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 Petition for a Writ of Certiorari
to the Supreme Court of Appeals of West Virginia

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF THE PETITION

ALAN B. MORRISON
1937 Biltmore Street NW
Washington DC 20009
(202) 506-6744

ALLISON M. ZIEVE
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae
Public Citizen, Inc.

August 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES, RULES, AND JUDICIAL CANONS

REPORTS AND SURVEYS

INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization incorporated and headquartered in the District of Columbia, with approximately 80,000 members nationwide. Public Citizen is active before Congress, administrative agencies, and courts throughout the country on a wide variety of issues, including access to the civil justice system, campaign finance reform, and protection of the right to due process. Public Citizen and its members have been and will continue to be parties to and appear as amicus curiae in litigation in state courts presided over by elected judges. As a corporation, Public Citizen is prohibited by the law of most states from contributing to political campaigns. Even if it were not prohibited from doing so, it could not afford to make substantial contributions and, in any event, would not do so because of concern that such contributions create the appearance that justice is for sale.

For many years, Public Citizen has been concerned about the due process implications of judges presiding over cases in which a party or a party's lawyer has made significant campaign contributions. In 2000, Public Citizen was one of the plaintiffs in a section 1983 case entitled *Public Citizen v. Bomer*, Civil No. A-00-

---

[1]Counsel of record for all parties received notice at least 10 days prior to the due date of amicus Public Citizen's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than Public Citizen made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

CA-218 (N.D. Tex.). *Bomer* was brought by five Texas lawyers and two non-profit organizations, on behalf of themselves, their clients, and their members who had litigated and would litigate in Texas courts. The plaintiffs—some of whom had contributed to judicial elections and some of whom had not—all believed that the system of financing judicial elections in that state created the appearance, if not the reality, of partiality and impropriety of Texas state judges, to the detriment of the legal profession, the lawyer-plaintiffs' law practices, and their clients' and/or members' interests.

The complaint in *Bomer* asked for a declaration that the current system, including the refusal of Texas courts even to consider campaign contributions from a party or its lawyer to a judge on the case as a basis for recusal, is unconstitutional, leaving to the State of Texas the decision of what constitutional system should be adopted in its place. In September 2000, the district court granted defendant's motion to dismiss for failure to state a claim. In November 2001, the Fifth Circuit affirmed the dismissal on the ground that the plaintiffs lacked standing. 274 F.3d 212 (5th Cir. 2001).

The outcome of Public Citizen's systemic challenge and of individual cases in Texas and elsewhere illustrates the difficulty of obtaining judicial review of the due process issue presented in this case, in *Dupre v. Telxon Corp.*, No. 08-41 (docketed July 7, 2008), and in *Walston v. Walston*, No. 07-1508 (docketed June 3, 2008). At the same time, the frequency with which the due process issue arises is illustrated by the fact that three pending petitions present substantially the same problem, in different factual settings.

Public Citizen is filing this brief to highlight the breadth of the problem, which extends well beyond cases involving eye-catching contribution amounts or multi-million dollar verdicts. We urge the Court to grant the petition in this case, as well as the petition in *Dupre*, to address the circumstances under which judicial campaign contributions can create an appearance of impropriety that threatens the public's and litigants' faith in the judicial system and violates due process.

REASONS FOR GRANTING THE WRIT

The petition in this case, like the pending petitions in *Dupre* and *Walston*, asks whether judicial campaign contributions can ever form the basis for recusal of a judge and, if so, under what circumstances recusal may be required. As discussed below, these questions are disputed among the state courts, some suggesting that recusal would never be required based on contributions and others recognizing that, in some circumstances, contributions can create an unconstitutional appearance of impropriety requiring a judge's recusal.

