No. 08-22

In The
Supreme Court of the United States

HUGH M. CAPERTON, et al.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., et al.,

Respondents.

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

BRIEF OF TEN CURRENT AND FORMER CHIEF JUSTICES AND JUSTICES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

PATRICK J. WRIGHT
Counsel of Record
140 West Main Street
Midland, MI 48118
(989) 631-0900

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICI CURIAE

Amici Curiae are ten current and former justices of the highest courts in their respective states.[1]

The current justices are Maura D. Corrigan, who has served on the Michigan Supreme Court since 1999, and who served as Chief Justice of that court from 2001 to 2005; Richard B. Sanders, who has served on the Washington Supreme Court since 1995; Evelyn Lundberg Stratton, who has served on the Ohio Supreme Court since 1996; and Robert P. Young, Jr., who has served on the Michigan Supreme Court since 1999.

The former justices are Raoul G. Cantero, III, who served on the Florida Supreme Court from 2002 to 2008; Craig T. Eonch, who served on the Texas Supreme Court from 1993 to 2003; Perry O. Hooper, Sr., who served as Chief Justice of the Alabama Supreme Court from 1994 to 2000; Burley B. Mitchell, Jr., who served on the Supreme Court of North Carolina from 1982 to 1999, and who served as Chief Justice of that court from 1995 to 1999; Harold F. See, Jr., who served on the Alabama Supreme Court from 1997 to 2008; and Clifford W. Taylor, who served on the Michigan Supreme Court from 1997 to

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amici Curiae or their counsel, make a monetary contribution to the preparation or submission of this brief.

2008, and who served as Chief Justice of that court from 2005 to 2008.

SUMMARY OF THE ARGUMENT

Many states in this country have a long tradition of electing judges, who, like their appointed counterparts, have been entitled to the strong presumption of integrity. These states with judicial elections have chosen the accountability model, which allows the public greater control over individual judges and judicial philosophy. Recently many interest groups have discovered that judicial philosophy is an important factor in determining whether judges are amenable to, or hostile to, public policies enacted by the legislatures. This has led to increased spending in judicial elections. In essence, the question presented here is whether the increased spending in judicial races should overcome the historical presumption of judicial integrity.

Only in rare instances has this Court found that the Due Process Clause of the Fourteenth Amendment overcomes the strong presumption of judicial integrity. In such instances, this Court has set forth prophylactic rules against judicial participation in limited types of cases in order to prevent the possibility that the average judge would fail to "weigh the scales of justice equally between contending parties." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). To date, most of this Court's constitutionally

mandated recusals occurred because the judge had a direct pecuniary interest in the outcome of the case.

Petitioners contend that a due process violation exists here because the expenditures made in a judicial election would create a debt of gratitude in a judge towards the individual that made those expenditures. Accordingly, they claim, public confidence in judicial integrity would be hurt if the judge failed to recuse in a case involving a party that employs the individual who made the expenditure.

The logic of such a debt-of-gratitude rule could not be limited in a principled way to the instant case; therefore, the entire process of judicial elections would be imperiled. Indeed, the logic of such a rule would apply when the judge is aware of the individual's preferred position even if neither that individual nor any related entity or person were a party. The logic would also apply to nonmonetary political support like editorial page endorsements or in-kind contributions such as get-out-the-vote efforts.

Were this Court to adopt a multi-factored amorphous due process rule, there are a number of likely consequences that would lead to decreased public confidence in the judiciary. Such a holding would endanger collegiality by creating the opportunity for political gamesmanship between different ideological factions on a court. "Weaponizing" the judicial disqualification process by importing a multi-factored due process notion would create a tool for litigants to use to undermine the people's democratically expressed

preference for a certain type of judicial philosophy. It could wreak havoc with stare decisis as "special" litigants would be able to create different compositions of a court by selectively targeting for disqualification judges whose judicial philosophy they deemed insufficiently congenial to the litigant's cause. By using disqualification as a weapon, litigants would be able to create a jurisprudence that would diverge from that which would have otherwise emerged from the court's duly elected judges.

Because the debt-of-gratitude argument has no logical stopping point and creation of an amorphous due process test will lead the public to holding the judiciary in lower esteem, this Court should not hold that lawful campaign activity creates a due process violation. Elected judges should retain their strong presumption of integrity.

ARGUMENT

I. Judicial elections have a long history in this country, and elected judges are presumed to perform their duties honorably.

A. Elections and appointments.

State court judges and their federal counterparts have historically enjoyed a presumption of honesty and integrity. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 899 (8th Cir. 2001) (Beam, J., dissenting),

("Judges, elected or otherwise, are thought to be citizens of honor, integrity and fortitude."), rev'd on other grounds sub nom., *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).[2] But while all have agreed that integrity should be presumed, from the founding of our Republic there was a question whether judges should operate under an independence model or an accountability model.

In Anti-Federalist XV, Brutus set forth the accountability model. Brutus' concern about undue influence on judges was secondary to insuring a democratic check on judicial actions.[3] Obviously,

---

[2] Given that some state courts preexist the federal courts, and that judicial elections have such a long history in this country, it is somewhat distressing to see some of petitioners' amici liken state courts with elected judges to judiciaries in nascent democracies.

[3] Brutus noted that in the British system judicial appointments commissioned "during good behaviour" were acceptable because they prevented the King from having undue influence on judges whose salaries depended upon having the office, and because there was a sufficient check on judicial power. Brutus Essay XV (March 20, 1788) in The Anti-Federalist Papers and the Constitutional Convention Debates 304, 305 (Ralph Ketcham ed., 1986). But, he argued, such appointments were improper in the proposed federal constitutional system since there was not a sufficient check on judicial power:

> There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

(Continued on following page)

Alexander Hamilton disagreed. In Federalist No. 78, he argued that judicial independence required lifetime appointments.[4] This question was decided, for the federal judiciary, in favor of Hamilton's view; but,

---

. . .

> . . . A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; . . . but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them. . . .

Id. at 305-10.

[4] Hamilton explained:

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

The Federalist No. 78, at 469-70 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

the question for the state judiciaries remained a matter for each State to resolve.

