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

BRIEF *AMICUS CURIAE* OF THE WASHINGTON APPELLATE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

A. The Washington Appellate Lawyers Association

This amicus curiae brief in support of Petitioners is filed on behalf of the Washington Appellate Lawyers Association ("WALA").

The constitution of WALA recites the following purposes of the organization, among others: to foster and encourage improvements in the practice of appellate advocacy; to promote and encourage changes in reforms and appellate procedure designed to insure effective representation of appellate litigants and more efficient administration of justice at the appellate level; to cooperate with the judiciary, the Legislature, and such other organizations and committees as may be involved in matters relating to the appellate practice; and to actively support the integrity of the appellate process and principles of ethical appellate advocacy in the spirit of a free and independent bar.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* Washington Appellate Lawyers Association or counsel for *amicus* contributed monetarily to the preparation and submission of this brief. The parties have consented to the filing of this brief. Counsel for petitioners advises that they have filed a letter of consent with the Court. *Amicus* is filing a letter of consent from respondent.

To promote these purposes, members of WALA have actively supported improvements in judicial elections in Washington State, especially at the appellate level. Members of WALA have supported establishing limitations on contributions to committees supporting the election of judicial candidates, public financing of judicial elections, making available to the public more information about judicial elections, and exploring proposals to require recusal of judges who exceeded a threshold amount of campaign contributions from a party or counsel for a party.

Members of WALA represent a variety of individuals, organizations and governmental units in every substantive area of the law. WALA views with alarm the rapidly increasing magnitude of both judicial campaign contributions and independent expenditures in judicial races. Washington State, while by no means at the forefront of this trend, has witnessed a dramatic surge in both direct and indirect contributions to judicial campaigns. *E.g.*, Charles K. Wiggins, *The Washington State Supreme Court Elections of 2006: Factors at Work and Lessons Learned*, 46 Judges Journal 33 (Winter 2007) (hereafter "Judges Journal"). WALA submits that substantial campaign contributions and independent expenditures threaten to compromise the impartiality of even the most conscientious judge. At some point, the due process clause, interpreted in light of centuries of cultural and legal tradition on which our legal system is based, precludes a judge who has benefited from contributions or independent expenditures from sitting on a case.

The time is ripe for the Court to examine the issue, the facts of the *Caperton* case present an ideal vehicle for this examination, and contemporary campaign conduct throughout the country heightens the need for guidance from this Court.

B. Judicial Elections In Washington State

A brief description of judicial selection in Washington State further explains why *amicus* WALA urges this Court to grant certiorari. Prior to statehood, the judges of Washington territory were appointed by the President with the advice and consent of the Senate. Charles H. Sheldon, *A Century of Judging: A Political History of the Washington Supreme Court* 15 (1988). Residents of the territory resented the fact that many of the appointments were made without regard to local feeling or knowledge of the laws, people and land of Washington territory, with half of the judges having been from out-of-state when they were appointed. *Id.* at 17.

By 1889, when Congress authorized statehood for Washington (as well as the Dakotas and Montana), there was virtually no support among the Constitutional Convention delegates for continuing the practice of appointing judges. Charles K. Wiggins, *George Turner and the Judiciary Article: Part II*, 43 Wash. State B. News No. 10, 20 (1989).[2] The Convention

2 The sentiment for election was amusingly expressed by attorney Lair Hill, who wrote a proposed constitution for the new state, published in the Morning Oregonian on the opening day of the convention. Hill reported the response of a

overwhelmingly decided that all supreme court judges and superior court judges (Washington's trial court of general jurisdiction) would be elected, with the governor appointing to fill mid-term vacancies. Wash. Const. art. IV §§ 3, 5.

The Constitutional Convention's choice of judicial elections is unsurprising. In the early days of the Republic, judges were appointed either by the governor or the legislature. Larry Berkson, Rachel Caulfield, *Judicial Selection of the United States: A Special Report* (1980, updated in 2004), *available at* http://www.ajs.org/selection/docs/Berkson.pdf. "At the time of the founding, only Vermont (before it became a State) selected any of its judges by election." *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002). Even today, of the five states using gubernatorial or legislative appointment of judges, four are on the east coast – Maine, New Jersey, Virginia and South Carolina – with California using a combination of

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"gentleman who had considered the subject pretty thoroughly" to the suggestion that appointed judges would be abler and more independent:

> That is a lawyer's view of it, and possibly it is correct, though I doubt it. At all events, correct or incorrect, it is immaterial; for the people of this republic have concluded that their courts of justice are of sufficient importance to warrant their being brought into conformity with republican institutions; and they are not going to allow anybody hereafter to force upon them better judges than they think they need.