The due process issue presented here can arise at all levels of the elected state judiciaries, in cases as newsworthy as the overturning of the $50 million verdict in this case, and as personal as the divorce proceedings in *Walston*. The issue is recurring. *See*, *e.g.*, *Avery v. State Farm Mut. Auto. Ins. Co.*, 547 U.S. 1003 (2006) (denying petition for certiorari) (trial judge received more than $350,000 in donations from one party, its lawyers, and amici and their lawyers, and more than $1 million from groups with which the party

was affiliated); *Consolidated Rail Corp. v. Wightman*, 529 U.S. 1012 (2006) (denying petition for certiorari) (while case was pending on petitions for discretionary review, party's counsel and his close family members contributed 4.4% and 4.7%, respectively, of total contributions received by each of two justices). And with the increasing levels of judicial campaign fund-raising in recent years, the need for this Court's guidance on the questions presented has also increased. The potential for a due process violation may arise from contributions made by a party to litigation, a lawyer, a local political party, or an amicus with business or other financial interests affected by the suit. Contributions may be very large or more modest, and the percentage relative to the judge's total contributions may sometimes be more important than the amount looked at in isolation. In addition, non-monetary contributions to a judge's campaign, such as fundraising or a leadership position in the campaign, often coupled with financial support, may also bear on a due process claim.

Public Citizen urges the Court to grant the petition to address the issues presented when an individual with interests at stake in a lawsuit makes or has made substantial campaign contributions to the judge(s). In deciding the question presented, the Court should prescribe factors for state courts to consider in individual cases. Such factors might include, for example, the amount of donations from interested parties, the timing of the donations, and the percentage of the donations relative to the total contributions received. Public Citizen also urges the Court to grant both this petition and the petition in *Dupre* to enable

the Court more fully to evaluate and address the various circumstances under which campaign contributions may create an unconstitutional appearance of partiality.

I. The Right To Due Process Includes The Right To A Decisionmaker Who Both Is And Appears To Be Impartial.

Parties to civil cases have a constitutional right to a fair trial. *Latiolais v. Whitley*, 93 F.3d 205, 207 (5th Cir. 1996); *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993); *Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988). And "[t]rial before an 'unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (citation omitted).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). "[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Concrete Pipe & Prods.*, 508 U.S. at 618 (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980)).[2] The Due Process Clause forbids even the "possible temptation to the average man as judge" not to be neutral and detached. *Id.* at 617 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)).

---

[2] *Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) ("goal" of federal recusal statute, 28 U.S.C. § 455(a), "is to avoid even the appearance of partiality").

Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court reversed a conviction in a case adjudicated by a town mayor who was paid for his service as a judge from fines he assessed when acting in a judicial capacity, although no showing of actual bias was made.

"[T]he [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (administrative board composed of optometrists could not preside over hearing against competing optometrists). *See*, *e.g.*, *Ward*, 409 U.S. at 58-59 (invalidating scheme whereby mayor responsible for revenue production also adjudicated traffic and ordinance violations, where fines and other money derived from proceedings in mayor's court accounted for substantial portion of village's revenue); *Marshall*, 446 U.S. at 243 & n.2 (citing cases); *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").[3]

Petitioners' case exemplifies the constitutional risk of allowing interested parties to finance expensive judicial campaigns. Whether or not the decisions below were in fact affected by the sizable campaign

[3]Justice O'Connor has raised the question whether "the very practice of electing judges undermines" the interest in a judiciary that both is and appears to be impartial, and she has emphasized that the need to raise substantial funds to campaign for judicial office exacerbates this problem. *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring).

contributions described in the petition, petitioners can have no faith that the outcome of the case was not affected by the contributions to the judge who ruled against them. Indeed, the appearance of partiality in this case—where A.T. Massey Coal's chief executive officer contributed $3 million to a state supreme court justice while preparing to appeal a $50 million verdict against his company, and that amount was more than 60 percent of the total contributions received by the justice—is much stronger, and the connection between the money and the appearance of impropriety is far more direct, than in *Ward*.

II. It Is Widely Recognized That Campaign Contributions Can And Often Do Create An Appearance Of Partiality.

Contributions to and expenditures in judicial campaigns have markedly increased in recent years. *See generally* Amicus Br. of Brennan Center at I.A. Not surprisingly, individuals and groups with substantial interests in litigation, including lawyers, businesses, and groups with a significant number of cases pending before the courts, are the primary contributors to candidates for judicial office. For example, the parties and lawyers involved in six of the nine cases heard by the Texas Supreme Court in February 2004 had contributed $716,279 to the nine justices. Texans For Public Justice, *Dollar Docket* (Mar. 2004), *available at* www.tpj.org/publication_list.jsp?typeid=1. Such figures are not unusual. *See id.* (contribution totals from Feb. 2002 - Apr. 2004).

