No. 08-22

In The Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, and SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC.,

Respondent.

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

BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE CAMPAIGN LEGAL CENTER, AND THE REFORM INSTITUTE IN SUPPORT OF PETITIONERS

J. GERALD HEBERT
PAUL S. RYAN
TARA MALLOY
CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., NW, Suite 650
Washington, DC 20036
(202) 736-2200

JAMES J. SAMPLE
Counsel of Record
AZIZ HUQ
J. ADAM SKAGGS
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Ave. of Americas, 12th Fl.
New York, NY 10013
(212) 998-6730

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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STATEMENT OF INTEREST[1]

This *amici curiae* brief in support of Petitioners is filed on behalf of three nonprofit, nonpartisan organizations: The Brennan Center for Justice at New York University School of Law (the "Brennan Center"), The Campaign Legal Center, and The Reform Institute.

The Brennan Center recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system. Through empirical research, counseling, and advocacy, the Brennan Center works to protect the judiciary from politicizing forces, including the undue influence of money. The Brennan Center favors neither judicial appointments nor judicial elections. Rather, it strives to promote fair courts regardless of selection mechanism.

The Campaign Legal Center, Inc. ("CLC") works in the areas of judicial integrity, campaign finance, voting rights, and governmental ethics. CLC represents the public interest in administrative and legal proceedings where the nation's governmental ethics, campaign finance, and election laws are enforced.

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[1] The parties have consented to the filing of this brief. Petitioners and Respondents have each filed a letter of consent to all *amicus* briefs with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* contributed monetarily to the preparation or submission of this brief.

The Reform Institute brings together business leaders and policy experts, as well as retired and current elected officials, to work to restore integrity and effectiveness to our government and the electoral process. The Institute is a nonpartisan educational organization working to strengthen the foundations of our democracy and build a resilient society. The Institute formulates and advocates valuable, solutions-based reform in vital areas of public policy. Since its founding in 2001, the Institute has supported reforms that protect the integrity of the electoral process, promote a more informed electorate, encourage greater competition, empower citizens, reduce the influence of special interests, and ensure effective enforcement and administrative support.

Amici share the concern that the injection of massive sums of money into judicial campaigns by litigants and lawyers can, in extraordinary circumstances, threaten the integrity, impartiality, and independence of the courts, and thereby deprive the litigants appearing before those courts of due process of law. *Amici* therefore file this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

This case involves an egregious instance of a broader national trend: (1) a litigant faces a $50 million judgment in a business dispute between mining companies; (2) a sole individual, the litigant's

CEO, individually spends $3 million to help elect a judge; (3) the $3 million spent by the sole individual amounts to more than all other expenditures in support of that judge *combined*; (4) the judge, after his election, declines to recuse himself from the litigant's appeal; and (5) the same judge casts an outcome-determinative vote reversing the judgment against the litigant. These extraordinary facts warrant reversal as a manifest affront to due process.

While the facts of this case are egregious, the underlying question of due process is raised in an increasing number of cases nationally. The last decade has witnessed an explosion in campaign expenditures in judicial elections. Lawyers and litigants, unsurprisingly, are the principal sources of funds. Increasingly, as Justice Sandra Day O'Connor has observed, such contributions "threaten the integrity of judicial selection and compromise the public perception of judicial decisions." Sandra Day O'Connor, Op-Ed., *Justice for Sale*, Wall St. J., Nov. 15, 2007, at A25.

This Court should make clear that the Fourteenth Amendment's Due Process Clause compels recusal where, as in this case, the facts and circumstances create the overwhelming perception that objectively massive campaign expenditures can purchase a favorable outcome in a specific pending case. Such a decision would establish the need for state courts to tread with proper concern for constitutional values in

an area that has so far been characterized by doubt, uncertainty, and variable enforcement.

If the Court does not speak decisively in this bellwether case, which is being closely watched across the country, the message will be clear: Litigants, lawyers, and judges will understand that the Due Process Clause imposes no meaningful constraints on attempts to buy influence, even in pending cases. A decision lacking an unequivocal statement that the facts of this case, taken together, fall beneath the floor of due process, will unfortunately – but inevitably – be interpreted as license by future actors in the shoes of Mr. Blankenship and Justice Benjamin. The resulting race to the bottom will severely corrode both the quality and perception of American justice. Conversely, reversal would convey to litigants, lawyers, and judges that disqualification standards – and their due process underpinnings – must be taken seriously. The Court would thereby thwart, or at least mitigate, a damaging national trend.