While the independence model originally was the accepted norm in the states, the rise of Jacksonian democratic principles and concern about the politics of judicial appointments led to the accountability model gaining ascendance. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, AM. B. FOUND. RES. J. 345. It is estimated that "more than 90% of the judicial business in this country is handled by state courts." Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 976 (2001). Nearly 89% of state court judges face elections. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1092 (2007).

B. Modern interest in state court litigation.

The rise of interest in state court elections should not come as a surprise. In 1986, as Justice Brennan believed that his federal colleagues were beginning to "underenforce" constitutional rights, he encouraged litigants to file suit in state courts under state constitutions. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986). Many litigants followed Justice Brennan's advice. For example, after this Court held that no fundamental right to education existed under the

federal constitution, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), a number of suits were filed in state courts. See generally, Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992).

Another area that has led to increased attention to judicial elections is tort reform. A leading tort reform proponent contends that while state court decisions favor tort reform efforts by a two-to-one margin, nonetheless, ninety state court decisions have struck down tort reform laws. Victor E. Schwartz, et al., *Tort Reform Past, Present and Future: Solving Old Problems Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 246-47 (2000).

Regardless of what one thinks of tort reform, the divergent treatment of the reform efforts shows why so much attention is being paid to state courts. In a particular venue, presuming that a judicial decision favoring tort reform or one opposing it both are within the continuum of principled judicial decisions, then the judicial philosophy of a majority of the court becomes crucial. Legislatures are important, but in matters of state law, the courts can be the final arbiter of public policy changes. The same dynamic applies to other areas of the law, such as legislative redistricting, criminal justice, or gay marriage. This point has not been lost on the litigants or on interest groups and there has been a significant increase in interest and support of judicial campaigns.

At the same time that spending in judicial elections was increasing, this Court overturned a Minnesota Judicial Canon, the "announce clause," that was meant to limit judicial action regarding elections. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Many observers, worried that judicial elections were becoming too much like legislative elections, suggested recusals under the Due Process Clause to protect the neutrality and detachment of the independent judiciary.

C. Due process concerns that have overcome the presumption of honesty and integrity.

This Court has recognized that constitutionally mandated recusal is rare:

> The Court has recognized that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." [*Tumey v. Ohio*, 273 U.S. 510, 523 (1927)]; see also [*FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)] ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level"). Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. . . . The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice. . . . But that alone

> would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

Lavoie, 475 U.S. at 820 (some citations omitted).

In those rare instances where this Court has found that due process concerns require judicial recusal, a prophylactic rule has been put forth. To date, no multi-factored, fact-dependent balancing tests have been created.

This Court has recognized that a direct pecuniary interest requires judicial recusal. The holding in *Tumey v. Ohio*, 273 U.S. 510 (1927), was that due process was violated when a mayor, who was sitting as a judge, had a financial interest in finding the defendants guilty:

> But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

Id. at 523. Once a pecuniary interest was shown, there was not a need to show that the particular judge was influenced by that interest. *Id*. at 532. This Court set forth a prophylactic rule to prevent potential due process violations. Direct pecuniary interest also led to recusals in *Ward v. Monroeville*, 409 U.S. 57 (1972), and *Lavoie*.

Recusal has been required where a judge acts as both prosecutor and adjudicator. *In re Murchison*, 349 U.S. 133 (1955). Also, recusal from criminal contempt proceedings has been required in some egregious instances where a judge had been subjected to serial abuse by the litigant. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

In every situation where constitutionally mandated recusal has been required, this Court has set forth clear rules that are easily followed.

II. Petitioners' test would imperil judicial elections and would lead to the public holding the judiciary in lower esteem

A. Petitioners' proffered due process interests.

Petitioners put forth the following purported due process interest. They assert that Justice Benjamin owes a "debt of gratitude" for Mr. Blankenship's support and that Justice Benjamin would fear voting against Blankenship's interests because such a vote "may foreclose the possibility of similar financial support when the judge seeks reelection." Petitioners' Merits Brief at 31. Petitioners contend they are not seeking to prevent any litigant or attorney from making a contribution, but only seek to prevent contributions like the one at issue here. Petitioners also contend that finding a due process violation is necessary to preserve the public's respect for judiciary.

B. Debt-of-gratitude and reelection support as a pecuniary interest.

Petitioners' debt-of-gratitude pecuniary interest cannot be limited to the current factual situation and would imperil the very existence of judicial elections.[5] There are any number of people a judge could be wary of offending that could imperil a reelection.

For instance, many would argue that elected judges bend their decisions to reach popular outcomes. No remedy could prevent this. Take this Court's holding in *Kelo v. City of New London*, 545 U.S. 469 (2005), that economic-development takings were not prohibited under the federal constitution. Many elected state court judges have faced similar issues following *Kelo*. Are we to presume as a matter of constitutional law that all those judges would be concerned about the electoral consequences of ruling in favor of the developers? A campaign commercial featuring the bulldozing of a church, business, or a person's home could be quite effective in the current political environment. If that scenario raised due process concerns, what would be the proper remedy? Would the developers or municipalities be allowed to cherry pick which judges to file a recusal motion

[5] The futility of trying to create a useful standard is demonstrated by petitioners and petitioners' amici. Several wildly varying, non-exhaustive, multi-factored tests are put forth, but none provide a logical test for determining how much campaign support is too much. The brief of the states in support of Respondents ably demonstrates this point.

against thereby effectively manufacturing their own court? Would those entities need federal intervention to void any decision that prevented an economic-development taking?

If we limit the inquiry to electoral support, problems remain. Sometimes, the judge might know the hopes of a major contributor where that contributor is not a party. One does not need the Chamber of Commerce to be a party to know how it feels about tort reform. Nor does a state employees' union need to be a party for judges to understand whether the union would prefer a right-to-work law to be broadly or narrowly interpreted.

Further, interest groups such as unions, trial lawyers, businesses, doctors, and others often act in concert. While sometimes their individual donations might be small, in the aggregate they can become quite large. Should any judge with significant union support be recused in all labor cases? Should any judge with significant trial lawyer support or support from physicians be recused in all medical malpractice cases? Should any judge with significant business support be recused from workers' compensation cases or tort reform? If the disqualification standard is that there is the potential for offending a significant donor (or group of donors) and thereby imperiling reelection chances, the scenarios are endless in which such interest groups will be energized to use disqualification as a legal and political weapon.