Facts such as these undermine the public's respect for the judicial system in states with elected judges.

Survey after survey shows that a large majority of the public believes that contributions to state judicial campaigns influence the judges' decisions. *See*, *e.g.*, Minn. Jud. Branch, *The Minnesota Difference: The Minnesota Court System and the Public* 16 (2007), *available at* www.mncourts.gov/?page=519; *Report from the Commission to Promote Public Confidence in Judicial Elections* 13 (N.Y. June 29, 2004), *available at* www.nycourts.gov/press/ (report on public confidence in NY judicial election process); National Center for State Courts, *How The Public Views The State Courts, A 1999 National Survey* 3 (May 1999), *available at* www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf; *see also* Br. of Amicus Brennan Center at 11-12. Indeed, this concern was the thrust of the amicus brief filed by 40 corporations in support of the petition for certiorari in *Dimick v. Republican Party of Minnesota*, No. 05-566 (filed Jan. 4, 2006).

That significant campaign contributions from a litigant or interested party may create an appearance of partiality is well accepted. What remains controversial—and cries out for this Court's attention—are the circumstances in which this appearance arises, such that due process is violated and recusal is necessary.

III. The States' Varying Approaches Demonstrate The Need For This Court's Guidance.

The American Bar Association's Model Rule of Judicial Conduct states: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." ABA

Model Code of Judicial Conduct, Canon 2, R. 2.11(A) (2007). Among the circumstances that warrant disqualification, the 2007 amendments to the Model Code added campaign contributions above a minimum amount (not specified in the Model Code) from a party, his or her lawyer, or the law firm. *Id.*, R. 2.11(A)(4).

Although most states have adopted the general standard of Rule 2.11(A), they apply it in markedly different ways when considering whether campaign contributions to a judge presiding over litigation from parties interested in that litigation have created an unconstitutional appearance of partiality. For example, in *Dupre*, the Ohio Supreme Court seemed to reject out of hand the notion that campaign contributions could create a due process issue. *See* Petition for Cert. in *Dupre*, *supra*, App. at 1a (dismissing appeal "as not involving any substantial constitutional question"). *Cf. In re Disqualification of Burnside*, 863 N.E.2d 617, 619 (Ohio 2006) (denying motion to disqualify after fact-specific review).

Similarly, Texas courts have repeatedly rejected the argument that acceptance of campaign contributions from a party or its lawyer may constitute a due process violation or provide grounds for recusal. *See Williams v. Viswanathan*, 65 S.W.3d 685, 689 (Tex. App. 2001) (argument that "bias is shown because appellants' opposing counsel made contributions to [judge's] campaign . . . has been rejected by the courts of this state"); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) (no recusal where judge personally solicited and lawyer contributed while case pending); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 842 (Tex. App.

1987) (no recusal although plaintiff's counsel contributed $10,000 to trial judge soon after filing lawsuit); *River Road Neighborhood Ass'n v. S. Tex. Sports, Inc.*, 673 S.W.2d 952, 952-53 (Tex. App. 1984) (no recusal although 21.7% of total campaign contributions of one justice came from appellee's lawyer; 17.1% of contributions to another justice came from appellee). Given the steadfast refusal of the Texas courts to consider campaign contributions a basis for recusal, the constitutional issue will continue to go unaddressed in that state, unless this Court makes clear that state courts may not close their eyes to the due process issue raised by significant campaign contributions by interested persons to judges sitting on a case.

Other state high courts, however, have reached different conclusions. And although some of the cases base their holdings on state-law canons, rather than due process analysis, due process considerations, including the right to an impartial judicial decisionmaker, are at the heart of each decision.