In 2002, Justice Kennedy made clear that states "may adopt recusal standards more rigorous than due process requires." *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring). Justice Kennedy thus appropriately invited states to consider measures aimed at due process *plus*. This case however, calls on this Court to reinforce the predicate implicit in Justice Kennedy's statement in *White*: that there is a floor of due process *simpliciter* – a point at which the facts are so egregious as to cross over "the outer boundaries" of judicial qualification

such that the Due Process Clause of the Fourteenth Amendment requires recusal. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

ARGUMENT

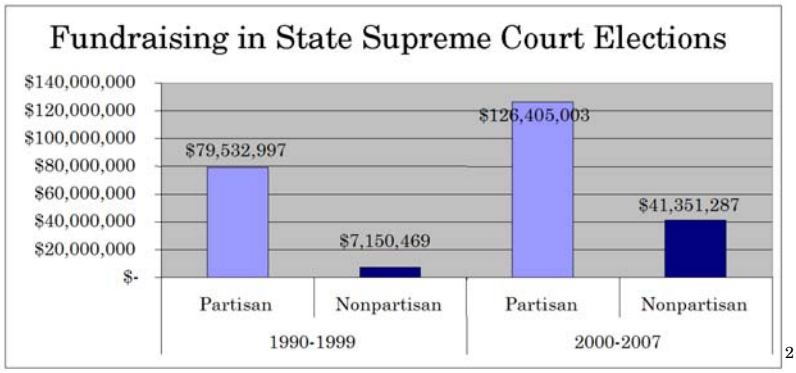
I. CHANGES IN THE FINANCING OF JUDICIAL ELECTION CAMPAIGNS HAVE CREATED NEW THREATS TO DUE PROCESS.

The mere fact that judges on state courts across the United States are elected does not, in and of itself, implicate due process concerns. But massive campaign expenditures by litigants and lawyers before the courts, combined with particularized circumstances such as those in this case, implicate fundamental fairness concerns. No litigant in the position of the Petitioners in this case could believe that they had received the *sine qua non* of due process: a fair hearing before an impartial arbiter.

The circumstances and sums of the expenditures by the Respondent's CEO constitute an egregious example of a troubling trend. Increasingly, litigants and lawyers, sometimes with specific pending cases before the bench, are spending extraordinary sums in judicial elections. In turn, variable enforcement of the general disqualification standard, as illustrated by Justice Benjamin, creates the appearance, and perhaps the reality, of bias. This case offers the Court a clean vehicle to mitigate the most pernicious effects of this worsening trend.

A. Judicial Election Expenditures Have Dramatically Increased In The Last Decade.

The trend towards expensive judicial campaigns began in the late 1990's. The sums raised by judicial candidates have escalated dramatically since then. Indeed, as the following graph indicates, state supreme court candidate fundraising in the 2000's through the year 2007 alone, dwarfs the totals for the entirety of the 1990's.



[2]

[2] The fundraising totals in the graph above are based on data from the National Institute on Money in State Politics. The data are available at www.followthemoney.org. For purposes of the figures illustrated above, the partisan category includes Alabama, Illinois, Louisiana, Michigan, North Carolina, New Mexico, Ohio, Pennsylvania, Texas, and West Virginia. The nonpartisan category includes Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, North Carolina, North Dakota, Nevada, Oregon, Washington, and Wisconsin. Ohio and Michigan are categorized as partisan states, even though candidates are not identified by party on the ballots. In both states, candidates are identified with parties during the campaign season; in Michigan, parties nominate the candidates.

(Continued on following page)

In the 2005-06 election cycle, half of the states that held entirely privately-financed, contested supreme court elections (five of ten) broke state fundraising records; the median amount raised by supreme court candidates also leapt 20 percent from 2004. James Sample et al., *The New Politics of Judicial Elections 2006* 15 (Justice At Stake 2006), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf [hereinafter *New Politics 2006*]. Increases in fundraising are reflected in a concomitant growth of expenditures, particularly on television advertising. In 2008, spending on television advertising in state supreme court races jumped 24 percent from 2006, reaching $19.8 million. Press Release, Brennan Center for Justice, *Buying Time-Spending Rockets Before Elections* (Nov. 13, 2008), http://www.brennancenter.org/content/resource/buying_time_spending_rockets_before_elections/. And as the chart on page eight reflects, in just eight years, television advertising in state supreme court campaigns has gone from a rarity to a clear norm. Indeed,

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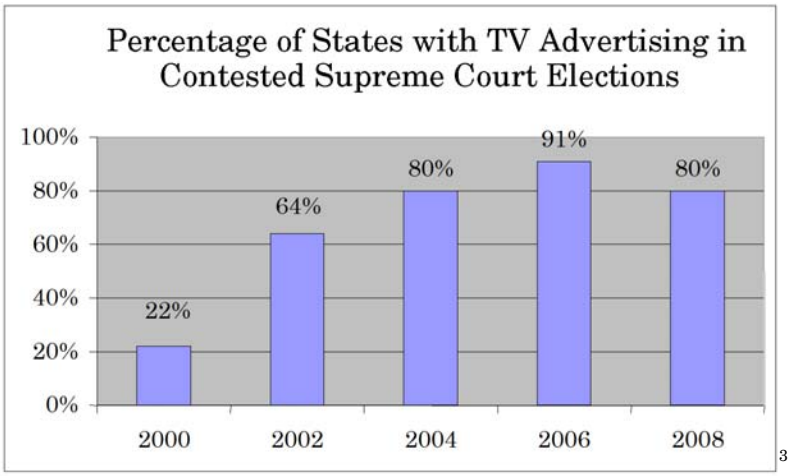
In Illinois, justices are first selected in partisan elections and thereafter stand in retention elections. In New Mexico, justices are appointed, but must run in a partisan election the first time they defend their office. After that, all elections are retention contests. In Montana, justices run in nonpartisan, contested elections; incumbents without an opponent run in retention elections. North Carolina held partisan elections until the 2004 cycle, when public funding was introduced and high court elections became nonpartisan. In Pennsylvania, candidates run for a first full term in partisan elections and run in retention elections thereafter.

