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 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 Brief for Petitioners remains accurate.

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"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). That right requires not only "an absence of actual bias in the trial of cases," but also "prevent[s] even the *probability* of unfairness." *Id.* (emphasis added).

Massey contends that petitioners received all the due process to which they were constitutionally entitled despite the fact that the decisive vote in this case was cast by the beneficiary of $3 million in campaign support from the chairman and CEO of their adversary at the very time when their case was headed to that judge's court.

Massey dismisses the manifest probability that any jurist would have a difficult time being even-handed in the face of such immense and influential campaign support by asserting that bias is *never* a constitutional ground for recusal; that any such principle unaccompanied by a clear, bright line would be limitless and unmanageable; and that, in any event, the $3 million was expended by an individual who was not actually a party to the case, and not to elect Justice Benjamin, but to defeat his only opponent.

Each of Massey's three defenses evaporates when scrutinized. The notion that there is no due process right to an unbiased judge has been rejected repeatedly by this Court. *See*, *e.g.*, *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam); *Bracy v. Gramley*, 520 U.S. 899, 905 (1997). Massey knows that to be the case because in its brief in opposition it explicitly acknowledged that "a judge cannot constitutionally hear a case where the judge . . . harbors some form of substantial actual bias." Br. in Opp.

15; *see also id.* at 16, 27, 30. Moreover, while the petition for certiorari was pending in this very case, but before it was granted, Massey filed its own petition in this Court seeking the recusal of another West Virginia Supreme Court justice on the ground that a "biased decisionmaker is 'constitutionally unacceptable.'" Pet. for Cert. 26, *Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, No. 08-218 (cert. denied Dec. 1, 2008). Massey therefore cannot credibly maintain that bias is not a constitutionally compelled basis for judicial recusal.[1]

The absence of merit in Massey's absolutist position leads it to resort to a slippery-slope/parade-of-horribles argument. Massey contends that, unless there is a bright-line demarcation identifying when a judge may participate in a case where a litigant had a major and presumptively dispositive role in bankrolling his election, a constitutional recusal standard will be limitless and unworkable, and therefore does not exist. But those arguments are equally unavailing. The Court regularly establishes case-by-case

[1] Massey's assertion that the writ of certiorari should be dismissed as improvidently granted because *petitioners'* due process arguments have shifted is therefore surpassingly ironic—and completely unfounded. Petitioners' arguments have remained consistent throughout this litigation. *Compare* Pet. for Cert. 16-17 ("Because of the substantial risk of actual bias created by Mr. Blankenship's extraordinary level of financial support for Justice Benjamin's campaign . . . , the Constitution required Justice Benjamin to recuse himself from Massey's appeal."), *with* Pet. Br. 18 ("Where, as here, the 'appearance of bias' is serious enough to create a 'probability' that the judge is actually biased against a litigant, due process requires the judge's recusal."). The Question Presented is whether due process required recusal due to Mr. Blankenship's financial support for Justice Benjamin's election—the precise issue discussed in petitioners' briefs.

constitutional standards in due process, equal protection, reasonable search and seizure, and comparable constitutional cases because no one bright line can ever be articulated to define every condition where such constitutional standards may come into play. Indeed, in this very field, the Court has explained that a disqualifying interest "cannot be defined with precision," but that a "reasonable formulation" is whether the circumstances would make it difficult for a judge to "hold the balance nice, clear and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (internal quotation marks omitted). The Conference of Chief Justices has made clear in its brief that the courts that would be affected more than any others by the resolution petitioners seek in this case would welcome that result and that a case-by-case constitutional inquiry would not precipitate the deluge of recusal requests that Massey has imagined. CCJ Br. 4, 23.

The foregoing formulation, endorsed repeatedly by this Court, cries out for application here. Massey argues that Mr. Blankenship's generous checkbook could not have had any impact on Justice Benjamin's objectivity in this case because Mr. Blankenship was not himself a party. But that proposition is difficult to take seriously since Mr. Blankenship was not only Massey's chairman and CEO but also the principal figure in the events that gave rise to the jury's $50 million verdict against his company. Without Mr. Blankenship and his efforts to do what the jury found to be fraudulent and outrageous, this case would not exist. Of course he wanted his case to be decided by the jurist of his choosing.