Lair Hill, *Article*, Morning Oregonian July 4, 1889.

gubernatorial appointment of appellate judges and popular election of superior court trial judges. American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf.

In the early part of the 19th Century, appointment of judges lost favor due to resentment of control over the judiciary by the landed upper class, and through the influence of popular sovereignty generally described as Jacksonian Democracy. Burkson & Caulfield, *supra*. "'Between 1846 and 1912 every new state entering the Union embraced' popular elections, and many of the earlier appointive states changed to this mode of recruitment." Sheldon, *supra* at 22, (quoting Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, American Bar Foundation Research Journal (Spring 1984), 346-47).

The delegates to the 1889 convention assumed that judges would be chosen through partisan elections (although the Constitution is silent on the subject). In 1907 the legislature provided that judicial elections would be non-partisan. Sheldon, *supra*, at 43.

Throughout the twentieth century, a number of states moved from elective systems to commission systems (also known as merit selection or the "Missouri Plan"). Commission systems have been studied and proposed in Washington at least four times: in 1934 by the Washington State Bar

Association ("WSBA"); in 1969 by a Constitutional Revision Commission appointed by Governor Daniel Evans; in 1995 by the Walsh Commission, with members appointed by all three branches of state government; and in 2007 by a majority report of the Task Force of the WSBA, which was subsequently rejected by the Board of Governors of the Association. John Ruhl, *President's Page: Bills Back Judicial Appointment To End Special Interest Wave,* King County Bar Bull. (March 2007) *available at* www.kcba.org/scriptcontent/kcba/barbulletin/archive/2007/07-03/prespage.cfm; WSBA News Flash (June 2008), www.wsba.org/newsflash0608.pdf. Bills calling for a popular vote on a constitutional amendment to adopt a commission system are periodically introduced in the Legislature, but none has succeeded.

Meanwhile, campaign contributions and independent expenditures for Washington Supreme Court elections have recently increased dramatically. The total funds spent by all Supreme Court candidates in one election cycle did not top $1 million until 2004, when the candidates spent $1.2 million.[3] Judges Journal, *supra* at 33. From 1990 through 2004, only five candidates raised and spent over $200,000. *Id.* But in 2006, the total spending on Supreme Court elections quadrupled. *Id.* at 34.

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3 The Washington Supreme Court has nine justices serving six-year staggered terms, with three justices up for election each even-numbered year. RCW 2.04.070-.071.

These historical facts give rise to the concern of *amicus* WALA. The choice of an elective system in Washington State, as doubtless in most states, has been dictated by history. Whatever its merits or demerits, Washington's system of electing judges overwhelmingly resists change and will likely persist for some time to come. Although no single special interest has succeeded in electing a judge to the Washington Supreme Court through contributions and independent expenditures, the West Virginia experience, and the experience of other states, teaches that special interest success is only a matter of time. *Amicus* WALA urges the Court to grant certiorari to begin to define the parameters of the due process clause as applied to judges who are elected through substantial contributions and independent expenditures.

SUMMARY OF ARGUMENT

This Court's prior decisions establish beyond cavil that the protections of the Constitution, and especially the due process clause, apply to judicial elections and specifically to the potential financial interest of a judge in the outcome of a case. Just as election supporters have a first amendment right to support the judicial candidates of their choice, so litigants have a due process right to judicial decisions free of financially-interested judges. In this era of rapidly increasing contributions and independent expenditures in state judicial elections, the Court should grant certiorari to analyze and define the application of the due process clause to the impact of such contributions and expenditures.

In defining the application of the due process clause to judicial campaign contributions and expenditures, the Court draws on a rich tradition prohibiting financially-interested judges from deciding cases. The Court can draw on accumulated wisdom on this subject from early Biblical times to the Magna Charta, from the common law to the ABA Canons of Judicial Ethics. Moreover, this Court has already laid a foundation for applying due process to judicial campaign expenditures.

