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SUPREME COURT OF THE STATE OF WASHINGTON

In re	)	NO. 200,577-2
	)	
BRADLEY R. MARSHALL,	)	ADDITIONAL AUTHORITIES
	)	IN SUPPORT OF
	)	SUPREME COURT
Lawyer,	)	DISQUALIFICATION
	)	
	)	
WSBA No. 15830	)	

COMES NOW the appellant Bradley R. Marshall and submits the document described below and attached hereto as additional authority under Rule 10.8 of the Rules of Appellate Procedure:

> *Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. v. A.T. Massey Coal Company, Inc., et al.* **(BRIEF OF PETITIONERS ON WRIT OF CERTIORARI TO THE U.S. SUPREME COURT)**

The opinion of the Supreme Court of Appeals of West Virginia is not yet published but is electronically reported at 2008 W. Va. LEXIS 22. J.A. 485a. This matter was argued in March, 2009 before the United States Supreme Court on certiorari and the opinion of the Court is expected in July, 2009.

DATED: April 14, 2009.

BRADLEY R. MARSHALL
Appellant

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On this day I provided a copy of the foregoing Additional Authorities in Support of Supreme Court Disqualification via email and posted a copy on April 15, 2009 with the U.S. Postal Service addressed to:

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On this date the said document was sent via email for filing with the Clerk of Court as follows:

Mr. Ronald Carpenter, Clerk
Washington State Supreme Court
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington on April 14, 2009.

Kay Gordon

Kay Gordon, Assistant to
Bradley R. Marshall, Appellant

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

BRIEF FOR PETITIONERS

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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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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is not yet published but is electronically reported at 2008 W. Va. LEXIS 22. J.A. 485a. Justice Benjamin's orders declining to recuse himself are not reported. *Id.* at 336a, 442a, 482a.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on April 3, 2008. The petition for a writ of certiorari was filed on July 2, 2008, and granted on November 14, 2008. This Court has jurisdiction 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

After a jury returned a $50 million fraud verdict against respondent A.T. Massey Coal Co. ("Massey"), Massey's chairman, CEO, and president, Don L. Blankenship, set out to single-handedly change the composition of the only state court that could hear Massey's appeal—the Supreme Court of Appeals of West Virginia. As Massey prepared its appeal, a previously unknown lawyer, Brent Benjamin, launched a challenge to the re-election of Supreme Court Justice Warren McGraw. In June 2004, Mr.

Benjamin's campaign appeared to be a long shot; his campaign committee had reported contributions totaling only $25,000. Motion of Respondent Corporations for Disqualification of Justice Benjamin ("Disqual. Mtn.") Ex. 27.

Benjamin's campaign began to gain momentum, however, after Mr. Blankenship threw his full weight (and great personal wealth) behind the campaign. Mr. Blankenship contributed the maximum amount permitted by West Virginia law to Benjamin's campaign committee. He then spent *3,000 times* that amount—some $3 million—to underwrite independent advertisements supporting Benjamin, while publicly urging others to make additional donations to the campaign. Ultimately, Mr. Blankenship was personally responsible for more than 60% of the total financial support for the Benjamin campaign—three times as much as Benjamin's own campaign committee. Upon Justice Benjamin's election to the state supreme court, some in West Virginia wondered aloud whether Massey had "b[ought] itself a judge." *See infra* pg. 8.

When Massey's case came before the newly-reconstituted Supreme Court of Appeals, petitioners repeatedly moved for Justice Benjamin to recuse himself from his principal financial supporter's case. Justice Benjamin refused, insisting that his participation "was wholly consistent with due process" because petitioners had not proven "any actual bias" on his part. J.A. 654a, 657a. He then cast the deciding vote in the court's 3-2 decision overturning the verdict against Massey.

Justice Benjamin's decision not to recuse himself was constitutionally flawed and should be reversed. Petitioners had a constitutional right to a panel of

"neutral and detached judge[s]" to decide this appeal (*Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972)), and, to preserve that right, Justice Benjamin was required to recuse himself not only upon proof of actual bias, but also when confronted with an objective "probability of actual bias." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Mr. Blankenship's extraordinary efforts on behalf of Justice Benjamin's campaign—undertaken when Mr. Blankenship was preparing to appeal a judgment of great personal and professional significance to the very court on which Justice Benjamin was seeking a seat—created a constitutionally unacceptable probability that Justice Benjamin was biased in favor of Massey and against petitioners. Justice Benjamin's refusal to recuse himself denied petitioners their fundamental due process right to an impartial judge and, in so doing, substantially undermined the integrity of the West Virginia judicial system.

1. Massey is one of the Nation's largest coal companies. Until the corporate petitioners—Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc.—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. J.A. 488a.

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 had repeatedly refused to purchase Massey's coal because it "was inferior in quality to the coal obtained from the Harman Mine." J.A. 492a 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, in turn, resold that coal to LTV. *Id.* at 492a. "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.* at 493a.

