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

BRIEF OF THE CENTER FOR POLITICAL ACCOUNTABILITY AND THE CAROL AND LAWRENCE ZICKLIN CENTER FOR BUSINESS ETHICS RESEARCH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Center for Political Accountability ("CPA") and the Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School of the University of Pennsylvania ("The Zicklin Center") submit this brief as *amici curiae* in support of the Petitioners.[1]

CPA is a non-profit, non-partisan organization dedicated to ensuring transparency and accountability of corporate political spending for the benefit of shareholders, the public, and the political process. CPA seeks to create a business environment that promotes ethical behavior. Critical to its success are laws and regulations that foster rather than impede ethical decision-making. Since CPA was founded in 2003, it has worked with shareholders and companies to enable companies to pursue their political interests openly and responsibly. Drawing from the published practices of leading companies, CPA developed a model code for corporate political activity. Major corporations including Intel, Merck, and Dell subsequently modeled their codes on CPA's.

CPA also promotes corporate disclosure and oversight of company political spending. As a result of its efforts, sixty leading public companies, including forty S&P 100 companies, have made

[1] CPA and The Zicklin Center submit this brief pursuant to the written consent of the parties, as reflected in letters the parties have filed with the Clerk. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than CPA and The Zicklin Center has made a financial contribution to its preparation or submission.

political disclosure and oversight an essential element of their political programs.

CPA produces reports on issues related to corporate political activity and has conducted surveys that have examined the attitudes of directors and shareholders toward political spending. Those surveys have demonstrated broad support for transparency and accountability and, more generally, a commitment to the highest ethical standards in corporate political involvement. The business community understands well the reputational and legal risks that irresponsible political behavior poses.

The Zicklin Center, established in 1997, sponsors and disseminates leading research on business ethics and corporate social responsibility. It provides students, educators, business leaders, and policymakers with tools to meet the ethical challenges that arise in complex business transactions. The Zicklin Center supports research that examines organizational incentives and disincentives to ethical business practices. Among The Zicklin Center's primary concerns are conflicts of interest that compromise independent judgment or create the appearance of such a compromise. One lesson that can be drawn from its work is that a society cannot expect its businesses to behave ethically if it does not create conditions where ethical behavior, if not rewarded, is at least not punished in the marketplace.

CPA and The Zicklin Center share concerns about corporate officers' use of their firms' resources to influence judicial elections. At the very least, significant political spending by corporations creates

the appearance of a disparity of justice that disadvantages individuals and companies lacking the means to contribute to judicial campaigns. Corporate expenditures may also unleash an arms race of political spending and lead to a "pay-to-play" environment, where judicial decisions appear to be more influenced by the money spent on clever political advertisements than by the merits of a case.

SUMMARY OF ARGUMENT

When a judge of a state's highest court casts the deciding vote in favor of a party whose chief executive officer spent millions of dollars supporting his election campaign, the opposing parties and observers should rightfully question whether the judge was impartial and whether all parties received due process. Under these circumstances, the Fourteenth Amendment's Due Process Clause demands that judges recuse themselves from cases involving persons or companies that supported their election through substantial campaign spending.

There is no effective legal constraint on the amount or source of money that a corporation or its directors, officers, or major shareholders may spend to influence the election of candidates for state judicial office. Many states prohibit direct corporate contributions to state and local candidates. But even where direct corporate contributions are prohibited, avenues remain for corporate money to find its way into the political process in the form of candidate-specific issue advocacy and independent expenditures that are protected by the First Amendment. Aware of this, corporate officers, directors, and major shareholders may rationally

conclude that it is in their company's best interests to spend large sums of money to influence a judicial election.