from a judicial candidate's perspective, expensive advertising is, in most races, now a necessity for electoral success, regardless of whether paid for by the candidate's own campaign or by individuals like Mr. Blankenship and/or groups like And For The Sake Of The Kids.



[3]

Measured by the total number of television spots aired, in 2008, eight states – Idaho, Louisiana, Michigan, Mississippi, Nevada, Texas, Wisconsin, and West Virginia – had more television advertising in state

[3] The Brennan Center's analyses of television advertising in state Supreme Court elections use data obtained from a commercial firm, TNS Media Intelligence/Campaign Media Analysis Group ("CMAG"), which records each ad via satellite. CMAG provides information about the location, dates, frequency, and estimated costs of each ad, as well as storyboards. Cost estimates are refined over time and do not include the costs of design and production. As a result, cost estimates substantially understate the actual cost of advertising.

supreme court races than in any election year since 2000. *Id.* Perhaps most tellingly, the $19.8 million spent on television advertising in supreme court races in 2008 reflects a 139 percent increase from just six years ago. *See* Deborah Goldberg et al., *The New Politics of Judicial Elections 2002* 7 (Justice At Stake 2002), *available at* http:// www.gavelgrab.org/wp-content/resources/NewPoliticsReport2002.pdf.

Wisconsin, Illinois, and Alabama offer illustrative snapshots of the trend:

• Less than two months after being disciplined by the Wisconsin Supreme Court for ruling, as a lower court judge, on eleven cases involving a bank for which her husband served as a director, Justice Annette Ziegler wrote the majority opinion in a 4-3 decision in favor of the position advocated by a group that spent over $2 million supporting her 2007 election. The group had "long considered the case a top priority." Patrick Marley & Stacy Forster, *Ziegler, Big Lobby Think Alike*, Milwaukee J. Sentinel (Wis.), July 14, 2008, at A6. This year, Wisconsin surpassed the expenditure records set in Justice Ziegler's 2007 race. Interest groups ranging from trial lawyers and corporate organizations to tax opponents and teachers' unions combined to make Wisconsin's April 1, 2008 supreme court contest the most expensive judicial race in state history. Press Release, Wisconsin Democracy Campaign, *Nasty Supreme Court Race Cost Record $6 Million: Candidates Were Outspent $4 to $1 by Outside Special Interests* (July 22, 2008), *available at* http://wisdc.org/pr072208.php. Reflecting

on the developing state of affairs just one week after that contest, Justice Sandra Day O'Connor opened a conference by declaring, "We put cash in the courtrooms, and it's just wrong." Dorothy Samuels, Editorial Observer, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom'*, N.Y. Times, April 15, 2008, at A22.

• In a 2004 race for a seat on the Illinois Supreme Court, which is elected by district, two candidates raised more than $9.3 million combined, a figure that outpaced candidates in eighteen U.S. Senate races that year, and that was nearly double the previous national record for a judicial election. Deborah Goldberg et al., *The New Politics of Judicial Elections 2004* 14-15, 32 (Justice At Stake 2005), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf. The winner of the election, then-trial judge Lloyd Karmeier, reflected on the six-figure checks that poured into both campaigns, including from competing sides in a then-pending appeal, saying: "That's obscene for a judicial race. What does it gain the people? How can people have faith in the system?" *Id.* at 19.

• From 1993-2006, Alabama Supreme Court candidates raised in aggregate more than $54 million. *New Politics 2006*, at 15. In the 2005-06 election cycle alone, state supreme court candidates in Alabama raised $13.4 million, surpassing the previous state record by more than a million dollars. *Id.* The three candidates for chief justice raised a combined $8.2 million, making it the most expensive judicial race in

state history, and the second most expensive judicial campaign in American history. *Id.* at 15, 26. Alabama State Bar President Mark White recently put the sums into a sharp comparative perspective, noting that in 2006, candidates for judicial office in Alabama spent more than twice Alabama's total annual spending on civil legal services for the poor. Editorial, *Justice at Any Price*, The Birmingham News, July 23, 2008, at 2008 WL 13791071.

