No.

IN THE

Supreme Court of the United States

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

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of the $50 million jury verdict in this case, even though the CEO of the lead defendant spent $3 million supporting his campaign for a seat on the court—more than 60% of the *total* amount spent to support Justice Benjamin's campaign—while preparing to appeal the verdict against his company. After winning election to the court, Justice Benjamin cast the deciding vote in the court's 3-2 decision overturning that verdict. The question presented is whether Justice Benjamin's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc., were defendants-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Sovereign Coal Sales, Inc., and Harman Mining Corporation are wholly-owned subsidiaries of Harman Development Corporation. Harman Development Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioners Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc., respectfully submit this petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is not yet published but is electronically reported at 2008 WL 918444. Pet. App. 1a. Justice Benjamin's orders declining to recuse himself are not reported. *Id.* at 148a, 152a, 157a.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on April 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

This Court has emphasized that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). This case affords the Court the opportunity to clarify the

circumstances in which a litigant's expenditures on a judicial election campaign create an "appearance of bias" that is so significant that due process requires the recusal of the judge who benefited from those expenditures—a question that is vitally important to preserving the "reputation for impartiality and nonpartisanship"—and, ultimately, the "legitimacy"—"of the Judicial Branch." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

Mr. Don L. Blankenship, chairman, CEO, and president of respondent A.T. Massey Coal Co. ("Massey"), spent $3 million supporting the 2004 campaign of Justice Brent Benjamin for a seat on the Supreme Court of Appeals of West Virginia. Mr. Blankenship spent that extraordinary sum of money—which represents more than sixty percent of the total amount spent supporting Justice Benjamin's campaign—while Massey was preparing to appeal a $50 million fraud verdict to the West Virginia Supreme Court of Appeals. After Justice Benjamin won the election and took his seat on that court, petitioners requested that Justice Benjamin recuse himself from Massey's appeal due to the unavoidable appearance of impropriety generated by Mr. Blankenship's multimillion-dollar campaign expenditures. Justice Benjamin refused to recuse himself, and then voted with the court's majority to overturn the verdict against Massey by a 3-2 vote.

Petitioners renewed their recusal motion after photographs were made public showing the chief justice of the West Virginia Supreme Court of Appeals vacationing with Mr. Blankenship on the French Riviera while Massey's appeal was pending. Although the chief justice and another justice subsequently recused themselves and the court granted rehearing, Justice Benjamin—who then became the

acting chief justice—again refused to recuse himself, appointed two replacement justices, and again cast the deciding vote in the court's 3-2 decision overturning the verdict against Massey.

This Court's review of Justice Benjamin's insistence on participating in this case is warranted to provide authoritative guidance to the lower courts regarding the circumstances in which due process requires recusal of a judge who has benefited from a litigant's substantial campaign contributions and to restore public confidence in the judicial systems of the thirty-nine States that elect their judges. The $3 million that Mr. Blankenship spent supporting Justice Benjamin's campaign while planning to pursue an appeal to the West Virginia Supreme Court of Appeals created a constitutionally unacceptable appearance of impropriety that required Justice Benjamin to recuse himself from the court's consideration of Massey's appeal. His failure to do so conflicts with the constitutional recusal standards articulated by this Court and other lower courts, denied petitioners their due process rights, and substantially undermined the integrity and reputation of the West Virginia judicial system.

1. Massey is one of the Nation's largest coal companies. Until the corporate petitioners were forced into bankruptcy by Massey's fraudulent business practices, they competed with Massey through the production of coal at the Harman Mine in Virginia. Pet. App. 4a.

This case arose out of Massey's efforts to obtain the business of LTV Steel ("LTV"), one of the principal purchasers of petitioners' coal. LTV repeatedly refused to purchase Massey's coal because it "was inferior in quality to the coal obtained from the Har-

man Mine." Pet. App. 7a n.11. In an effort to secure LTV's business, Massey purchased the parent of Wellmore Coal Corporation ("Wellmore"), which was the sole direct purchaser of petitioners' coal and which resold that coal to LTV. *Id.* at 8a. "Massey hoped to substitute its own coal for the Harman Mine coal that Wellmore had been supplying to LTV." *Id.* LTV, however, refused to accept the substitution of Massey coal for Harman coal and severed its business relationship with Wellmore. *Id.*

In response, Wellmore, "at Massey's direction," invoked the *force majeure* clause in its coal supply agreement with petitioners Sovereign Coal Sales, Inc., and Harman Mining Corporation—a provision that excused nonperformance due to "acts of God, acts of the public enemy, epidemics," and other "causes reasonably beyond the control" of the parties—and drastically reduced the amount of coal that it agreed to purchase from petitioners. Pet. App. 5a n.8, 9a. As the trial court found, "Massey knew" that this "declaration" "would put [petitioners] out of business." *Id.* at 9a. Indeed, "Massey delayed Wellmore's termination of [the] contract until late in the year, knowing it would be virtually impossible for [petitioners] to find alternate buyers for [their] coal at that point in time." *Id.* at 10a.

