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 Petition For A 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

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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 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, but rather strives to promote fair courts regardless of selection mechanism.

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

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* contributed monetarily to the preparation of this brief. The parties have consented to the filing of this brief. Petitioners filed a letter of consent to all *amicus* briefs with the Clerk of the Court. Written consent from Respondents has been filed with the Clerk of the Court along with this brief.

laws are enforced. CLC also works to support prompt and rigorous enforcement of government ethics rules.

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. The Institute believes that surmounting the most intractable issues facing the nation will require fundamental reform that results in a government that inspires and instills public confidence through transparency and accountability, leadership that serves as a catalyst for innovation and collaboration, and policies that promote competition in elections and the markets. 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 a concern that the injection of massive sums of money into judicial campaigns by litigants and lawyers, can, in certain 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* believe that the time is ripe for this Court to

provide litigants, lawyers, and judges nationwide with guidance regarding the role of recusal under the Due Process Clause of the Fourteenth Amendment and therefore file this brief in support of the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

This case is an exceptional instance of a broader national trend. It concerns the affront to due process when: (1) a litigant faces a $50 million judgment in a contract dispute between mining companies; (2) a sole individual, the litigant's CEO, spends more than three million dollars to help elect a judge – more than all other expenditures in support of the judge *combined*; (3) the judge, after his election, refuses to recuse himself from the litigant's appeal; and (4) the same judge casts a deciding vote reversing the judgment against the litigant. The facts of this case are egregious, but the underlying questions about due process are raised in an increasing number of cases nationally. This case provides the Court with a clean vehicle to address an important constitutional issue and to prevent the facts of this case from becoming harbingers of a new and disturbing norm.

The last decade has seen an explosion in campaign expenditures in judicial elections. Lawyers and litigants, unsurprisingly, are the principal sources of funds. Increasingly, as retired Supreme Court 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.

State court judges, lawyers and litigants need this Court's guidance as to when due process requires recusal to prevent the perception (or reality) that enormous campaign expenditures can be made to cause a favorable outcome in a specific pending case. The startling facts of this case demonstrate as much.

If the Court does not intervene in this, a bellwether case closely watched across the country, litigants, lawyers, and judges will draw the lesson that the Due Process Clause imposes no meaningful constraints on attempts to buy influence, even in pending cases. The resulting race to the bottom will exacerbate the present variability in enforcement of the general disqualification standard, severely corroding both the quality and perception of American justice.[2] If the Supreme Court steps in now, however, the communicative impact of a reversal and remand would be substantial. Judges, litigants and lawyers would understand that disqualification standards

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[2] As explained in Part II.B of this brief, forty-seven states, including West Virginia, have adopted the American Bar Association's standard that: "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) (formerly Canon 3E(1)); *see infra* Part II.B.

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's statement appropriately invites states to consider measures that ensure due process "plus." This case, however, illustrates the urgent need for guidance as to the floor of due process *simpliciter* – the 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 CREATE 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 court, combined with particularized circumstances such as those present in this case, implicate fundamental fairness concerns. No litigant standing in the shoes of the Petitioners in this case

would believe that they 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 growing trend. Increasingly, litigants and lawyers, sometimes with specific pending cases before the bench, are the principal sources of campaign money in judicial elections. In turn, variable underenforcement of the objective component of the general disqualification standard, as illustrated by Justice Benjamin, yields the appearance, and perhaps the reality, of bias. This case offers the Court a unique, 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 high levels of judicial campaign expenditures began in the late 1990s. The amount of money raised by judicial candidates has escalated dramatically since then. In the past four election cycles (2000-2006), judicial candidates raised $157 million, nearly double the amount raised in the four preceding election cycles (1992-1998). James Sample et al., *The New Politics of Judicial Elections 2006* 15 (Justice At Stake 2006), *available at* http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf [hereinafter *New Politics 2006*]. In the