Unsurprisingly, the judicial candidate with the most funds in a race generally wins the election. In 2006, the candidate who raised the most money in state high court races won 68 percent of the time. In 2004, that figure was 85 percent. *New Politics 2006,* at vii. This dynamic poses a particularly nettlesome dilemma for judicial candidates, above and beyond the problems faced by other electoral candidates, due to the likely source of such funds: present and prospective litigants and counsel before the relevant courts. Former West Virginia Supreme Court Justice Richard Neely summarized the dilemma: "It's an absolute disaster for the judiciary. . . . Now every seat on the Supreme Court is for sale. . . . Judges will be required to dance with the one that brung them. . . . When someone like Don Blankenship offers you $3 million, you can't turn it down." Brad McElhinny, *Next Court Race Could Be Just as Nasty*, Charleston Daily Mail (W. Va.), Nov. 4, 2004, at 1A.

B. Massive Contributions And Expenditures By Present Or Prospective Litigants And Their Lawyers Threaten Due Process.

Increased campaign expenditures in judicial elections elicit public concern, but do not, standing alone, present a constitutional problem. Rather, the immediate constitutional concern involves campaign expenditures made in extraordinary amounts and under circumstances where an ordinary person cannot but conclude that they were made with the aim of securing a favorable outcome in a specific case in which the spender is a litigant or has some other substantial pecuniary interest.

Research by the National Institute on Money in State Politics identified and disaggregated 84 percent of directly contributed funds raised in 2005-06 state high court elections by interest group sector. Business interests represented the principal source of contributions, accounting for 44 percent of all contributed funds. Lawyers constituted the second largest source of contributions, accounting for 21 percent of all contributed funds. *New Politics 2006,* at 18, fig. 11.

The proportion of contributions to judicial candidates by lawyers and businesses may be partly explained by the belief among contributors that contributions will affect the outcome of cases in which they are involved. That this belief is pervasive is no longer in doubt. A study by the Texas State Bar and Texas Supreme Court found that 79 percent of

attorneys surveyed indicated their belief that campaign contributions have a significant influence on a judge's decision. Alexander Wohl, *Justice for Rent*, The Am. Prospect, Nov. 30, 2002, *available at* http://www.prospect.org/cs/articles?article=justice_for_rent.

The perception that campaign contributions buy influence on the bench in pending or imminent cases is so strong that litigants and lawyers give even when their candidate *cannot* lose. A recent *Los Angeles Times* study found that even Nevada judges running *unopposed* collected hundreds of thousands of campaign dollars from litigants and lawyers, frequently "within days of when a judge took action in the contributor's case." Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing with a Stacked Judicial Deck*, L.A. Times, June 8, 2006, at A1.

The perception among contributing litigants and counsel is shared by their non-contributing counterparts. In a 2006 *amicus* brief urging this Court to grant *certiorari* in *Dimick v. Republican Party of Minnesota*, thirty-nine large national corporations stated: "*Amici* often have reasons for concern about – and many of them have had at least one experience of – receiving what appears to be less than fair and impartial justice in jurisdictions where they . . . have not contributed to . . . judicial candidates." Brief of *Amicus Curiae* Concerned Corps. in Support of Petitioners at 3, *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006) (No. 05-566), 2006 WL 42102. As that brief shows, potential donors may feel locked

into a dynamic in which they have to give, regardless of whether they actually favor the recipient, as a result of the sheer prevalence and perceived influence of contributions. Similar concerns are echoed in two business-perspective *amicus* briefs filed in support of the Petitioners in this case. *See* Brief of Cmte. for Economic Development, Intel Corp., Lockheed Martin Corp., Pepsico, Wal-Mart Stores, Inc., Defense Trial Counsel of Indiana, The Illinois Ass'n of Defense Counsel, and Transparency International USA; Brief of Center for Political Accountability and the Zicklin Center for Business Ethics Research at the Wharton School.

Perceptions of improper influence are sustained by findings of strong correlations between contributions and litigation outcomes. A 2001 report on the Texas Supreme Court revealed that the average petitioner who gave the court $250,000 or more was ten times more likely than the average non-contributor to have a petition for discretionary review granted. The average petitioner who gave the court $100,000 or more was 7.5 times more likely than the average non-contributor to have a petition accepted. The report concluded that "across the board, the more a petitioner gave, the greater the likelihood that the court would accept a given petition." Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* 10 (2001), http://www.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf.

