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SUPREME COURT OF THE STATE OF WASHINGTON 2009 APR 14 P 4: 37

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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., petitioners v. A.T. Massey Coal Company, Inc., et al. respondents* **(Brief of Justice At Stake, American Judicature Society, Appleseed, Common Cause, Constitutional Accountability Center, Institute for the Advancement of the American Legal System, League of Women Voters, National Ad Hoc Advisory Committee on Judicial Campaign Conduct, Alabama Appleseed Center for Law & Justice, Colorado Judicial Institute, Democracy North Carolina, Fund for Modern Courts, Illinois Campaign for Political Reform, Justice For All, League of Women Voters of Michigan, League of Women Voters of Wisconsin Education Fund, Massachusetts Appleseed Center for Law & Justice, Michigan Campaign Finance Network, Missourians for Fair and Impartial Courts, NC Center for Voter Education, Ohio Citizen Action, Pennsylvanians for Modern Courts, Texans for Public Justice, Washington Appellate Lawyers Association, Washington Appleseed, Wisconsin Democracy Campaign, Chicago Appleseed, and Chicago Council of Lawyers as *Amici Curiae* in Support of Petitioners)**

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

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of the Court is expected in July, 2009.

DATED: April 14, 2009.

BRADLEY R. MARSHALL
Appellant

DECLARATION OF SERVICE AND FILING

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:

Scott Busby, Disciplinary Counsel
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Seattle WA 98101-2539
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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
Email address: supreme@courts.wa.gov

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, Assistant to
Bradley R. Marshall, Appellant

American Bar Association
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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 of Justice At Stake, American Judicature Society, Appleseed, Common Cause, Constitutional Accountability Center, Institute for the Advancement of the American Legal System, League of Women Voters, National Ad Hoc Advisory Committee on Judicial Campaign Conduct, Alabama Appleseed Center for Law & Justice, Colorado Judicial Institute, Democracy North Carolina, Fund for Modern Courts, Illinois Campaign for Political Reform, Justice For All, League of Women Voters of Michigan, League of Women Voters of Wisconsin Education Fund, Massachusetts Appleseed Center for Law & Justice, Michigan Campaign Finance Network, Missourians for Fair and Impartial Courts, NC Center for Voter Education, Ohio Citizen Action, Pennsylvanians for Modern Courts, Texans for Public Justice, Washington Appellate Lawyers Association, Washington Appleseed, Wisconsin Democracy Campaign, Chicago Appleseed, and Chicago Council of Lawyers as *Amici Curiae* in Support of Petitioners

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE HISTORY OF THE DUE PROCESS CLAUSE SHOWS A PARTICULAR CONCERN FOR ENSURING UNBIASED DECISIONMAKERS 3

II. A CONSTITUTIONAL RULING IN THIS CASE WILL ENCOURAGE STATE JUDICIAL SELECTION REFORM EFFORTS TO FURTHER DEFINE AND PREVENT THREATS TO JUDICIAL IMPARTIALITY 8

A. The Court Has Expressed Its View That Its Role Is To Set Constitutional Requirements And The Role Of The States Is To Enact Policy That Fulfills And Furthers These Requirements 9

B. Current State Reform Efforts Will Give Effect To The Court's Due Process Ruling 11

C. State Reform Efforts Will Likely Be Weakened If The Court Tolerates The Substantial Risk Of Actual Bias Presented By The Facts Of This Case..... 16