At the direction of Massey's CEO, Mr. Blankenship, Wellmore responded by invoking 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. J.A. 64a, 490a n.8, 493a. As the trial court found, "Massey knew" that this "declaration" "would put [petitioners] out of business." *Id.* at 494a. 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.*

Massey simultaneously entered into negotiations with petitioners to purchase the Harman Mine. J.A. 493a. 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 494a-95a. 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 494a (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 495a.

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. J.A. 496a.

Mr. Blankenship was the central figure in the trial. Petitioners alleged that Mr. Blankenship had personally directed Massey's unlawful course of conduct in order to force petitioners into bankruptcy (J.A. 63a-65a), and Mr. Blankenship provided extensive testimony at trial about his dealings with petitioners.

After a seven-week trial, 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. J.A. 497a.

The trial court denied Massey's post-trial motions challenging the verdict and the size of the damages award, finding that Massey "intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, [Massey] concluded it was in its financial interest to do so." J.A. 32a.

3. Immediately after the verdict was announced, Mr. Blankenship publicly vowed that Massey would

appeal the result, which he criticized as "frightening" and bad for "the children of our state." J.A. 115a. Due to the delay generated by Massey's numerous post-trial motions (including its challenge to the accuracy 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 altered by lawyer Brent Benjamin's 2004 electoral victory over incumbent Justice Warren McGraw.

Mr. Blankenship played a significant—and very public—role in that election, spending $3 million of his own money to support Justice Benjamin's campaign and actively soliciting additional financial support from other donors. Mr. Blankenship's extraordinary level of support for the Benjamin campaign was unparalleled and virtually unprecedented. Indeed, the $3 million that he expended in support of Justice Benjamin was more than the total amount spent by all other Benjamin supporters combined, three times the amount spent by Justice Benjamin's own campaign committee, and likely more than any other individual spent on a judicial election that year. J.A. 288a; *see also infra* note 4.

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. J.A. 150a.[1]

And For The Sake Of The Kids used most of these funds to finance hundreds of campaign advertisements in the weeks preceding the election, 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 of his personal funds on independent expenditures directly supporting the Benjamin campaign, mostly through payments to media outlets for television and newspaper advertisements. J.A. 186a, 200a. Mr. Blankenship also worked to solicit funds on behalf of Justice Benjamin's campaign. Most notably, he widely distrib-

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[1] Nationally, only four political groups directly involved in state elections in 2004 outraised And For The Sake Of The Kids: the Republican Governors Association, the Democratic Governors Association, the Republican State Leadership Committee, and the Democratic Legislative Campaign Committee. Disqual. Mtn. Ex. 17.

uted letters exhorting doctors to donate to the campaign because electing Justice Benjamin would purportedly help to lower their malpractice premiums. *Id.* at 181a.

Mr. Blankenship's significant efforts on behalf of the Benjamin campaign did not go unnoticed. *See, e.g.*, Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. Times, Oct. 24, 2004, at A1; 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 support for Justice Benjamin's campaign created a constitutionally unacceptable appearance of bias. J.A. 108a. Massey did not file a response to petitioners' motion to recuse Justice Benjamin (or to either of petitioners' two subsequent recusal motions directed to Justice Benjamin). Indeed, at the same time that petitioners were seeking the recusal of Justice Benjamin, Massey was seeking the recusal of another justice on the West Virginia Supreme Court, Justice Larry Starcher, on the ground that he had made public statements critical of Mr. Blankenship's involvement in the 2004 election. After Justice Starcher initially refused to recuse himself, Massey filed suit against the West Virginia Supreme Court alleging that the court's recusal procedures violate its "rights to the appearance of justice under the Due Process Clause of the Fourteenth Amendment" because the procedures do not provide a means for the full court to review a justice's decision not to recuse himself. Compl. at 5, *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.

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." J.A. 336a-37a.

5. 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. J.A. 357a. Justice Benjamin joined the majority's opinion reversing the verdict against Massey.

Creating nearly a dozen 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 shall be filed in and decided by the Circuit Court of Buchanan County, Virginia." J.A. 358a. 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 377a, 386a-87a.

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. J.A. 411a. 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 392a, 406a, 407a.

Justices Albright and Starcher filed vigorous dissents. Both expressed alarm at the "result-driven effort" of the majority to relieve Massey of liability. J.A. 423a; *see also id.* at 420a. 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 429a, 430a-31a (emphasis omitted).

6. 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 his Monte Carlo vacation with Mr. Blankenship. J.A. 432a. Petitioners simultaneously

renewed their request that Justice Benjamin recuse himself based on the appearance of bias generated by Mr. Blankenship's exceptional support for Justice Benjamin's 2004 campaign. *Id.*

Chief Justice Maynard recused himself from further participation in the case. J.A. 447a. Although he professed the ability to be impartial in his consideration of Massey's appeal, he nevertheless concluded that his participation in the case was inappropriate because the "mere appearance of impropriety . . . can compromise the public confidence in the courts." *Id.*

Justice Benjamin, however, again refused to recuse himself (J.A. 445a)—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.").

