No. 08-22

IN THE

Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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The infusion of massive amounts of money into state judicial systems through campaign contributions and other expenditures poses a grave threat to state courts' "reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). Indeed, the five *amicus* briefs filed in support of the petition by organizations with otherwise divergent institutional goals—as well as the chorus of support from other groups interested in preserving the "legitimacy of the Judicial Branch" (*id.*)—underscore the urgent need for this Court to grant review and to clarify the circumstances in which due process requires the recusal of a judge who has benefited from a litigant's substantial financial support. *See*, *e.g.*, Am. Bar Ass'n Br. 4; Editorial, *Too Generous*, N.Y. Times, Sept. 7, 2008, at WK8 ("Situations like the Massey Energy case create an unmistakable impression that justice is for sale."); Opinion, *Fairness: Impartial Justice*, Saturday Gazette Mail (Charleston), Aug. 2, 2008, at 4A ("Every court system in the world requires judges to not only be impartial but also avoid the mere appearance of partiality. In Benjamin's situation, the appearance is overwhelming.").

Until Massey filed its brief in opposition, it appeared to agree that "due process is denied by circumstances that create the likelihood or the appearance of bias" (*Peters v. Kiff*, 407 U.S. 493, 502 (1972)) and that the Constitution therefore may "sometimes bar trial by judges who have no actual bias." *In re Murchison*, 349 U.S. 133, 136 (1955). In its motion seeking Justice Starcher's recusal from this case, Massey emphasized that "avoiding the appearance of impropriety is as important in developing public con-

fidence in our judicial system as avoiding impropriety itself" (Mtn. for Disqualification of Justice Starcher 8-9 (internal quotation marks omitted)), and explained that "to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* at 3 (internal quotation marks and alteration omitted). In an effort to evade this Court's review, however, Massey now endorses a significantly narrower conception of due process, arguing that "a judge cannot constitutionally hear a case" *only* where the "judge harbors some form of substantial actual bias." Opp. 15. But no amount of backpedaling on Massey's part can conceal the stark conflict between Justice Benjamin's participation in this case—after receiving more than $3 million in campaign support from Massey's CEO—and the fundamental notions of procedural fairness embodied in the Due Process Clause and this Court's precedent.

Review is warranted to address this conflict and to make clear to lower courts that, in exceptional circumstances such as those presented here, due process prohibits a judge from presiding over the case of a significant financial supporter.

I. JUSTICE BENJAMIN'S PARTICIPATION IN THIS CASE CONFLICTS WITH THE DUE PROCESS DECISIONS OF THIS COURT AND OTHER COURTS.

A. According to Justice Benjamin, "[t]he very notion of appearance-driven disqualifying conflicts . . . is antithetical to due process." Supp. App. 21a n.12. Massey—now that it is no longer seeking the recusal of Justice Starcher in this case—agrees, and attempts (at 29) to dismiss as dicta this Court's unequivocal statement that "due process is denied by circumstances that create the likelihood or the ap-

pearance of bias." *Peters*, 407 U.S. at 502; *see also Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) ("any tribunal . . . not only must be unbiased but also must avoid even the appearance of bias"). Massey's attempt to obscure the conflict between Justice Benjamin's decision to participate in this case and this Court's due process precedent is utterly unsuccessful.

This Court has never required proof of *actual* bias before concluding that due process mandated the recusal of a judge due to circumstances that "might lead him not to hold the balance nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), for example, the Court held that due process required the recusal of a judge who had been subjected to repeated verbal abuse by a criminal defendant because "[n]o one so cruelly slandered is *likely* to maintain that calm detachment" necessary for a fair trial. *Id.* at 465 (emphasis added). This "likel[ihood]" of bias was sufficient to require recusal—despite the absence of any evidence that the judge harbored an actual bias against the defendant.

Similarly, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court deemed it unnecessary "to decide whether in fact Justice Embry was influenced" by the close relationship between the issues in the case before him and his own lawsuit against an insurance company. *Id.* at 825. The "*possible* temptation" that these circumstances offered "to the average . . . judge to . . . lead him not to hold the balance nice, clear and true" was enough to require recusal under the Due Process Clause. *Id.* (emphasis added; alterations in original; internal quotation marks omitted).