And the notion that Mr. Blankenship's pervasive involvement in Justice Benjamin's election was less influential because Mr. Blankenship purportedly

used his funds to undermine Justice Benjamin's opponent rather than to promote Justice Benjamin (which is demonstrably untrue) is simply not sustainable. Mr. Blankenship wanted to unseat a judge whom he perceived to be unfavorable to his case and to replace him with a more congenial jurist. So he spent his money to advance precisely that goal in every way he could—support for the candidate he liked *and* opposition to the candidate he feared.

If, as this Court has said, "justice must satisfy the appearance of justice" (*Murchison*, 349 U.S. at 136 (internal quotation marks omitted)), and if a litigant need not definitively prove, as rarely could be proved, actual bias to disqualify a judge, then surely the overwhelming showing in this case of circumstances that would lead virtually any objective observer to perceive the probability of bias decisively fails that constitutional standard.

I. DUE PROCESS REQUIRED JUSTICE BENJAMIN TO RECUSE HIMSELF FROM MASSEY'S APPEAL.

Massey's defense of Justice Benjamin's participation in this case rests upon a misreading of this Court's due process jurisprudence and a futile effort to dispel the taint of judicial bias generated by Mr. Blankenship's extraordinary campaign support for Justice Benjamin.

A. Due Process Requires Recusal Where There Is A Probability Of Judicial Bias.

The latest iteration of Massey's due process theory is even narrower than Justice Benjamin's reading of the Due Process Clause. Justice Benjamin at least concedes that judicial bias can require recusal in some cases (while incorrectly demanding conclu-

sive proof of actual bias as a prerequisite to recusal). J.A. 662a. Massey goes further, however, arguing that "[t]his Court's due-process decisions . . . apply exactly the common law rule: a judge with a financial interest in the outcome of the case may not sit," and "do not recognize 'bias' . . . as a general ground for disqualification." Resp. Br. 19 (internal quotation marks omitted). Thus, according to Massey, due process *never* requires an elected judge to recuse himself from a campaign supporter's case—no matter how much money that supporter gave to the judge's campaign, irrespective of the proportion of overall campaign support for which the supporter was personally responsible, and regardless of the timing of that support. Massey's characterization of this Court's recusal jurisprudence is simply not accurate.

1. Massey's defense of Justice Benjamin places dispositive weight on common-law recusal practice. Because there were no judicial elections at common law, however, common-law practice cannot itself resolve whether due process requires the recusal of an elected judge who has benefited from a litigant's manifestly decisive financial influence. Common-law recusal principles must instead be applied to modern-day judicial elections. *Cf. Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996) ("Where there is no exact antecedent" in the Seventh Amendment context, "the best hope lies in comparing the modern practice to earlier ones . . . , seeking the best analogy we can draw between an old and the new.") (citations omitted).

At common law, judges with a direct financial interest in the outcome of a case were required to recuse themselves because that interest "would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true" be-

tween the parties. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In the context of today's judicial elections, this common-law principle would mandate recusal when a litigant's campaign support for an elected judge provides a "temptation" to tip the judicial "balance" in favor of a financial sponsor. Although not all financial support provides a judge with such a "temptation," a judge who received $3 million (more than 60% of his total campaign support) from a single litigant may well be "tempt[ed]," perhaps unconsciously, to decide the case in that litigant's favor—in order to assist his financial benefactor and preserve the possibility of future campaign support—just as a judge with a direct financial interest in a case may be tempted to rule in a manner consistent with that interest.

In any event, this Court has never intimated that the due process guarantee of a "neutral" judge is defined exclusively by the contours of common-law recusal doctrine. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). Indeed, in many respects, due process imposes more extensive recusal requirements than the common law. Most significantly, this Court has held that due process requires recusal not only where a direct pecuniary interest in a case provides a judge with a "possible temptation" to tip the judicial "balance," but also where a judge has an indirect financial interest that could potentially be affected by a case's outcome (*Lavoie*, 475 U.S. at 824), and where other, nonpecuniary interests generate a "probability of actual bias on the part of the judge." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also Bracy*, 520 U.S. at 904-05 ("the floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of

his particular case") (internal quotation marks and citation omitted). These disqualifying interests can be identified only by "consider[ing]" the "[c]ircumstances and relationships" peculiar to each case. *Murchison*, 349 U.S. at 136.[2]

In *Johnson v. Mississippi*, for example, the Court held that a judge who had been sued by a criminal defendant in a civil-rights action was constitutionally barred from presiding over the defendant's contempt proceeding. 403 U.S. at 215. The Court explained that the judge was "so enmeshed in matters involving [the defendant] as to make it most appropriate for another judge to sit" because "[t]rial before an unbiased judge is essential to due process." *Id.* at 215-16 (internal quotation marks omitted); *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) (recusal was constitutionally required where a judge had been verbally abused by a criminal defendant because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication"); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (same).