A groundbreaking 2006 *New York Times* review of twelve years of Ohio Supreme Court decisions augmented

these findings. *See* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, at A1 [hereinafter Liptak & Roberts]. The study found that Ohio justices routinely sat on cases after having received campaign contributions from the parties involved, and that they then voted in favor of those contributors 70 percent of the time. *Id*. One justice voted in favor of his contributors 91 percent of the time. *Id.*

This year, a study of the Louisiana Supreme Court went a step further by controlling for the baseline decisional tendencies of individual judges in cases involving non-contributors. The authors of the study concluded that "judicial voting favors plaintiffs' or defendants' positions not on the basis of judicial leaning or philosophical orientation but on the basis of the size and timing of a political donation." The study further found that the "higher the donation, the higher the odds that the contributor's position will prevail."[4]

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[4] Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul. L. Rev. 1291, 1314 (2008). This particular study, however, has recently been the subject of significant methodological and empirical criticisms. *See* Robert Newman et al., *A Critique of "The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function"* 1, 2 (2008), http://www.lasc.org/press_room/press_releases/2008/Critique_of_Tulane_Law_Review.pdf (criticizing the study for failing to address whether expected voting behavior influences contributions, as well as whether contributions influence voting behavior); E. Phelps Gay & Kevin R. Tully,

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Because direct evidence of influence is generally unavailable since neither judges nor litigants readily admit to a *quid pro quo*, evidence of correlation is often the strongest evidence available of the causal connection between contributions and altered outcomes. Compounding the absence of direct proof, research on social psychology shows that much bias is unconscious and that people therefore tend to underestimate and undercorrect for their own biases and conflicts of interest.[5] Even candid self-reporting would therefore be likely to yield an undercount of influence. But, as Ohio Justice Paul E. Pfeifer has observed: "Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it's hard to say." Liptak & Roberts.

Rebuttal of "The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function" 1, 10 (2008), http://www.lasc.org/press_room/press_releases/2008/Rebuttal_revised.pdf (noting errors in the data).

[5] *See, e.g.*, James Sample et al., *Fair Courts: Setting Recusal Standards* 20 (Brennan Center for Justice 2008), *available at* http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf [hereinafter *Setting Recusal Standards*] (summarizing studies); Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier To Recognizing Conflicts of Interest*, *in* Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy 74 (Don A. Moore et al. eds., 2005); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 Psychol. Rev. 781 (2004); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1248-50 (2002).

Aside from the risk of actual *quid pro quo*, cash from litigants has an inevitably corrosive effect on public confidence in America's courts. More than 70 percent of Americans believe that judicial campaign contributions have at least some influence on judges' decisions in the courtroom, according to a 2004 public poll. Justice At Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004), *available at* http://faircourts.org/files/ZogbyPollFactSheet.pdf. These results echo a 2001 nationwide poll, in which 76 percent of those surveyed stated their belief that campaign contributions influence judges' decisions. Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake Frequency Questionnaire* 4 (2001), http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf. In that 2001 survey, 79 percent of the registered voters polled indicated their belief that "[j]udges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 10. The statistics illustrate that the public intuitively understands what jurists strive to prove: judicial independence matters, and the best indicator of whether courts are fair in a world too often lacking in direct evidence of improper influence is the appearance *vel non* of bias.

This case in particular has had a direct and substantial impact on public perceptions of judicial independence in West Virginia. A 2008 study by Talmey-Drake Research and Strategy found that over 67 percent of West Virginians doubted that Justice

Benjamin would be fair and impartial in considering this case. Only 15 percent of West Virginians believed that Justice Benjamin *could* be fair and impartial. Second Renewed Joint Mot. for Disqualification of Justice Benjamin 3.[6]

Members of the bench share the public's concern about the influence – perceived and at least occasionally real – of political contributions on the judicial process. In a written survey of 2,428 state lower, appellate, and supreme court judges, almost half (46 percent) of the judges surveyed indicated a belief that campaign contributions to judges influence decisions. Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake State Judges Frequency*

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[6] This sentiment was amply echoed in public forums such as editorial and letters pages. *See, e.g.*, Allan N. Karlin & John Cooper, Op-Ed., *Perception that Justice Can Be Bought Harms the Judiciary*, The Sunday Gazette Mail (W. Va.), Mar. 2, 2008, at 3C ("Nor is it surprising that West Virginians . . . 'reasonably question' Benjamin's ability to impartially sit on cases involving Blankenship's companies."); Editorial, *Benjamin Shows Need for Judicial Selection Reform*, Huntington Herald-Dispatch (W. Va.), Sept. 24, 2005, at 4A. ("Benjamin's case is more extreme than others, but the same concern applies to all."); Cecil E. Roberts, Op-Ed., *Blankenship's Hollow Rhetoric: His Money Defeated McGraw*, The Charleston Gazette (W. Va.), Dec. 13, 2004, at P5A ("Give us a break, Don . . . The real reason you bought the state Supreme Court seat is because Massey will soon stand before that court to try to rid itself of a $50 million jury penalty for putting . . . Harman Mining, out of business."); Eddie Tucker, Letter to the Editor, The Charleston Daily Mail (W. Va.), Dec. 10, 2004, at 4A ("Justice Brent Benjamin, as everyone knows, is bought and paid for by Blankenship.").

Questionnaire 5 (2002), http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf. More than 70 percent of surveyed judges expressed concern regarding the fact that, "[i]n some states, nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case." *Id.* at 9. As a result, more than 55 percent of state court judges believe that "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 11.