2005-2006 election cycle, 50 percent of states that held entirely privately-financed, contested supreme court elections (5 of 10) broke state fundraising records; the median amount raised by supreme court candidates also increased 20 percent from 2004. *Id.*

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

- Less than two months after being disciplined by the Wisconsin Supreme Court for ruling, while a lower court judge, on eleven cases involving a bank for which her husband served as a director, Justice Annette Ziegler authored 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 lawyer 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, retired Supreme Court Justice Sandra Day O'Connor opened a conference by declaring, "We put

cash in the courtrooms, and it's just wrong." Dorothy Samuels, *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 rather than statewide, 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.justiceatstake.org/files/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.

• Since 1993, Alabama Supreme Court candidates have raised in aggregate more than $54 million. *New Politics 2006*, at 15. In the 2005-2006 election cycle alone, judicial 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.

Unsurprisingly, the judicial candidate with the most funds in a race generally wins the election. In 2006, the candidate who raised more 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 From Present Or Prospective Litigants And Their Lawyers Threaten Judicial Independence And Due Process.

Increased campaign expenditures in judicial elections elicit public concern, but do not, by themselves, rise to the level of a constitutional issue. Rather, the immediate constitutional concern involves campaign expenditures made in large amounts and under circumstances where an ordinary person would

conclude that they were made with the aim of securing a favorable outcome in a specific case in which the contributor 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 2005-2006 state high court elections by interest group sector. Business interests represented the largest 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. For example, in a study by the Texas State Bar and Texas Supreme Court, 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 accept 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 suggested, potential donors may feel locked into a dynamic in which they have to give, regardless of whether they actually favor the recipient, thanks to the sheer prevalence, and perceived influence, of contributions.

Disturbingly, perceptions of improper influence are supported 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 10 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. And the report found 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 2006 *New York Times* study by Adam Liptak and Janet Roberts augmented these earlier findings via a groundbreaking review of twelve years of Ohio Supreme Court decisions. 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 receiving campaign contributions from the parties involved, and that they then voted in favor of those contributors 70 percent of the time. *Id.* One justice, Terrence O'Donnell, 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."[3]

Evidence of correlation is often the strongest evidence available of the causal connection between contributions and altered outcomes. In any given instance, direct evidence of influence is unsurprisingly unavailable because neither judges nor litigants readily admit to a quid pro quo. Moreover, 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.[4] Even frank self-reporting would

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[3] 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, 1291 (2008). This study, however, has recently been the subject of 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, *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_June_12.pdf (noting errors in the data).

[4] *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

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therefore yield an underestimate of influence. But as Ohio Justice Paul E. Pfeifer has explained: "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.

Beyond the risk of an actual quid pro quo, cash from litigants also 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

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[hereinafter *Fair Courts*] (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).

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. These statistics illustrate that the public intuitively knows what constitutional theorists strive to prove: judicial independence matters, and the best indicator of whether courts are fair, in a world that too often lacks direct evidence of improper influence, is the appearance – or not – of bias.

This case in particular has had a direct and substantial impact on the public perception 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 adult West Virginians believed that Justice Benjamin *could* be fair and impartial. Second Renewed Joint Mot. for Disqualification of Justice Benjamin at 3.[5]

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[5] 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. 3, 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*

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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 their belief that campaign contributions to judges influence decisions. Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake State Judges Frequency Questionnaire* 5 (2002), http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf. And 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.

It is certainly logical to presume that these overwhelmingly consistent perceptions of contributors, non-contributors, members of the public, and

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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.").

members of the bench would apply *a fortiori* where the source of funds is the CEO of a litigant and the amount in question is in excess of three million dollars. That *a fortiori* dynamic is particularly pertinent where, as here, the operative standard requires disqualification whenever "the judge's impartiality might reasonably be questioned." *See infra* Part II.B.