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. J.A. 449a.[2]

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[2] Under established seniority and rotation procedures uniformly 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* J.A. 457a (Starcher, J., recusing); Paul J. Nyden, *Albright Passed over for Chief Justice*, Charleston Ga-

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. J.A. 462a. 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 definition 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. *Id.* at 456a, 460a.

To substantiate Justice Starcher's observations, petitioners submitted a third recusal motion to Justice Benjamin accompanied by poll results indicating that 67% of West Virginians doubted his ability to be fair and impartial in deciding Massey's appeal. J.A. 467a. 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." *Id.* at 483a.

[Footnote continued from previous page]

zette, 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.*; *see also* J.A. 457a (Starcher, J., recusing) (Chief Justice Maynard "recently voted to remove two justices from the Chief Justice rotation order, materially affecting the appointment of replacement judges in cases involving Mr. Blankenship's companies").

That same day, the West Virginia Supreme Court of Appeals—which now included two circuit court judges appointed by Justice Benjamin to replace Chief Justice Maynard and Justice Starcher—issued its opinion on rehearing, and again reversed the judgment against Massey by a 3-2 vote. J.A. 485a. Justice Benjamin joined the majority opinion, which relied on the same legally dubious forum-selection 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." J.A. 633a. The dissenting opinion meticulously critiqued the factual findings and new points of law fashioned "to achieve the result desired by the majority." *Id.* at 583a.

In addition to their disagreement with the majority's forum-selection and res judicata analyses, the dissenters also explained that they were "unable to stand silent" regarding Justice Benjamin's failure to recuse himself. J.A. 633a 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." J.A. 633a 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.*

7. Four months after the West Virginia Supreme Court of Appeals' decision on rehearing—and nearly a month after the petition for a writ of certiorari was filed in this Court—Justice Benjamin filed a concurring opinion that provided a lengthy explanation for his decision not to recuse himself from Massey's appeal. J.A. 635a. Justice Benjamin insisted that his "participation herein was wholly consistent with due process" because petitioners had not "claim[ed] any *actual* bias or prejudice on [his] part." *Id.* at 654a-55a, 657a (emphasis added). Justice Benjamin maintained that "appearances"—even the overwhelming appearance of bias generated by a CEO's expenditure of $3 million to support the campaign of a judge deciding his company's appeal—"should never alone serve as the basis for a due process challenge" to a judge's participation in a case. *Id.* at 657a n.14. Indeed, in Justice Benjamin's view, the "very notion of appearance-driven disqualifying conflicts . . . is antithetical to due process" and would have a "long-lasting negative effect on public confidence in our courts." *Id.* at 655a n.12, 663a.

SUMMARY OF ARGUMENT

Justice Benjamin was constitutionally required to recuse himself from this case because Mr. Blankenship's extraordinary support for his election campaign created an objective probability that he was biased in favor of Massey and against petitioners.

A. In order to safeguard the constitutional right to an impartial judge, "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). To that end, this Court has repeatedly held that due process requires recusal not only where there is proof

that a judge is actually biased, but also where an objective inquiry establishes a probability of bias on a judge's part. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

This objective recusal standard is required to ensure that litigants receive a "fair trial in a fair tribunal" (*Murchison*, 349 U.S. at 136) because, in most cases, it is extraordinarily difficult to prove that a judge harbors a subjective bias against a litigant. Judges are highly unlikely to acknowledge that they are biased, and discovery is almost always unavailable to substantiate the existence of judicial bias. A standard that tolerated adjudication by any judge who has not been conclusively proven to be partial would relegate parties to trial before judges with a strongly suspected, yet unprovable, bias and would profoundly undermine public confidence in the integrity and legitimacy of the judicial branch.

B. It is not the case that recusal is constitutionally required whenever a judge receives campaign support from a litigant or attorney—especially where that support represents only a small fraction of the total support for the judge's campaign. In this case, however, there are at least five reasons that Mr. Blankenship's campaign support generated a constitutionally unacceptable probability that Justice Benjamin was biased in favor of Massey and against petitioners.

When viewed together, the facts surrounding Mr. Blankenship's underwriting of Justice Benjamin's campaign—the staggering amount of money that Mr. Blankenship expended, the fact that Mr. Blankenship's expenditures represented more than

half of the total financial support for Justice Benjamin, Mr. Blankenship's additional fundraising efforts on the campaign's behalf, his provision of this support while preparing this multimillion-dollar appeal to the state supreme court, and the fact that Justice Benjamin's participation in this case was not subject to review by any other justice—created an overwhelming probability of bias that required Justice Benjamin to recuse himself.