The escalation of judicial campaign spending traps business leaders into a classic "prisoner's dilemma." For ethical and financial reasons, most corporations would prefer to avoid spending money on an election that involves candidates for a seat on a court where it has a matter pending. An ethically-centered company would seek to avoid being drawn into the sort of judicial politics that Massey Coal board chairman, CEO, and president Don L. Blankenship so aggressively waged in 2004 to elect Justice Brent Benjamin to the West Virginia Supreme Court of Appeals. In today's election environment, however, a corporation must consider the likelihood that its opponent in high-stakes litigation may actively support one or more of the judges that will hear its case. Increasingly, corporations feel compelled to support their own candidates to guard against an adverse judgment that damages the company and its shareholders.

Mandatory recusal is necessary to stanch this campaign spending arms race and maintain the integrity of the judicial system. The economy and the rule of law cannot thrive without robust safeguards of judicial impartiality. Mandatory recusal of judges who receive substantial support from the parties before them would ensure minimal due process while enabling individuals and corporations to freely exercise their First Amendment rights to engage in political speech.

ARGUMENT

I. There is No Effective Legal Constraint on Corporate Spending in Support of Judicial Candidates

In states that elect judges, political campaign contribution rules are set by state campaign finance laws. For over a century, Congress and many state governments have banned direct corporate contributions to political candidates to prevent large corporate money war chests from being funneled to candidates in a manner that corrupts or creates an appearance of corruption. *See Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 154 (2003).

At first glance, state law restrictions on corporate spending may seem like an effective means for protecting the integrity of judicial elections. Indeed, in the present case, West Virginia law prohibited Massey Coal from contributing corporate treasury funds to Justice Benjamin's 2004 campaign and limited Mr. Blankenship's personal contribution. *See* W. Va. Stat. § 3-8-8(a). But recent cases, including this one, illustrate that companies like Massey Coal have many other avenues to spend as much money as they can budget to influence judicial elections.

A. Issue Advocacy

One avenue for corporate political expenditures is candidate-centric advocacy on public issues, commonly referred to as "issue advocacy." In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court recognized a constitutional separation between issue advocacy and express advocacy, the latter being speech that calls for the "election or defeat" of a

clearly identified candidate for public office. *Id.* at 43-44 & n.52. Speech that urges voters to vote for or against a particular candidate through such calls for action as "vote for," "support," "elect," or "defeat," or by using the functional equivalent of these words, constitutes express advocacy. *Id.*; *see also Federal Election Comm'n v. Wis. Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL*"). A corporation's right to speak on matters of public importance must yield only to the government's compelling interest in eliminating corruption or the appearance of corruption in the political process, which justifies prohibitions on corporations using their treasury funds in political campaigns. *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). This compelling interest justifies regulatory limits on contributions to political campaigns, which this Court has described as "a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21, 25-29.

But when it comes to advocating positions on public issues, this Court has found that the First Amendment protects expression paid for by corporate treasury funds just as it does for individuals. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978). Corporate speech advocating positions on such public issues as taxes, welfare reform, and education is included in that "type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777 (footnote omitted).

This Court recently reaffirmed this principle in *WRTL* when it held that Section 203 of the Bipartisan Campaign Reform Act ("BCRA") did not apply to certain television advertisements produced by a non-profit corporation. 127 S. Ct. at 2670. The Court held that the advertisements at issue, which asked viewers to urge Wisconsin Senators Russ Feingold and Herb Kohl to oppose Senate filibusters of federal court nominees, could not be regulated because they focused on legislative issues and lacked the "indicia of express advocacy." *Id*. at 2667.

WRTL teaches that a communication that "is susceptible of [any] reasonable interpretation other than as an appeal to vote for or against a specific candidate" falls in the issue advocacy category. *Id*. at 2667. Communications that might arguably be construed as supporting or opposing a judicial candidate might not fall in the regulated express advocacy category if, at the same time, the communications urge support or opposition to public issues. *See Buckley*, 424 U.S. at 42 ("Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest."). This is so even when the communication references a candidate and casts that candidate in a favorable or unfavorable light. *See WRTL*, 127 S. Ct. at 2660.