There are also many nonmonetary yet valuable contributions that a judicial candidate can receive. Endorsements from other public officials are quite useful. Imagine that a state attorney general or a governor endorsed a judicial candidate. Should that judge face recusal whenever an entity represented by the attorney general appears before the court? Would the judge be allowed to sit on any case in which the Governor or an executive agency is a party? Clearly, one could argue that a judge would not want to embarrass a political ally by holding that the ally or those under his or her control had acted in an unlawful manner since such a holding might jeopardize future endorsements.

Newspaper endorsements are sought by judicial candidates. Should any judge who has received such an endorsement be recused from any libel suit involving the paper?[6] Should endorsed judges be recused from Freedom of Information Act or Open Meetings Act suits, which are often of great interest to newspapers

---

[6] In *Schultz v. Newsweek, Inc.*, 668 F.2d 911 (6th Cir. 1982), a recusal motion under 28 U.S.C. § 455(a) was denied where a plaintiff in a libel suit sought to recuse the federal trial judge who, during trial, had received a supportive editorial from one of the defendants upon her nomination to the Sixth Circuit. *Schultz*, 668 F.2d at 919-20 Under petitioners' test, that holding is dubious since the trial court would have been indebted to the newspaper for its editorial.

Baker v. City of Detroit, 458 F.Supp. 374 (E.D. Mich. 1978) is another case where a recusal motion for indebtedness due to a recommendation for promotion was rejected.

even when they are not parties? The failure to receive a future endorsement could seriously impact a judge's reelection odds.

Judges sometimes seek endorsements from police officers associations. Because these endorsements are valued and might seriously impact a judge's reelection fortunes, should a criminal defendant be allowed to seek recusal from any judge who has received one?[7]

Aside from endorsements, what about in-kind contributions? The people who knock on doors and distribute literature or fill envelopes or organize get-out-the-vote operations aid judicial campaigns in getting the message out to the voters and in getting the voters to the polls. To the extent that these are political party volunteers, it may be that the rule of necessity prevents any recusal scenario since any matter involving one major political party will naturally involve the other and someone has to hear the case.[8] But sometimes these volunteers may be from

---

[7] In *Pennsylvania v. Abu-Jamal*, 720 A.2d 121 (Penn. 1998), a criminal defendant who had murdered a police officer sought the recusal of a state supreme court justice who had received the endorsement of the Fraternal Order of Police. The justice noted that the movant had not sought to recuse other justices who had received that same endorsement, and the motion was denied. This holding would seem to be imperiled by petitioners' debt-of-gratitude test.

[8] If the rule of necessity were not to apply when political parties were involved, then would all political cases be heard entirely by panels of visiting judges?

interest groups not from the political parties themselves. Should a judge face recusal since the judge's reelection might be imperiled if that group does not support him or her in the future?

Some of petitioners' amici would exempt support from traditional supporters or at least weigh it less heavily in a due process analysis. But there is no justification for this. There is no logical reason that an entity's traditional support should be less worrisome; the mere fact that an entity figured out the importance of judicial elections before others did is not a principled basis for allowing it to receive special treatment or for not allowing such treatment to another.

In essence, petitioners are haggling about price; they contend that at a yet-to-be-determined point campaign support (even if indirect) means average judges will act unethically or at least be so tempted to do so that recusal is constitutionally required. They want this Court (or perhaps lower federal courts) to determine when that point is met.

The "most notable strength" of judicial elections is that these elections force judges to interact and communicate with the public: "This system fosters communication with the electorate, speech-making, debate, the search for support and endorsements, campaign advertising, expressions of judicial philosophy, and efforts to persuasively explain why the election of one or the other candidate ought to be preferred." *Adair v. Michigan Dep't of Educ.*, 709

N.W.2d 567, 580 (Mich. 2006) (Taylor, C.J., Markman, J.); see also, Harold See, "An Essay on Judicial Selection" in Keith Bybee (editor), *Bench Press: The Collision of Courts, Politics, and the Media* (Stanford University Press, 2007) (discussing benefits of judicial elections). If judicial elections are to exist, those campaigns should be "well-funded and informative" so that the candidates and their supporters can "be afforded the fullest opportunity" to explain judicial philosophy and other potential differences between the candidates. *Adair*, 709 N.W.2d at 580.

Thus, the debt-of-gratitude argument is difficult to contain. It is really no different than the argument that Hamilton put forth two centuries ago that has been rejected by numerous states. Petitioners and their amici contend that their due process disqualification argument does not imperil judicial elections. But if, as petitioners imply, judges have a direct pecuniary interest in reelection, it is difficult to see how judicial elections can continue to be viable. The inexorable result of acceptance of petitioners' due process recusal argument is that voters may continue to elect their judges, but those judges cannot actually serve.

C. Public perception of judiciary.

Petitioners and their amici cite some public opinion polls and contend that public confidence in the judiciary would be imperiled if a due process violation were not found here. This argument is examined in depth below, but it is first worth noting

that there is a certain irony in using public opinion polls to seek recusal of a democratically elected judge. In states with judicial elections, the public has chosen to elect judges with a full awareness that candidates have to raise money to campaign. To the extent that the public expresses some cynicism in public opinion polls, it has not expressed that same cynicism at the ballot box when offered the opportunity to change judicial selection methods in proposed state constitutional amendments. *D'Aurizio v. Borough of Palisade Park*, 899 F.Supp. 1352, 1356 (D.N.J. 1995) ("Secrecy in voting is essential to the democratic process in obtaining the free exercise of the franchise and accurate voter opinion.")

Ultimately, adoption of a multi-factored amorphous due process test would not lead to more public confidence in the integrity of the judiciary; instead, it might lead to less. If this Court were to create a multi-factored due process test, someone would have to enforce it. Petitioners contend that a state supreme court justice's colleagues should do so in the first instance. This could exacerbate tensions that already exist on many courts over judicial philosophy. Further, politics might play a role; the judges' denials or determinations of judicial bias could be published and released to exert maximum political effect on their colleagues.