Concerns about fiscal influence are cast into dramatic light by the startling sequence of events at issue in this petition. Pet. 5-8. 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 flyers, and telephone calls to registered voters. Mot. of Resp't Corps. For Disqualification of Justice Benjamin Exs. 18, 24. 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.[6] Rachel Weiss, *Fringe Tactics: Special*

[6] 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. It does *not* concern any limitations on the support itself. Rather, this case, in which Mr. Blankenship's direct and indirect expenditures accounted for 60 percent of all combined support for Justice Benjamin, allows the Court to address the due process issues without the need for elaborate inquiry into whether a line should be drawn between direct expenditures supporting a candidate and expenditures supporting independent entities that, in turn, support that candidate. As a practical matter, distinctions between direct and indirect expenditures have only marginal salience when it comes to

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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 more than $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. Len Boselovic, *W. Va. Court Won't Hear Appeal in Massey Case,* Pittsburgh Post-Gazette (Pa.), May 24, 2008, at A10.

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 wealth" has created "a cancer in the affairs of [West Virginia's] court." Starcher Recusal Order at 9. 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

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applying the general disqualification standard of whether a judge's impartiality "might reasonably be questioned." In any event, the amount of money involved in this case, the fact that the money consisted of both direct and indirect expenditures, the fact of the sole interested source, and the timing of the appeal, together obviate the need to distinguish direct and indirect expenditures. Whatever First Amendment interest a litigant or counsel has in spending in a campaign, he or she has no constitutionally-protected interest in gaining a litigation advantage on that basis.

litigant or his companies – or appoint judges to sit on those cases." *Id.* at 7.

Elected legislators are expected to serve interest-group constituencies, including contributors, and 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 personal interests. We all suffer when any decision reinforces suspicions that the biggest donor, and not the best case, wins. And the trend lines in judicial elections raise real concerns that a denial of certiorari in this case will exacerbate the broader problem.

II. The Court Should Grant Certiorari In This Bellwether Case To 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 Murchinson*, 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 the tension noted in *Chisom* is not merely theoretical. As this Court expressly found in *White*, preventing bias for or against particular parties is an essential concern 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 the Court to explain whether, and, if so, under what circumstances, the Due Process Clause of the Fourteenth Amendment requires recusal.

A judge generally has only two litigants before him or her. What follows is almost always a zero sum game: one litigant will win, one will lose. 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." *Id.* 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, 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 ABA'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) (emphasis 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. *Fair Courts,* at 17.

For the most part, the general standard works well. 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. 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

redounds to the detriment not only of litigants and the public, but to the ninety-nine other judges as well.

This case is that scenario in microcosm. 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 could create an appearance of impropriety. And 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."

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 Honorable 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." *Fair Courts*, at 3. By singling out this case as a violation of due process, the Court

would signal to judges, litigants, and counsel across the nation that disqualification standards must be taken seriously. The communicative impact of a reversal and remand in this case, moreover, would discourage future erosion of judicial independence. 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. This Case Presents An Important And Unique Opportunity For the Court To Clarify The Due Process Floor And The Court's Failure To Do So Would Harm Judicial Independence.

The national profile of this bellwether case makes it all the more important that this Court grant certiorari. *See, e.g.*, Tim Jones, *Lobbyist Cash Clouds Judicial Races*, Chicago Tribune, July 28, 2008, at C1; Dorothy Samuels, *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 may interpret a denial of certiorari 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 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 grants certiorari can it put appropriate and manifest muscle into the constitutional commitment to a lack of judicial bias for or against particular litigants.

Significantly, the facts in the petition furnish the Court with an opportunity to address the issue of recusal in a case in which a simple, clean holding is possible. Because the amount of money, the sole interested source of the funds, the timing of the expenditures, and the other facts of this case are so egregious – by today's standards at least – the case does not present more complex questions about how much is too much, or how remote an interest is too remote. *Amici* thus agree with Petitioners that this case offers the Court the ideal opportunity to offer much needed guidance on one of the most fundamental rights in *any* system of law.

CONCLUSION

For the foregoing reasons *Amici* respectfully urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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