Massey simultaneously entered into negotiations with petitioners to purchase the Harman Mine. Pet. App. 9a. The trial court found that Massey "utilized the confidential information it had obtained" from petitioners during these negotiations "to take further actions"—including the purchase of a narrow band of coal reserves surrounding the entire Harman Mine—"in order to make the Harman Mine unattractive to others and thereby decrease its value." *Id.* at 10a-11a. Massey then "delayed" consummation of its

agreement to purchase the Harman Mine and "ultimately collapsed the transaction in such a manner so as to increase [petitioners'] financial distress." *Id.* at 10a (internal quotation marks omitted). Left without a purchaser for either their coal or their mining facilities, the corporate petitioners were compelled to cease operations and file for bankruptcy. *Id.* at 11a.

2. In 1998, petitioners filed suit against Massey and several affiliated companies in the Circuit Court of Boone County, West Virginia, to recover damages attributable to Massey's unlawful interference with petitioners' business relations and Massey's fraudulent conduct during its negotiations to purchase the Harman Mine. Pet. App. 11a-12a. After a lengthy trial that included extensive testimony from Don L. Blankenship, president, CEO, and chairman of Massey, the jury returned a verdict in August 2002 that found Massey liable for tortious interference with existing contractual relations, fraudulent misrepresentation, and fraudulent concealment, and awarded petitioners more than $50 million in compensatory and punitive damages. *Id.* at 13a. Mr. Blankenship immediately vowed that Massey would appeal the verdict. Motion of Respondent Corporations for Disqualification of Justice Benjamin ("Disqual. Mtn.") Ex. 5.

3. Due to a lengthy delay in the trial court's consideration of post-trial motions and in the production of the trial transcript, Massey did not file a petition for review of the trial court's judgment in the West Virginia Supreme Court of Appeals—the sole appellate court in the State—until October 24, 2006.

In the time between the 2002 verdict and Massey's 2006 petition for review, the composition of the West Virginia Supreme Court of Appeals was al-

tered by lawyer Brent Benjamin's 2004 electoral victory over incumbent Justice Warren McGraw. That judicial election was described by observers as one of the "nastiest" in the Nation that year. Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, Wash. Post, Nov. 4, 2004, at A15; *see also* Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. Times, Oct. 24, 2004, at A1.

Mr. Blankenship played a significant—and very public—role in that election. Indeed, the $3 million that he spent to support Justice Benjamin's campaign was more than the *total* amount spent by all other Benjamin supporters combined and was likely more than any other individual spent on a judicial election that year. *See infra* note 2.

Most of Mr. Blankenship's campaign expenditures were made through And For The Sake Of The Kids, a so-called "527 organization" that, according to Mr. Blankenship, was formed after the verdict in this case for the purpose of "beat[ing] Warren McGraw," the incumbent justice against whom Brent Benjamin was running, and that was "named for its belief that McGraw's policies [were] bad for children and their future." Tom Diana, *W. Va. Coal Executive Works to Oust McGraw*, Wheeling News-Register, Oct. 25, 2004; Brad McElhinny, *Big-Bucks Backer Felt He Had to Try*, Charleston Daily Mail, Oct. 25, 2004, at 1A. By the time of the election, Mr. Blankenship had donated $2,460,500 to And For The Sake Of The Kids—more than two-thirds of the total funds raised by the organization. Disqual. Mtn. Ex. 11.[1]

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[1] Nationally, only four political groups directly involved in state elections in 2004 outraised And For The Sake Of The

And For The Sake Of The Kids used most of these funds to run campaign advertisements, including a series of television ads that accused Justice McGraw of voting to release an incarcerated child molester and to permit him to work in a high school. *See* Deborah Goldberg et al., *The New Politics of Judicial Elections* 4-5 (2004) (describing one of these ads, which stated, "Letting a child rapist go free? To work in our schools? That's radical Supreme Court Justice Warren McGraw. Warren McGraw—too soft on crime. Too dangerous for our kids.").

In addition to the nearly $2.5 million that Mr. Blankenship donated to And For The Sake Of The Kids, he spent another $517,707 in direct support of the Benjamin campaign, mostly through payments to media outlets for television and newspaper advertisements. Disqual. Mtn. Exs. 18, 24. The $3 million that Mr. Blankenship spent to support Justice Benjamin's campaign through donations to And For The Sake Of The Kids and through direct expenditures is $1 million more than the total amount spent by all of Justice Benjamin's other campaign supporters and three times the amount spent by Justice Benjamin's own campaign committee.[2]

[Footnote continued from previous page]

Kids: the Republican Governors Association, the Democratic Governors Association, the Republican State Leadership Committee, and the Democratic Legislative Campaign Committee. Disqual. Mtn. Ex. 17.