For example, the Oklahoma Supreme Court recognizes that "due process must include the right to a trial without the appearance of judge partiality arising from counsel's campaign contribution on behalf of a judge during a case pending before that judge." *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001). Although in Oklahoma a "lawyer's contribution to a judge's campaign does not *per se* require that judge's disqualification when the lawyer comes before him," due process may require disqualification in an individual case. *Id.* at 798 (disqualification required when a

lawyer made maximum campaign contribution allowed by statute, member of lawyer's immediate family contributed, and lawyer solicited contributions for judge's campaign).

The Florida Supreme Court has held that receipt of legal campaign contributions from parties or their lawyers does not itself require disqualification, although disqualification may be warranted if an additional factor is present, such as the party's lawyer serving as chair of the judge's campaign. *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1338 & n.5 (Fla. 1990) ($500 contribution to judicial campaign of judge's spouse does not warrant disqualification).

A decision from a Kentucky Supreme Court justice granting a motion to recuse takes a similar approach. *Dean v. Boudurant*, 193 S.W.3d 744, 752 (Mich. 2006).

Similarly, in Washington, North Dakota, Tennessee, and West Virginia, "[a]lthough campaign contributions of which a judge has knowledge are not prohibited, these contributions may be relevant to recusal" or disqualification. Wash. Code of Jud. Conduct, comment to Canon 7(b)(2); *see* N.D. Code of Jud. Conduct, comment to Canon 5(C)(2); Tenn. S. Ct. R. 10 (Code of Judicial Conduct), commentary to Canon 5(C)(2)(b); W. Va. Code of Jud. Conduct, comment to Canon 5(C)(2).

Nevada's practice is closer to that of Texas, although not as absolute. On the one hand, the Nevada Supreme Court has held open the possibility that contributions could warrant disqualification: "In the context of campaign contributions, . . . a contribution to a presiding judge by a party or an attorney does not

ordinarily constitute grounds for disqualification." *City of Las Vegas Downtown Redev. Agency v. Eighth Jud. Dist. Court*, 5 P.3d 1059, 1062 (Nev. 2000) (emphasis added, citation omitted). On the other hand, the Nevada court has held that disqualification was *improper* when parties on one side of a case gave four donations to the presiding judge, ranging from $150 to $2,000. *Id.*; *see also* Nev. Code of Jud. Conduct, comment to Canon 3(E)(1) ("The mere receipt of a campaign contribution from a witness, litigant, or lawyer involved with a proceeding is not grounds for disqualification.").

In Alabama, a state statute requires recusal where judicial campaign contributions create an "appearance of impropriety." Ala. Stat. § 12-24-1; *see also* Ala. Stat. § 12-24-2(a), (b) (parties and lawyers required to disclose amount of contributions to assigned judge(s); recusal required on request of party if either opposing party or opposing counsel contributed more than $4,000 to supreme court justice or court of appeals judge, or more than $2,000 to circuit court judge). However, in a recent case, one party argued that a trial judge should have recused himself because an appearance of partiality was created by opposing counsel's $2,000 contribution and the party's own counsel's running against the judge in an upcoming election. Holding that recusal was not required, the court of appeals seemed to require a showing of *actual* bias. *Curvin v. Curvin*, __ So. 2d __, 2008 WL 400364, *5 (Ala. Civ. App. 2008) ("[T]he party seeking recusal must come forward with evidence establishing the existence of bias or prejudice.").

And a Michigan court has held that judicial campaign contributions within the state's contribution limits, "lawfully reported and lawfully disclosed, cannot fairly constitute a basis for judicial disqualification." *Adair v. State Dep't of Educ.*, 709 N.W.2d 567, 581 (2006).

In sum, the states disagree on the extent to which campaign contributions from parties and lawyers on one side of a case can implicate the due process rights of the opposing party, although they are all reluctant in individual cases to consider fully the due process implications of judicial campaign contributions and to find an appearance of partiality. The petition should be granted to provide guidance about the circumstances under which judicial campaign contributions by litigants and their lawyers can constitute a due process violation.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Alan B. Morrison
1937 Biltmore Street NW
Washington DC 20009
(202) 506-6744

Allison M. Zieve
Counsel of Record
Brian Wolfman
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae
Public Citizen, Inc.

August 2008