsibilities, and obligations of the member."

Section 3 adds, "Members of the Board of Regents are to be provided access to such information as will enable them to fulfill their duties and responsibilities as Regents of the U. T. System." Rule 10101, §3.1.

The argument made against Hall's right to see the Kroll Report holds that a Regent, with statutory oversight duties and the specific responsibility to set admissions standards, has *no legitimate interest* in a file assembled for the very purpose of evaluating documented favoritism in the University of Texas-Austin's admissions standards. To this claim, one must ask, "If not this, what, then, *could ever* qualify as an activity in which a Regent has a "legitimate interest"? To deny a Regent's legitimate interest in this vital information simultaneously drains the substance from the previously cited section from the Texas Education Code, which holds, "Members of the Board of Regents are to be provided access to such information as will enable them to fulfill their duties and responsibilities as Regents of the U. T. System."

Denying a Regent access to this information effectively nullifies Texas law's admonition to Regents that it is their "responsibility . . . to be knowledgeable in some detail regarding the operations, management, finances, and effectiveness of the academic, research, and public service programs of the U. T. System." One struggles in vain to discover how any Regent could fulfill such an oversight responsibility without being provided the information on the very activities he/she has been tasked to oversee.

Moreover, it appears contradictory on its face to assert that the Kroll investigators merited access to this information but that a Regent's request to review the same information fails to constitute a "legitimate" interest.

After all, the Kroll investigators were provided this information because it was required to accurately evaluate allegations of improprieties in the admissions process at UT-Austin. But, this evaluation is equally—indeed, more—the right and responsibility of the school's Regents. Because a Regent must have such access to this information in order to fulfill his/her tasks, one cannot help but wonder why—after favoritism was shown to have taken place—only one Regent requested to see such vital information, which bears on the integrity of the whole process.

In sum, how are Regents to fulfill their legal responsibility to oversee what they are not allowed to see? Finally, with regard to the question of regents' powers and duties, the Texas Attorney General opines that, under Texas law, public university regents have both the right and the responsibility to examine university records and documents that, in the opinion of the regent or regents, are relevant to the fulfillment of these rights and responsibilities. "Texas attorneys general have consistently concluded 'a member of a governing body has an inherent right of access to the records of that body when requested in the member's official capacity and for the member's performance of official duties.'" Tex. Att'y. Gen. Op. No.

KP-0021 at 3 (2015). Therefore, university employees must honor a regent's request for information "unless a federal or state law requires otherwise." *Id.*

II. STATE AND FEDERAL LAW REQUIRES REGENTS TO MAINTAIN CONFIDENTIALITY OF UNIVERSITY INFORMATION

University of Texas System board members who have been provided access to confidential information bear a legal responsibility to keep such information confidential. Section 3.3 of the University of Texas System's "Duties and Responsibilities of Each Regent" cautions: "A Regent may not publicly disclose information that is confidential, by law, unless disclosure is required by law or made pursuant to a vote of the Board to waive an applicable privilege. . . . In addition, the use or disclosure of information that has not been made public may implicate the provisions of Texas Penal Code Section 39.06 (Misuse of Official Information)." Rule 10101, § 3.3.

In addition to the above limitations imposed by Texas law, federal law prohibits the public disclosure by university officials of confidential student information. Section 1232(g)(b)(1)(A) of the Federal Educational Rights and Privacy Act of 1974, (FERPA) stipulates that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as

defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization. . . ."

The FERPA regulations next identify those individuals and parties who are entitled to access to this otherwise-protected information. These exempted individuals and parties include "other school officials . . . who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required." 20 U.S.C. §1232g(b)(1)(A).

Agreeing with this interpretation of the FERPA guidelines, the University of Texas-Austin also agrees that Regent Hall is a qualifying education official, but it denies that he has a legitimate educational interest in student information in the admissions-review file. This is the sole basis on which it refuses to honor Regent Hall's request to review the information. The school acknowledges that, if Regent Hall's interest in reviewing the information were a legitimate educational interest, then FERPA would not prohibit the school from honoring the request.

III. THE POTTER OR THE CLAY? IMPLICATIONS FOR OTHER STATE-AUTHORIZED GOVERNING BOARDS IN TEXAS

If it should be decided that a university regent has both a legitimate interest in viewing student records and such viewing is not precluded by FERPA, can such a regent be legally denied such information by a majority vote of the other board members? If so, what would be the legal implications regarding the oversight

responsibilities of not only the University of Texas System Board, but also, other state-authorized governing boards?