[2] A total of $4,986,711 was spent on Justice Benjamin's 2004 campaign: $3,623,500 by And For The Sake Of The Kids (Disqual. Mtn. Ex. 17), $845,504 by the Benjamin for Supreme Court Committee (*id.* Ex. 31), and $517,707 by Mr. Blankenship through direct expenditures (*id.* Exs. 18, 24).

Mr. Blankenship also worked to solicit funds on behalf of Justice Benjamin's campaign. Most notably, he widely distributed letters exhorting doctors to support Justice Benjamin in order to lower their malpractice premiums and "get rid of a judge . . . who let a rapist of children out of jail." Disqual. Mtn. Ex. 14. Mr. Blankenship's letters are directly responsible for a portion of the more than $800,000 donated to Justice Benjamin's campaign committee.

Mr. Blankenship's significant efforts on behalf of the Benjamin campaign attracted scrutiny from both state and national media outlets. *See*, *e.g.*, Liptak, *supra*; Toby Coleman, *Coal Companies Provide Big Campaign Bucks*, Charleston Gazette, Oct. 15, 2004, at 1A. Indeed, a number of observers openly questioned the motives behind Mr. Blankenship's extraordinary campaign expenditures at a time when Massey was preparing to appeal a $50 million verdict to the state supreme court. *See*, *e.g.*, William Kistner, *Justice for Sale*, American RadioWorks (2005), *at* http://americanradioworks.publicradio.org/features/judges/ ("One of [Justice Benjamin's] major backers was the CEO of Massey Energy Company, the largest coal producer in the region. The company happened to be fighting off a major lawsuit headed to the West Virginia Supreme Court. That prompted many in these parts to say that Massey was out to buy itself a judge."); Edward Peeks, Editorial, *How Does Political Cash Help Uninsured?*, Charleston Gazette, Nov. 9, 2004, at 2D ("[T]hese voices raise the question of vote buying to a new high in politics.").

The $3 million that Mr. Blankenship spent to support the Benjamin campaign bore fruit: Justice Benjamin defeated Justice McGraw in the November 2004 election and was sworn in as a justice of the

West Virginia Supreme Court of Appeals in January 2005.

4. Before Massey filed its petition in the West Virginia Supreme Court of Appeals seeking review of the $50 million judgment against it, petitioners filed a motion requesting that Justice Benjamin recuse himself from participation in Massey's forthcoming appeal. In accordance with the West Virginia Rules of Appellate Procedure, the motion was directed solely to Justice Benjamin, and his decision was not subject to review by any other member of the court. *See* W. Va. R. App. P. 29.

In their recusal motion, petitioners argued that federal due process required Justice Benjamin to recuse himself from participation in Massey's appeal because Mr. Blankenship's extraordinary financial support for Justice Benjamin's campaign created a constitutionally unacceptable appearance of impropriety. *See* Disqual. Mtn. 3 ("The principle of Due Process requires that where such a shadow is cast over the objectivity of a member of the judiciary, so much so that the public would lose confidence in the fairness of the government, a justice should disqualify himself . . . ."); *see also* Corporate Appellees' Resp. Br. 30 (Feb. 25, 2008) ("Justice Benjamin's refusal to recognize that his participation in this case presents a well-recognized, widely commented upon appearance of impropriety, constitutes a violation of the Fourteenth Amendment of the United States Constitution.").[3]

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[3] Massey did not file a response to any of petitioners' motions to recuse Justice Benjamin. Indeed, at the same time that petitioners were seeking the recusal of Justice Benjamin, Massey was seeking the recusal of Justice Starcher on the ground that he had made public statements critical of Mr. Blankenship's

In an April 7, 2006, memorandum, Justice Benjamin declined to recuse himself, writing that "no objective information is advanced to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case." Pet. App. 149a.

The West Virginia Supreme Court of Appeals thereafter granted Massey's petition for review. In a 3-2 decision, the court reversed the $50 million verdict against Massey and dismissed the case with prejudice—while "mak[ing] perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered" against it. *Caperton v. A.T. Massey Coal Co.*, 2007 W. Va. LEXIS 119, at *22-23 (Nov. 21, 2007). Justice Benjamin joined the majority's opinion reversing the verdict against Massey.

Creating numerous new points of West Virginia law, the majority held that petitioners' suit against Massey was barred by a forum-selection clause in the coal supply agreement that Sovereign Coal Sales, Inc., and Harman Mining Corporation had entered into with Wellmore, which provided that "[a]ll actions brought in connection with this Agreement

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involvement in the 2004 election. After Justice Starcher initially refused to recuse himself, Massey filed suit against the West Virginia Supreme Court of Appeals in federal court alleging that the court's recusal procedures violate federal due process because they do not provide a means for the full court to review a justice's decision not to recuse himself. *See Massey Energy Co. v. W. Va. Supreme Court of Appeals*, No. 06-0614 (S.D. W. Va. filed Aug. 8, 2006). That suit remains pending.

shall be filed in and decided by the Circuit Court of Buchanan County, Virginia." *Caperton*, 2007 W. Va. LEXIS 119, at *23. The majority reached this conclusion even though it acknowledged that neither Massey itself nor two of the petitioners—Harman Development Corporation and Mr. Hugh Caperton—were parties to the agreement and that the causes of action on which petitioners prevailed sounded in tort, rather than contract. *Id.* at *42, *53.