WRTL also invalidates restrictions on the timing of issue advertising. Section 203 of BCRA prohibited corporations and unions from engaging in electioneering communications, defined as any broadcast, cable, or satellite communication that "refers to a clearly identified candidate for Federal office" and is made within sixty days before a general

election, special, or runoff election or thirty days before a primary. 2 U.S.C. §§ 434(f)(3), 441b(b)(2). Although BCRA barred candidate-specific corporate broadcast advertising only during a limited period immediately before an election, that fact was insufficient to sustain the ban when applied to issue advocacy. The Court held that the prohibition, which included communications that merely mentioned a candidate, was unconstitutional when applied to the genuine issue advocacy in which WRTL was engaged. *WRTL*, 127 S. Ct. at 2663, 2673.

After *WRTL*, corporations, their directors, officers, and shareholders may spend unlimited amounts of money to fund broadcast, print, internet, and other advertisements supporting or criticizing issues taken on by courts and judges. Blanket prohibitions on such spending are unconstitutional. These advertisements may associate a candidate with positions on issues and may be designed to influence voter attitudes toward that candidate. Nevertheless, an advertisement may not be regulated merely because of its author's intentions or its likely effect. A company's decision to spend in a judicial election thus becomes a business decision rather than a legal question. So long as the corporation carefully avoids express advocacy, its activity is protected by the First Amendment.

B. Independent Expenditures

Independent expenditures provide a second avenue for spending in judicial elections. An independent expenditure advocates the election or defeat of a candidate without the control of or coordination with a candidate, his or her campaign

committee or agents, or a political party or its agents. *Buckley*, 424 U.S. at 46; *see*, *e.g.*, 2 U.S.C. § 431(17) (defining "independent expenditure" under federal campaign finance law).

Governments may prohibit corporations from making independent expenditures, but they cannot limit the amount of money an individual spends to support or oppose a political candidate if the expenditures are made without coordinating with a political campaign, committee, or party. *Buckley*, 424 U.S. at 20-21. While the Court has described *contributions* as "general expression[s] of support for the candidate" that may be regulated, independent spending by individuals constitutes expressive activity protected by the First Amendment. *Id*. at 19-21 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 300-01 (1981) (Rehnquist, J., concurring) ("[I]n this situation there is no state interest which could justify a limitation on the exercise of rights guaranteed under the First and Fourteenth Amendments to the United States Constitution.").

As a result, a corporate officer or shareholder may engage in independent expenditures supporting or opposing judicial candidates, the only limitation being the amount of money he or she wishes to spend. After surveying the field of judicial candidates, one could decide which represent an

opportunity for a reasonable return on investment and which could potentially stifle the company's business goals. The officer or shareholder could then fund direct mail pieces, television, radio and newspaper advertisements, attack ads, "push polls," and other electioneering activities so long as they are uncoordinated. Such expenditures have the unmistakable intent of influencing the public's opinion of the candidates.

C. No Limitation on the Content of Political Expenditures

The content of speech in judicial elections, whether funded constitutionally through issue advocacy or independent expenditures, cannot be regulated by the government. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). "[C]ontent-based restrictions on political speech are 'expressly and positively forbidden by' the First Amendment." *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964)). This longstanding rule of constitutional law provides corporations and individuals with a guarantee that the government cannot censor the message conveyed about public issues and judicial candidates.

II. A Corporation May Rationally Decide Political Spending Serves Its Interests

Aware of this legal landscape, a corporation, its officers, directors, or major shareholders could make a calculated business decision to spend money to influence the results of a judicial election. Indeed, a corporation and its agents may owe duties and

obligations to shareholders to support candidates whose judicial philosophies represent the company's best interests in pending or anticipated litigation. *See*, *e.g.*, *Miller v. U.S. Foodservice, Inc.*, 361 F. Supp. 2d 470, 477 (D. Md. 2005) ("The duty of care requires that corporate officers and directors 'exercise an informed business judgment' to make decisions reasonably determined to be in the best interests of the corporation and its shareholders.") (citation omitted); *see also* Rev. Model Bus. Corp. Act § 8.42(a)(3) (prescribing that a corporate officer must act "in a manner the officer reasonably believes to be in the best interest of the corporation"). That judicial candidates have a First Amendment right to announce their position on issues that may come before the court allows corporate officers to evaluate which candidates would best suit the company's interests. *See White*, 536 U.S. at 788.