If this Court wishes to see what would become commonplace in state courts if a due process violation were held to exist here, it need look no further than Justice Scalia's denial of recusal in *Cheney v. United*

States District Court for the District of Columbia, 541 U.S. 913 (2004). There twenty of the thirty largest newspapers in the country contended that recusal was required because Justice Scalia had gone on a duck hunting trip with then Vice President Cheney who, in his official capacity, was the subject of a lawsuit that had received a fair amount of media attention.

After noting that many of the editorials contained factual and legal errors, Justice Scalia stated:

> [R]ecusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.
>
> My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons. The Los Angeles Times has already suggested that it was improper for me to sit on a case argued by a law school dean whose school I had visited several weeks before – visited not at his invitation, but at his predecessor's. . . . While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be

> corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.

Id. at 927-28. Imagine the circumstances if the remaining eight members of this Court had, as a constitutional matter, an obligation to vote on the recusal motion after Justice Scalia denied it.[9] Imagine further that a single Justice disagreed, what would the media coverage have been like? And would a recusal process such as this have led to greater respect for the judiciary?

An open-ended due process ruling will invite such challenges regarding state courts. Members of the Michigan Supreme Court discussed this very point:

> [W]hile cogent arguments have been made in favor of judicial selection reform, until such reforms are adopted by the people of Michigan, there is little alternative to active judicial participation in the electoral process and the concomitant need to raise funds in order to effectively participate and communicate in this process. If justices of the [Michigan] Supreme Court, in particular, were to recuse themselves on the basis of campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would be an increasing number of recusal motions designed to effect

[9] See *Rogers v. Bradley*, 909 S.W.2d 872 (Tex. 1995).

> essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities.

Adair, 709 N.W.2d at 580-81 (Taylor, C.J., and Markman, J.). These recusal motions will, of course, lead to much sensationalized media coverage that will inevitably fail to provide the analysis and nuance needed for the public to properly understand the issues.

Most courts and individual judges do not have sufficient staff or funding to fight a coordinated public relations campaign, especially *after* an election. So not only could the media coverage impugn judicial integrity, but a judge who was the subject of such coverage might feel the need to raise even more campaign dollars during election season to counteract the negative press. This, of course, could exacerbate the perception problem of money influencing judicial results, the very perception that is being sought to be cured by a constitutional recusal standard.

The belief that litigants would not try to use constitutional recusal claims to manipulate the membership of the courts that hear their cases is naïve. While not a perfect example, Michigan's recent experience with a proposed constitutional amendment shows the willingness of some parties to strategically attack who hears certain cases via recusal motions. The amendment in question was offered by a group called Reform Michigan Government Now. On its face, it was a wide-ranging reform amendment that would have amended multiple parts of Michigan's

constitution. In reality, it was an attempt to change the judicial philosophy of Michigan's judiciary and obtain a partisan advantage in redistricting for one of the major political parties.[10] The proposed amendment eliminated two Supreme Court seats based on seniority and it eliminated a number of Court of Appeals seats based on a separate facially neutral criterion, but the clear intent was to remove judges aligned with one political party. The proposed amendment also reduced judicial salaries across the board. Having given almost all of the judges in Michigan a pecuniary interest in the amendment, the supporters then filed limited recusal motions against some, but not all of the justices of the Michigan Supreme Court.[11] The justices rejected the recusal on the grounds of the rule of necessity since all the judges had a pecuniary interest potentially affected. *Citizens Protecting Michigan's Constitution v. Secretary of State*, 755 N.W.2d 147 (Mich. 2008).[12]

---

[10] This intent was disclosed on what was meant to be an internal PowerPoint presentation that was posted on a UAW website and clearly indicated the "reform" mantra was meant to mislead the public so that the judicial reformation and redistricting advantages would not be noticed. Screen captures of the PowerPoint slides can be found here: http://www.mackinac.org/article.aspx?ID=9668.

[11] The Michigan Supreme Court was deciding whether the proposed amendment should be placed on the ballot. See, *Citizens Protecting Michigan's Constitution v. Secretary of State*, 755 N.W.2d 157 (Mich. 2008).

[12] A similar motion was filed against some, but not all, of the judges of the Michigan Court of Appeals. The order rejecting

(Continued on following page)

It must be remembered that in states with judicial elections, when a judge is recused, the people's will is being thwarted. Creating appearance-based due process recusals essentially gives litigants a weapon to overturn election results they do not like.

This is particularly true on state courts of final resort. These are the courts that set the binding precedent on state law matters. One presumes that litigants will usually file recusal motions only when they believe it can make a difference in the outcome of a case. A second reasonable presumption is that more recusals will be filed in cases with wide-ranging public policy implications because these are the issues that attract the donors in the first place.

Using tort reform as an example, say that business interests empty their coffers to change the judicial philosophy of a court by supporting Justice X. The people were made aware by the media and Justice X's opponents of the business support, and Justice X explained his judicial philosophy and won the election. A business supporter is a party to the suit, and after a due process challenge is made, Justice X is recused by a federal court (perhaps this Court). Assuming that state law allows for a replacement, tort reform is struck down by a one-vote margin with the replacement in the majority. Are the citizens stuck with a decision made by this "altered court" or

---

that motion can be found here: http://coa.courts.mi.gov/documents/coa/public/orders/2008/286734(33)_order.pdf.

after that case is decided, if no major contributor was a party, would it then be appropriate for the reconstituted elected court to take another tort reform case and overturn the previous decision? After all, the people were informed of Justice X's philosophy and elected him. What would be the impact on the public's respect for the judiciary if the law was quickly altered in such a fashion? These same issues would arise if a judge who would have made the difference to strike down a tort reform measure was recused due to support from the plaintiffs' bar.

The attempt to use due process recusals to prevent harm to the image of the judiciary fails. A constitutional recusal standard will lead to a dramatic increase in recusal motions. Frankly, armed with such a weapon, it is hard to understand why any litigant would fail to use it if he thought that the outcome of the case might be altered. Litigants and interest groups including the media will feel the need to publicize these claims of bias so as to obtain relief in the particular case or to potentially harm the reelection prospects of a judge whose philosophy they disagree with. This process would not reflect well on the judiciary.

CONCLUSION

For the reasons set forth above, this Court should hold that the Due Process Clause of the Fourteenth Amendment is not implicated by otherwise lawful

contributions to campaigns, direct advocacy, or independent expenditures. Elected judges have traditionally been accorded the strong presumption of integrity, and the fact that recently more money has been spent on judicial elections should not change that.