The majority further held, in the alternative, that petitioners' suit was foreclosed by principles of res judicata because Sovereign Coal Sales and Harman Mining had obtained a breach-of-contract verdict against Wellmore in a Virginia state court based on Wellmore's improper invocation of the *force majeure* clause in the coal supply agreement. *Caperton*, 2007 W. Va. LEXIS 119, at *67. In so holding, the majority disregarded the fact that Massey, Harman Development, and Mr. Caperton were not parties to the Virginia action; that the Virginia action involved breach-of-contract, not fraud, claims; that the cases involved vastly different issues and evidence; and that the Virginia action had been on appeal, and was thus nonfinal for res judicata purposes, at the time Massey moved in the trial court to dismiss petitioners' suit on res judicata grounds. *Id.* at *69, *78, *88.

Justices Albright and Starcher filed vigorous dissents. Both expressed alarm at the "result-driven effort" of the majority to relieve Massey of liability. *Caperton*, 2007 W. Va. LEXIS 119, at *93-94; *see also id.* at *105. Justice Albright described the majority opinion as "a convoluted discussion . . . to hide the fact that it molds the law to attain the desired result." *Id.* at *95. According to Justice Albright, the majority "went out of its way to make findings that fit its intended result" and did so "by twisting logic,

misapplying the law and introducing sweeping 'new law' into our jurisprudence." *Id.* at *101, *104 (emphasis omitted).

Petitioners timely petitioned for rehearing. While that petition was pending, photographs were made public showing Chief Justice Maynard, who had joined the majority's opinion in favor of Massey, vacationing with Mr. Blankenship on the French Riviera during the pendency of Massey's appeal. *See* Paul J. Nyden, *Coal Operator Says Photos Show Maynard Should Not Hear Appeal*, Charleston Gazette, Jan. 15, 2008, at 1A. Petitioners promptly moved for the recusal of Chief Justice Maynard based on the appearance of impropriety generated by his ill-timed vacation with Mr. Blankenship. Petitioners simultaneously renewed their request that Justice Benjamin recuse himself based on the equally strong appearance of impropriety created by Mr. Blankenship's substantial expenditures supporting Justice Benjamin's 2004 campaign.

Chief Justice Maynard recused himself from further participation in the case. Justice Benjamin, however, again refused to do so (Pet. App. 152a)—notwithstanding widespread public demands that he step aside from the case in order to restore the perception of an impartial and unbiased judiciary in West Virginia. *See*, *e.g.*, Editorial, *Bravo*, Charleston Gazette, Feb. 16, 2008, at 4A ("Benjamin remains the only Massey-connected justice still presiding over Massey cases. Clearly, for the sake of impartiality, he should . . . recus[e] himself from all Massey cases."); Editorial, *Finally*, Register Herald (Beckley, W. Va.), Feb. 18, 2008 ("Benjamin clearly was aided by Blankenship's multi-million dollar campaign against incumbent Warren McGraw and even[ ] though the justice has stated unequivocally he isn't

influenced by Blankenship, it just doesn't look good."); Editorial, *Perception That Justice Can Be Bought Harms the Judiciary*, Sunday Gazette Mail (Charleston), Mar. 2, 2008, at 3C ("It is time to say publicly what attorneys across the state are saying privately: Justice Brent Benjamin needs to . . . step down from hearing cases involving Massey Energy and its subsidiaries. His continued involvement in Massey litigation endangers the public perception of the integrity of the Supreme Court of Appeals.").

Justice Benjamin, as the justice next in line for the court's rotating chief justiceship, selected a state circuit court judge to replace Chief Justice Maynard. The reconstituted court granted petitioners' petition for rehearing and set the case for reargument.[4]

Shortly thereafter, Justice Starcher recused himself from further participation in the case due to the perception created by his public statements criticizing Mr. Blankenship's role in Justice Benjamin's campaign. In his recusal order, Justice Starcher urged Justice Benjamin also to step aside from the case, asserting that Mr. Blankenship's extraordinary campaign expenditures gave rise to "the very defini-

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[4] Under established seniority and rotation procedures followed by the West Virginia Supreme Court of Appeals for twenty-eight years, Justice Albright, not Justice Benjamin, would have been next in line for the court's rotating chief justiceship and would have appointed a replacement for Chief Justice Maynard. *See* Paul J. Nyden, *Albright Passed over for Chief Justice*, Charleston Gazette, Nov. 23, 2007, at 1A. Justice Benjamin secured this authority, however, when Chief Justice Maynard, Justice Davis, and Justice Benjamin—the three justices who formed the majority in the first opinion in favor of Massey—voted to disregard those long-standing procedures and to move Justice Benjamin ahead of Justice Albright in the order of succession to the chief justiceship. *Id.*

tion of 'appearance of impropriety'" and "have far more egregiously tainted the perceived impartiality of this Court than any statement" he had made about Mr. Blankenship. Starcher Recusal Order 3, 7. Justice Starcher suggested that "a serious read of the United States Supreme Court case, *Aetna Insurance Co. v. Lavoie*, 475 U.S. 813 (1986)"—which held that due process requires recusal when the "situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true" (*id.* at 822 (alterations in original; internal quotation marks omitted))—"is in order before . . . a decision is made" by Justice Benjamin concerning his further participation in the case. Starcher Recusal Order 9-10.