In the case of a regent's request for information that is judged to be both legitimate and exempt from FERPA's restrictions, there is no legal authority on whose basis university staff can rightfully claim a prerogative to deny the regent full access to the requested information. If no legal authority exists, then such refusal of a regent's request is unlawful.

If the denial is unlawful, one cannot defend the case that a majority vote, or even a unanimous board vote, supporting such denial should be judged sufficient legal grounds for denying such a request. Contrary to the court of appeals' opinion, if the denial was unlawful in the first place, no endorsement by the other board members could make it lawful. That is to say, if a state employee—in this case, at the University of Texas—were unlawfully to deny such a request for information, no board actions supporting such denial could immunize the state employee's *ultra vires* act from subsequent legal scrutiny.

If a board endorsement *were* to be judged sufficient for immunizing a state employee's *ultra vires* act, these legal implications regarding the oversight responsibilities of the University of Texas System Board, would presumably have the same consequence for all other state-authorized governing boards?

The court of appeals' opinion cannot help but to have broad implications for all state universities and other agencies. Allowing members of agency governing boards to endorse *ultra vires* refusals to provide board members with information requested in their official capacities, and holding that such endorsements place the decisions above the law, threatens to facilitate destructive cover-ups in any number of state institutions.

In this vein, consider the similarities in this case to that of the University of Illinois' 2009 admissions scandal, dubbed "The Clout Scandal." In May 2009, the *Chicago Tribune* published "Clout Goes to College," which exposed preferential consideration to applicants with connections to politicians and university trustees. The *Tribune* found that some students had been admitted despite having sub-par qualifications. The investigation documented that approximately 800 students over a five-year period were placed on a "clout list" with an admission rate for these students that was eight percentage points higher than the school average. (Cohen, Jodi S. May 29, 2009. "Clout Goes to College." Chicago Tribune).

In response to the revelations, then-Governor Patrick Quinn appointed a panel to investigate the full extent of admissions favoritism at Illinois' flagship university. Quinn subsequently accepted the panel's recommendation to demand

the resignations of all the university's trustees. In October of that year, the university president also resigned.

The panel offered a number of recommendations designed to prevent another such scandal. Among these recommendations was the building of a "firewall" to block university officials from becoming illegitimately entangled in the admissions process. ("Report & Recommendations." State of Illinois Admissions Review Commission. August 7, 2009.)

The relevance of the Illinois situation to the current case consists in the following: Of what use would the erection of a firewall—however sturdily constructed—between school officials and the admissions process be if a majority vote of the university board of trustees could immunize from judicial scrutiny the unlawful actions of school officials?

It is difficult if not impossible to conclude anything but that state law would henceforth lack a judicial remedy against unlawful actions by a university—and, by implication, any state agency—official whose board endorses the official's withholding of information from those entrusted by state law with oversight responsibility.

If it should be decided that boards indeed have such power to block legitimate information requests made by one of their own members, such a standard promise to erode—to the point of inconsequentiality—both effective

oversight and, with it, the Legislature's intentions as they appear in the previously cited sections of the Texas Education Code.

The clay would thus reign over the potter.

PRAYER

The Court should grant the Petition for Review and reverse.

Respectfully submitted,

<u>/s/ Robert Henneke</u>
ROBERT HENNEKE
Texas Bar No. 24046058
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728
rhenneke@texaspolicy.com

Counsel for Amicus Curiae
Texas Public Policy Foundation

CERTIFICATE OF SERVICE

Pursuant to Rule 9.5 of the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of the foregoing Brief of *Amicus Curiae* Texas Public Policy Foundation in Support of Petitioner has been served by the Court's CM/ECF service on this 10th day of November, 2016:

Joseph R. Knight
Ewell, Brown, Blanke & Knight, LLP
111 Congress Avenue, 28th Floor
Austin, Texas 78701

Rick Milvenan
Stephanie N. Duff-O'Bryan
McGinnis Lochridge & Kilgore
600 Congress Avenue, Suite 2100
Austin, Texas 78701

Wallace B. Jefferson
Amy Warr
Alexander Dubose Jefferson &
Townsend, LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562

/s/ Robert Henneke
ROBERT HENNEKE

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains 1,932 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(l).

/s/ Robert Henneke
ROBERT HENNEKE