Massey asserts that these decisions mandating recusal on nonpecuniary grounds "are limited to the specific context of contempt and lack applicability to

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[2] In other respects, the common law's recusal requirements were actually broader than the requirements of due process. At common law, "the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide"—such as residence in a town whose tax base could have been affected by a decision—"rendered the decision voidable." *Tumey*, 273 U.S. at 524, 526. But this Court has "decline[d] to . . . constitutionaliz[e] any rule that a decision rendered by a judge with 'the slightest pecuniary interest' constitutes a violation of the Due Process Clause." *Lavoie*, 475 U.S. at 825 n.3.

an ordinary civil or criminal case." Resp. Br. 22. But Massey is unable—and, indeed, does not even attempt—to explain why judicial bias, or the inability to maintain judicial detachment, would be a ground for recusal in contempt cases but not in other settings. A "fair trial in a fair tribunal" is not a constitutional imperative only for those being prosecuted for contempt. In any event, Massey's effort to carve out a special set of constitutional recusal rules for contempt cases fails because the Court has explicitly held in cases outside the contempt context that due process requires recusal based on judicial bias.

In *Ward v. Village of Monroeville*, the Court held that a village mayor was constitutionally required to recuse himself from a trial because the mayor was responsible for the village's finances, which depended to a significant extent upon the fines levied in such proceedings. 409 U.S. at 60. Unlike in *Tumey v. Ohio*, this mayor did not have a "direct, personal, substantial, pecuniary interest" (273 U.S. at 523) in the outcome of the case because he would not have personally received a portion of the fines assessed against the criminal defendant. *Ward*, 409 U.S. at 60. The Court nevertheless held that due process prohibited the mayor from presiding over the criminal trial because a "possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant . . . may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.*

Similarly, in *Bracy v. Gramley*, the Court held that it would violate due process if a judge who regularly accepted bribes from criminal defendants had attempted to facilitate the conviction of a defendant

who had not bribed him in order to deflect attention away from his pro-defendant rulings in other cases. 520 U.S. at 905. According to the Court, "there is no question that, if it could be proved, such compensatory, camouflaging bias on [the judge's] part in [the defendant's] own case would violate the Due Process Clause of the Fourteenth Amendment." *Id.*

2. Of course, it would typically be difficult to present definitive proof that a judge harbored an actual bias against a litigant—especially because, "[i]n a [recusal] motion . . . , there is not apt to be anything akin to the 'record' that supplies the factual basis for adjudication in most litigated matters." *Laird v. Tatum*, 409 U.S. 824, 824 n.1 (1972) (Rehnquist, J.). For that reason and others, in considering a due-process-based recusal request, a court is "not required to decide whether in fact [the judge] was influenced, but only whether sitting on the case . . . would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Lavoie*, 475 U.S. at 813 (internal quotation marks omitted; first and second alterations added). Where that "possible temptation" is strong enough to create a "probability of actual bias on the part of the judge" (*Withrow*, 421 U.S. at 47) or a "probability of unfairness" to one of the litigants (*Murchison*, 349 U.S. at 136), then due process requires recusal even if the judge "would do [his] very best to weigh the scales of justice equally between contending parties." *Id.* This "neutrality requirement"—which "has been jealously guarded by this Court"—"helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

B. Blankenship's Pervasive And Overwhelming Campaign Support Would Lead A Reasonable Observer To Perceive A Probable Bias By Justice Benjamin In Adjudicating His Benefactor's Case.