Amicus WALA suggests that in defining the due process parameters applicable to judicial campaign contributions and expenditures, the Court consider the following non-exclusive factors: the amount of money involved; the directness of the relationship of the contribution/expenditure to the case; the availability of another judge to substitute for the financially-interested judge; and, the availability of review of the decision of an individual judge not to recuse or disqualify himself or herself from the case. A decision by this Court will provide much-needed guidance to judicial candidates, campaign donors and supporters, non-donor litigants, and the courts in general.

ARGUMENT

A. The Selection Of Judges Is Subject To Fundamental Constitutional Rights And Limitations, Especially The Due Process Clause.

This Court has clearly held that the selection of judges by popular election is subject to the fundamental protections and limitations set forth in the United States Constitution. *Republican Party of Minn. v. White*, *supra.* Despite the diversity of the opinions in *White*, the key issue is the importance of judicial independence and impartiality. 536 U.S. at 775 (Scalia, J.); 536 U.S. at 788 (O'Connor, J., concurring); 536 U.S. at 793 (Kennedy, J., concurring); 536 U.S. at 797 (Stevens, J., dissenting); 536 U.S. at 804-05 (Ginsburg, J., dissenting). As Justice O'Connor pointed out in her concurring opinion,

> [R]elying on campaign donations may leave judges feeling indebted to certain parties or interest groups. . . . Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."

536 U.S. at 790 (O'Connor, J., concurring). Justice Kennedy noted that it is vitally important to maintain the integrity of the judiciary: "Judicial

integrity is, in consequence, a state interest of the highest order." 536 U.S. at 793 (Kennedy, J., concurring).

The Court has also found violations of the due process clause where judges have sat in cases in which they had an interest in the outcome of the case. *E.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Monroeville*, 409 U.S. 57 (1972); *Bracy v. Gramley*, 520 U.S. 899 (1997); *In Re Murchison*, 349 U.S. 133 (1955).

In light of these precedents, there can be no doubt that due process places some limit on the propriety of a judge who has received campaign contributions to sit in judgment in a case involving that party. As the petition points out, judicial campaign contributions have increased dramatically in recent years. This Court has not yet had an opportunity to define the relationship between judicial campaign contributions and the due process clause. The time is right for an exploration of that relationship, judicial contributors deserve guidance on the impact their contributions may have, non-donor parties to lawsuits need guidance on the applicable principles, judges themselves would benefit from this Court's review, and this case presents an ideal vehicle for such a review.

B. Two Of The Most Fundamental Protections Of Due Process Are Judicial Impartiality And Independence From Financial Interest In The Case.

This Court looks to legal traditions from ancient times through English history to the American experience in measuring the parameters of the due process clause. *In re Winship*, 397 U.S. 358, 361-62 (1970); *Klopfer v. North Carolina*, 386 U.S. 213, 223-25 (1967). The prohibition against adjudication by a financially-interested judge is of ancient vintage and has been repeatedly articulated down through the centuries. By defining the application of the due process clause to judicial campaign contributions, this Court will be building on a solid foundation, applying a well-established principle to recent developments in judicial election campaigns.

The prohibition against financially-interested judges is rooted deep within the Judeo-Christian heritage. The law of Moses directed the appointment of judges who "shall judge the people fairly": "Do not pervert justice or show partiality. Do not accept a bribe, for the bribe blinds the eyes of the wise and twists the words of the righteous." *Deuteronomy* 16:18-19 (New Int. Vers.). The wisdom of this admonition played out in the early biblical narrative, when Samuel appointed his two sons as judges for Israel: "But his sons did not walk in his ways. They turned aside after dishonest gain and accepted bribes and perverted justice." *1 Samuel* 8:3 (New Int. Vers.). The writer of *1 Samuel* tells us that this so alienated the people

that they rejected the leadership of judges and demanded a king. *1 Samuel* 8:5. The writer of Proverbs teaches, "He who is greedy for unjust gain makes trouble for his household, but he who hates bribes will live." *Proverbs* 15:27 (Rev. Std. Vers.).