Respectfully submitted,

PATRICK J. WRIGHT
Attorney for Amici Curiae

INTEREST OF AMICI CURIAE

Amici Curiae are ten current and former justices of the highest courts in their respective states.[1]

The current justices are Maura D. Corrigan, who has served on the Michigan Supreme Court since 1999, and who served as Chief Justice of that court from 2001 to 2005; Richard B. Sanders, who has served on the Washington Supreme Court since 1995; Evelyn Lundberg Stratton, who has served on the Ohio Supreme Court since 1996; and Robert P. Young, Jr., who has served on the Michigan Supreme Court since 1999.

The former justices are Raoul G. Cantero, III, who served on the Florida Supreme Court from 2002 to 2008; Craig T. Eonch, who served on the Texas Supreme Court from 1993 to 2003; Perry O. Hooper, Sr., who served as Chief Justice of the Alabama Supreme Court from 1994 to 2000; Burley B. Mitchell, Jr., who served on the Supreme Court of North Carolina from 1982 to 1999, and who served as Chief Justice of that court from 1995 to 1999; Harold F. See, Jr., who served on the Alabama Supreme Court from 1997 to 2008; and Clifford W. Taylor, who served on the Michigan Supreme Court from 1997 to

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amici Curiae or their counsel, make a monetary contribution to the preparation or submission of this brief.

2008, and who served as Chief Justice of that court from 2005 to 2008.

SUMMARY OF THE ARGUMENT

Many states in this country have a long tradition of electing judges, who, like their appointed counterparts, have been entitled to the strong presumption of integrity. These states with judicial elections have chosen the accountability model, which allows the public greater control over individual judges and judicial philosophy. Recently many interest groups have discovered that judicial philosophy is an important factor in determining whether judges are amenable to, or hostile to, public policies enacted by the legislatures. This has led to increased spending in judicial elections. In essence, the question presented here is whether the increased spending in judicial races should overcome the historical presumption of judicial integrity.

Only in rare instances has this Court found that the Due Process Clause of the Fourteenth Amendment overcomes the strong presumption of judicial integrity. In such instances, this Court has set forth prophylactic rules against judicial participation in limited types of cases in order to prevent the possibility that the average judge would fail to "weigh the scales of justice equally between contending parties." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). To date, most of this Court's constitutionally

mandated recusals occurred because the judge had a direct pecuniary interest in the outcome of the case.

Petitioners contend that a due process violation exists here because the expenditures made in a judicial election would create a debt of gratitude in a judge towards the individual that made those expenditures. Accordingly, they claim, public confidence in judicial integrity would be hurt if the judge failed to recuse in a case involving a party that employs the individual who made the expenditure.

The logic of such a debt-of-gratitude rule could not be limited in a principled way to the instant case; therefore, the entire process of judicial elections would be imperiled. Indeed, the logic of such a rule would apply when the judge is aware of the individual's preferred position even if neither that individual nor any related entity or person were a party. The logic would also apply to nonmonetary political support like editorial page endorsements or in-kind contributions such as get-out-the-vote efforts.

Were this Court to adopt a multi-factored amorphous due process rule, there are a number of likely consequences that would lead to decreased public confidence in the judiciary. Such a holding would endanger collegiality by creating the opportunity for political gamesmanship between different ideological factions on a court. "Weaponizing" the judicial disqualification process by importing a multi-factored due process notion would create a tool for litigants to use to undermine the people's democratically expressed

preference for a certain type of judicial philosophy. It could wreak havoc with stare decisis as "special" litigants would be able to create different compositions of a court by selectively targeting for disqualification judges whose judicial philosophy they deemed insufficiently congenial to the litigant's cause. By using disqualification as a weapon, litigants would be able to create a jurisprudence that would diverge from that which would have otherwise emerged from the court's duly elected judges.

Because the debt-of-gratitude argument has no logical stopping point and creation of an amorphous due process test will lead the public to holding the judiciary in lower esteem, this Court should not hold that lawful campaign activity creates a due process violation. Elected judges should retain their strong presumption of integrity.

ARGUMENT

I. Judicial elections have a long history in this country, and elected judges are presumed to perform their duties honorably.

A. Elections and appointments.

State court judges and their federal counterparts have historically enjoyed a presumption of honesty and integrity. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 899 (8th Cir. 2001) (Beam, J., dissenting),

("Judges, elected or otherwise, are thought to be citizens of honor, integrity and fortitude."), rev'd on other grounds sub nom., *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).[2] But while all have agreed that integrity should be presumed, from the founding of our Republic there was a question whether judges should operate under an independence model or an accountability model.

In Anti-Federalist XV, Brutus set forth the accountability model. Brutus' concern about undue influence on judges was secondary to insuring a democratic check on judicial actions.[3] Obviously,

---

[2] Given that some state courts preexist the federal courts, and that judicial elections have such a long history in this country, it is somewhat distressing to see some of petitioners' amici liken state courts with elected judges to judiciaries in nascent democracies.

[3] Brutus noted that in the British system judicial appointments commissioned "during good behaviour" were acceptable because they prevented the King from having undue influence on judges whose salaries depended upon having the office, and because there was a sufficient check on judicial power. Brutus Essay XV (March 20, 1788) in The Anti-Federalist Papers and the Constitutional Convention Debates 304, 305 (Ralph Ketcham ed., 1986). But, he argued, such appointments were improper in the proposed federal constitutional system since there was not a sufficient check on judicial power:

> There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

(Continued on following page)

Alexander Hamilton disagreed. In Federalist No. 78, he argued that judicial independence required lifetime appointments.[4] This question was decided, for the federal judiciary, in favor of Hamilton's view; but,

---

. . .

> . . . A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; . . . but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them. . . .

Id. at 305-10.

[4] Hamilton explained:

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

The Federalist No. 78, at 469-70 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

the question for the state judiciaries remained a matter for each State to resolve.

While the independence model originally was the accepted norm in the states, the rise of Jacksonian democratic principles and concern about the politics of judicial appointments led to the accountability model gaining ascendance. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, AM. B. FOUND. RES. J. 345. It is estimated that "more than 90% of the judicial business in this country is handled by state courts." Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 976 (2001). Nearly 89% of state court judges face elections. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1092 (2007).