Massey argues that "there is no sufficient probability of bias here to warrant recusal" even under the due process recusal standard advanced by petitioners (and compelled by this Court's precedent). Resp. Br. 49 (capitalization altered). Massey's defense of Justice Benjamin is utterly unpersuasive because, "under a realistic appraisal of psychological tendencies and human weakness," permitting a judge to decide an appeal with profound personal and professional consequences for his principal financial benefactor "poses such a risk of actual bias . . . that the practice must be forbidden" to "implement[ ]" the "guarantee of due process." *Withrow*, 421 U.S. at 47.

Massey contends that this "risk of actual bias" on Justice Benjamin's part should be excused because he has also voted against Massey in several other cases. Resp. Br. 50. But when petitioners initially moved for Justice Benjamin's recusal—the relevant time period for evaluating whether due process required him to step aside—he had only voted against Massey in a single case, where the state supreme court had unanimously denied a Massey petition for appeal. *See McNeely v. Indep. Coal Co.*, No. 042156 (W. Va. review denied Feb. 9, 2005). And neither Massey nor Justice Benjamin identifies a single case (either before *or* after petitioners first moved for recusal) where Justice Benjamin has cast an outcome-determinative vote against Massey. In every instance cited, at least three of the four other justices

on the West Virginia Supreme Court also voted against Massey. *See* J.A. 674a n.29; Pet. Br. 32 n.5.

In any event, even if Justice Benjamin had cast a deciding vote against Massey in another case, it would not diminish the likelihood of bias in favor of Massey in *this* case, where he was asked to review a $50 million verdict against Massey that was premised on conduct orchestrated by his financial benefactor (J.A. 63a-65a), and which was heading for an appeal to the West Virginia Supreme Court precisely when Mr. Blankenship set out to secure Justice Benjamin a seat on that court. Given Mr. Blankenship's central role in Massey's dealings with petitioners (for which he was answerable to Massey's board and shareholders) and his substantial stockholdings in Massey (which had lost 16% of their value the day after the verdict (*see infra* note 3)), the stakes for Mr. Blankenship could hardly have been higher. The "possible temptation" for Justice Benjamin to tip the balance toward Mr. Blankenship—in order to make his extraordinary campaign support worthwhile and "maintain th[at] high level of contribution" in future election campaigns (*Ward*, 409 U.S. at 60)—would have been acute. *Tumey*, 273 U.S. at 532.[3]

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[3] Mr. Blankenship's financial interest in the outcome of this case went well beyond his "$175,000 stake in the judgment"—a calculation that Massey bases solely upon the size of the verdict and the fact that Mr. Blankenship held 0.35% of Massey's outstanding stock. Resp. Br. 53. In fact, Mr. Blankenship stood to lose much more than just his proportionate share of the judgment. Mr. Blankenship could have lost millions of dollars in investments if his 296,000 shares of Massey's stock decreased in value as a result of an appellate decision upholding the jury's verdict. Indeed, on the first day of trading after the verdict (which was returned after trading hours), Massey's shares lost 15.8% of their value. And Mr. Blankenship stood to lose mil-

Massey suggests that the probability of judicial bias was diminished by the fact that the vast majority of Mr. Blankenship's support for Justice Benjamin's campaign was provided through independent expenditures, rather than direct campaign contributions. But whether or not "independent expenditures . . . 'pose[] the same risk of real or apparent corruption' as direct contributions" (Resp. Br. 53 (brackets in original)), due process demands more of judges than the mere avoidance of *corruption*. In the judicial setting, prohibiting "*quid pro quo* corruption between a candidate and a contributor" is not enough. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297 (1981) (internal quotation marks omitted). Due process demands a "neutral" judge (*Ward*, 409 U.S. at 62) who will "apply the law to [each litigant] in the same way he applies it to any other party." *Republican Party v. White*, 536 U.S. 765, 776 (2002). Thus, while "mere . . . favoritism or opportunity for influence alone is insufficient to justify regulation" of campaign support in legislative and executive branch races (*McConnell v. FEC*, 540 U.S. 93, 153 (2003)), comparable "favoritism" toward a judicial campaign supporter is constitutionally intolerable. Due process does not permit a judge to sit in a case where he is "predisposed to find against" one of the litigants before him. *Marshall*, 446 U.S. at 242.