The above perceptions of contributors, non-contributors, members of the public, and members of the bench would plainly apply *a fortiori* when the source of funds is an active litigant's CEO and the amount in question is $3 million. Indeed, the overwhelming consistency of these perceptions is especially instructive since, in the first instance, Justice Benjamin was required to apply a state law recusal rule that requires disqualification whenever "the judge's impartiality might reasonably be questioned." *See infra* Part III.B. Well beyond that standard, however, the extreme facts of this case implicate due process because the "probability of actual bias . . . is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Concerns about fiscal influence are cast into dramatic light by the startling sequence of events at issue in this case. In 2004, Mr. Blankenship made $517,707.53 in personal, direct expenditures in support of Justice Benjamin's candidacy, including radio and newspaper advertisements, campaign

fliers, and telephone calls to registered voters. Pet. Br. at 7. He also contributed millions of dollars more to Section 527 organizations that supported Justice Benjamin or opposed his opponent – more than any other person or group that election cycle. Rachel Weiss, *Fringe Tactics: Special Interest Groups Target Judicial Races* 5 (The Institute on Money in State Politics 2005), http://www.followthemoney.org/press/Reports/200508251.pdf. In all, Mr. Blankenship poured $3 million into the race – more than the entire amount spent on Justice Benjamin's campaign by all other supporters *combined* – all while Massey was planning to appeal a $50 million trial court verdict to the court on which Justice Benjamin would sit. Pet. Br. at 6-7.

Even members of Justice Benjamin's own bench recognize the toll exacted by his refusal to recuse in this case. In the words of Justice Larry Starcher, "Mr. Blankenship's bestowal of his personal wealth" has created "a cancer in the affairs of [West Virginia's] court." Starcher Recusal Order at 9 (J.A. 460a). Justice Starcher added that he knew "hardly a soul who could believe" that a justice in Justice Benjamin's position vis-à-vis Mr. Blankenship "could rule fairly on cases involving that litigant or his companies – or appoint judges to sit on those cases." *Id.* at 7 (J.A. 459a-60a).

Elected legislators are expected to serve interest-group constituencies, including contributors. The representative branches function best when officials are lobbied by contributors and non-contributors

alike. Judges, including elected judges, are different in constitutionally salient ways. Judges are responsible for the fundamental promise of fair, impartially-decided cases. Judges function properly when they are "lobbied" only within the structured adversarial process and solely on the basis of law – not on the basis of personal, financial, or electoral interests. Everyone suffers when a judicial decision reinforces suspicions that the biggest donor, not the best case, wins.

II. The Fact That Mr. Blankenship Made Political Expenditures Rather Than Direct Contributions Does Not Alter The Due Process Analysis.

Respondents wrongly contend that the fact that Mr. Blankenship's support predominantly took the form of expenditures supporting Justice Benjamin, rather than contributions directly to Justice Benjamin, is significant to the Court's due process analysis in this case. *See, e.g.*, Br. for Respondents in Opposition at 20.

Just as large contributions directly to a judicial candidate "threaten the integrity of judicial selection and compromise the public perception of judicial decisions," Sandra Day O'Connor, Op-Ed, *Justice for Sale*, Wall St. J., Nov. 15, 2007, at A25, so too do large expenditures made explicitly for the purpose of supporting a judicial candidate. To assert otherwise defies logic.

Mr. Blankenship's $3 million in expenditures were, by legal definition, for the purpose of influencing the election. Mr. Blankenship spent $517,707 that he reported to the State as "expenditures" on W. Va. Official Form F-7B. Br. for Respondents in Opposition at 4. Form F-7B is used only to report an expenditure "for a communication which expressly advocates the election or defeat of a clearly identified candidate. . . ." Disqual. Mtn. Ex. 18 (Form F-7B); *see also* W. Va. Code § 3-8-1a(16) (defining "independent expenditure").

Mr. Blankenship spent an additional $2,460,500 through And For The Sake Of The Kids – a group registered with the Internal Revenue Service as a "political organization" under Section 527 of the federal tax code operated "primarily for the purpose" of "influencing or attempting to influence the selection, nomination, election, or appointment" of individuals to public office. 26 U.S.C. § 527(e)(1)-(2) (defining "political organization" and "exempt function"); *see also* Pet. Br. at 7, 34. According to Mr. Blankenship, And For The Sake Of The Kids was formed after the verdict in this case for the purpose of "beat[ing] Warren McGraw," Justice Benjamin's opponent. Pet. at 6.

While the Court has held that certain restrictions on campaign spending implicate the First Amendment, this case involves no such restrictions. This case is only about recusal when parties or counsel in a pending suit give massive support to a candidate who sits or intends to sit in that case.

Laws that limit political expenditures have traditionally been found by courts to burden a spender's First Amendment rights and, consequently, have traditionally been subject to exacting scrutiny. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976) (invalidating various political expenditure limits). By contrast, a legal regime that permits unlimited political expenditures and merely requires recusal by a justice who benefits from substantial political expenditures safeguards due process while in no way burdening the First Amendment rights of the spender who, notwithstanding the recusal, has her case decided by an impartial court.

