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 AMICI CURIAE IN SUPPORT OF PETITIONERS

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v.

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On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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BRIEF OF AMICI CURIAE THE COMMITTEE FOR ECONOMIC DEVELOPMENT, INTEL CORPORATION, LOCKHEED MARTIN CORPORATION, PEPSICO, WAL-MART STORES, INC., DEFENSE TRIAL COUNSEL OF INDIANA, THE ILLINOIS ASSOCIATION OF DEFENSE COUNSEL, AND TRANSPARENCY INTERNATIONAL – USA IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE[1]

This Amici Curiae brief in support of Petitioners is filed on behalf of corporations and organizations committed to maintaining public confidence in the judicial system in order to promote economic growth and development.

Amicus Curiae the Committee for Economic Development ("CED") is an independent, nonpartisan, trustee-directed organization of business leaders dedicated to policy research on economic and social issues and the implementation of its recommendations by the public and private sectors. CED's trustees include leaders of America's largest corporations and business organizations—companies that operate around the country and the world. Throughout its 66-year history, CED has addressed national issues that promote economic growth and development in the United States.

Amicus Curiae Intel Corporation is the world's largest semiconductor manufacturer. Intel and its founders pioneered the key technologies that have enabled the digital revolution, including the integrated circuit, computer memory, and the microprocessor.

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[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37, Amici Curiae state that counsel for Amici authored this brief in its entirety. No person or entity other than Amici, their supporting organizations, and their counsel made a monetary contribution to the preparation of this brief.

Amicus Curiae Lockheed Martin Corporation is a global security company that employs about 140,000 people worldwide and is principally engaged in the research, design, development, manufacture, integration and sustainment of advanced technology systems, products and services.

Amicus Curiae PepsiCo is one of the largest convenient foods and beverages companies in the world, with more than 180,000 employees. From beverages to snacks, PepsiCo offers consumers more than 600 product choices. PepsiCo's commitment to sustainable growth is focused on generating healthy financial returns while giving back to communities the company serves.

Amicus Curiae Wal-Mart Stores, Inc. operates Walmart discount stores, supercenters, Neighborhood Markets and Sam's Club locations in the United States. Wal-Mart Stores, Inc. also operates in Argentina, Brazil, Canada, China, Costa Rica, El Salvador, Guatemala, Honduras, Japan, Mexico, Nicaragua, Puerto Rico, and the United Kingdom and, through a joint venture, in India.

Amicus Curiae Defense Trial Counsel of Indiana ("DTCI") is an association of Indiana lawyers who defend individual and corporate clients in civil litigation. DTCI's primary mission is to assist and support its members by advocating and providing a voice of reason in government, the courts, the legal profession, and the community at large. Recognizing the impact that legal disputes have on businesses and on society as a whole, DTCI seeks to promote the ra-

tional and efficient administration of justice while recognizing the duty to represent clients zealously.

Amicus Curiae the Illinois Association of Defense Counsel ("IDC") is a voluntary organization of independent lawyers whose experience includes substantial tort practice generally for the defense. IDC is a nonprofit organization with approximately 1,000 members drawn from nearly every county in Illinois. It and its many members believe that they have a constructive role to play in the development of our system of justice and that their interests may be greatly affected by this Court's determination of the important issues in this appeal.

Amicus Curiae Transparency International-USA ("TI-USA") is the U.S. chapter of Transparency International ("TI"), an independent, nonpartisan, nonprofit organization working to combat corruption and increase accountability in government and international business. Judicial integrity is a longstanding TI priority, reflected in a comprehensive report on "Corruption in Judicial Systems" issued in 2007 and the reform efforts of its more than 80 national chapters around the world. TI-USA believes that public confidence in the fairness and integrity of judicial systems is critical to maintaining a strong rule of law at home and in the many jurisdictions abroad that look to U.S. practice as a model.