The actions taken by Mr. Blankenship well illustrate the business calculation. Petitioners won a $50 million jury verdict against Massey Coal in August 2002. Anticipating a petition for review to the five-member West Virginia Supreme Court of Appeals, Mr. Blankenship sought to install a new justice in the 2004 election.

Mr. Blankenship undisputedly spent nearly $3 million on Justice Benjamin's election to the West Virginia Supreme Court of Appeals. [Pet. 7] By Respondents' own count, Mr. Blankenship spent a total of $2,988,207, consisting of a $1,000 donation to Justice Benjamin's campaign, $517,707 in independent expenditures, and $2,460,500 through "And For the Sake of the Kids," an advocacy group that is apparently registered as a Section 527

organization.[2] [Opp. 4] Mr. Blankenship's independent expenditures and Section 527 contributions were used both to support Justice Benjamin's candidacy and to attack the incumbent Justice, Warren McGraw. [*Id*.] One advertisement appealed to voters' basic fears by describing Justice McGraw as a "radical" who allowed "a child rapist [to] go free . . . [t]o work in our schools[.]" [Pet. 7] Mr. Blankenship apparently wrote letters to potential contributors that "are directly responsible for a portion of the more than $800,000 donated to Justice Benjamin's campaign committee." [*Id*. at 8]

Justice Benjamin won the 2004 election and took office in 2005. Mr. Blankenship soon realized a return on his investment. Justice Benjamin refused repeated requests that he recuse himself and supplied the deciding vote that overturned the $50 million verdict against Massey Coal.

III. Spending In a Judicial Election by Parties With a Matter Before the Court Presents a Classic "Prisoner's Dilemma"

Many corporations would prefer not to play the judicial sweepstakes, despite the possible payoff. These companies elevate corporate ethics, shareholder values, and their public image above the short-term gains from spending on judiciary candidates. Survey evidence reveals that most business leaders believe that disproportionately large campaign contributions influence judges'

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[2] In West Virginia, a person may contribute to a candidate's campaign committee up to $1,000 for the primary election and another $1,000 for the general. W. Va. Code § 3-8-12(f).

decisions and create an unacceptable appearance of such influence. Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* 3-4 (2007).

The proliferation of big-money judicial contests[3] ensnares conscientious business leaders in a classic "prisoner's dilemma." In this game theory problem, prisoners A and B stand accused of the same crime. A and B will both be better off if neither confesses. But A will be individually worse off if B alone confesses, and vice versa. The outcome is that both prisoners confess, even though this makes them worse off than if both had remained silent.

Similarly, corporations A and B are rivals in "bet the company" litigation. Both would prefer to avoid the ethical maelstrom and cost of supporting a candidate for the court in which their case is or will be pending. The optimal outcome is for neither to spend on the election. Corporation A, however, cannot help but worry that it will incur great financial losses if Corporation B supports a candidate and Corporation A does not. Corporation B faces the same dilemma. Each rationally assumes that the other will spend and, therefore that it must also spend. As a result, both expend substantial resources on the election, leaving them (and their shareholders and society at large) worse off.

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[3] In the four most recent election cycles, judicial candidates raised nearly twice the amount raised in the four election cycles preceding them. James Sample et al., *The New Politics of Judicial Elections* 15 (2006).

This simple hypothetical demonstrates the plight of the reluctant corporate spender. In a judicial election system that is increasingly pay-to-play, everyone must pay, whether they want to or not. The prisoner's dilemma pits the corporation's long-term commitment to sound ethical and financial management against its short-term obligation to protect shareholders from a harmful adverse judgment.