C. None of Justice Benjamin's reasons for refusing to recuse himself from this case is constitutionally sufficient.

Although Justice Benjamin emphasized that he has voted against Massey's interests in other cases, he failed to identify any case in which he has cast an outcome-determinative vote against Massey. And the fact that Mr. Blankenship is the chairman, CEO, and president of Massey—rather than a named party—is similarly irrelevant. Mr. Blankenship is a substantial stockholder in Massey who personally directed Massey's unlawful conduct against petitioners. He therefore has a strong personal and professional interest in the outcome of this case—which created a compelling reason for Justice Benjamin to repay his debt of gratitude to Mr. Blankenship by casting the deciding vote in Massey's favor.

The likelihood that Justice Benjamin harbored, and sought to repay, that debt of gratitude in this case is not diminished by Mr. Blankenship's use of independent expenditures, rather than direct contributions, to furnish his financial support. The end result was the same: Mr. Blankenship's expenditures were directly responsible for hundreds of pro-Benjamin and anti-McGraw campaign advertisements that unquestionably helped Justice Benja-

min—a previously unknown and underfunded candidate—prevail in his sharply contested race. It would only be natural for Justice Benjamin to feel indebted to Mr. Blankenship for these extraordinary efforts on his behalf.

Justice Benjamin's decision not to recuse himself should be reversed.

ARGUMENT

Justice Benjamin refused to recuse himself from Massey's appeal because he found that petitioners had not proven "any actual bias" on his part. J.A. 654a. Justice Benjamin's self-serving conclusion that due process requires recusal *only* where there is definitive proof of a judge's actual bias against a party is inconsistent with this Court's well-settled precedent, which establishes 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) (emphasis added). Where, as here, the "appearance of bias" is serious enough to create a "probability" that the judge is actually biased against a litigant, due process requires the judge's recusal. *In re Murchison*, 349 U.S. 133, 136 (1955); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

DUE PROCESS REQUIRED JUSTICE BENJAMIN TO RECUSE HIMSELF FROM THE APPEAL OF HIS PRINCIPAL FINANCIAL SUPPORTER.

This Court has emphasized that a "fair trial in a fair tribunal is a basic requirement of due process." *Murchison*, 349 U.S. at 136. A "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). Justice Benjamin's participation in this appeal denied petitioners this fundamental due process right.

A. Due Process Requires The Recusal Of A Judge Who Is Actually Biased Or Tainted By A Probability Of Bias.

Justice Benjamin's primary basis for refusing to recuse himself from this case was his contention that due process requires the recusal of a judge only where there is definitive proof of "actual bias" on his part. J.A. 654a; *see also id.* at 336a-37a ("no objective information is advanced to show that this Justice has a bias for or against any litigant"). This was error.

1. It is a basic principle of due process that a judge may not participate in a case where he is actually biased against one of the parties. *Murchison*, 349 U.S. at 136. It is equally well-established that "our system of law has always endeavored to prevent even the *probability* of unfairness." *Id.* (emphasis added). 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).

In light of the importance of preserving the "appearance of justice," this Court has repeatedly held that, where an objective inquiry establishes a "probability" of bias on a judge's part, the judge is constitutionally barred from participating in a case even if there is insufficient evidence to establish that the judge is subjectively biased against a party. *Murchison*, 349 U.S. at 136; *Withrow*, 421 U.S. at 47.

In *Tumey v. Ohio*, 273 U.S. 510 (1927), for example, the Court held that it violated due process for a village mayor to preside over a criminal proceeding where the mayor was only paid for his services if the defendant was convicted and where the village received a share of any fine that was levied against the defendant. *Id.* at 535. The Court acknowledged that "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it." *Id.* at 532. "[B]ut the requirement of due process of law in judicial procedure," the Court continued, "is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* Whether or not the mayor was actually biased against the defendant, due process prohibited him from presiding over the case because "[e]very 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." *Id.* (emphases added); *see also North v. Russell*, 427 U.S. 328, 337 (1976) (in *Tumey*, "[f]inancial interest in the fines was thought to risk a *possible* bias in finding guilt

and fixing the amount of fines, and the Court found that *potential* for bias impermissible") (emphases added).

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 proof of actual bias on the judge's part, the Court concluded that recusal was constitutionally required because "[n]o one so cruelly slandered is *likely* to maintain that calm detachment necessary for fair adjudication." *Id.* at 465 (emphasis added).[3]

This constitutional prohibition upon adjudication by judges tainted by a probability of bias applies with equal force in the civil setting. 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 pursuing his own bad-faith suit against an insurance company and the supreme court's decision could have had a direct impact on the outcome of the justice's case. *Id.*

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[3] *See also Withrow*, 421 U.S. at 47 ("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"); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (due process barred a judge who had become embroiled in a running dispute with a contumacious attorney from presiding over a contempt hearing because "there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused") (internal quotation marks omitted).

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."

2. The due process prohibition upon adjudication by judges tainted by a probability of bias is essential to ensuring that all litigants receive their fundamental right to a "fair trial in a fair tribunal." *Murchison*, 349 U.S. at 136.