As this Court has explained, due process requires the recusal of judges laboring under a serious appearance of impropriety because such a strong *appearance* of judicial bias generates a "probability of *actual* bias on the part of the judge . . . [that] is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (emphasis added); *see also Murchison*, 349 U.S. at 136 ("our system of law has always endeavored to prevent even the probability of unfairness"). Except in the rare case where a judge candidly declares that he is biased against one of the parties appearing before him, it is virtually impossible to prove that a judge is actually biased against a party. Because recusal motions must invariably be filed without the benefit of discovery or an evidentiary hearing, informed inferences drawn from the totality of the publicly available information are generally the only basis for seeking to remove a judge strongly suspected of harboring a bias against one of the parties. The "actual bias" standard endorsed by Justice Benjamin and defended in this Court by Massey would therefore create a nearly insurmountable hurdle for litigants seeking the recusal of a judge who appears to be biased against them. For such parties, the promise of a "fair trial in a fair tribunal" would be illusory indeed. *Id.*

B. Mr. Blankenship, Massey's chairman, CEO, and president, spent $3 million supporting Justice Benjamin's campaign for a seat on the West Virginia Supreme Court of Appeals. Those staggering expenditures—which represented more than 60% of the total amount spent supporting Justice Benjamin's campaign—generated an undeniable appearance of impropriety that required Justice Benjamin to recuse himself from Massey's appeal of the $50 million verdict in this case.

None of the *post hoc* rationalizations that Massey offers on behalf of Justice Benjamin—which, as an initial matter, are far better-suited to a brief on the merits than a brief in opposition—can dispel this constitutionally unacceptable appearance of bias. For example, the fact that the campaign expenditures were nominally made by Mr. Blankenship, rather than by Massey, does not remove the due process bar to Justice Benjamin's participation in Massey's appeal. Mr. Blankenship is Massey's chief corporate officer, he personally directed the actions found to be unlawful by the jury and testified at trial about those actions, and his campaign expenditures were widely viewed at the time as having been made on Massey's behalf in an effort to secure the election of a justice sympathetic to the company's interests. *See* William Kistner, *Justice for Sale*, American RadioWorks (2005), *at* http://americanradioworks.publicradio.org/features/judges/ ("many in these parts . . . [said] that Massey was out to buy itself a judge"); Toby Coleman, *Coal Companies Provide Big Campaign Bucks*, Charleston Gazette, Oct. 15, 2004, at 1A. Indeed, because a "corporation acts only through its directors, officers, and agents" (*Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001)), due process would mean little if a corporation could evade the Constitution's requirements by simply contending that the conduct in question was undertaken by one of its individual agents.[1]

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[1] Moreover, Massey had no qualms about equating Justice Starcher's purported bias *against* Mr. Blankenship with a bias against the company itself when seeking Justice Starcher's recusal in this case. *See* Mtn. for Disqualification of Justice Starcher 3 (arguing that recusal was required because Justice Starcher had mounted "vitriolic personal attacks on Mr. Blankenship as CEO and as an individual").

It is similarly irrelevant that the West Virginia Supreme Court issued its 3-2 opinion reversing the verdict in petitioners' favor several years after the election campaign. The $50 million verdict was entered against Massey in August 2002 (Pet. App. 13a), and Mr. Blankenship immediately vowed to appeal the verdict to the West Virginia Supreme Court (the only appellate court in the State). Motion of Respondent Corporations for Disqualification of Justice Benjamin ("Disqual. Mtn.") Ex. 5. The case was thus inevitably heading on appeal to the state supreme court at the time that Mr. Blankenship was pouring money into the 2004 election campaign on behalf of Justice Benjamin. This timing was not lost on observers. *See* Kistner, *supra* (Massey "happened to be fighting off a major lawsuit headed to the West Virginia Supreme Court" at the time of Mr. Blankenship's campaign expenditures).

Nor is the appearance of impropriety generated by Mr. Blankenship's staggering campaign expenditures ameliorated by the fact that most of this support was provided either through contributions to a 527 organization or through independent expenditures, such as payments to media outlets. Regardless of the precise procedures through which the funds were channeled, Mr. Blankenship unquestionably provided those funds to support Justice Benjamin's candidacy for a seat on the state supreme court and to improve his chances of prevailing in his highly competitive contest with the incumbent justice. Justice Benjamin's victory in that election—by a slim margin of 53% to 47%—was doubtless attributable in no small part to the hours of television advertising and pages of favorable newspaper copy financed by Mr. Blankenship's expenditures. Under the circumstances, Justice Benjamin could not help

but feel a debt of gratitude to his principal financial supporter. His decision to participate in this case while laboring under this unavoidable "temptation" to tip the "balance" in Massey's favor is flatly at odds with this Court's due process jurisprudence. *Lavoie*, 475 U.S. at 825.[2]

C. That decision—premised on Justice Benjamin's uncompromising position that "appearances . . . should never alone serve as the basis for a due process challenge" (Supp. App. 23a n.14)—also conflicts with the decisions of a number of state and federal courts recognizing that "[d]ue process requires not only that a judge be fair, but that he also appear to be fair." *Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) (citation omitted); *see also* Pet. 22 & n.6 (citing cases). Justice Benjamin is not alone, however, in endorsing a restrictive notion of due process that requires recusal only where there is proof that a judge is actually biased against a litigant. Several state and federal courts have expressly adopted a similarly narrow view of the protections afforded by the Due Process Clause. *See*, *e.g.*, *State v. Canales*, 916 A.2d 767, 781 (Conn. 2007) ("a judge's failure to disqualify himself or herself will implicate the due

