No. 08-22

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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Four months after the West Virginia Supreme Court of Appeals released its 3-2 opinion overturning the $50 million verdict in favor of petitioners—and nearly a month after the petition for a writ of certiorari was filed in this Court—Justice Brent Benjamin issued a lengthy concurring opinion defending his decision to participate in the appeal of his principal financial supporter. That concurring opinion—which is reproduced in the appendix to this Supplemental Brief—underscores the conflict between Justice Benjamin's decision not to recuse himself and the due process precedent of both this Court and a number of lower courts. Far from dispelling the constitutional concerns generated by his participation in this case, Justice Benjamin's concurring opinion reinforces the compelling need for this Court to clarify when the Constitution requires the recusal of a judge who has benefited from a litigant's substantial campaign expenditures.

In his concurring opinion, Justice Benjamin insists that his "participation herein was wholly consistent with due process." Supp. App. 23a. Justice Benjamin's contention that due process did not require recusal—notwithstanding the more than $3 million that Massey's CEO spent supporting his judicial election campaign—rests upon his belief that "[d]ue process . . . requires recusal *only* in those rare cases wherein a judge or justice has a 'direct, personal, substantial [or] pecuniary interest' in the outcome of the case." *Id.* at 28a (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986)) (second brackets in original; emphasis added).

Justice Benjamin categorically asserts that an appearance of impropriety generated by a judge's participation in a case can *never* be so serious as to require recusal under the Due Process Clause. *See* Supp. App. 23a n.14 ("it is an extraordinary and unprecedented argument which contends that '*apparent* conflicts' alone can have such an effect on the outcome of a case that due process considerations are implicated") (emphasis in original); *id.* at 27a (the "due process 'floor' is 'a "fair trial in a fair tribunal," before a judge with no *actual* bias against the defendant *or interest in the outcome of* his particular case'") (quoting *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997)) (emphasis added by Justice Benjamin). According to Justice Benjamin, the "very notion of appearance-driven disqualifying conflicts . . . is antithetical to due process." *Id.* at 21a n.12.

Justice Benjamin's uncompromising position that due process *never* requires recusal based on an appearance of impropriety is squarely at odds with this Court's precedent. Indeed, this Court has explained that, "even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters v. Kiff*, 407 U.S. 493, 502 (1972); *see also Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) ("any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias"). This Court has accordingly concluded on multiple occasions that due process required a judge's recusal, despite the absence of evidence of *actual* bias on the part of the judge. *See*, *e.g.*, *In re Murchison*, 349 U.S. 133, 137 (1955); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971).

This "stringent rule" mandating recusal based on an appearance of impropriety is constitutionally required because "our system of law has always endeavored to prevent even the *probability* of unfairness." *Murchison*, 349 U.S. at 136 (emphasis added). Justice Benjamin, in contrast, is prepared to tolerate even a substantial probability of judicial bias where the aggrieved party is unable to prove that the judge was actually biased.*

Justice Benjamin is far from the only lower-court judge to deny a recusal motion based on the conclusion that "appearances . . . should never alone serve as the basis for a due process challenge" to a judge's participation in a case. Supp. App. 23a n.14. At least five state supreme courts agree with Justice Benjamin that recusal is constitutionally required only where there is proof that a judge is actually biased. *See* Pet. 22-23 & n.7 (citing cases). Those decisions directly conflict with a long line of lower-court cases recognizing that due process requires the recusal of a judge tainted by an appearance of impropriety. *Id.* at 22 & n.6 (citing cases). These divergent due process standards reinforce the need for this Court to grant certiorari and explicitly reject the

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* Such an actual bias standard would provide scant protection for litigants' due process rights. Indeed, only in the most exceptional circumstances is there concrete evidence available to demonstrate that a judge is *actually* biased against a litigant. In the absence of such evidence, a judge harboring bias against a litigant would be able to participate in a case by simply denying the existence of that bias—even where the facts created an overwhelming appearance of impropriety. For that reason, this Court has never required evidentiary confirmation of actual bias when determining whether due process mandated a judge's recusal. *See*, *e.g.*, *Murchison*, 349 U.S. at 137; *Mayberry*, 400 U.S. at 465.

artificially narrow conception of due process endorsed by Justice Benjamin.

Indeed, Justice Benjamin has it precisely backward when he suggests that "an appearance-driven due process standard for disqualification" would have an "incalculable" and "long-lasting negative effect on public confidence in our courts." Supp. App. 29a. As evidenced by the diverse group of *amici* supporting the petition for certiorari and the extensive public attention generated by this case (*see* Pet. 12-13), it is a judge's insistence on participating in a case when tainted by an unavoidable appearance of impropriety—not the application of the Due Process Clause's fundamental procedural protections to ensure a fair hearing for all litigants—that profoundly undermines "public confidence in our courts" and the judges who preside over them.

This Court's review is necessary to restore public confidence in state courts inundated by staggering financial contributions to judges who insist on deciding their financial supporters' cases in the absence of evidentiary proof of actual bias.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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