In his second order refusing to recuse himself, Justice Benjamin had stated that recusal "is appropriate only when . . . the facts asserted provide what an objective, knowledgeable person would find to be a reasonable basis for doubting the judge's impartiality." Pet. App. 154a. Because, as Justice Starcher observed in his recusal order (at 7), "hardly a soul . . . could believe that a justice who" benefited to the extent that Justice Benjamin did "from a litigant could rule fairly on cases involving that litigant," petitioners submitted a third recusal motion to Justice Benjamin accompanied by survey results indicating that 67% of West Virginians doubted his ability to be fair and impartial in deciding Massey's appeal. Justice Benjamin nevertheless again refused to recuse himself, declaring that the results were "neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification." Pet. App. 158a.

That same day, the West Virginia Supreme Court of Appeals—which now included two circuit court judges appointed by Justice Benjamin to re-

place Chief Justice Maynard and Justice Starcher—issued its opinion on rehearing, and again reversed the judgment against Massey by a 3-2 vote. Justice Benjamin joined the majority opinion (Pet. App. 95a), which relied on the same legally dubious forum-selection clause and res judicata grounds as the court's earlier decision in favor of Massey.

Justice Albright, now joined by Circuit Judge Cookman, strenuously dissented, contending that "the majority consciously chose to decide this case in such a way as to allow wrongdoers to skirt the consequences of their actions." Pet. App. 146a. The dissenting opinion meticulously critiqued the factual findings and new points of law fashioned "to achieve the result desired by the majority." *Id.* at 97a. "Not only is the majority opinion unsupported by the facts and existing case law," Justice Albright concluded, "but it is also fundamentally unfair." *Id.* at 146a.

In addition to their disagreement with the majority's forum-selection clause and res judicata analysis, the dissenters also explained that they were "unable to stand silent" regarding Justice Benjamin's failure to recuse himself. Pet. App. 146a n.16 (Albright, J., dissenting). "Upon reviewing the cases of *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986), and *In re Murchison*, 349 U.S. 133, 136 (1955)," the dissenters wrote, "it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts." Pet. App. 146a n.16 (Albright, J., dissenting). "It is now clear, especially from the last motion for disqualification filed in this case," they continued, "that there are now genuine due process implications arising under federal law, and therefore under our law, which have not been addressed." *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to clarify the circumstances in which due process requires the recusal of an elected judge who has benefited from a litigant's substantial campaign expenditures—an issue with profound ramifications for the Due Process Clause's guarantee of judicial neutrality and for the legitimacy of state judicial systems across the Nation.

Justice Benjamin's conclusion that he could participate in this case consistent with the requirements of due process cannot be squared with this Court's repeated admonition that, in order to foreclose the possibility of *actual* judicial bias, a judge "must avoid even the *appearance* of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (emphasis added). A constitutionally unacceptable appearance of bias exists, for example, where a judge criminally charges a defendant with contempt and then presides over the contempt proceedings (*In re Murchison*, 349 U.S. 133, 136 (1955)) and where a judge decides a legal issue that has a direct impact on the outcome of his own lawsuit. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). An equally unacceptable appearance of bias was generated when Massey's CEO spent $3 million supporting Justice Benjamin's candidacy for a seat on the state supreme court—an amount that represents more than sixty percent of the total expenditures supporting the campaign—and solicited additional contributions from other donors. Because of the substantial risk of actual bias created by Mr. Blankenship's extraordinary level of financial support for Justice Benjamin's campaign (which was provided to Justice Benjamin while this case was heading on appeal to the West Virginia Supreme Court of Appeals), the Constitu-

tion required Justice Benjamin to recuse himself from Massey's appeal.

Justice Benjamin's insistence on participating in this case therefore conflicts with this Court's decisions specifying the circumstances in which due process requires recusal. It also deepens a three-way division among the lower courts regarding the due process standard governing recusal determinations and is squarely at odds with a decision of the Supreme Court of Oklahoma holding that federal due process requires recusal whenever a judge receives substantial campaign contributions from a party or attorney who also solicited donations from other campaign supporters. *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001).

Although judicial elections—and contributions to elected judges—are a well-established means of selecting a state judiciary, there will be rare cases where campaign expenditures by a litigant create a constitutionally unacceptable appearance of impropriety. This is such a case—and it affords the Court an ideal opportunity both to clarify the circumstances in which due process mandates recusal and to restore the public's waning confidence in state judicial systems in the face of the increasingly significant role of campaign contributions in state judicial elections.