Here, there can be little doubt that Mr. Blankenship's financial dominance in his election made a profound impression on Justice Benjamin. The $3 million that Mr. Blankenship spent on the

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lions more in compensation if Massey's board and shareholders disapproved of his intentionally tortious and fraudulent conduct found by the jury.

campaign was three times the amount raised by Justice Benjamin's own campaign committee, and unquestionably improved the election prospects of this then-unknown private attorney. While Massey contends that the probability of judicial bias is reduced because factors other than Mr. Blankenship's financial support had some role in Justice Benjamin's electoral success (Resp. Br. 55), it defies reality to suggest that the hundreds of television and print advertisements in West Virginia funded by Mr. Blankenship did not contribute materially and substantially to Justice Benjamin's narrow victory over Justice McGraw.

Justice Benjamin's tendency to feel "predisposed" toward—and "indebted" to (*White*, 536 U.S. at 790 (O'Connor, J., concurring))—his financial benefactor would hardly have been diminished if, as Massey claims, Mr. Blankenship had provided his support "to defeat Justice McGraw," rather than to elect Justice Benjamin. Resp. Br. 55. In their two-man race, every dollar spent to oppose Justice McGraw was a dollar spent to elect Justice Benjamin. In any event, contrary to the impression advanced by Massey, Mr. Blankenship made more than $500,000 in independent expenditures that he reported to election officials as "*[s]upport [for the] candidacy of Brent Benjamin*" (J.A. 184a (emphasis added); *see also id.* at 188a), and the nearly $2.5 million that he donated to And For The Sake Of The Kids funded advertisements that not only attacked Justice Benjamin's sole general election opponent, but also expressly endorsed Justice Benjamin. *See id.* at 304a ("Please vote Brent Benjamin for Supreme Court.").

Finally, Massey argues that "this case was decided several years after Justice Benjamin's election." Resp. Br. 55. Although the probability of judi-

cial bias in favor of a campaign supporter may diminish with time in some circumstances, here Mr. Blankenship provided his support for Justice Benjamin quite soon after he had publicly vowed to appeal this multimillion-dollar case to the West Virginia Supreme Court. J.A. 115a. And the fact that this case took so long from verdict to appellate decision involved several factors that enhance, rather than diminish, the due process implications raised by this case. J.A. 447a (recusal of Chief Justice Maynard); W. Va. S. Ct. D.E. 78, 86 (orders of Justice Benjamin appointing judges to replace Chief Justice Maynard and Justice Starcher). The entire sequence of events creates a strong inference that Mr. Blankenship set out to change the composition of the West Virginia Supreme Court in order to improve his company's chances of success in this very case, and heightens the concern over the probable bias of the judge who Mr. Blankenship helped to install on the court that would decide his $50 million case.[4]

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[4] Massey's assertion (at 55) that "there is no indication that Blankenship and Justice Benjamin even knew one another" may be mistaken. *See* Paul J. Nyden, *Massey Fights Order to Raise Court Deposit*, Sunday Gazette Mail (Charleston), Apr. 9, 2006, at 5B (reporting on Mr. Blankenship's March 2006 dinner with Justices Benjamin and Maynard). However, the basis for recusal is not personal friendship, but the great lengths to which Mr. Blankenship went to secure Justice Benjamin's seat on the state supreme court.

II. THE DUE PROCESS RIGHT TO A FAIR TRIBUNAL FREE FROM BIAS DUE TO THE INFLUENCE OF EXTRAORDINARY ELECTION SPENDING DOES NOT PRESENT PROBLEMS OF JUDICIAL ADMINISTRATION.

Massey ultimately retreats to a parade of horribles to defend Justice Benjamin's refusal to recuse himself from participation in this case. But Massey's unsubstantiated speculation cannot diminish the serious constitutional deficiencies in the proceedings below.

A. A Decision Requiring Justice Benjamin To Recuse Himself Would Not Unsettle Existing Recusal Standards Or Generate A Flood Of New Recusal Requests.

Massey asserts that requiring Justice Benjamin's recusal in this case would generate an avalanche of constitutionally mandated recusals in cases outside of the campaign-finance context. Massey suggests, for example, that if Mr. Blankenship's campaign support for Justice Benjamin created a constitutionally unacceptable probability of bias, then Justices of this Court would be required to recuse themselves in every case of importance to the President who nominated them. Resp. Br. 32.