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Cases

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986) 6

Dr. Bonham's Case, 8 Co. Rep. 107a,
77 Eng. Rep. 638 (C.P. 1610) 4

In re Murchison,
349 U.S. 133 (1955) 6

N.Y. State Bd. of Elections v. Lopez Torres,
128 S. Ct. 791 (2008) 2, 11

Pennsylvania v. Finley,
481 U.S. 551 (1987) 13

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 11

Smith v. Robbins,
528 U.S. 259 (2000) 2, 10

Spencer v. Texas,
385 U.S. 554 (1967) 10

Tumey v. Ohio,
273 U.S. 510 (1927) 3, 6

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 6, 7

TABLE OF AUTHORITIES--cont'd

Page

Constitutional Provisions, Statutes & Legislative History

U.S. CONST. amend. V 3

U.S. CONST. amend. XIV 3

Cong. Globe, 32d Cong., 1st Sess. 1107 (1852) 4

Cong. Globe, 36th Cong., 1st Sess. 1839 (1860) 5

Cong. Globe, 39th Cong., 1st Sess. 1094 (1866) 5

Cong. Globe, 39th Cong., 1st Sess. 1065 (1866) 4

Cong. Globe, 39th Cong., 2d Sess. 160 (1866) 4

Fugitive Slave Act, ch. 60, §§ 1-10, 9 Stat. 462 (1850) 4

Miscellaneous

ABA Model Code of Conduct, Canon 3E(1)(E) 14

Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005) 5

Akhil Reed Amar, THE BILL OF RIGHTS (1998) 5

Larry C. Berkson, *Judicial Selection in the United States: A Special Report* (1980) (updated by Rachel Caufield in 2004) 8-9

TABLE OF AUTHORITIES–cont'd

Page

Michael Kent Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) 5

Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead the Recusal Revolution*, 46 WASHBURN L.J. 503 (2007) 13

Greenberg Quinlan Rosner Research & American Viewpoint, Justice at Stake Frequency Questionnaire (2001) 11, 12

Jay Hall, *The Road Less Traveled: The Third Circuit's Preservation of Judicial Impartiality in an Imperfect World*, 50 VILLANOVA L. REV. 1265 (2005) 8

Judicial Selection in the States: How It Works, Why It Matters (American Judicature Society & Institute for the Advancement of the American Legal System, 2008) 15

Justice at Stake Campaign, March 2004 Survey Highlights: Americans Speak Out on Judicial Elections (2004) 11

Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, A1 12

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TABLE OF AUTHORITIES–cont'd

Page

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Malia Reddick, *Preface to the 2008 Revision*, MODEL JUDICIAL SELECTION PROVISIONS (American Judicature Society, 2008) 16

James Sample et al., *The New Politics of Judicial Elections 2006* (2006) 14, 15

James Sample et al., *Fair Courts: Setting Recusal Standards* (2008) 14

Testimony of Pennsylvanians for Modern Courts on Pennsylvania House Bill No. 1720, submitted by Shira J. Goodman and Lynn A. Marks (Aug. 13, 2007) 13

Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* (2001) 12

INTEREST OF AMICI CURIAE[1]

Amici curiae respectfully submit this brief to the Court to demonstrate and explain the interaction between the constitutional question presented to the Court in this case and the policy issues currently being addressed by state judicial selection reform efforts.

The twenty-eight *amici* represented on this brief are national, state, and local organizations committed to preserving judicial independence and integrity: Justice At Stake, American Judicature Society, Appleseed, Common Cause, Constitutional Accountability Center, Institute for the Advancement of the American Legal System at the University of Denver, League of Women Voters of the United States, National Ad Hoc Advisory Committee on Judicial Campaign Conduct, Alabama Appleseed, Colorado Judicial Institute, Democracy North Carolina, Fund for Modern Courts (New York), Illinois Campaign for Political Reform, Justice For All (Arizona), League of Women Voters of Michigan, League of Women Voters of Wisconsin Education Fund, Massachusetts Appleseed, Michigan Campaign Finance Network, Missourians for Fair and Impartial Courts, NC Center for Voter Education,

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Ohio Citizen Action, Pennsylvanians for Modern Courts, Texans for Public Justice, Washington Appleseed, Washington Appellate Lawyers Association, Wisconsin Democracy Campaign, Chicago Appleseed, and the Chicago Council of Lawyers.

A description of each *amicus* organization may be found in the Appendix to this brief.

SUMMARY OF ARGUMENT

This case presents concerns about judicial elections that fall on both sides of "the distinction between constitutionality and wise policy," *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 801 (2008) (Stevens, J., concurring). While the Court will surely be mindful in this case, as it has been in the past, of the questions of "wise policy" raised by the current state of judicial elections, it need not be concerned that its constitutional ruling requires the Court to take positions on policy. Rather, as the Court has routinely stated, its role is to set the minimum level of process required by the Fourteenth Amendment, while the role of the states is to promulgate appropriate procedures and rules that further define and build upon the Court's articulation of the constitutional floor. *See Smith v. Robbins*, 528 U.S. 259, 274-75 (2000).