This case, in which Mr. Blankenship's expenditures accounted for 60 percent of all combined support for Justice Benjamin, allows the Court to resolve the due process issues without any need for inquiry into the permissibility of restrictions on expenditures supporting a candidate vis-à-vis contributions to a candidate. As a practical matter, distinctions between contributions and expenditures have only marginal salience when it comes to the fundamental fairness concerns at the core of due process. *Amici* agree with Petitioners that the amount of money involved, the fact that Mr. Blankenship's expenditures represented more than half of the total amount spent supporting Justice Benjamin, the fact that the money was used by Mr. Blankenship explicitly for the purpose of influencing the election of Justice Benjamin, and the fact that Justice Benjamin played a critical role in Mr. Blankenship's appeal of a $50 million damages

verdict against his company, created "an overwhelming probability of bias that required Justice Benjamin to recuse himself." Pet. Br. at 17.

Whatever First Amendment interest a litigant or counsel has in contributing or spending in a campaign, he or she has no constitutionally-protected interest in gaining an unfair litigation advantage on that basis. The Due Process Clause requires recusal under these circumstances.

III. Reversal In This Bellwether Case Would Substantially Clarify The Due Process Floor For Recusal.

A. Due Process Entitles Litigants To A Judge Free Of Bias Or The Appearance Of Bias.

This Court has recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Yet this Court has also recognized the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom v. Roemer*, 501 U.S. 380, 400 (1991). The facts of this case show that this tension is no mere theoretical possibility. As this Court expressly found in *White*, preventing bias for or against particular parties is essential under the Due Process Clause. 536 U.S. at 775-76. It is precisely this narrow form of bias that is at issue here. There could scarcely be an instance in which there is a more acute need for this Court to reinforce the "stringent

rule" articulated in *Murchison*, namely, that to "perform its high function in the best way justice must satisfy the appearance of justice" even though such a rule "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." 349 U.S. at 136 (internal quotation marks omitted).

In his year-end report on the federal courts, Chief Justice Roberts underscored the core concern at issue in this case: America's courts "guarantee that those who seek justice have access to a fair forum where all enter as equals and disputes are resolved impartially under the rule of law." Chief Justice John G. Roberts, Jr., 2008 Year-End Report on the Federal Judiciary 7 (Dec. 31, 2008) *available at* http://supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf. A judge generally has only two litigants before him or her. What follows is almost always a zero-sum game: one litigant wins, one loses. The prize at stake may be a large amount of money, one's freedom, or even one's life. Accordingly, maintaining the integrity of the judiciary and respect for its judgments is a state interest "of the highest order." *White*, 536 U.S. at 793 (Kennedy, J., concurring); *see also Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (explaining that a state may protect against the possibility of public perception that judicial action "did not flow only from the fair and orderly working of the judicial process").

Recusal is an incomplete but vital fairness protection. Yet, without this Court's intervention, recusal

is in danger of becoming a nullity, invoked only out of altruism – and as such, variably and unpredictably – disadvantaging litigants and diminishing the courts.

B. Variable Enforcement Of Recusal Standards Is Becoming The Norm, Exacerbating The Due Process Problem.

Certain features of disqualification law are largely consistent across United States jurisdictions. The most widely shared is Rule 2.11(A) of the American Bar Association's 2007 Model Code of Judicial Conduct (formerly Canon 3E(1)): "A judge *shall* disqualify himself or herself in any proceeding in which the judge's impartiality *might* reasonably be questioned." ABA Model Code of Judicial Conduct Canon 2 R. 2.11 (2007) (emphases added). That general standard has been incorporated into federal law and the judicial conduct codes of forty-seven states, and it offers the most expansive ground for disqualification everywhere it appears. *Setting Recusal Standards*, at 17.

For the most part, this general standard works well as a protection for due process values. But in certain instances, such as in this case, a judge either fails to apply the general standard, or simply refuses to recognize that it is unquestionably unreasonable *not* to conclude that his or her impartiality "might reasonably be questioned." It is in such instances that litigants and judges need guidance as to when recusal is constitutionally required, especially in the context of highly financed judicial election campaigns. A

scenario in which, for example, ninety-nine out of one-hundred judges adhere to the general disqualification standard while an isolated colleague ignores it without consequence – even in cases that, under the standard, cannot credibly be described as "close" – encourages and induces precisely the most dangerous attempts to purchase influence. Such a state of affairs harms not only litigants and the public, but the ninety-nine other judges as well.

This case is that scenario in microcosm.[7] Justice Benjamin refused to recuse himself based upon his subjective belief that he could be fair, while Justice Starcher did recuse himself, despite a finding that he too could be fair, based upon the further finding that his failure to recuse himself could create an appearance of impropriety. As this Court observed in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981), "[a]n uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all."