It is often exceptionally difficult—if not wholly impossible—to present conclusive proof that a judge is subjectively biased. Indeed, it is extraordinarily rare for a judge to acknowledge that he harbors a bias against a litigant. *See Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias . . . might exist in the mind of one . . . who was quite positive that he had no bias"). And it is nearly equally rare for litigants to be afforded the opportunity for discovery to obtain evidence of a judge's bias because the availability of discovery generally rests in the "sound discretion" of the judge whose impartiality is being challenged. *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997).

As in this case, then, most recusal motions must rely solely on the publicly available facts about a judge. In light of this evidentiary hurdle, the right of litigants to a fair trial before an unbiased judge can only be vindicated by mandating recusal where these

publicly available facts create an objective "probability of actual bias on the part of the judge." *Withrow*, 421 U.S. at 47; *see also Murchison*, 349 U.S. at 136. A requirement that a litigant seeking a judge's recusal conclusively establish the existence of judicial bias would eviscerate the procedural protections afforded by due process and relegate parties to trial before judges who harbor a strongly suspected (but unprovable) bias against them.

For this reason, the Court has repeatedly recognized that, "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 bias creates a constitutionally unacceptable risk of *actual* bias. *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (plurality op. of Marshall, J.); *see also Tumey*, 273 U.S. at 532; *Lavoie*, 475 U.S. at 825. In *Lavoie*, for example, the Court held that Justice Embry's recusal was constitutionally required—despite the absence of proof of actual bias—because his pending suit against another insurance company created the probability that he was biased against Aetna. *Id.*

For similar reasons, federal law and state judicial codes generally mandate recusal where a judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *see also* ABA Model Code of Judicial Conduct R. 2.11(A) (2007) (same). Although these standards are more stringent than the constitutional floor established by the Due Process Clause—they require recusal whenever there is a "reasonabl[e]," objective basis for questioning a judge's impartiality (*see Liteky v. United States*, 510 U.S. 540, 548 (1994)), while due process mandates recusal only when the appearance of partiality is serious enough to generate an objective "probability of actual bias"

(*Withrow*, 421 U.S. at 47)—both the nonconstitutional and due process recusal standards are animated by the same concern about possible judicial bias.

The implications of permitting a judge to participate in a case while tainted by a probability of bias transcend the constitutional rights of the litigants in that particular case. It is axiomatic that the "legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). Tolerating the participation of a judge who is likely to harbor a bias against a litigant would do irreparable harm to the public's confidence in the judicial system. *See 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."). Neither the litigant relegated to the tainted judicial proceeding nor the public evaluating the result of that proceeding is likely to take much solace from the fact that, despite the overwhelming appearance of bias, there was no definitive proof of actual bias. The legitimacy of the judicial branch—just as much as the constitutional rights of individual litigants—depends upon preserving the appearance of impartiality in judicial proceedings.

3. These constitutional principles are well-established and have been regularly reaffirmed. *See, e.g.*, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (due process "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against

him"). It is therefore not surprising that Massey itself has repeatedly acknowledged—in this litigation and closely related litigation—that due process prohibits the participation of a judge who is tainted by a probability of bias.

When Massey sought the recusal of Justice Starcher in this case based on his public criticism of Mr. Blankenship, it did so on the ground that "Justice Starcher by his very public and derogatory comments has created an appearance of partiality." Motion for Disqualification of Justice Starcher at 8; *see also id.* at 8-9 ("avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself") (internal quotation marks omitted). Moreover, in its ongoing § 1983 action against the West Virginia Supreme Court of Appeals, Massey has argued that Rule 29 of the West Virginia Rules of Appellate Procedure "violates [its] rights to the appearance of justice under the Due Process Clause of the Fourteenth Amendment to the United States Constitution insofar as the rule . . . permits a justice of the West Virginia Supreme Court who is the subject of a disqualification motion exclusively to determine the merits of that motion." Compl. at 5-6, *Massey Energy Co.*, No. 06-0614; *see also* Mem. in Support of Plaintiffs' Motion for Summary Judgment at 15, *Massey Energy Co.*, No. 06-0614 ("Rule 29 also violates the Due Process Clause because it undermines the court's obligation to render the appearance of justice.").

Massey's suggestion in this Court that due process requires recusal only "where the judge harbors some form of substantial actual bias" (Br. in Opp. 15) represents an abrupt about-face from the position it unambiguously staked both earlier in this litigation and in its related § 1983 suit. Massey's conveniently

timed reformulation of its views might have been necessary to facilitate its defense of Justice Benjamin, but Massey's artificially narrow understanding of due process cannot be reconciled with its own previous statements on the issue or with this Court's profound concern for "prevent[ing] even the probability of unfairness" in judicial proceedings. *Murchison*, 349 U.S. at 136.

B. Mr. Blankenship's Campaign Support For Justice Benjamin Created A Constitutionally Unacceptable Probability Of Bias.

Mr. Blankenship's prodigious efforts on behalf of Justice Benjamin's campaign, all undertaken while he prepared to appeal this case to the state supreme court, generated an overwhelming probability that Justice Benjamin was biased in favor of Mr. Blankenship's company and against petitioners in this case. Justice Benjamin's insistence on nevertheless participating in his principal financial supporter's appeal violated due process.