If the Court finds, as Petitioners and *amici* urge, that the facts of this case rise to the level of a due process violation, state reform efforts will work within the contours of the Court's constitutional ruling to find solutions to the questions of "wise

policy" raised by the serious threats to judicial impartiality posed by judicial campaigns and elections. On the other hand, if the Court does not find that the egregious facts of this case rise to the level of a due process violation, state reform efforts will be weakened by the Court's acceptance of the perceived and actual threats to judicial impartiality posed by high levels of campaign contributions to judicial candidates.

The history of due process and judicial independence in the United States supports the proposition that the Constitution must be used to preserve fundamental fairness and the perception and reality of impartial justice. The Court should follow the long line of precedent that holds that due process requires judges to "hold the balance nice, clear, and true," *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The Court's constitutional ruling in this case, compelled by history and precedent, will encourage states to reform judicial selection in general and improve recusal provisions in particular.

ARGUMENT

I. THE HISTORY OF THE DUE PROCESS CLAUSE SHOWS A PARTICULAR CONCERN FOR ENSURING UNBIASED DECISIONMAKERS.

From the English common law through the guarantees of due process in the Fifth and Fourteenth Amendments of the U.S. Constitution, a fair and impartial judiciary has been an indispensable feature of democracy. *See* U.S.

CONST. amend. V, XIV. The judicial insistence on unbiased adjudicators goes back at least as far as the early seventeenth century common law, *see Dr. Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610), and was invoked by the American Founders, *see* THE FEDERALIST No. 10, at 47 (James Madison) (Clinton Rossiter ed., 1999) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity.").

Securing impartial justice was of particular concern to the drafters of the Fourteenth Amendment's Due Process Clause, who acted against the backdrop of widespread maladministration of justice in the South, whereby neither freed slaves nor Unionists could be sure of due process in the courts. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1065, 1091, 1093-94 (remarks of Rep. Bingham), 1263 (remarks of Rep. Broomall) (1866); Cong. Globe, 39th Cong., 2d Sess. 160 (1866) (remarks of Sen. Trumbull) (noting that Union delegations in the South have reported "that they can get no justice in the courts, and that they have no protection for life, liberty or property."). The drafters of the Fourteenth Amendment were also keenly aware of the particular injustices wrought by the Fugitive Slave Act in the North. Under the federal Fugitive Slave Act of 1850, the commissioner who decided whether the person brought before him was a fugitive slave received $10 for returning a purported slave, but only $5 for declaring him free. *See* Fugitive Slave Act, ch. 60, §§ 1-10, 9 Stat. 462 (1850); Cong. Globe, 32d Cong., 1st Sess. 1107 (1852) (remarks of Sen. Sumner)

("Adding meanness to the violation of the Constitution, it bribes the commissioner by a double fee to pronounce against freedom. If he dooms a man to slavery, the reward is $10; but, saving him to freedom, his dole is $5."); Cong. Globe, 36th Cong., 1st Sess. 1839 (1860) (remarks of Rep. Bingham) (decrying the fugitive slave law of 1850 as "a law which, in direct violation of the Constitution, transfers the judicial power...to irresponsible commissioners...tendering them a bribe of five dollars if...he shall adjudge a man brought before him on his warrant a fugitive slave"); *see generally* Michael Kent Curtis, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 40 (1986).

The "controversy over fugitive-slave rendition had heightened abolitionists' sensitivity to fair procedure," because the Fugitive Slave Act deprived black defendants of basic fair-trial rights, including "an unbiased decision-maker." Akhil Reed Amar, THE BILL OF RIGHTS 278 (1998); *see also* Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 388 (2005) (noting the "due-process claims of free blacks threatened by the rigged procedures of the Fugitive Slave Act of 1850"). Accordingly, Representative Bingham, principal drafter of Section 1 of the Fourteenth Amendment, intended the Amendment to secure "due process of law...which is impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

This Court has applied the Due Process Clause to guarantee the impartial adjudicators the framers of the Fourteenth Amendment found lacking in

some Civil War-era courts. In *Tumey v. Ohio*, the Court held that the due process guarantee of the Fourteenth Amendment is violated when a judge "has a direct, personal, substantial pecuniary interest in reaching a conclusion against [a litigant]." 273 U.S. 510, 523 (1927). After an exposition of the common law history of due process, the *Tumey* Court stated the rule that "[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.* at 532.