Amici believe that public confidence in judicial integrity and in the evenhandedness of the judicial system is a critical element of America's stable, prosperous business climate. As Justice Story wrote, "[n]o man can be insensible to the value, in promoting

credit, of the belief of there being a prompt, efficient, and impartial administration of justice . . . ." 3 J. Story, *Commentaries on the Constitution of the United States* § 1685, at 564 (1833). Essential to public confidence in the judiciary is the assurance that justice is not for sale and that legal disputes will be resolved by fair and impartial judicial officers.

Where, as here, a party or its representative has made disproportionately large campaign contributions to a judge, that judge's impartiality in a case involving the contributor is cast into doubt. A decision by that judge to hear such a case has far-reaching consequences because it erodes public confidence that the case has been decided fairly, and, accordingly, that future cases will be decided fairly. Recusal in a case such as this is essential, both to guarantee due process and to preserve confidence in the judiciary. Because Justice Benjamin's refusal to recuse himself under the circumstances undermines confidence in the result the court reached, Amici strongly urge the Court to vacate the decision below.

SUMMARY OF ARGUMENT

Due process required West Virginia Supreme Court Justice Brent Benjamin to recuse himself on account of the campaign support he received from the CEO of Respondent A.T. Massey Coal Company ("Massey"). By not recusing himself from the appeal of a $50 million jury verdict against Massey—after he received over $3 million in post-verdict, pre-appeal campaign support from Massey's CEO—Justice Benjamin created an appearance of bias that would diminish the integrity of the judicial process in

the eyes of any reasonable person. In light of the appearance of bias, Petitioners cannot be said to have received due process.

It is imperative to the preservation of public confidence in the elected judiciary that the Court hold that such an appearance of bias is not consistent with due process. Such confidence in the judiciary is of particular value to those engaged in commerce, who rely on evenhanded justice to make informed financial and investment decisions. Survey data indicate that business executives, as well as judges themselves and voters at large, believe that campaign contributions influence judicial decisionmaking. In the face of ever more expensive and politicized judicial elections, there is a need to signal to businesses and the general public that judicial decisions cannot be bought and sold, and reversal of the judgment below based on Justice Benjamin's failure to recuse himself would accomplish that.

A holding that Justice Benjamin's participation in Massey's appeal violated due process would, in itself, place no limits on otherwise appropriate contributions. Nor would it restrict the rights of contributors and candidates to participate vigorously in campaigns. Rather, it would preserve the integrity of both the judiciary and judicial elections. It also would allow campaign contributions to continue without undermining confidence in the judiciary.

ARGUMENT

I. CLEARLY ESTABLISHING THAT DUE PROCESS REQUIRES RECUSAL OF A JUDGE WHO HAS RECEIVED OUTSIZED CAMPAIGN CONTRIBUTIONS FROM A PARTY BEFORE THAT JUDGE WILL PRESERVE CONFIDENCE IN THE JUDICIARY AND PROMOTE ECONOMIC GROWTH

Consistent with the command that a "fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136 (1955), this Court has made it clear that recusal is required where a judge has a significant personal interest in a case, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986). This Court has also written, in discussing the Due Process Clause, that "justice must satisfy the appearance of justice . . . and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (U.S. 1980) (*quoting Offutt v. United States*, 348 U.S. 11, 14 (1954) and *In re Murchison*, 349 U.S. at 136) (internal quotation marks omitted).

Due process not only protects litigants, but also furthers larger societal goals. One such goal is preserving the institutional legitimacy of the judiciary, which relies on public confidence in its independence and evenhandedness for its power. *See* THE FEDERALIST No. 78 (A. Hamilton) (J. Pole ed. 2005) (advocating the importance of "public and private confidence" in judicial integrity in order to avoid "univer-

sal distrust and distress"); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 800 (2002) (Stevens, J., dissenting) (noting "the importance of maintaining public confidence in the impartiality of the judiciary"). Another goal is permitting citizens—including investors and other economic actors—to "order their behavior." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting). In light of these important aims, Amici urge the Court to hold that due process requires recusal of a judge who has received campaign contributions from a party to a case or its representatives so substantial that they create an appearance of bias or unfairness.