1. Judicial elections are a well-established and constitutionally permissible means of selecting state court judges, and it is certainly not the case that due process requires a judge to recuse himself every time a litigant or attorney contributed to or otherwise supported the judge's election campaign. This is particularly true where the contribution represents only a small fraction of the overall financial support for a judge's campaign. Absent other evidence, no reasonable observer would conclude that such modest campaign support creates a probability that the judge is biased in favor of the supporter.

But it is just as surely not the case that campaign support from a litigant or attorney is *never* suf-

ficient to compromise a judge's impartiality and to require recusal. Maintaining the unassailable neutrality of judicial decision-making is exceptionally—and uniquely—important to the judicial branch because the public's "respect for judgments depends . . . upon the issuing court's absolute probity." *Republican Party v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). Neutral decision-making does not carry the same importance to either of the political branches of government. Indeed, while this Court has recognized a compelling government interest in extirpating actual corrupt *quid pro quo* transactions, and the appearance of such transactions, from the political branches (*Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam)), politicians are under no obligation to maintain neutrality in their official acts and remain free to give preferential access and consideration to their campaign supporters. In contrast, due process *absolutely* prohibits a judge from according preferential treatment to any litigant appearing before him. *See White*, 536 U.S. at 776 (due process "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party"). Accordingly, if a litigant's or attorney's campaign support for a judge generates an objective probability of bias in favor of one of the parties to a case, due process requires the judge's recusal. *See Murchison*, 349 U.S. at 136; *Withrow*, 421 U.S. at 47.

For at least five reasons, any reasonable observer would conclude that Mr. Blankenship's support for Justice Benjamin's campaign generated a constitutionally unacceptable probability that Justice Benjamin was biased in favor of Massey in this case.

First, the sheer volume of Mr. Blankenship's financial support for Justice Benjamin's campaign is

truly staggering. West Virginia law imposes a $1,000 limit on contributions to judicial campaigns. W. Va. Code § 3-8-12(f). Through his donations to And For The Sake Of The Kids and direct expenditures on campaign advertising, Mr. Blankenship spent *3,000 times* that amount supporting Justice Benjamin. The $3 million that Mr. Blankenship spent is three times the amount spent by Justice Benjamin's own campaign committee (J.A. 288a) and $1 million more than the *total* amount spent by Justice Benjamin's committee and the committee of his opponent, Justice Warren McGraw. *See* Goldberg, *supra*, at 16. Indeed, the $2.5 million that Mr. Blankenship spent to fund And For The Sake Of The Kids' campaign to elect Justice Benjamin is more than any other individual or group contributed to a 527 organization involved in *any* 2004 judicial election campaign. *See* Rachel Weiss, *Fringe Tactics: Special Interest Groups Target Judicial Races* 5 (2005). The next largest donor gave $600,000 less than Mr. Blankenship. *Id.*

Second, the appearance of bias generated by the size of Mr. Blankenship's campaign expenditures is reinforced by the fact that his expenditures represent 60% of the *total* amount spent to support Justice Benjamin's campaign.[4] Thus, this is not a case where the expenditures in question—even though large in absolute terms—were matched by equally large donations from other parties that could con-

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[4] A total of $4,986,711 was spent supporting 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 (J.A. 288a), and $517,707 by Mr. Blankenship through direct expenditures (*id.* at 186a, 200a).

ceivably have diminished the probability of judicial bias in favor of one specific donor.

Third, Mr. Blankenship did more than spend vast sums of money to support Justice Benjamin's campaign. He also actively campaigned for Justice Benjamin and solicited donations on his behalf. Most notably, he distributed letters urging doctors to "send $1000 to Brent Benjamin" because "[i]f Warren McGraw gets re-elected to the West Virginia Supreme Court your insurance rates will almost certainly be higher for the next twelve years than they will be if Brent Benjamin gets elected." J.A. 181a. Mr. Blankenship's letters are directly responsible for a portion of the more than $800,000 donated to Justice Benjamin's campaign committee.

Fourth, the timing of Mr. Blankenship's campaign support strongly suggests that it was intended to influence the outcome of this $50 million appeal. Mr. Blankenship's campaign expenditures and fundraising efforts were made between August 2004 and November 2004 (J.A. 119a, 199a), when Mr. Blankenship was preparing to appeal this personally and professionally significant case to the court on which Justice Benjamin was seeking a seat. Indeed, after the jury returned its verdict against Massey in August 2002, Mr. Blankenship immediately made a public vow to appeal the verdict to that court. *Id.* at 115a. Although the appeal was delayed by Massey's post-trial motions, there was no doubt during the 2004 campaign that the case would ultimately be decided by the state supreme court and that, if elected, Justice Benjamin would have the opportunity to cast a vote in that appeal.