Since *Tumey*, the Court has continued to protect the Fourteenth Amendment "right to have an impartial judge," *id.* at 535, by preventing judges from presiding over cases in which they have a financial stake or are otherwise not wholly disinterested in the outcome. *See In re Murchison*, 349 U.S. 133, 136 (1955) (finding that a judge may not act as a grand jury and then try the person so indicted because the guarantee of a "fair trial in a fair tribunal" requires not just "an absence of actual bias in the trial of cases" but also endeavors "to prevent even the probability of unfairness"); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (finding that a petitioner was denied an impartial adjudicator where the mayor, who served as judicial officer, was arguably interested in increasing court fines and forfeitures because these amounts provided a substantial portion of village funds); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813

(1986) (invalidating a ruling written by an Alabama State Supreme Court justice who had a personal interest in the resolution of a dispositive issue, noting that it was unnecessary to determine whether the judge was actually biased, since "justice must satisfy the appearance of justice") (citation omitted). *See generally* Pet. Br. at 19-24 (discussing relevant precedent at length); Brennan Ctr. Br. at I.A. (discussing current state judicial election patterns that implicate fundamental fairness concerns). The *Ward* case, in particular, shows that a decision-maker need not be tempted to line his own pockets to be deemed biased under due process analysis; rather, a less direct financial incentive, like continued campaign contributions or enhanced professional position, may count as a pecuniary interest and suffice to deny a party her constitutional right to "a neutral and detached judge." *Ward*, 409 U.S. at 62.

This precedent, and the history of the Due Process Clause, require that the Court find that judicial campaign contributions can, in certain circumstances, create the reality or appearance of judicial bias in violation of the Due Process Clause. The extraordinary facts of this case provide a clear opportunity for the Court to set a constitutional floor for judicial campaign contributions and the requirements of due process.

II. A CONSTITUTIONAL RULING IN THIS CASE WILL ENCOURAGE STATE JUDICIAL SELECTION REFORM EFFORTS TO FURTHER DEFINE AND PREVENT THREATS TO JUDICIAL IMPARTIALITY.

History shows that the Due Process Clause should be applied in this case to protect both the reality and appearance of judicial impartiality and fundamental procedural fairness. History also suggests that, with this Court's guidance firmly in hand, state reformers will work with legislatures and courts to fill in the contours of the Court's ruling, refining how due process and recusal will interact in the context of an elected judiciary. Just as in the federal context recusal statutes provide such strenuous review of judicial activity that some commentators have deemed due process challenges to be "superfluous," *see* Jay Hall, *The Road Less Traveled: The Third Circuit's Preservation of Judicial Impartiality in an Imperfect World*, 50 VILLANOVA L. REV. 1265, 1266 n.8 (2005), the current judicial selection reform movement in the states shows that there are efforts in place to build upon any due process floor articulated by the Court in this case.

State judicial elections first arose in the early nineteenth century as efforts to make courts more democratic and accountable. At the time the Fourteenth Amendment was drafted and ratified, the majority of states elected judges to some degree. *See* Larry C. Berkson, *Judicial Selection in*

the United States: A Special Report 1 (1980) (updated by Rachel Caufield in 2004), available at http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf (noting that, by the time of the Civil War, 24 of 34 states had established an elected judiciary; as new states were admitted to the Union, all of them adopted popular election of some or all judges until the admission of Alaska in 1959). But as this case shows, the promise of popular judicial elections has led, in some cases at least, to a perception that justice is for sale, as campaign contributions increase exponentially and public confidence in the system wanes. This Court should recognize that there are circumstances—like those presented in this case—under which the threats to judicial independence and impartiality posed by judicial elections can threaten constitutionally-required due process. Such a ruling will guide and inspire current state reformers to enact policies designed to restore the appearance and reality of equal justice and judicial independence.

A. The Court Has Expressed Its View That Its Role Is To Set Constitutional Requirements And The Role Of The States Is To Enact Policy That Fulfills And Furthers These Constitutional Requirements.