B. Modern interest in state court litigation.

The rise of interest in state court elections should not come as a surprise. In 1986, as Justice Brennan believed that his federal colleagues were beginning to "underenforce" constitutional rights, he encouraged litigants to file suit in state courts under state constitutions. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986). Many litigants followed Justice Brennan's advice. For example, after this Court held that no fundamental right to education existed under the

federal constitution, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), a number of suits were filed in state courts. See generally, Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992).

Another area that has led to increased attention to judicial elections is tort reform. A leading tort reform proponent contends that while state court decisions favor tort reform efforts by a two-to-one margin, nonetheless, ninety state court decisions have struck down tort reform laws. Victor E. Schwartz, et al., *Tort Reform Past, Present and Future: Solving Old Problems Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 246-47 (2000).

Regardless of what one thinks of tort reform, the divergent treatment of the reform efforts shows why so much attention is being paid to state courts. In a particular venue, presuming that a judicial decision favoring tort reform or one opposing it both are within the continuum of principled judicial decisions, then the judicial philosophy of a majority of the court becomes crucial. Legislatures are important, but in matters of state law, the courts can be the final arbiter of public policy changes. The same dynamic applies to other areas of the law, such as legislative redistricting, criminal justice, or gay marriage. This point has not been lost on the litigants or on interest groups and there has been a significant increase in interest and support of judicial campaigns.

At the same time that spending in judicial elections was increasing, this Court overturned a Minnesota Judicial Canon, the "announce clause," that was meant to limit judicial action regarding elections. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Many observers, worried that judicial elections were becoming too much like legislative elections, suggested recusals under the Due Process Clause to protect the neutrality and detachment of the independent judiciary.

C. Due process concerns that have overcome the presumption of honesty and integrity.

This Court has recognized that constitutionally mandated recusal is rare:

> The Court has recognized that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." [*Tumey v. Ohio*, 273 U.S. 510, 523 (1927)]; see also [*FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)] ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level"). Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. . . . The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice. . . . But that alone

> would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

Lavoie, 475 U.S. at 820 (some citations omitted).

In those rare instances where this Court has found that due process concerns require judicial recusal, a prophylactic rule has been put forth. To date, no multi-factored, fact-dependent balancing tests have been created.

This Court has recognized that a direct pecuniary interest requires judicial recusal. The holding in *Tumey v. Ohio*, 273 U.S. 510 (1927), was that due process was violated when a mayor, who was sitting as a judge, had a financial interest in finding the defendants guilty:

> But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

Id. at 523. Once a pecuniary interest was shown, there was not a need to show that the particular judge was influenced by that interest. *Id*. at 532. This Court set forth a prophylactic rule to prevent potential due process violations. Direct pecuniary interest also led to recusals in *Ward v. Monroeville*, 409 U.S. 57 (1972), and *Lavoie*.

Recusal has been required where a judge acts as both prosecutor and adjudicator. *In re Murchison*, 349 U.S. 133 (1955). Also, recusal from criminal contempt proceedings has been required in some egregious instances where a judge had been subjected to serial abuse by the litigant. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

In every situation where constitutionally mandated recusal has been required, this Court has set forth clear rules that are easily followed.

II. Petitioners' test would imperil judicial elections and would lead to the public holding the judiciary in lower esteem

A. Petitioners' proffered due process interests.

Petitioners put forth the following purported due process interest. They assert that Justice Benjamin owes a "debt of gratitude" for Mr. Blankenship's support and that Justice Benjamin would fear voting against Blankenship's interests because such a vote "may foreclose the possibility of similar financial support when the judge seeks reelection." Petitioners' Merits Brief at 31. Petitioners contend they are not seeking to prevent any litigant or attorney from making a contribution, but only seek to prevent contributions like the one at issue here. Petitioners also contend that finding a due process violation is necessary to preserve the public's respect for judiciary.

B. Debt-of-gratitude and reelection support as a pecuniary interest.

Petitioners' debt-of-gratitude pecuniary interest cannot be limited to the current factual situation and would imperil the very existence of judicial elections.[5] There are any number of people a judge could be wary of offending that could imperil a reelection.

For instance, many would argue that elected judges bend their decisions to reach popular outcomes. No remedy could prevent this. Take this Court's holding in *Kelo v. City of New London*, 545 U.S. 469 (2005), that economic-development takings were not prohibited under the federal constitution. Many elected state court judges have faced similar issues following *Kelo*. Are we to presume as a matter of constitutional law that all those judges would be concerned about the electoral consequences of ruling in favor of the developers? A campaign commercial featuring the bulldozing of a church, business, or a person's home could be quite effective in the current political environment. If that scenario raised due process concerns, what would be the proper remedy? Would the developers or municipalities be allowed to cherry pick which judges to file a recusal motion

[5] The futility of trying to create a useful standard is demonstrated by petitioners and petitioners' amici. Several wildly varying, non-exhaustive, multi-factored tests are put forth, but none provide a logical test for determining how much campaign support is too much. The brief of the states in support of Respondents ably demonstrates this point.

against thereby effectively manufacturing their own court? Would those entities need federal intervention to void any decision that prevented an economic-development taking?

If we limit the inquiry to electoral support, problems remain. Sometimes, the judge might know the hopes of a major contributor where that contributor is not a party. One does not need the Chamber of Commerce to be a party to know how it feels about tort reform. Nor does a state employees' union need to be a party for judges to understand whether the union would prefer a right-to-work law to be broadly or narrowly interpreted.

Further, interest groups such as unions, trial lawyers, businesses, doctors, and others often act in concert. While sometimes their individual donations might be small, in the aggregate they can become quite large. Should any judge with significant union support be recused in all labor cases? Should any judge with significant trial lawyer support or support from physicians be recused in all medical malpractice cases? Should any judge with significant business support be recused from workers' compensation cases or tort reform? If the disqualification standard is that there is the potential for offending a significant donor (or group of donors) and thereby imperiling reelection chances, the scenarios are endless in which such interest groups will be energized to use disqualification as a legal and political weapon.