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[7] The overwhelming appearance of impropriety created by Justice Benjamin's refusal to recuse himself is reinforced by the remarkable array of *amici* supporting Petitioners, including, notably, twenty-seven former state supreme court chief justices and justices from across the country. *See* Brief of Former State Supreme Court Justices at 5 ("*Amici uniformly* believe that the participation of Justice Benjamin in this case created an appearance of impropriety. All *amici* participating in this brief would have recused if they had benefitted from the level and proportion of independent expenditures by the CEO of a party to a case pending before the court.") (emphasis added).

Amici do not suggest that *any* campaign expenditure by a litigant on behalf of a judge necessitates disqualification. But the proposition that campaign expenditures, regardless of the amounts, timing, or manner in which they are made never cross over "the outer boundaries" of judicial qualification established by the Due Process Clause would in effect nullify one of the Constitution's most fundamental protections. *Lavoie*, 475 U.S. at 828.

As the Hon. Thomas R. Phillips, retired Chief Justice of the Supreme Court of Texas recently wrote: "Now as never before, reinvigorating recusal is truly necessary to preserve the court system that Chief Justice Rehnquist called the 'crown jewel' of our American experiment." *Setting Recusal Standards*, at 3.

Unfortunately, Chief Justice Phillips's exhortation, as with Justice Kennedy's encouragement in *White* that states consider adopting "more rigorous" recusal measures, runs counter to powerful dynamics of institutional inertia that have, on the whole, prevented systemic reinvigoration from occurring. The result, despite widespread compliance, is that isolated, but increasingly troublesome outlier scenarios such as in this case, occur without consequence. Absent reinforcement by this Court of the constitutional "outer boundaries" of judicial qualification in this case, there is every reason to believe such instances will continue to flourish, causing harm to litigants, damage to the judiciary, and a loss of faith in the rule of law.

By identifying this case as a violation of due process, the Court would signal to judges, litigants, and counsel across the nation that disqualification standards, and their due-process underpinnings, must be taken seriously. The communicative impact of a reversal and remand, moreover, would discourage future erosion of judicial impartiality. Not only would such a signal bolster the efforts of the vast majority of the nation's state court judges, *i.e.*, those committed to the highest ideals of due process, but it would do so without extensively involving the Court in jurisdictionally unique and otherwise idiosyncratic circumstances best addressed by the state courts themselves.

C. A Failure To Identify This Important And Unique Case As Beneath The Floor Of Due Process Would Harm Judicial Independence.

The national profile of this bellwether case makes it all the more important that this Court unequivocally reverse and remand for reconsideration without Justice Benjamin. *See, e.g.*, Editorial, *Tainted Justice*, N.Y. Times, Nov. 13, 2008, at A36; Tim Jones, *Lobbyist Cash Clouds Judicial Races*, Chicago Tribune, July 28, 2008, at C1; Dorothy Samuels, Editorial Observer, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom'*, N.Y. Times, April 15, 2008, at A22; Len Boselovic, *W. Va. Ruling Faces Appeal to Top Court; Mining Firm Claims Bias in Favor of Massey*, Pittsburgh Post-Gazette (Pa.), April 4, 2008,

at A1; Kris Maher, *Massey Wins Latest Round with Harman*, Wall St. J., April 4, 2008, at B4; James Sample, Op-Ed., *Justice for Sale*, Wall St. J., Mar. 22, 2008, at A24; Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, Wash. Post, Nov. 4, 2004, at A15. The nation is watching closely what the Court does in this case. Litigants and their lawyers would interpret a decision to affirm as an indication that even a blatant appearance of partiality does not lead to correction, and that, in effect, there are no real due process constraints on recusal. Such a ruling may well trigger a rapid race to the bottom, as litigants, particularly those in the position of Petitioners in this case, are forced to come to terms with the possibility that, at least in certain instances, justice may actually be for sale.

Only if this Court reverses and remands to the West Virginia Supreme Court of Appeals for further proceedings without any involvement by Justice Benjamin can it put appropriate muscle in the constitutional commitment to judicial impartiality.

The $3 million in expenditures; the fact that those expenditures represented more than all other financial support for Justice Benjamin *combined*; the sole interested source of those funds; the timing of the expenditures; and the other facts of this case are so egregious – by today's standards at least – that they offer the Court the ideal opportunity to reinforce one of the most fundamental rights in *any* system based on the rule of law: the right to a fair hearing before an impartial arbiter.

CONCLUSION

For the foregoing reasons, Justice Benjamin's decision not to recuse himself should be reversed, the judgment of the Supreme Court of Appeals of West Virginia vacated, and the case remanded for further proceedings.

Respectfully submitted,

JAMES J. SAMPLE
Counsel of Record
AZIZ HUQ
J. ADAM SKAGGS
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Ave. of Americas, 12th Fl.
New York, NY 10013
(212) 998-6730

J. GERALD HEBERT
PAUL S. RYAN
TARA MALLOY
CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., NW,
Suite 650
Washington, DC 20036
(202) 736-2200

Counsel for Amici Curiae

Dated: January 5, 2009