The interaction between state judicial election reform efforts and the due process "floor" Petitioners and *amici* advocate for in this case fits within the Court's view of its role not as "rule-making organ for the promulgation of state rules,"

Spencer v. Texas, 385 U.S. 554, 564 (1967), *quoted in Smith v. Robbins*, 528 U.S. 259, 274 (2000), but as the arbiter of "whether those procedures fall below the minimum level the Fourteenth Amendment will tolerate," *id.* The Court has suggested a dynamic relationship between the states and the Court that is well-suited to this case: states are encouraged to enact standards that effectuate and perhaps go beyond a constitutional due process minimum identified by the Court in a particular case. As Justice Thomas wrote in *Smith*, "it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down. We should, and do, evaluate state procedures one at a time, as they come before us, while leaving the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance." 528 U.S. at 275 (citation and quotation marks omitted).

Accordingly, the Court may "avoid imposing a single solution on the States from the top down," *Smith*, 528 U.S. at 275, by setting the due process floor in this case. This would, in turn, encourage the state reform efforts detailed by *amici* to build upon that floor by further defining the circumstances under which recusal is required or by addressing the problematic aspects of judicial elections that give rise to such threats to judicial independence in the first place.

B. Current State Reform Efforts Will Give Effect To The Court's Due Process Ruling.

Heeding the call to engagement expressed in Justice Kennedy's concurrences in *Lopez Torres*, 128 S. Ct. at 803, and *Republican Party v. White*, 536 U.S. 765, 794 (2002), state efforts are already underway to reform judicial elections in general and improve recusal provisions in particular. While most flaws in the judicial election process do not rise to the level of a constitutional violation, the problems attendant to judicial elections have become so serious and immediate that a national movement, of which many *amici* are a part, has been formed to reform state judicial selection.

Judicial elections have created a crisis of public confidence. National surveys from 2001 and 2004 found that over 70% of Americans believe that campaign contributions have at least some influence on judges' decisions in the courtroom.[2] *See generally* Brennan Ctr. Br. at I.B (describing the perception and reality of bias occasioned by campaign contributions in judicial elections). Taking just one state as an example, retired Justice Sandra Day O'Connor has highlighted that "[n]ine out of 10 Pennsylvanians regard judicial

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[2] *See* Greenberg Quinlan Rosner Research & American Viewpoint, Justice at Stake Frequency Questionnaire 4 (2001), available at http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf; Justice at Stake Campaign, March 2004 Survey Highlights: Americans Speak Out on Judicial Elections (2004), available at http://www.faircourts.org/files/zogbypollfactsheet.pdf.

fundraising as evidence that justice is for sale, and many judges agree." Sandra Day O'Connor, *Justice for Sale: How Special-interest Money Threatens the Integrity of Our Courts*, THE WALL ST. JOURNAL, A25 (Nov. 15, 2007). Unsurprisingly, but unfortunately, this perception of the influence of judicial campaign contributions causes the public to question whether equal justice under the laws is a reality and not merely an aspiration: according to a 2001 poll, just 33% of those surveyed believed that "the justice system in the U.S. works equally for all citizens," and 62% believed that "[t]here are two systems of justice in the U.S.—one for the rich and powerful and one for everyone else."[3] *See* Sample, *supra*, at 10-11. Even worse, studies suggest that this perception of bias may actually reflect reality.[4]

A due process ruling by the Court in this case would draw a constitutional line at a particularly egregious set of facts; state reform efforts will then give effect to this ruling across a broader spectrum. Within constitutional limits, states have a significant amount of discretion to carry out constitutional mandates. *See Pennsylvania v.*

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[3] Greenberg Quinlan, *supra* note 2, at 7.

[4] *See* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (reviewing 12 years of Ohio Supreme Court decisions and finding that justices ruled in favor of campaign contributors between 55% to 91% of the time); Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* 10 (2001), available at http://www.tpj.org /docs/2001/04/reports/paytoplay/paytoplay.pdf (showing that the average petitioner who contributed $250,000 or more to the Texas Supreme Court's campaigns was 10 times more likely than the average non-contributor to have a petition for discretionary review granted).

Finley, 481 U.S. 551, 555-59 (1987) (describing the Court's constitutional ruling in that case as setting a prophylactic framework that could adequately vindicate due process rights, while explaining that states have "substantial discretion to develop and implement programs" within that framework). In the context of judicial elections, reform advocates have proposed a variety of measures to restore public confidence and protect judicial independence; the following examples[5] suggest several ways that a constitutional ruling in this case could be furthered in the states.