There are also many nonmonetary yet valuable contributions that a judicial candidate can receive. Endorsements from other public officials are quite useful. Imagine that a state attorney general or a governor endorsed a judicial candidate. Should that judge face recusal whenever an entity represented by the attorney general appears before the court? Would the judge be allowed to sit on any case in which the Governor or an executive agency is a party? Clearly, one could argue that a judge would not want to embarrass a political ally by holding that the ally or those under his or her control had acted in an unlawful manner since such a holding might jeopardize future endorsements.

Newspaper endorsements are sought by judicial candidates. Should any judge who has received such an endorsement be recused from any libel suit involving the paper?[6] Should endorsed judges be recused from Freedom of Information Act or Open Meetings Act suits, which are often of great interest to newspapers

---

[6] In *Schultz v. Newsweek, Inc.*, 668 F.2d 911 (6th Cir. 1982), a recusal motion under 28 U.S.C. § 455(a) was denied where a plaintiff in a libel suit sought to recuse the federal trial judge who, during trial, had received a supportive editorial from one of the defendants upon her nomination to the Sixth Circuit. *Schultz*, 668 F.2d at 919-20 Under petitioners' test, that holding is dubious since the trial court would have been indebted to the newspaper for its editorial.

Baker v. City of Detroit, 458 F.Supp. 374 (E.D. Mich. 1978) is another case where a recusal motion for indebtedness due to a recommendation for promotion was rejected.

even when they are not parties? The failure to receive a future endorsement could seriously impact a judge's reelection odds.

Judges sometimes seek endorsements from police officers associations. Because these endorsements are valued and might seriously impact a judge's reelection fortunes, should a criminal defendant be allowed to seek recusal from any judge who has received one?[7]

Aside from endorsements, what about in-kind contributions? The people who knock on doors and distribute literature or fill envelopes or organize get-out-the-vote operations aid judicial campaigns in getting the message out to the voters and in getting the voters to the polls. To the extent that these are political party volunteers, it may be that the rule of necessity prevents any recusal scenario since any matter involving one major political party will naturally involve the other and someone has to hear the case.[8] But sometimes these volunteers may be from

---

[7] In *Pennsylvania v. Abu-Jamal*, 720 A.2d 121 (Penn. 1998), a criminal defendant who had murdered a police officer sought the recusal of a state supreme court justice who had received the endorsement of the Fraternal Order of Police. The justice noted that the movant had not sought to recuse other justices who had received that same endorsement, and the motion was denied. This holding would seem to be imperiled by petitioners' debt-of-gratitude test.

[8] If the rule of necessity were not to apply when political parties were involved, then would all political cases be heard entirely by panels of visiting judges?

interest groups not from the political parties themselves. Should a judge face recusal since the judge's reelection might be imperiled if that group does not support him or her in the future?

Some of petitioners' amici would exempt support from traditional supporters or at least weigh it less heavily in a due process analysis. But there is no justification for this. There is no logical reason that an entity's traditional support should be less worrisome; the mere fact that an entity figured out the importance of judicial elections before others did is not a principled basis for allowing it to receive special treatment or for not allowing such treatment to another.

In essence, petitioners are haggling about price; they contend that at a yet-to-be-determined point campaign support (even if indirect) means average judges will act unethically or at least be so tempted to do so that recusal is constitutionally required. They want this Court (or perhaps lower federal courts) to determine when that point is met.

The "most notable strength" of judicial elections is that these elections force judges to interact and communicate with the public: "This system fosters communication with the electorate, speech-making, debate, the search for support and endorsements, campaign advertising, expressions of judicial philosophy, and efforts to persuasively explain why the election of one or the other candidate ought to be preferred." *Adair v. Michigan Dep't of Educ.*, 709

N.W.2d 567, 580 (Mich. 2006) (Taylor, C.J., Markman, J.); see also, Harold See, "An Essay on Judicial Selection" in Keith Bybee (editor), *Bench Press: The Collision of Courts, Politics, and the Media* (Stanford University Press, 2007) (discussing benefits of judicial elections). If judicial elections are to exist, those campaigns should be "well-funded and informative" so that the candidates and their supporters can "be afforded the fullest opportunity" to explain judicial philosophy and other potential differences between the candidates. *Adair*, 709 N.W.2d at 580.

Thus, the debt-of-gratitude argument is difficult to contain. It is really no different than the argument that Hamilton put forth two centuries ago that has been rejected by numerous states. Petitioners and their amici contend that their due process disqualification argument does not imperil judicial elections. But if, as petitioners imply, judges have a direct pecuniary interest in reelection, it is difficult to see how judicial elections can continue to be viable. The inexorable result of acceptance of petitioners' due process recusal argument is that voters may continue to elect their judges, but those judges cannot actually serve.

C. Public perception of judiciary.

Petitioners and their amici cite some public opinion polls and contend that public confidence in the judiciary would be imperiled if a due process violation were not found here. This argument is examined in depth below, but it is first worth noting

that there is a certain irony in using public opinion polls to seek recusal of a democratically elected judge. In states with judicial elections, the public has chosen to elect judges with a full awareness that candidates have to raise money to campaign. To the extent that the public expresses some cynicism in public opinion polls, it has not expressed that same cynicism at the ballot box when offered the opportunity to change judicial selection methods in proposed state constitutional amendments. *D'Aurizio v. Borough of Palisade Park*, 899 F.Supp. 1352, 1356 (D.N.J. 1995) ("Secrecy in voting is essential to the democratic process in obtaining the free exercise of the franchise and accurate voter opinion.")

Ultimately, adoption of a multi-factored amorphous due process test would not lead to more public confidence in the integrity of the judiciary; instead, it might lead to less. If this Court were to create a multi-factored due process test, someone would have to enforce it. Petitioners contend that a state supreme court justice's colleagues should do so in the first instance. This could exacerbate tensions that already exist on many courts over judicial philosophy. Further, politics might play a role; the judges' denials or determinations of judicial bias could be published and released to exert maximum political effect on their colleagues.

If this Court wishes to see what would become commonplace in state courts if a due process violation were held to exist here, it need look no further than Justice Scalia's denial of recusal in *Cheney v. United*

States District Court for the District of Columbia, 541 U.S. 913 (2004). There twenty of the thirty largest newspapers in the country contended that recusal was required because Justice Scalia had gone on a duck hunting trip with then Vice President Cheney who, in his official capacity, was the subject of a lawsuit that had received a fair amount of media attention.