That contention is meritless. In order for this Court to discharge its constitutional "duty . . . to say what the law is" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), it is both necessary and appropriate for Justices routinely to decide cases that are important to the Presidents who nominated them (and to the Senators who confirmed them). Indeed, Chief Justice Jay—one of the authors of *The Federalist*—and Chief Justice Ellsworth and Justices

Blair, Paterson, and Wilson—each of whom participated in the Constitutional Convention—regularly sat in cases that had profound implications for both President Washington and the United States Senate. *See*, *e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (federal court jurisdiction over suits against States); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) (constitutionality of federal carriage tax). In condoning this practice, the Framers reached the eminently reasonable conclusion that a Justice's life tenure and salary protections are sufficient to neutralize any appreciable risk of judicial bias in favor of the President and Senators responsible for a Justice's appointment. Judges continue to echo that conclusion today. *See In re Executive Office of the President*, 215 F.3d 25, 25 (D.C. Cir. 2000) (Tatel, J.) ("Hearing a case involving the conduct of the President who appointed me will not create in reasonable minds . . . a perception that [my] ability to carry out judicial responsibilities with integrity, impartiality, and competence [would be] impaired.") (internal quotation marks omitted; brackets in original).

Indeed, federal judges' recusal determinations are already governed by a federal statute that requires recusal whenever a judge's "impartiality might reasonably be questioned" (28 U.S.C. § 455(a))—a standard that encompasses any instance in which there is a reasonable basis to conclude that a judge is biased for or against one of the parties. *Liteky v. United States*, 510 U.S. 540, 548 (1994). This statutory standard establishes a lower threshold for recusal than the Due Process Clause, which, in this context, requires recusal only where the appearance of partiality is so strong as to create a probability of bias. Reaffirming that due process mandates recusal where there is a probability of ju-

dicial bias will thus have no impact on federal judges' recusal obligations.

Nor will it constitutionalize large swaths of state recusal law, as virtually all States have recusal requirements more stringent than the due process standard here. ABA Br. 14 n.29. Indeed, a decision holding that the Due Process Clause requires the recusal of judges who, more probably than not, are biased against a party would leave States free—as they have always been—to "adopt recusal standards more rigorous than due process requires" (*White*, 536 U.S. at 794 (Kennedy, J., concurring)) and free to experiment with different modes of selecting judges, including judicial elections. But States may not, consistent with the federal guarantee of due process, condone decision-making by judges tainted by a probability of bias. As this Court has recognized, this constitutional floor is necessary because state-law recusal standards all too often "protect[ ] too little" (*Ward*, 409 U.S. at 61), and because federal protection is necessary where state judges' actual judicial recusal decisions fail to satisfy the constitutional minimum. Indeed, the Court has never declined to enforce a fundamental federal right—such as the right to "[t]rial before 'an unbiased judge'" (*Johnson*, 403 U.S. at 216)—simply because state law provides its own set of procedural safeguards.

Amicus Conference of Chief Justices—a body that comprises the chief justices and chief judges of every State—agrees with petitioners that "the due-process guarantee . . . protects the right to a fair hearing if extreme facts create a 'probability of actual bias . . . too high to be constitutionally tolerable'" and "may require the disqualification of a judge in a particular matter because of extraordinarily out-of-

line campaign support." CCJ Br. 4 (second alteration in original).

Alabama and six other States dissent from the adoption of this constitutional minimum because, in their view, enforcing this constitutional guarantee would interfere with their efforts to "experiment[ ] with different—and often novel—ways of ensuring the impartiality of their own judges." Alabama Br. 17. But that is manifestly not the case, and, apparently, the *forty-three* States that did not join that *amicus* brief do not share Alabama's desire to be free to experiment with reductions below the constitutional floor. And with good reason. The States may be the laboratories of democracy, but their constitutional prerogatives have never encompassed the authority to reduce constitutional minimums—not, at least, since the Fourteenth Amendment was ratified. While the States are free to craft different procedures to enforce federal rights, the States may not simply disregard them. The States' discretion to design their own judicial-selection and recusal procedures thus does not include the right to condone proceedings before a judge who is "predisposed to find against" one of the parties. *Marshall*, 446 U.S. at 242.