Recusal Standards. The Court's constitutional ruling in this case could have a significant effect on reform of recusal standards. Currently, the rate of recusal because of campaign contributions is incredibly low. *See* Testimony of Pennsylvanians for Modern Courts on Pennsylvania House Bill No. 1720, submitted by Shira J. Goodman and Lynn A. Marks (Aug. 13, 2007); *see also* Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead the Recusal Revolution*, 46 WASHBURN L.J. 503 (2007). The American Bar Association has recently proposed a model code provision that would allow each state to fill in the blanks in the proposed code provision to require recusal

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[5] There are many more reform efforts underway in the states, including movements to increase voter education, create campaign conduct oversight committees, transition from partisan to non-partisan elections, and implement judicial performance evaluation processes; a full description of the panoply of reform efforts is beyond the scope and space of this brief. *See generally* Justice at Stake Campaign, http://www.faircourts.org/ (providing information about reform partners and projects).

whenever campaign contributions reach a particular level, within a specified time-frame. *See* ABA Model Code of Conduct, Canon 3E(1)(E). Reform movements are calling upon states to consider adopting some version of the ABA model provision; two states have already done so. *See* James Sample et al., *Fair Courts: Setting Recusal Standards* (2008), available at http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/. If the Court draws a constitutional line, even in an extreme case, it will be clear that at least at some point judges must recuse themselves from cases involving campaign contributors. With this starting point, states will be encouraged to consider provisions like the model canon proposed by the ABA to define for themselves the circumstances giving rise to campaign-related recusal.

Public Financing. Within a contested election system, "[p]ublic financing can help mitigate the worst side-effects of high-cost judicial elections, while still leaving the final decision in the hands of the voters." James Sample et al., *The New Politics of Judicial Elections 2006* 39 (2006), available at http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf. In 2007, New Mexico became the second state to provide full public financing for judicial elections; North Carolina was the first, having offered voluntary funding to qualified candidates for its Supreme Court and Court of Appeals since 2004. *Id.* at 39-40. The North Carolina program has documented success: in 2004, 14 of 16 candidates enrolled in the state's trial run of the program; in 2006, eight of 12

candidates opted to limit their fundraising in exchange for public funds; and in 2008, 11 of 12 high court candidates opted into the system. *See id.* With the public financing system in place, candidates collected smaller contributions from more donors and 53% of all donations came from public funds or contributions of less than $100. The program has also been a success with the public: a 2005 poll found that 74% of North Carolina voters approved continuing the public financing system. *Id.*

Merit Selection. In many states, reform advocates have sought to move away from partisan, contested elections altogether in favor of appointment-based or "merit-selection" systems. Under a merit-selection system, a nominating commission evaluates judicial applicants and sends the names of the best-qualified candidates to the state governor. The governor then appoints one of the nominees submitted by the commission; in some states, the state senate confirms the nominated judges, and, in most systems, these appointed judges will eventually stand for a retention election. Several states already use a merit-based selection process exclusively, and many states use some mix of an appointment system and elections. *See* Judicial Selection in the States: How It Works, Why It Matters (American Judicature Society & Institute for the Advancement of the American Legal System, 2008), available at http://www.judicialselection.us/uploads/documents/JudicialSelectionBrochureemail_A2E54457CD359.pdf. The American Judicature Society has published Model Judicial Selection Provisions to

offer states "exemplary language for establishing judicial nomination and evaluation processes of the highest quality." Malia Reddick, *Preface to the 2008 Revision*, MODEL JUDICIAL SELECTION PROVISIONS (American Judicature Society, 2008).

All of these reform efforts aim to preserve judicial accountability, while removing undue special interest influence and restoring public confidence in and respect for state judiciaries. Most importantly, all of these proposed reforms will provide a due process "buffer zone," ensuring that state judicial selection systems do not approach the limits of the Fourteenth Amendment's guarantee of an unbiased decisionmaker in courts of justice.

C. State Reform Efforts Will Likely Be Weakened If The Court Tolerates The Substantial Risk Of Actual Bias Presented By The Facts Of This Case.

While it is likely that a ruling in favor of Petitioners will have the effect of encouraging state judicial selection reform, it may also be that a contrary ruling will discourage such efforts. If the Court does not find a due process violation under the facts of this case, state reform efforts may be weakened or even overcome by the Court's implicit acceptance of the perceived and real threats to judicial impartiality raised by substantial campaign contributions like the ones in this case.