A. Litigants, Judges, and the Public at Large Believe that Campaign Contributions Influence Judicial Decisionmaking

The belief among the American business community that justice is evenhanded affects economic decisionmaking, reduces the perception of risk, and encourages consistent adherence to transparent rules of law. The integrity of the American judicial system allows economic actors to rely on existing legal frameworks in weighing the potential costs and benefits of business and investment decisions. For American businesses such as Intel, Lockheed Martin, PepsiCo, and Wal-Mart, as well as CED's supporting organizations and the clients of members of DTCI and IDC, the ability to assess risks and calibrate benefits is critically important.

Corporations appear frequently in a variety of courts. Although it is not possible for litigants to

predict the outcome of any dispute or class of disputes with certainty, corporate actors can nonetheless make informed business decisions—and take informed risks—based on knowledge of the factual context in which disputes are likely to arise, the existing state of the law, and the judicial system as a whole. The influence of campaign contributions threatens to undermine such decisionmaking. Without exaggerating the predictability of judicial decisions, it certainly is true that, where outsized judicial contributions by parties create the perception that legal outcomes can be purchased, economic actors will lose confidence in the judicial system, markets will operate less efficiently, and American enterprise will suffer accordingly.

There is strong evidence that the confidence of business executives in the elected judiciary has been impaired. In 2007, CED commissioned Zogby International to survey business leaders regarding state judicial election fundraising. Zogby surveyed 200 senior executives, primarily at companies with more than 500 employees. *See* Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* 3–4 (2007). The results show that American business leaders are concerned that disproportionately large campaign contributions are influencing judges' decisions and creating an unacceptable appearance of such influence. Four in five business leaders expressed concern that "financial contributions have a major influence on decisions rendered by judges," *id.* at 4, and survey respondents were nearly unanimous in their opinion that judges should recuse themselves from cases involving contributors, *id.* at 6.

These results comport with data that demonstrate that the American citizenry is less than completely confident of the impartiality of elected judges in cases involving contributors. Surveys in several states have found that voters overwhelmingly believe that campaign contributions influence judicial decisions.[2] Even judges themselves acknowledge the bias that results when judges hear cases involving donors. A 2002 survey of more than 2,400 state court judges found that 46% of the judges surveyed believe that judicial campaign contributions influence decisions by the recipients of those contributions. Greenberg Quinlan Rosner Research, Inc. & Am. Viewpoint, *Justice at Stake—State Judges Frequency Questionnaire* 5 (2002). A majority of state court judges believe judges should be prohibited from presiding over cases in which any party has contributed money to the judge's campaign. *Id.* at 11.

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[2] *See, e.g*, N. Carolina Center for Voter Education, *American Viewpoint: North Carolina Statewide Survey* (June 2005) (86% of those polled believe campaign contributions too often lead to conflicts of interest); Commission to Promote Public Confidence in Jud. Elections, *Report to the Chief Judge of the State of New York* (June 29, 2004) (83% of those polled think that contributions have at least some influence on judicial decisions); A.B.A. Standing Committee on Jud. Independence, *Public Financing of Judicial Campaigns: Report of the Commission on Public Financing of Judicial Campaigns* (Feb. 2002) (nine out of ten Pennsylvania voters believe large campaign contributions influence judicial decisions); Texas Supreme Court Justice Thomas R. Phillips, State of the Judiciary Address to the 76th Legislature of the State of Texas (March 29, 1999) (83% of Texans polled thought that money had an impact on judicial decisions).

The very fact that these beliefs are so widespread is itself a serious threat. Indeed, the perception of bias has a pernicious impact whether or not the bias actually exists. The American Bar Association recognized the importance of perception and appearance of fairness in judicial decisionmaking in 1972 when it adopted the Model Code of Judicial Conduct, which subjects a judge to disqualification "in a proceeding in which his impartiality might reasonably be questioned . . . ." Model Code of Jud. Conduct, Canon 3C (1972) (current version at Model Code of Judicial Conduct, R. 2.11 (2007)).