After noting that many of the editorials contained factual and legal errors, Justice Scalia stated:

> [R]ecusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.
>
> My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons. The Los Angeles Times has already suggested that it was improper for me to sit on a case argued by a law school dean whose school I had visited several weeks before – visited not at his invitation, but at his predecessor's. . . . While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be

> corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.

Id. at 927-28. Imagine the circumstances if the remaining eight members of this Court had, as a constitutional matter, an obligation to vote on the recusal motion after Justice Scalia denied it.[9] Imagine further that a single Justice disagreed, what would the media coverage have been like? And would a recusal process such as this have led to greater respect for the judiciary?

An open-ended due process ruling will invite such challenges regarding state courts. Members of the Michigan Supreme Court discussed this very point:

> [W]hile cogent arguments have been made in favor of judicial selection reform, until such reforms are adopted by the people of Michigan, there is little alternative to active judicial participation in the electoral process and the concomitant need to raise funds in order to effectively participate and communicate in this process. If justices of the [Michigan] Supreme Court, in particular, were to recuse themselves on the basis of campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would be an increasing number of recusal motions designed to effect

[9] See *Rogers v. Bradley*, 909 S.W.2d 872 (Tex. 1995).

> essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities.

Adair, 709 N.W.2d at 580-81 (Taylor, C.J., and Markman, J.). These recusal motions will, of course, lead to much sensationalized media coverage that will inevitably fail to provide the analysis and nuance needed for the public to properly understand the issues.

Most courts and individual judges do not have sufficient staff or funding to fight a coordinated public relations campaign, especially *after* an election. So not only could the media coverage impugn judicial integrity, but a judge who was the subject of such coverage might feel the need to raise even more campaign dollars during election season to counteract the negative press. This, of course, could exacerbate the perception problem of money influencing judicial results, the very perception that is being sought to be cured by a constitutional recusal standard.

The belief that litigants would not try to use constitutional recusal claims to manipulate the membership of the courts that hear their cases is naïve. While not a perfect example, Michigan's recent experience with a proposed constitutional amendment shows the willingness of some parties to strategically attack who hears certain cases via recusal motions. The amendment in question was offered by a group called Reform Michigan Government Now. On its face, it was a wide-ranging reform amendment that would have amended multiple parts of Michigan's

constitution. In reality, it was an attempt to change the judicial philosophy of Michigan's judiciary and obtain a partisan advantage in redistricting for one of the major political parties.[10] The proposed amendment eliminated two Supreme Court seats based on seniority and it eliminated a number of Court of Appeals seats based on a separate facially neutral criterion, but the clear intent was to remove judges aligned with one political party. The proposed amendment also reduced judicial salaries across the board. Having given almost all of the judges in Michigan a pecuniary interest in the amendment, the supporters then filed limited recusal motions against some, but not all of the justices of the Michigan Supreme Court.[11] The justices rejected the recusal on the grounds of the rule of necessity since all the judges had a pecuniary interest potentially affected. *Citizens Protecting Michigan's Constitution v. Secretary of State*, 755 N.W.2d 147 (Mich. 2008).[12]

---

[10] This intent was disclosed on what was meant to be an internal PowerPoint presentation that was posted on a UAW website and clearly indicated the "reform" mantra was meant to mislead the public so that the judicial reformation and redistricting advantages would not be noticed. Screen captures of the PowerPoint slides can be found here: http://www.mackinac.org/article.aspx?ID=9668.

[11] The Michigan Supreme Court was deciding whether the proposed amendment should be placed on the ballot. See, *Citizens Protecting Michigan's Constitution v. Secretary of State*, 755 N.W.2d 157 (Mich. 2008).

[12] A similar motion was filed against some, but not all, of the judges of the Michigan Court of Appeals. The order rejecting

(Continued on following page)

It must be remembered that in states with judicial elections, when a judge is recused, the people's will is being thwarted. Creating appearance-based due process recusals essentially gives litigants a weapon to overturn election results they do not like.

This is particularly true on state courts of final resort. These are the courts that set the binding precedent on state law matters. One presumes that litigants will usually file recusal motions only when they believe it can make a difference in the outcome of a case. A second reasonable presumption is that more recusals will be filed in cases with wide-ranging public policy implications because these are the issues that attract the donors in the first place.

Using tort reform as an example, say that business interests empty their coffers to change the judicial philosophy of a court by supporting Justice X. The people were made aware by the media and Justice X's opponents of the business support, and Justice X explained his judicial philosophy and won the election. A business supporter is a party to the suit, and after a due process challenge is made, Justice X is recused by a federal court (perhaps this Court). Assuming that state law allows for a replacement, tort reform is struck down by a one-vote margin with the replacement in the majority. Are the citizens stuck with a decision made by this "altered court" or

---

that motion can be found here: http://coa.courts.mi.gov/documents/coa/public/orders/2008/286734(33)_order.pdf.

after that case is decided, if no major contributor was a party, would it then be appropriate for the reconstituted elected court to take another tort reform case and overturn the previous decision? After all, the people were informed of Justice X's philosophy and elected him. What would be the impact on the public's respect for the judiciary if the law was quickly altered in such a fashion? These same issues would arise if a judge who would have made the difference to strike down a tort reform measure was recused due to support from the plaintiffs' bar.

The attempt to use due process recusals to prevent harm to the image of the judiciary fails. A constitutional recusal standard will lead to a dramatic increase in recusal motions. Frankly, armed with such a weapon, it is hard to understand why any litigant would fail to use it if he thought that the outcome of the case might be altered. Litigants and interest groups including the media will feel the need to publicize these claims of bias so as to obtain relief in the particular case or to potentially harm the reelection prospects of a judge whose philosophy they disagree with. This process would not reflect well on the judiciary.

CONCLUSION

For the reasons set forth above, this Court should hold that the Due Process Clause of the Fourteenth Amendment is not implicated by otherwise lawful

contributions to campaigns, direct advocacy, or independent expenditures. Elected judges have traditionally been accorded the strong presumption of integrity, and the fact that recently more money has been spent on judicial elections should not change that.

Respectfully submitted,

PATRICK J. WRIGHT
Attorney for Amici Curiae