While there are many examples of threats to judicial independence posed by state judicial elections, *see* Brennan Ctr. Br. at Section I, the

facts of this case are extraordinary. Don Blankenship, chairman, CEO, and president of A.T. Massey Coal Co., spent $3 million supporting Justice Benjamin's campaign for a seat on the West Virginia Supreme Court of Appeals. Those remarkable expenditures represented more than 60% of the total amount spent in support of Justice Benjamin's candidacy; Blankenship spent this money in support of Justice Benjamin while Massey was preparing to appeal a $50 million fraud verdict to the West Virginia Supreme Court of Appeals. *See* Pet. Br. at 3-15 (describing the facts of the case in detail). Justice Benjamin's decision not to recuse himself from Massey's appeal—despite the staggering amount of Blankenship's campaign expenditures and the timing of those contributions in relation to Massey's appeal—creates an undeniable appearance of impropriety, if not evidence of an actual bias.

For the Court not to recognize a due process violation under these circumstances would send a message that concerns about judicial elections are not so serious as to pose a threat to the independent judicial system our Constitution requires. Such a ruling would constitute a significant setback for the state judicial selection reform movement, which is premised on the idea that judicial elections and campaign contributions can, in some cases, threaten the appearance or reality of impartial justice. A ruling by the Court that the facts of even this case do not present a constitutionally significant threat to equal justice

would significantly undermine this premise, and weaken state reform efforts.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse Justice Benjamin's decision not to recuse himself, vacate the judgment of the Supreme Court of Appeals of West Virginia, and remand for further proceedings without Justice Benjamin's participation.

Respectfully submitted.

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APPENDIX

LIST OF *AMICI CURIAE* ORGANIZATIONS

JUSTICE AT STAKE is a non-partisan campaign of more than 50 organizations working to keep courts fair and impartial. Justice at Stake Campaign partners educate the public and work for reforms to keep special interest pressure out of the courtroom.*

AMERICAN JUDICATURE SOCIETY works to maintain the independence and integrity of the courts and increase public understanding of the justice system. Founded in 1913, the society is a non-partisan organization with a national membership of judges, lawyers and other citizens interested in the administration of justice. Its mission is to secure and promote an independent and qualified judiciary and fair system of justice.

APPLESEED is a non-profit network of public interest justice centers and professionals dedicated to building a just society through legal, legislative and market-based structural reform.

COMMON CAUSE is one of the nation's oldest and largest citizen advocacy organizations, with organizations in 35 states, and nearly 400,000

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* The arguments expressed in this brief do not necessarily express the opinion of every Justice at Stake partner or board member. Members of Justice at Stake's board of directors who are sitting judges did not participate in the formulation or approval of this brief.

members and activists around the country. Common Cause is a strong proponent of a fair and impartial judiciary, and supports reform initiatives for judicial election, selection, and retention that eliminate the undue influence of special interest money on the judiciary. Common Cause seeks such reforms through state chapters in many states, including Georgia, Ohio, Pennsylvania, and Wisconsin.

CONSTITUTIONAL ACCOUNTABILITY CENTER is a think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history, including preserving access to equal justice and impartial courts.

The INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM AT THE UNIVERSITY OF DENVER is a national, non-partisan organization, dedicated to improving the process and culture of the U.S. civil justice system.

The LEAGUE OF WOMEN VOTERS OF THE UNITED STATES is a non-partisan political organization that, since 1920, has encouraged informed and active participation in government, worked to increase understanding of major public policy issues, and sought to influence public policy through education and advocacy.

The NATIONAL AD HOC ADVISORY COMMITTEE ON JUDICIAL CAMPAIGN CONDUCT is an independent entity established to promote the use of judicial campaign oversight committees.

ALABAMA APPLESEED CENTER FOR LAW AND JUSTICE, INC. is one of a network of 15 independent public interest justice centers that seeks to identify root causes of injustice and inequality, and then to fashion systemic solutions that benefit all Alabamians. Alabama Appleseed is a tax-exempt, non-partisan group of pro bono lawyers who have identified the massive amounts of private donations to all of Alabama's judges, elected by partisan elections – some $13 million for contested Supreme Court seats in 2006 – as gravely undermining the public's belief that justice in Alabama is blind.