Congress, too, has acknowledged the importance of the appearance of impartiality among judges. In 1974, it amended the federal judicial disqualification statute to require the recusal of any federal judge whose "impartiality might reasonably be questioned." 28 U.S.C. § 455 (2007). Congress adopted the Model Code approach in order to create an "objective standard . . . designed to promote public confidence in the impartiality of the judicial process . . . ." H.R. Rep. No. 93-1453 (1974), as reprinted in 1974 U.S. Code Cong. § Admin. News 6351, 6355. Even if judges are less vulnerable to influence by contributions than the public believes—and judges themselves profess to believe—the existence of the widespread belief undermines the confidence in judicial fairness that is a central component of a prosperous and growing economy.

B. Economic Research Demonstrates that Confidence in the Judiciary Is Fundamental to a Fair Legal Climate and Promotes Economic Growth

Economic analysis has addressed this same point in the context of developing economies. Research findings demonstrate that, where private parties reasonably expect that judges will enforce contracts and settle disputes impartially, transaction costs are lower, which in turn leads to a greater number of welfare-enhancing transactions. Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 EUR. J. OF POL. ECON. 497, 499 (2003). An evenhanded judiciary serves as "a device to turn promises . . . into credible commitments." *Id.* A survey of business leaders in five countries with developing economies found that those who express confidence in courts grant more trade credit and that countries where managers express such confidence have lower barriers to entry and greater overall productivity. Simon Johnson, John McMillan & Christopher Woodruff, *Courts and Relational Contracts*, 18 J. L. ECON. & ORG. 221, 260 (2002).

Consistent with this research, the World Bank and other growth-oriented global organizations have implemented programs to remedy and counteract the harmful economic effects of judiciaries plagued by corruption and partiality. *See* World Bank, *Anti-Corruption in Transition: A Contribution to the Policy Debate* (2000). As Rodrigo de Rato, former Managing Director of the International Monetary Fund, has acknowledged, "a competent and independent

judiciary is crucial to the development of business and financial systems." Rodrigo de Rato, Managing Director, Int. Monetary Fund, Luncheon Remarks at the Sixth Jacques Polak Annual Research Conference (Nov. 3, 2005); *cf.* Transparency Int'l, *Global Corruption Report 2007: Corruption In Judicial Systems* (2007) ("It is difficult to overstate the negative impact of a corrupt judiciary . . . it diminishes trade, economic growth and human development . . . .").

While there are many obvious differences between the United States' economy and judicial system and those of the countries at issue in this literature, the basic conclusion of the literature—that an expectation of impartiality in judicial decisionmaking promotes economic growth—applies squarely in this country.

II. IN LIGHT OF THE INCREASED COST AND POLITICIZATION OF JUDICIAL CAMPAIGNS, THE COURT SHOULD CLEARLY ESTABLISH THAT OUTSIZED CAMPAIGN CONTRIBUTIONS MADE BY PARTIES OR THEIR REPRESENTATIVES REQUIRE RECUSAL

In the four election cycles between 1999 and 2006, judicial candidates raised nearly twice the amount raised in the four previous election cycles. James Sample et al., *The New Politics of Judicial Elections* 15 (2006). In recent years, there have been exceptionally expensive judicial campaigns in states such

as Alabama,[3] Georgia,[4] Illinois,[5] and Wisconsin.[6] As judicial campaign contributions continue to increase in the 39 states that elect some or all of their judges, Am. Judicature Soc'y, *Judicial Selection in the States* 4–7 (2008), the frequency of recusal motions stemming from contributions by parties or their officers or counsel should increase as well.