Several lessons emerge from these verses. First, judges are commanded to refrain from both bribery and "dishonest gain." Dishonest gain is a broader term, standing in contrast to doing justice and judging fairly, instead practicing oppression and violence. *E.g. Jeremiah* 22:15-17. Second, bribery, or seeking financial gain, "blinds the eyes of the wise", preventing them from seeing and judging correctly.

A similar pledge against bribery and unjust gain was carried into Article 40 of the Magna Charta (1215): "To none will we sell, to none will we deny, to none will we delay right or justice." (Quotation from *Parker v. Ellis*, 362 U.S. 574, 585, n. 11 (1960) (Warren, C.J., dissenting) (quoting Magna Charta, reprinted in S. Doc. No. 232, 66th Cong., 2d Sess. 17) *overruled by*, *Carafas v. La Vallee*, 391 U.S. 234, 240 (1968) (adopting C.J. Warren dissent in *Parker*.). The Magna Charta's prohibition against the sale of justice became the touchstone for disqualification at the common law, which was limited to judges with a pecuniary interest in the outcome of the litigation:

> At the time the American court system was established, the common law of disqualification "was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing

> else." John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947). No other interest would suffice to require, or even permit, a judge to disqualify himself, including evidence of bias against a litigant. *Id*. at 611-12; see also *Aetna*, 475 U.S. at 820.

Del Vecchio v. Ill. Dept. of Corr., 31 F.3d 1363, 1372 (7th Cir. 1994).

The common law rule against financially-interested judges is illustrated by *Bonham's Case*, 8 Coke 118a (cited at *Tumey*, *supra*, 273 U.S. at 524). *Bonham's Case* arose out of an early day form of licensing in which several doctors designated by the King as "censors" denied Bonham a license to practice "physic." Mark Andrew Grannis, *Note: Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 Mich. L. Rev. 382, 387 (1987). Bonham was imprisoned when he continued to practice without a license, but, "Lord Coke rendered judgment for Bonham in his suit for false imprisonment, holding that '[t]he censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture . . . ." *Id*. at 387-88.

The common law prohibition against financially-interested judges was carried over into the first statutory disqualification standard adopted by Congress in 1792, providing that a judge should recuse in any case in which "it shall

appear that the judge of such court is, any ways, concerned in interest . . . ." Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278-79 (repealed 1911) (quoted in Peter Bowie, *Centennial Reflections on Roscoe Pound's The Causes of Popular Dissatisfaction With The Administration of Justice: Foreword: The Last 100 Years: An Era of Expanding Appearances*, 48 S. Tex. L. Rev. 911, 913 (2007). In 1922, Chief Justice Taft chaired the American Bar Association Committee that drafted the Canons of Judicial Ethics, which provided that a judge should avoid even the appearance of impropriety. Bowie, *supra*, at 917-18. Avoiding the appearance of impropriety was carried into the 1972 ABA Code of Judicial Conduct, and eventually into 28 U.S.C. § 455(a), requiring that a judge "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* at 930-31.

This Court relied on this common law background in the series of cases discussed in the petition in this case. In *Tumey*, 273 U.S. 510, Chief Justice Taft delivered the opinion of the court finding a violation of due process under the Ohio statutory scheme in which the judge (the mayor of the village prosecuting the offense) was paid $12 for presiding over a case and finding the defendant guilty. Chief Justice Taft wrote:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the

> accused, denies the latter due process of law.

273 U.S. at 532. This Court relied on *Tumey* to find a violation of due process under a similar scheme in *Ward*, 409 U.S. 57, finding a "possible temptation" not to hold the balance nice, clear and true even though the Mayor in the *Ward* case did not have a direct financial stake in the outcome of the case.

Relying on *Tumey*, the Court held in *In re Murchison*, 349 U.S. at 136 that, "A fair trial in a fair tribunal is a basic requirement of due process." In order to prevent even the probability of unfairness, "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* And in *Aetna Life Ins.* 475 U.S. 813, the court found a violation of due process where a state supreme court justice participated in review of a bad faith refusal to pay an insurance claim where the judge was a party to a bad faith claim in a different case, that could be impacted by the decision under review.

C. The Court Should Grant Certiorari To Analyze How These Longstanding Prohibitions Against Financial Influence Apply To Modern State Judicial Elections.