I. JUSTICE BENJAMIN'S REFUSAL TO RECUSE HIMSELF CONFLICTS WITH THIS COURT'S DUE PROCESS PRECEDENT.

This Court has emphasized that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). A "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Mon-*

roeville, 409 U.S. 57, 62 (1972). Indeed, "even if there is no showing of actual bias" on the part of a judge, "due process is denied by circumstances that create the likelihood or the appearance of bias" because such a *possibility* of judicial impropriety creates a constitutionally unacceptable risk of *actual* impropriety. *Peters v. Kiff*, 407 U.S. 493, 502 (1972).

Because Mr. Blankenship's extraordinary level of support for Justice Benjamin's campaign generated the unavoidable—and constitutionally impermissible—appearance that Justice Benjamin was biased in favor of Massey, Justice Benjamin's refusal to recuse himself from Massey's appeal conflicts with this Court's decisions specifying the circumstances in which due process requires recusal.

A. "[O]ur system of law has always endeavored to prevent even the probability of unfairness." *Murchison*, 349 U.S. at 136. This "stringent rule," the Court has explained, "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. But to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted). Accordingly, in *Murchison*, the Court held that it violated due process for a judge who acted as a "one-man judge-grand jury" to charge a witness with contempt in grand jury proceedings and then convict the defendant of that charge because, having been part of the accusatory process that culminated in the contempt charge, it was improbable that the judge could be "wholly disinterested" in the outcome of the contempt proceedings. *Id.* at 137.

Similarly, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the Court held that a judge who had been

subjected to repeated verbal abuse by a criminal defendant could not preside over the defendant's criminal contempt proceedings. *Id.* at 466. Despite the absence of evidence of actual bias on the part of the judge, the Court concluded that recusal was required because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Id.* at 465; *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable" in cases in which the judge "has been the target of personal abuse or criticism from the party before him").

And, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court held that it violated due process for a state supreme court justice to participate in the court's review of a verdict for bad-faith refusal to pay an insurance claim because the justice was at that time pursuing his own bad-faith suit against an insurance company and the legal principles established by the supreme court's decision had a direct impact on the outcome of the justice's own case. *Id.* at 825. The Court explained that it was "not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Id.* (alterations in original; internal quotation marks omitted). Justice Embry's ongoing pursuit of monetary damages through a cause of action identical to the one pending before the state supreme court offered just such a "temptation."

B. The appearance of impropriety created by the $3 million that Mr. Blankenship spent on Justice Benjamin's campaign is at least as strong as the ap-

pearance of impropriety in *Murchison*, *Mayberry*, and *Lavoie*. Indeed, just as it is human nature for a judge to be biased *against* a criminal defendant whom he has charged with committing contempt or by whom he has been verbally abused, it is equally a part of human nature for a judge to be biased *in favor* of a party whose CEO facilitated his election to the bench through massive campaign expenditures that were larger than the combined amount spent on the judge's campaign by all other supporters. *See Republican Party v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) ("relying on campaign donations may leave judges feeling indebted to certain parties or interest groups").

Similarly, just as a judge operates under a constitutionally unacceptable "temptation" to decide a case in a manner that furthers his own interests where he is pursuing a lawsuit raising issues identical to the case pending before him, such a "temptation" is equally acute where the judge is beholden to the CEO of a defendant corporation for the majority of the funds expended in support of his recent campaign for office—and where casting an outcome-determinative vote against the corporation in a multimillion-dollar case may foreclose the possibility of similar financial support when the judge seeks reelection.[5]

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[5] This Court has held that it "violates the Fourteenth Amendment . . . to subject [a defendant's] 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." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Accordingly, it was inconsistent with due process, for example, for a village mayor to preside over a hearing for violation of a village ordinance where the mayor was responsible for the village's finances, which depended to a significant extent

The circumstances surrounding Justice Benjamin's election to the bench therefore "create[d]" a constitutionally intolerable "appearance of bias" (*Peters*, 407 U.S. at 502) that required Justice Benjamin to step aside from consideration of Massey's appeal. Certiorari is warranted to reconcile Justice Benjamin's insistence on participating in this case with the requirements established by this Court's due process jurisprudence.

II. JUSTICE BENJAMIN'S REFUSAL TO RECUSE HIMSELF DEEPENS AN EXISTING CONFLICT AMONG THE LOWER COURTS REGARDING THE CIRCUMSTANCES IN WHICH RECUSAL IS CONSTITUTIONALLY REQUIRED.

Although this Court has repeatedly recognized that "[t]rial before 'an unbiased judge' is essential to due process" (*Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam)), lower courts have reached conflicting conclusions regarding the federal constitutional standard governing recusal determinations—a conflict that extends to the campaign contribution setting implicated in this case.