Mr. Blankenship's successful effort to install Justice Benjamin demonstrates what a well-heeled, determined supporter can achieve through the judicial election process. Justice Benjamin may have no actual bias in favor of Massey Coal, as he insists. But a judge who casts the deciding vote to overturn a $50 million jury verdict against a corporation whose CEO spent $3 million in support of his campaign inevitably creates a perception of bias.

That perception alone is sufficient to ignite a judicial campaign spending arms race. More than sixty percent of business leaders surveyed by Zogby expressed concern that the "rising cost of judicial elections around the country is forcing businesses to spend more of their money contributing to judicial campaigns." Zogby Int'l, *supra*, at 5. Moreover, mounting empirical evidence confirms that the connection between judicial campaign spending and judicial outcomes is real, not just perceived.[4] In a legal environment devoid of effective restraints on

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[4] *See* TEXANS FOR PUBLIC JUSTICE, PAY TO PLAY: HOW BIG MONEY BUYS ACCESS TO THE TEXAS SUPREME COURT 10 (2001), at http://www.tpj.org/docs/2001/04/reports/paytoplay/; Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1.

such undue corporate influence, even reluctant corporations may feel compelled to support their own judicial candidates to protect shareholders' interests.

As spending escalates, judicial elections more and more appear to be a tool of the wealthy and powerful, casting doubt on the impartiality and legitimacy of the judicial system overall. "A judiciary independent from both government intervention and influence by the parties in a dispute provides the single greatest institutional support for the rule of law. If the law or the courts are perceived as partisan or arbitrary in their application, the effectiveness of the judicial system in providing social order will be reduced." WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 129 (Oxford Univ. Press 2002).[5]

The courts cannot purport to guarantee due process in a pay-to-play environment. The legal system must promote ethical business behavior with respect to campaign spending, not undermine it by rewarding firms that secure their short-term interests by influencing elections.

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[5] *See also* Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform* 3 (World Bank Technical Paper No. 319, 1996), cited in Robert Kossick, *The Rule of Law and Development in Mexico*, 21 Ariz. J. Int'l & Comp. L. 715, 721 n.21 (2004) ("[R]eporting that most Latin American respondents in a multi-national survey consider the judicial system to be among the top 10 restraints to private sector development.").

IV. Mandatory Recusal Enables a Corporation to Pursue Both Its Public and Private Interests Ethically

Mandating recusal in appropriate circumstances would simultaneously facilitate ethical business behavior and safeguard First Amendment activity. The business community values an impartial judiciary and indeed depends upon it to sustain a stable legal environment in which capitalism can thrive. "The degree of judicial independence is correlated with economic growth. Better performing courts have been shown to lead to more developed credit markets. A stronger judiciary is associated with more rapid growth of small firms as well as with larger firms in the economy." Kenneth W. Dam, *The Judiciary and Economic Development* 1 (The Univ. of Chicago John M. Olin Law & Econ. Working Paper No. 287, 2006) (footnote omitted).

Corporate campaign spending to address public issues and corporate officers' individual spending to opine on candidates' qualifications are legitimate exercises of First Amendment rights that need not conflict with impartial justice. Yet the current system puts these interests in conflict. Four in five American business leaders express concern that "financial contributions have a major influence on decisions rendered by judges." Zogby Int'l, *supra*, at 3-4. These leaders are nearly unanimous in the opinion that judges should recuse themselves from cases involving contributors. *Id.* at 6.

A constitutional standard for mandatory recusal, therefore, facilitates First Amendment activity

without rewarding campaign spending aimed at subverting judicial independence.[6]

Wise executives understand that "[t]he power and the prerogative of a court to perform [its] function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity." *White*, 536 U.S. at 793 (Kennedy, J., concurring). Mandatory recusal would serve due process by disentangling a corporation's public interests (supporting qualified judges and expressing its views on matters of public import) from its private ones (achieving a favorable outcome in a particular court case). Corporations and officers would be better able to pursue ethically their interests in elections because they could spend freely without the expectation of a quid pro quo.