The authorities discussed above, ancient and modern, are a rich source of guidance for applying the due process clause to judicial campaign contributions. Just as the first amendment limits the ability of the states to regulate speech in judicial election campaigns, so the due process

clause speaks to the right of a litigant to adjudication by a fair and unbiased judge free of any financial interest in the matter. Indeed, the applicability of the due process clause in this case is even stronger than the application of the first amendment in *White*. Unlike the announce clause in *White*, the prohibition against financially-interested judges is rooted deeply in our legal and cultural heritage. The Court should grant certiorari and analyze whether the petitioners were denied due process by the participation of Justice Benjamin in the decision of the West Virginia Supreme Court.

In applying the due process clause, the Court should consider the following factors. First, the Court should consider the amount of money involved. It is probably impossible to establish a bright line test for the level of contribution or independent expenditure that would give rise to a due process violation. But the amount of money involved is certainly a major factor. The Court may wish to consider judicial campaign contribution limits established by the various states as an indicator of the legislative judgment that there is an acceptable level of contributions that do not give rise to concern as a matter of public policy. The Court may also wish to consider the size of the contribution or independent expenditure in light of other expenditures in the judicial campaign. Whatever measure the Court may use, the expenditure of more than $3 million by the litigant's chief executive officer is a huge investment triggering the due process clause.

Second, the Court should consider the directness of the judge's interest in the outcome of the case under consideration. As this Court's precedents establish, an indirect interest suffices. Here, this case was destined for appeal during the judicial election. The $3 million spent to support Justice Benjamin was more than the total amount spent supporting Benjamin's campaign by all other sources. Petition at 2. No judge sitting on this appeal could set aside his or her awareness of the importance of these expenditures. As a matter of common sense, these expenditures directly affected Justice Benjamin's election and it is unrealistic to expect Justice Benjamin "to hold the balance nice, clear and true". *Tumey*, 273 U.S. at 532.

A third factor the Court should consider is whether the financially-interested judge can be replaced by a substitute, or whether disqualification would result in a decision by less than a full court. As members of this Court have noted, "there's no substitute for a Supreme Court Justice," making it important that members of this Court not lightly recuse themselves. Ryan Black & Lee Epstein, *Recusal On Appeal: Recusals and the "Problem" of an Equally Divided Supreme Court*, 7 J. App. Prac. & Process, 75, 76-77 (2005) (quoting Ruth Bader Ginsburg, *An Open Discussion With Justice Ruth Bader Ginsburg*, 36 Conn. L. Rev. 1033, 1039 (2004)).

By contrast, when a justice is disqualified from sitting in the West Virginia Supreme Court, the Chief Justice or Acting Chief Justice may assign a senior justice, senior judge, or a circuit judge to serve in place of disqualified justice. W.

Va. R. App. P. 29(g).[4] Disqualification should be more readily granted in jurisdictions in which a substitute judge is available.

A fourth factor the Court should consider is whether a justice's recusal decision is subject to review by other judges. No such review is available under West Virginia Supreme Court Practice. W. Va. R. App. P. 29.[5] Where no review is available, the judge who is asked to recuse is sitting in judgment on his or her own fitness to decide the case. This practice is contrary to the long established principle that no one should sit in judgment on their own case. *Munchison*, 349 U.S. at 136. The absence of any review mechanism heightens the need for due process protection.

Amicus WALA urges the Court to hold that a court considering a due process challenge to a judge's participation in a case should consider these non-exclusive factors, together with any other factors that might bear on the due process rights of the litigant challenging a judge's participation in the case.

CONCLUSION

Substantial judicial campaign contributions and expenditures of the magnitude in this case call for analysis of the due process rights of the petitioners. Review by this Court will also provide

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4 In Washington State, if recusal of a justice reduces the court to an even number, the Chief Justice must appoint a pro tempore justice unless a majority of the court directs otherwise. Wash. Sup. Ct. Admin R. 21(a).

5 Nor is review available under Wash. S. C. Admin R. 21.

guidance to other potential judicial campaign donors and supporters, to litigants facing a judge who has benefited from substantial contributions and expenditures, and to elected judges throughout the country in ruling on requests that they recuse themselves from further participation. Amicus WALA urges the Court to grant certiorari.

Dated: August 1, 2008.

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