Massey also predicts that mandating recusal based on a probability of judicial bias would generate a flood of new recusal motions. Resp. Br. 44; Alabama Br. 28. But the Conference of Chief Justices—whose members would bear the brunt of any increase in recusal requests—categorically dismisses Massey's speculation as "unfounded." CCJ Br. 23. Indeed, judicial bias has long been a ground for recusal under this Court's due process jurisprudence and federal and state recusal statutes, and there is no evidence that courts are inundated by bias-based

recusal requests. Even in Oklahoma, where the state supreme court has held that due process requires the recusal of a judge who has received as little as $5,000 in campaign donations from a party's attorney (*Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001)), the apocalypse predicted by Massey has not materialized.

B. The Due Process Right To An Unbiased Judge Is Not Dependent On The Existence Of A Bright-Line Rule.

Massey also suggests that this Court should decline to enforce the Due Process Clause's guarantee of an unbiased judge because there is no bright line that identifies with precision every set of circumstances in which a litigant's campaign support for a judge mandates recusal. Resp. Br. 36. But the absence of a bright line between the constitutional and the unconstitutional is a common feature of this Court's due process jurisprudence, which is "flexible and call[s] for such procedural protections as the particular situation demands." *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (internal quotation marks and brackets omitted). By its "very nature," then, the phrase "due process negates any concept of rigid procedures universally applicable to every imaginable situation." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) ("identification of the specific dictates of due process generally requires consideration of three distinct factors" applied to the particular facts of each case).

This Court has already said that the factors that would disqualify a judge from sitting "cannot be defined with precision." *Lavoie*, 475 U.S. at 822. But

that condition has never deterred the Court from enforcing the Constitution's broad guarantee of liberty.

The "flexib[ility]" of due process is particularly well-suited to the review of judicial campaign support because case-specific considerations—such as the amount of a litigant's campaign expenditures; the proportion of overall financial support for which the litigant was responsible; the litigant's provision of other, nonfinancial support for the campaign; and the timing of the litigant's support—will determine whether a litigant's support for a judge creates a probability of bias in favor of the supporter. As the Conference of Chief Justices recognizes, "no bright-line rule can or should be attempted" in this area because "the applicability of the Due Process Clause in the campaign spending context depends on the particular facts of each case." CCJ Br. 22. A litigant's $50,000 donation may not require recusal, for example, where it constitutes only a small fraction of the total campaign support for a judge and was donated years before the litigant's case began, but may require recusal where it represents 75% of the judge's total support, was made while the case was pending, and had an outcome-determinative effect on the election.

There is no reason to believe that the state courts on which the Conference's members sit—as well as the lower state courts that they oversee—will be unable to undertake such case-by-case recusal evaluations using the constitutionally pertinent factors identified by the Court in this case. Indeed, state courts perform similar fact-specific constitutional inquiries every time they are asked by a criminal defendant to determine whether a search or seizure was "unreasonable." *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("we have consistently eschewed bright-

line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry").

No one could credibly contend that the Court should stop enforcing the Fourth Amendment because it is impossible to draw a bright line between reasonable and unreasonable searches. It is no less implausible to suggest that this Court should refuse to apply the Due Process Clause in this case simply because there is no bright line that can identify in advance every set of facts in which a litigant's campaign support will mandate a judge's recusal.

The "bright line" alternative that Massey suggests—that the Due Process Clause *never* requires a judge's recusal no matter the size, proportion, or timing of a litigant's campaign support—"is not worth the downside." *Roell v. Withrow*, 538 U.S. 580, 590 (2003).

* * *

The "Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall*, 446 U.S. at 242. This "guarantee of a fair and meaningful proceeding" is fundamentally incompatible with judicial bias (*id.* at 250)—whether that bias is born of a judge's pecuniary interest in the outcome of a case, a judge's personal animus toward a particular litigant in a contempt proceeding, or a litigant's expenditure of millions of dollars to support a judge's election and defeat a judge's opponent. Where the size, proportion, and timing of that campaign support create an objective probability that the judge would be predisposed in favor of one party and against another, due process requires the judge's recusal. The "constitutional interest in fair adjudicative procedure" demands no less. *Id.* at 243.

CONCLUSION

Justice Benjamin's decision not to recuse himself should be reversed, the judgment of the Supreme Court of Appeals of West Virginia vacated, and the case remanded for further proceedings without Justice Benjamin's participation.

Respectfully submitted.

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