Lower court judges, who in West Virginia and many other states are the sole arbiters of motions seeking their recusal, look to this Court to set the "outer boundaries of judicial disqualifications" required by federal due process. *Aetna*, 475 U.S. at 828. Currently, elected judges faced with recusal motions stemming from campaign contributions by parties or their officers or counsel have little guidance on where the due process boundaries lie. A statement from this Court that the outsized contributions made by Massey's CEO to Justice Benjamin's campaign "might lead him not to hold the balance nice, clear and true between the" parties, *Ward v.*

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[3] Eric Velasco, *TV Ads Drive Up Campaign Tab: Nabors-Cobb Race Costliest in Nation for Judicial Post*, Birmingham News, Oct. 15, 2006, at 17A.

[4] Jill Young Miller & Jeremy Redmon, *Foes in Judicial Contest Go Dirty*, Atlanta Journal-Constitution, Oct. 31, 2006, at A1.

[5] Abdon M. Pallasch, *Cash Pours in to Heated Downstate Judicial Battle*, Chicago Sun-Times, Nov. 1, 2004, at 18.

[6] Bill Mears, Big Money, *Nasty Ads Highlight Wisconsin Judicial Race*, CNN.com, Mar. 31, 2008, http://www.cnn.com/2008/POLITICS/03/31/wisconsin.judicial.race.

Village of Monroeville, 409 U.S. 57, 60 (1972) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)), would provide lower courts with a much-needed benchmark against which to measure more frequent requests for recusal.

If Justice Benjamin's interpretation of federal due process is permitted to stand, state court judges may draw the conclusion that due process imposes no meaningful limits on their recusal decisions, and public and business confidence in judicial decision-making will continue to erode.

III. CLARIFYING THAT DUE PROCESS REQUIRES RECUSAL IN THIS CASE WILL PRESERVE FAIRNESS AND CONFIDENCE IN THE JUDICIARY WITHOUT LIMITING POLITICAL SPEECH

Many corporations and individual citizens exercise their constitutional right to political expression through contributions to judicial candidates and organizations who support them. This case does not call into question the propriety of such participation. That is so because recusal provides an effective and necessary means of avoiding an impermissible appearance of bias without restricting free speech. In fact, it serves to reinforce the legitimacy of widespread participation in judicial elections by demonstrating that campaign contributions are not a means for parties to purchase votes in their own cases. *See* Roy A. Schotland, *Judicial Elections in the United States: Is Corruption an Issue? in* Transparency Int'l, *Global Corruption Report 2007: Corruption In Judicial Systems* (2007) ("Campaign con-

tributions, unless severely abused, need not constitute corruption, but can create the appearance of a conflict of interest unless appropriate controls are applied.").

This Court has made clear that "[i]mpartiality" in the sense of "guarantee[ing] a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party" is not merely a state interest that might justify regulation, but is "essential to due process." *White*, 536 U.S. at 775–76. Indeed, Justice Kennedy's concurrence in *White* explicitly acknowledged that a federal due process floor exists independent of state recusal standards. *Id.* at 794 (noting a state's ability to "adopt recusal standards more rigorous than due process requires" in order to preserve the integrity of its elected judiciary).

Although some attempts to reconcile judicial impartiality and electoral accountability inappropriately infringe First Amendment rights, *see id.* at 787–88, recusal preserves due process and alleviates perceived bias without offending our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *FEC v. Wis. Right to Life*, 127 S. Ct. 2652, 2665 (2007) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Here, a holding that Justice Benjamin's failure to recuse himself from Massey's appeal violated federal due process would in no way limit the rights of Massey's CEO or others to support candidates for judicial office. Nor would it restrict the ability of can-

didates like Justice Benjamin to campaign vigorously for judicial office. Nor would such a holding preclude judges from presiding over cases involving legal issues that generally have an impact on their largest supporters.

All participants in judicial campaigns, including the business community, would benefit if contributions were perceived as support for ideas and philosophies in the public forum rather than as attempts by particular parties to buy votes in pending or future cases.

CONCLUSION

For the reasons stated above, the Court should vacate the decision of the West Virginia Supreme Court of Appeals.

Respectfully submitted,

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