Fifth, Justice Benjamin's decision to participate in Massey's appeal was not subject to review by the

other members of his court. Where a judge's decision not to recuse himself is endorsed by the court's other members, the likelihood of judicial bias may be diminished because the allegations of bias have been examined—and rejected—by the judge's colleagues. In this case, not only were the other justices of the West Virginia Supreme Court of Appeals precluded by state law from considering petitioners' recusal motions, but three members of the court (two justices and a circuit judge appointed to replace one of the recused justices) expressed strong concerns about Justice Benjamin's participation in the case. *See* J.A. 633a n.16 (Albright, J., joined by Cookman, J., dissenting); *id.* at 462a (Starcher, J., recusing). His colleagues' discomfort with Justice Benjamin's refusal to recuse himself underscores the strong probability of bias generated by Mr. Blankenship's support for Justice Benjamin's campaign.

2. The probability that Justice Benjamin was biased in favor of Massey and against petitioners is at least as strong as the probability of bias in *Tumey*, *Mayberry*, and *Lavoie*.

Just as it is human nature for a judge to be biased *against* a criminal defendant whose conviction would benefit the judge financially 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 through massive campaign expenditures that were larger than the combined amount spent by all of the judge's other supporters. Justice Benjamin won his seat on the West Virginia Supreme Court by a narrow 53-to-47-percent margin over Justice McGraw to become the first non-incumbent Republican to secure a seat on that court since the 1920s. *See* Juliet A. Terry, *Courting Change: Benjamin Hopes to Shine Light on*

Justice, State J. (W. Va.), Nov. 4, 2004, at 4; Lawrence Messina, *Benjamin Unseats McGraw After "Vicious," Pricey Court Race*, Associated Press State & Local Wire, Nov. 3, 2004. There can be little doubt that the extensive advertising that Mr. Blankenship funded through his direct expenditures and his contributions to And For The Sake Of The Kids immensely improved Justice Benjamin's electoral prospects in this closely contested race. It would only be natural for Justice Benjamin to feel a debt of gratitude to Mr. Blankenship for his extraordinary efforts on the campaign's behalf. *See White*, 536 U.S. at 790 (O'Connor, J., concurring) ("relying on campaign donations may leave judges feeling indebted to certain parties or interest groups").

Similarly, just as a judge is tainted by a constitutionally unacceptable "temptation" to decide a case in a manner that furthers his own interests where he is pursuing a lawsuit raising identical legal issues, such a "temptation" is equally acute where the judge is beholden to a corporation's CEO for the majority of the funds spent in support of his recent campaign—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.

In light of the overwhelming probability that Justice Benjamin was biased in favor of Massey and against petitioners, due process required Justice Benjamin to step aside from consideration of Massey's appeal.

C. Justice Benjamin's Reasons For Refusing To Recuse Himself Are Constitutionally Inadequate.

Although Justice Benjamin's primary ground for refusing to recuse himself was his erroneous assertion that due process requires recusal only where there is proof of "actual bias" (J.A. 654a), he also attempted to dispel the appearance of bias created by Mr. Blankenship's extraordinary level of campaign support. None of Justice Benjamin's rationalizations is constitutionally sufficient, however, to excuse his participation in this case.

Justice Benjamin observed, for example, that he has voted against Massey's interests in other cases. J.A. 674a n.29. But Justice Benjamin points to no case—and we are aware of none—in which he has cast an outcome-determinative vote against Massey.[5] In any event, the fact that a judge might not vote in favor of a particular litigant in *every* case hardly means that he does not harbor a bias in favor of that litigant in *any* case. *Cf. Bracy v. Gramley*, 520 U.S. 899, 901 (1997) (authorizing discovery into whether a judge who regularly took bribes from criminal defendants had issued rulings intended to facilitate the conviction of a defendant who had not bribed him in order "to deflect suspicion that he was taking bribes

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[5] *See* J.A. 674a n.29 (Benjamin, J., concurring) (citing *U.S. Steel Mining Co. v. Helton*, 631 S.E.2d 559 (W. Va. 2005) (concurring in part and dissenting in part from an opinion against Massey that was joined in full by three of the court's five justices); *Helton v. Reed*, 638 S.E.2d 160 (W. Va. 2006) (concurring in an opinion against Massey that was joined by three other justices); *Massey Energy v. Wheeling-Pittsburgh Steel Corp.*, No. 080182 (W. Va. May 22, 2008) (voting with the court's four other justices to deny Massey's petition for appeal)).

in other cases"). A judge tainted by a probability of bias cannot constitutionally immunize his actions by the simple expedient of failing invariably to vote in the manner suggested by that bias.

Justice Benjamin also suggested that the appearance of bias created by Mr. Blankenship's campaign support is minimized by the fact that Mr. Blankenship is "an employee of a party in this case" and not a party himself. J.A. 681a. But Mr. Blankenship is far more than a mere employee of Massey: He is the central figure in this litigation.