To be sure, numerous lower courts have faithfully applied this Court's decisions holding that due

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upon the fines levied in such proceedings. *Ward*, 409 U.S. at 60. The Court explained that the procedure provided the mayor with a financial incentive to rule against the defendant and therefore denied the defendant "a neutral and detached judge." *Id.* at 62. Although such a direct, pecuniary interest is not necessary to establish that a judge's participation in a case violated due process, Mr. Blankenship's expenditures on Justice Benjamin's campaign were so significant that they implicate not only this Court's decisions regarding appearances of impropriety but also those decisions regarding actual pecuniary interests.

process prohibits both actual bias and the appearance of bias on the part of a judge. *See*, *e.g.*, *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 678 (4th Cir. 1989) ("The due process clause protects not only against express judicial improprieties but also against conduct that threatens the 'appearance of justice.'"); *Archer v. State*, 859 A.2d 210, 227 (Md. 2004) ("Not only does a defendant have the right to a fair and disinterested judge but he is also entitled to a judge who has 'the appearance of being impartial and disinterested.'").[6]

But at least five state supreme courts, agreeing with Justice Benjamin, have held that the Due Process Clause requires only the absence of actual bias and does not require recusal based on an appearance of impropriety. *See State v. Canales*, 916 A.2d 767, 781 (Conn. 2007) ("a judge's failure to disqualify himself or herself will implicate the due process clause only when the right to disqualification arises from *actual bias* on the part of that judge") (emphasis in original); *Cowan v. Bd. of Comm'rs*, 148 P.3d 1247, 1260 (Idaho 2006) ("we require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has

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[6] *See also Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) ("Due process requires not only that a judge be fair, but that he also appear to be fair.") (citation omitted); *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) ("there need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns"); *State v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989) (due process requires that justice "'satisfy the appearance of justice'").

deprived the proceedings of the appearance of fairness").[7]

Moreover, while stopping short of reading the Due Process Clause to forbid only actual bias, several circuits have held that due process does not invariably require the disqualification of a judge who merely appears to be partial. *See*, *e.g.*, *Davis v. Jones*, 506 F.3d 1325, 1333 (11th Cir. 2007) (this Court's precedent does not clearly establish "that an appearance problem violates the Due Process Clause"); *Welch v. Sirmons*, 451 F.3d 675, 700 (10th Cir. 2006) (this Court's precedent does not hold "that the mere appearance of bias on the part of a state trial judge, without more, violates the Due Process Clause"); *Johnson v. Carroll*, 369 F.3d 253, 262 (3d Cir. 2004) (same); *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1371-72 (7th Cir. 1994) (en banc) ("The Supreme Court has never rested the vaunted principle of due process on something as subjective and transitory as appearance."). These circuits generally acknowledge, however, that even in the absence of actual bias, there may be circumstances that "give rise to a presumption or reasonable probability of bias" sufficient to establish a due process violation. *Welch*, 451 F.3d at 700; *see also Del Vecchio*, 31 F.3d at 1371 ("the due process clause sometimes requires a judge

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[7] *See also State v. Reed*, 144 P.3d 677, 682 (Kan. 2006) ("in order to establish a violation of due process, [one] must demonstrate actual bias or prejudice by the judge"); *Hirning v. Dooley*, 679 N.W.2d 771, 780-81 (S.D. 2004) (party's "constitutional right to due process is not implicated" where he failed to "assert actual bias or prejudice"); *Kizer v. Dorchester County Vocational Educ. Bd. of Trs.*, 340 S.E.2d 144, 148 (S.C. 1986) ("actual bias rather than a mere potential for bias must be shown").

to recuse himself without a showing of actual bias, where a sufficient motive to be biased exists").

Justice Benjamin's decision not to recuse himself because he saw no objective evidence that he was actually biased in favor of Massey deepens this tripartite disagreement among the lower courts. It also directly conflicts with a decision in which the Supreme Court of Oklahoma—siding with those courts that have deemed an appearance of impropriety sufficient to require recusal—held that federal due process requires recusal whenever a judge receives substantial campaign contributions from a party or attorney who also solicited donations from other campaign supporters. *See Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001); *see also MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1337 n.4 (Fla. 1990) ("There may very well come a point where a political contribution is substantial enough that it would create a well-founded fear of bias or prejudice.").

In *Pierce*, the Supreme Court of Oklahoma held that it violated federal due process for a judge to preside over divorce proceedings where an attorney for one of the parties had donated $5,000 to the judge's reelection campaign and solicited other contributions on the judge's behalf while the case was pending. 39 P.3d at 799. The court explained that "the reach of due process jurisprudence requires not only a fair tribunal, but also the *appearance* of a fair tribunal." *Id.* at 798 (citing *Murchison*, 349 U.S. at 136) (emphasis in original). Applying the due process principles articulated by this Court in *Murchison*, *Lavoie*, and other cases, the Oklahoma court "conclude[d] that due process must include the right to a trial without the *appearance* of judge partiality arising from counsel's campaign contributions and solicita-

tion of campaign contributions on behalf of a judge during a case pending before that judge." *Id.* at 799 (emphasis in original).