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[2] The constitutional shortcomings inherent in Justice Benjamin's insistence on participating in this case are not obviated by the fact that he has voted against Massey in *other* cases. Unlike here, in none of those cases was Justice Benjamin's vote outcome-determinative. In any event, it cannot be said that petitioners were afforded their constitutional right to a hearing before a "neutral and detached judge" (*Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972)) simply because, in other cases, Justice Benjamin may not have acted on his bias in favor of Massey. It is cold comfort to a party compelled to appear before a judge laboring under a substantial appearance of bias that the judge does not *always* allow that bias to sway his vote.

process clause only when the right to disqualification arises from *actual bias* on the part of that judge") (emphasis in original); *see also* Pet. 22-23 & n.7 (citing cases). This Court's review is warranted to provide authoritative guidance on this important and frequently recurring issue.

Tellingly, Massey nowhere denies the existence of this conflict. Opp. 31. Massey instead directs most of its effort to attempting to distinguish the holding of the Supreme Court of Oklahoma that federal due process required a judge to recuse himself where an attorney for one of the parties had donated to his campaign and solicited others to make contributions. *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001). While Massey is correct that the contributions in *Pierce* were made while the suit was pending before the recipient judge, the timing of the contributions does not meaningfully distinguish the holding in *Pierce* from the facts of this case because the Oklahoma Supreme Court's decision did not rest upon the contributions' timing. The decision was instead premised on the court's conclusion that "[d]ue process 'preserves both the *appearance* and reality of fairness,'" and that the totality of the circumstances associated with the attorney's support for the judge's campaign created a constitutionally unacceptable appearance of unfairness. *Id.* at 798 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)) (emphasis added). Notwithstanding Massey's factual quibbles with the *Pierce* decision, the fact remains that Justice Benjamin emphatically rejected the possibility that due process would *ever* require recusal based on an appearance of unfairness. Supp. App. 21a n.12. The conflict between these two fundamentally irreconcilable understandings of due process reinforces the urgent need for this Court's review.

II. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING A QUESTION OF EXCEPTIONAL IMPORTANCE TO THE LEGITIMACY OF STATE COURTS.

Massey contends that this case is not an appropriate vehicle for clarifying the circumstances in which due process requires the recusal of a judge who has benefited from a litigant's substantial financial support. In reality, this closely watched case provides the court with the perfect opportunity to address this vitally important issue.

Massey accuses petitioners of failing to "offer the Court a workable constitutional standard for when recusal will be constitutionally required." Opp. 13. Of course, the articulation of a specific "constitutional standard" is generally best left for a brief on the merits, rather than a petition for a writ of certiorari. In any event, the facts of this extraordinary case afford the Court an ideal opportunity to articulate the factors that lower courts should consider when weighing a motion for recusal based upon a litigant's financial support for a judge. Wherever the precise constitutional line lies, there can be little doubt that the facts of this case fall beyond that line: Mr. Blankenship expended more than $3 million supporting Justice Benjamin's campaign for a seat on the West Virginia Supreme Court of Appeals—which represented more than 60% of the total amount spent in support of the campaign—and solicited other donors to give money to the campaign while preparing to appeal a $50 million verdict to that court. Clarifying that these facts create a constitutionally intolerable appearance of impropriety would provide lower courts with substantial guidance in deciding future recusal motions.

It may well be difficult to draw a bright line identifying with absolute precision every case where due process requires the recusal of a judge who has benefited from a litigant's campaign expenditures. But this is equally true of other areas of constitutional law. The fact that it may be difficult to articulate precisely when the government has overstepped the bounds of the First and Fourth Amendments, for example, has not dissuaded the Court from granting certiorari in such cases in order to provide meaningful guidance to lower courts.

Indeed, "in our system of adjudication, principles seldom can be settled on the basis of one or two cases, but require a closer working out." *Am. Airlines v. Wolens*, 513 U.S. 219, 234-35 (1995) (internal quotation marks omitted). This is especially true for matters of due process, as it is frequently impossible for this Court to anticipate all of the factual permutations with which lower courts may be confronted and to draw a definitive line between the constitutionally permissible and the constitutionally infirm. In traditional common-law fashion, however, this Court has repeatedly granted review of procedural due process cases—and recusal cases, in particular—to provide lower courts with authoritative examples against which to measure future cases. *See Murchison*, 349 U.S. 133; *Mayberry*, 400 U.S. 455; *Ward*, 409 U.S. 57; *Lavoie*, 475 U.S. 813.

This Court should do so again here in order to preserve the "legitimacy of the Judicial Branch" in the face of increasingly pervasive campaign contributions from interested parties. *Mistretta*, 488 U.S. at 407. Although the election of state court judges does not, standing alone, raise any constitutional concerns, there are certain exceptional cases where the campaign expenditures supporting a judge are so

large and so ill-timed that they generate a constitutionally unacceptable appearance of impropriety. This is one of those cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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