Mr. Blankenship is not only the chairman, CEO, and president of Massey, but he also holds more than 250,000 shares of the company's stock. *See* Massey Energy, News Release, *Massey CEO Exercises Options Within Limited Trading Window and to Diversify Assets* (Feb. 8, 2008). Mr. Blankenship's business reputation and personal finances therefore depend to a significant extent upon Massey's financial well-being, which was materially weakened by the $50 million verdict in this case. Moreover, Mr. Blankenship personally directed the business decisions that gave rise to petitioners' fraud claims (J.A. 63a-65a), and he provided extensive testimony at trial about his business dealings with petitioners. *Id.* at 89a. The jury evidently found Mr. Blankenship to lack credibility because it rejected his version of events when it returned the fraud verdict against Massey. Mr. Blankenship therefore had a powerful personal and professional interest in securing the reversal of the jury's verdict, and Justice Benjamin had an equally powerful reason to repay his debt of gratitude to Mr. Blankenship by casting

the outcome-determinative vote in Massey's favor in this important case.[6]

Justice Benjamin also asserted that his "campaign was completely independent of any independent expenditure group," including And For The Sake Of The Kids. J.A. 673a. But there is no reason to believe that Justice Benjamin is any less likely to feel a debt of gratitude to Mr. Blankenship because a majority of his financial support was provided through And For The Sake Of The Kids—an organization formed for the express purpose of defeating Justice McGraw and electing Justice Benjamin—rather than directly to Justice Benjamin's campaign committee. *Cf. FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2672 (2007) (opinion of Roberts, C.J.) ("in some circumstances, large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions") (internal quotation marks omitted).

The end result was the same: Justice Benjamin benefited from extensive advertising criticizing his sole opponent for office and highlighting Justice Benjamin's qualifications. While Justice Benjamin con-

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[6] The extent to which a bias for or against Mr. Blankenship can translate into a bias for or against Massey is underscored by Massey's repeated efforts in this case and other litigation to obtain the recusal of Justice Starcher based on his public criticism of Mr. Blankenship. *See* Motion for Disqualification of Justice Starcher at 6 ("Can there truly be an honest debate whether a justice who has called a key witness in a case and the CEO of one of the defendants 'stupid' and 'a clown' should sit on the case?"); *see also Cent. W. Va. Energy Co. v. Wheeling Pittsburgh Steel Corp.*, No. 08-218 (cert. denied Dec. 1, 2008) (petition by Massey and affiliated company arguing that Justice Starcher violated due process by failing to recuse himself from a Massey case after publicly criticizing Mr. Blankenship).

tends that his victory over Justice McGraw was principally attributable to his campaign message and Justice McGraw's errors on the campaign trail (J.A. 673a-74a), it strains credulity to suggest that the $3 million in financial support provided by Mr. Blankenship—to say nothing of his other campaign efforts on Justice Benjamin's behalf—did not have a meaningful role in disseminating Justice Benjamin's message or highlighting Justice McGraw's perceived flaws. Any reasonable observer would conclude that a justice who had benefited to such a significant extent from a litigant's campaign expenditures would feel indebted to that litigant for his support.

* * *

According to Justice Benjamin, the "long-lasting negative effect on public confidence in our courts caused by an appearance-driven due process standard for disqualification of a judicial officer would be incalculable." J.A. 663a. In fact, it is Justice Benjamin's participation in his principal financial supporter's $50 million appeal that could have an "incalculable" and "long-lasting negative effect" on West Virginia's judicial system.

As this case vividly illustrates, the increasing prevalence of massive campaign expenditures in state judicial elections has had a corrosive effect on the public's confidence in the integrity of state courts. *See White*, 536 U.S. at 790 (O'Connor, J., concurring) (citing survey data "indicating that 76 percent of registered voters believe that campaign contributions influence judicial decisions"). Justice Benjamin's constricted understanding of due process—which holds that litigants' campaign expenditures can *never* create a probability of bias sufficient to mandate recusal—would hasten the loss of public

confidence in the judiciary and irretrievably weaken the courts' "reputation for impartiality and nonpartisanship." *Mistretta*, 488 U.S. at 407.[7]

Although not every campaign contribution or expenditure by a litigant or attorney creates a probability of bias that requires a judge's recusal, there are exceptional cases where recusal is constitutionally required—both to ensure the litigants' right to a fair trial and to safeguard public confidence in the judicial system. This is such a case.

CONCLUSION

For the foregoing reasons, Justice Benjamin's decision not to recuse himself should be reversed, the judgment of the Supreme Court of Appeals of West Virginia vacated, and the case remanded for further proceedings without Justice Benjamin's participation.

Respectfully submitted.

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[7] *See, e.g.*, 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."); Allan N. Karlin & John Cooper, 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.").

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December 29, 2008

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Dear Mr. Carpenter: Attached for filing is the first of six of appellant's Additional Authorities in Support of Supreme Court Disqualification, submitted under RAP 10.8 pursuant to your request.
Thank you for your courtesies.

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