The COLORADO JUDICIAL INSTITUTE is a 29-year old non-partisan, non-profit organization that seeks to preserve and enhance the independence and excellence of Colorado courts, further public understanding of the Colorado judicial system, and ensure that the courts meet the needs of the people.

DEMOCRACY NORTH CAROLINA is a non-partisan organization that uses research, organizing, coalition-building, and public education to enhance the vitality of democracy in North Carolina and help fulfill the promise of "one person, one vote." It was a major leader in the successful effort to make North Carolina the first state in the nation with a robust public financing program for candidates in statewide judicial elections.

The FUND FOR MODERN COURTS is a private, non-profit, non-partisan organization dedicated to improving the administration of justice in New

York State. For over 50 years the cornerstone of Modern Courts' mission has been the fight for an independent, highly qualified and diverse judiciary based upon a merit-based appointive system for the selection of judges.

The ILLINOIS CAMPAIGN FOR POLITICAL REFORM is a non-profit, non-partisan public interest group that conducts research and advocates reforms to promote public participation, address the role of money in politics and encourage integrity, accountability and transparency in government.

JUSTICE FOR ALL is the Arizona counterpart to Justice at Stake. Justice for All is dedicated to the preservation of an independent, impartial judiciary and the merit selection/retention system of appointing and retaining judges.

The LEAGUE OF WOMEN VOTERS OF MICHIGAN is a non-partisan political organization which encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.

The LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION FUND is a non-partisan, non-profit organization which encourages active, informed participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.

MASSACHUSETTS APPLESEED CENTER FOR LAW AND JUSTICE, INC. is one of 15 public interest law centers nationwide in the Appleseed pro bono justice center network. The Center devises non-partisan solutions to difficult social problems using teams of volunteer attorneys and other professionals and works to build a society that provides each individual access to justice and a genuine opportunity to lead a full and productive life. The Center believes an impartial judiciary is fundamental to the administration of justice.

The MICHIGAN CAMPAIGN FINANCE NETWORK conducts research and provides public education on money in Michigan politics. It has published analysis of the last five Michigan Supreme Court election campaigns.

MISSOURIANS FOR FAIR AND IMPARTIAL COURTS is devoted to protecting Missouri courts from attacks by special interest groups and preserving the Missouri non-partisan court plan. The organization seeks to promote courts that remain accountable to the Constitution and the laws of the states—not to political pressure and special interests.

The NC CENTER FOR VOTER EDUCATION is dedicated to improving the quality and responsiveness of elections through public education and research. The Center is a non-partisan, non-profit organization based in Raleigh, North Carolina.

OHIO CITIZEN ACTION was founded in 1975 and has 80,0000 members. Ohio Citizen Action's Money in Politics Project has identified sources of campaign contributions and the economic and policy interests of donors.

PENNSYLVANIANS FOR MODERN COURTS is a statewide non-profit, non-partisan organization founded to improve and strengthen the justice system in Pennsylvania by reforming the judicial selection process; improving court administration, court financing and the jury system; eliminating bias; and assisting citizens in navigating the courts and the justice system, whether as litigants, jurors, or witnesses. The organization's mission is to ensure that Pennsylvania has fair and impartial courts that serve all Pennsylvanians.

TEXANS FOR PUBLIC JUSTICE is a Texas-based non-profit research and advocacy organization established in 1997. One of the organization's missions is to research the role of campaign contributions in the Texas judicial system and to promote a range of judicial reforms.

WASHINGTON APPLESEED is one member of the network described by the national Appleseed Foundation. Washington Appleseed operates in the State of Washington, which elects its judges in non-partisan elections.

The WASHINGTON APPELLATE LAWYERS ASSOCIATION (WALA) is an invitational organization of attorneys representing private and public clients in every substantive area of the law

in the appellate courts of Washington State, which elects judges by popular vote. WALA's mission includes fostering effective representation and efficient administration of justice at the appellate level, and safeguarding the integrity of the appellate process.

The WISCONSIN DEMOCRACY CAMPAIGN is a non-partisan watchdog group that tracks the money in state politics and advocates for campaign finance reform and other reforms promoting clean, open and honest government.

CHICAGO APPLESEED is a research and advocacy organization which promotes social justice and government effectiveness by identifying injustice in the community, investigating its causes, and finding effective solutions.

CHICAGO COUNCIL OF LAWYERS is a public interest bar association which strives for the fair and effective administration of justice.

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

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