Mandatory recusal would also avoid the chilling effects associated with regulating political speech, of which the Court has long warned. *See*, *e.g.*, *Buckley*, 424 U.S. at 16-19. The establishment of a due process floor for recusal would respect the right of a corporation to engage in political speech without diminishing the due process rights of other parties.

A clear recusal standard would nullify the advantages of spending to influence judicial

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[6] Parties do not have a cognizable interest in hand-picking a judge to hear and decide their case, including one that has benefited from their campaign spending. Likewise, parties have no legitimate interest in demanding a particular judge based on other individual factors, such as a willingness to grant dispositive motions, management of discovery, and scrutiny of the qualifications of expert witnesses. *See Huber v. Taylor*, 532 F.3d 237, 251 (3d Cir. 2008).

outcomes. The minority of corporations that lack compunction about "buying elections" will lose the incentive to do so, ensuring that the majority of corporations are not punished by the market for behaving ethically. "Surely special interests would be less inclined to invest so heavily in judicial elections if they knew the recipients of their largess likely would be barred from sitting on their cases." Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom,'* N.Y. TIMES, April 15, 2008, at A22.

Due process accordingly requires that state courts establish a procedure for elected judges to follow when a litigant raises campaign spending as a basis for recusal. The judge who is being asked to recuse him or herself should have the first opportunity to rule on a recusal motion, but should not be the sole and final arbiter. An effective recusal process also requires that denied motions be referred to a disinterested reviewer, such as a retired judge, a board, or some other tribunal, for *de novo* review. Automatic review will correct wrongfully-denied motions, and, more importantly, encourage judges to grant meritorious motions in the first instance rather than face reversal by an impartial authority.

At a minimum, a judge and any reviewing body would need to assess the following factors when considering a recusal motion:

(1) Did an individual party or an officer, director, or major shareholder of a corporate party directly or indirectly contribute or spend a significant sum of money in connection with the judge's election?

(2) If the spending was in the form of advertising, did the advertising expressly refer to the judge or the judge's opponent?

(3) Was the sum spent significant in comparison to the total amount spent on the election?

(4) Was the nature and timing of the expenditure such that it would likely have an impact on the election?

(5) Was the race contested?[7]

(6) Did the party have a matter pending or reasonably anticipate having a particular matter before the court at the time of the expenditure?

When an analysis of these factors would lead a reasonable person to conclude that the spending would give rise to bias or the appearance of bias, due process requires that the judge recuse him or herself. Moreover, a process that thoughtfully considers these factors would relieve federal courts of the need to supervise state court judgments for potential campaign-related bias except in the most extraordinary circumstances.

It is the absence of such consideration that brings this matter before this Court. All these factors were present in Massey Coal's matter before the West Virginia Supreme Court of Appeals. A corporate

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[7] Campaign spending may still create bias or the appearance of bias in an uncontested election or a retention election in merit-based selection jurisdictions. Judges running unopposed can still benefit from independent spending by seeking to affect the outcome of current or anticipated litigation. Due process requires consideration of the other factors even when the judge ran in an uncontested election.

officer accounted for sixty percent of the winning candidate's total expenditures in a hotly contested judicial campaign, shortly before the officer's company appealed a $50 million jury verdict against it. Justice Benjamin nonetheless refused to recuse himself – not once, but twice.

Justice Benjamin's decision to participate in the Massey Coal appeal tainted the public's perception of him as a judge and its perception of the West Virginia Supreme Court of Appeals as an institution of justice. Requiring mandatory recusal where an officer of a corporate party has spent a substantial amount of money to elect a member of the state's judiciary – the state's court of last resort, no less – is the only way to ensure due process for all litigants and to maintain public confidence in the judicial system. A clear, practical due process standard will enable companies to act ethically without sacrificing their right to speak on important public issues.

CONCLUSION

The Court should grant the relief requested by Petitioners.

Respectfully submitted,

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