Because "the appearance of justice is often as important as the proper administration of justice," the Oklahoma court further held that "[c]ampaign contributions and solicitation of contributions of funds for judges by lawyers appearing before those judges in such amounts as to give off an appearance of partiality is not the type of error to which [it] will apply a harmless error standard." *Pierce*, 39 P.3d at 800. The court therefore disqualified the trial judge from further proceedings in the case. *Id*.

Justice Benjamin's refusal to recuse himself from consideration of Massey's appeal directly conflicts with the Supreme Court of Oklahoma's conclusion that federal due process requires the recusal of a judge who has benefited from the substantial campaign contributions and fundraising efforts of a party or attorney. Mr. Blankenship, chairman, CEO, and president of Massey, spent $3 million supporting Justice Benjamin's campaign to unseat Justice McGraw after a jury had returned a $50 million verdict against Massey and the case was heading on appeal to the West Virginia Supreme Court of Appeals. In addition to these extraordinary expenditures supporting Justice Benjamin's campaign—which constituted more than sixty percent of the *total* amount spent in support of his candidacy—Mr. Blankenship also solicited funds from potential donors on behalf of the campaign. Justice Benjamin nevertheless refused to recuse himself from consideration of Massey's appeal. If Mr. Blankenship had provided such significant campaign support to a justice on the Supreme Court of Oklahoma, that justice would have been required, under that court's interpretation of

federal due process in *Pierce*, to recuse himself from any case involving Mr. Blankenship.

In light of these divergent understandings of federal due process, this Court should grant review to provide the lower courts with authoritative guidance regarding the recusal standard mandated by the Due Process Clause and the circumstances in which that standard requires the recusal of a judge who has benefited from a litigant's campaign expenditures and fundraising efforts.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO THE PRESERVATION OF PUBLIC CONFIDENCE IN STATE COURT SYSTEMS ACROSS THE NATION.

This case raises a recurring issue of far-reaching national importance. Thirty-nine States elect at least some of their judges, and the amount of money spent on state judicial elections by candidates and third-party interest groups is steadily increasing. Indeed, between 1999 and 2006, candidates seeking seats on state supreme courts raised more than $157 million, which is nearly double the amount raised by candidates in the four previous election cycles. James Sample et al., *The New Politics of Judicial Elections* 15 (2006).

As the amount of contributions and independent expenditures in state judicial races increases, so will the number of cases in which a party or attorney has donated significant sums of money to a judge, and so, too, will requests for recusal of those judges. Although Mr. Blankenship's expenditures on Justice Benjamin's campaign are extraordinary by any measure, they exemplify the growing prevalence of substantial contributions and expenditures in state

judicial elections. *See* Sample, *supra*, at 15 (reporting that the median amount raised in 2006 by candidates for state supreme court seats was $243,910, which is $40,000 more than the median amount in the 2004 election cycle).

In light of the increasingly prominent role of money in judicial elections and the public perception of impropriety that such campaign contributions tend to generate, this Court should clarify the circumstances in which due process requires the recusal of a judge who benefited from the campaign expenditures of a party or an attorney. *Cf.* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, at A1 (discussing study indicating that campaign contributions influenced the voting patterns of elected judges in Ohio). Indeed, this Court has repeatedly emphasized the importance of maintaining the courts' "reputation for impartiality and nonpartisanship." *Mistretta*, 488 U.S. at 407; *see also White*, 536 U.S. at 802 (Stevens, J., dissenting) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring) ("The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges.").

Although "it may seem difficult to reconcile these aspirations with elections" (*Lopez Torres*, 128 S. Ct. at 803 (Kennedy, J., concurring)), elections have long been an accepted means of selecting state court judges. Contributions to judicial candidates from parties and their attorneys are a necessary byproduct of that electoral system, and it is certainly not

the case that every such contribution or expenditure creates an appearance of impropriety that is serious enough to require a judge's recusal. In fact, it will be the exceptional case where due process requires a judge to recuse himself on the basis of campaign expenditures by a party or an attorney.

This is such an exceptional case because of the extraordinary amount of money that Mr. Blankenship spent on Justice Benjamin's campaign, the timing of those expenditures (which were made after the entry of a multimillion-dollar judgment against Massey), and Mr. Blankenship's efforts to solicit campaign contributions from other donors on behalf of the Benjamin campaign. This case therefore represents the ideal opportunity for this Court to provide the lower courts with guidance regarding the factors that courts should weigh when determining whether due process requires recusal.

Ultimately, there is little reason to believe that the role of money in state judicial elections will diminish in the future. Indeed, as partisan interest groups become more actively involved in such elections, it is likely that expenditures on state judicial elections will increase substantially over time. In order to preserve public confidence in state judicial systems inundated with campaign contributions, this Court should grant certiorari and clarify the circumstances in which due process requires the recusal of judges who have benefited from such substantial financial support.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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