No. 08-22

IN THE

Supreme Court of the United States

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

Petitioners,

—v.—

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF *AMICUS CURIAE* THE COMMITTEE FOR ECONOMIC DEVELOPMENT IN SUPPORT OF PETITIONERS

DANIEL F. KOLB
Counsel of Record
EDMUND POLUBINSKI III
DAVID B. TOSCANO
SARAH S. MCDONALD
JASON M. SPITALNICK
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. CLARIFYING THAT DUE PROCESS REQUIRES RECUSAL OF A JUDGE WHO HAS RECEIVED OUTSIZED CAMPAIGN CONTRIBUTIONS FROM A PARTY WILL PRESERVE CONFIDENCE IN THE JUDICIARY AND PROMOTE ECONOMIC STABILITY..4

A. Confidence in the Judiciary Is Fundamental to a Fair Legal Climate and Promotes Economic Growth 5

B. Certiorari Is Warranted in Light of the Increased Cost and Politicization of Judicial Campaigns, Greater Likelihood of Campaign-Related Recusal Motions, and Disagreement Among Judges Deciding Such Motions 7

II. CLARIFYING THAT DUE PROCESS REQUIRES RECUSAL IN THIS CASE WILL PRESERVE FAIRNESS WITHOUT LIMITING POLITICAL SPEECH...................10

CONCLUSION...12

TABLE OF AUTHORITIES

Page

<u>CASES</u>

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 5, 8

FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007) 11

MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990) 9

In re Murchison, 349 U.S. 133 (1955) 5

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 11

Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 5

Pierce v. Pierce, 39 P.3d 791 (Okla. 2001) 9

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 10, 11

Tumey v. Ohio, 273 U.S. 510 (1927) 9

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 9

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONS, STATUTES & RULES

Sup. Ct. R. 37 1

OTHER AUTHORITIES

Am. Judicature Soc'y, *Judicial Selection in the States* (2008) 8

Greenberg Quinlan Rosner Research, Inc. & American Viewpoint, *Justice at Stake – State Judges Frequency Questionnaire* (2002) 7

Bill Mears, *Big Money, Nasty Ads Highlight Wisconsin Judicial Race*, CNN.com, Mar. 31, 2008, http://www.cnn.com/2008/POLITICS/03/31/wisconsin.judicial.race................................ 8

Jill Young Miller & Jeremy Redmon, *Foes in Judicial Contest Go Dirty*, Atlanta Journal-Constitution, Oct. 31, 2006 8

Abdon M. Pallasch, *Cash Pours in to Heated Downstate Judicial Battle*, Chicago Sun-Times, Nov. 1, 2004 8

James Sample et al., *The New Politics of Judicial Elections* (2006) 8

3 J. Story, *Commentaries on the Constitution of the United States* § 1685 (1833) 2

TABLE OF AUTHORITIES—Continued

Page

Eric Velasco, *TV Ads Drive Up Campaign Tab: Nabors-Cobb Race Costliest in Nation for Judicial Post*, Birmingham News, Oct. 15, 2006 8

Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* (2007) ... 6, 7

IN THE

Supreme Court of the United States

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

v.

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

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

---

BRIEF FOR *AMICUS CURIAE* THE COMMITTEE FOR ECONOMIC DEVELOPMENT

INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae the Committee for Economic Development ("CED") is an independent, nonpartisan, trustee-directed organization of business leaders dedicated to policy research on

---

[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37, amicus curiae states that counsel for amicus authored this brief in its entirety. No person or entity other than amicus, its supporting organizations, and its counsel made a monetary contribution to the preparation of this brief.

economic and social issues and the implementation of its recommendations by the public and private sectors. CED's trustees include leaders of America's largest corporations and business organizations – companies that operate around the country and the world. Throughout its 66-year history, CED has addressed national issues that promote economic growth and development in the United States.

CED believes that public confidence in the judicial system is a critical element of America's stable, prosperous business climate, which depends upon an even-handed justice system to resolve disputes. As Justice Story wrote, "[n]o man can be insensible to the value, in promoting credit, of the belief of there being a prompt, efficient, and impartial administration of justice . . . ." 3 J. Story, *Commentaries on the Constitution of the United States* § 1685, at 564 (1833). Encouraged by its trustees' belief in the importance of judicial integrity, and consistent with its mission to promote policies that encourage economic growth, CED has consistently worked on a range of questions pertaining to judicial reform.

Essential to public confidence in the judiciary is the assurance that justice is not for sale and that legal disputes will be resolved by a fair and impartial judicial officer. Where, as here, a party or its representative has made disproportionately large campaign contributions to a judge, that judge's impartiality in a case involving the contributor is cast into doubt. A decision by that judge to hear such a case has far-reaching consequences because it erodes public confidence that future cases will be

decided fairly. It would take no more than a handful of high profile cases like this one to create a perception of unfairness that taints the vast majority of ordinary, good faith contributions. Recusal in such a situation is essential, both to guarantee due process in that individual case and to preserve confidence in the judiciary.

Because of the importance of clearer guidance on the subject and because there is uncertainty among judges as to the circumstances in which due process requires recusal, CED strongly supports the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

This case raises an important, unsettled question of law: whether due process requires an elected state supreme court justice to recuse himself where the CEO of a party has made and solicited outsized contributions to support the justice's campaign for election. By not recusing himself from the appeal of a $50 million jury verdict against A.T. Massey Coal Company ("Massey") – after he received over $3 million in post-verdict, pre-appeal campaign support from Massey's CEO – West Virginia Supreme Court Justice Brent Benjamin created an appearance of bias that would diminish the integrity of the judicial process in the eyes of any reasonable person. The resulting appearance of impropriety was so severe that petitioners cannot be said to have received due process.

A holding by the Court that the Due Process Clause required Justice Benjamin's recusal would

provide crucial guidance to elected judges and preserve public confidence in judicial elections. Such confidence is of particular value to those engaged in commerce, who rely on even-handed justice to make informed financial and investment decisions. In the face of ever more expensive and politicized judicial elections, a decision by the Court to grant certiorari and clarify the recusal standard required by the Constitution would signal to businesses and the public at large that judicial decisions cannot be bought and sold.

A clearer due process standard with respect to recusal would place no limits on otherwise appropriate contributions. Nor would it restrict the rights of contributors and candidates to participate vigorously in campaigns. Rather, a clear indication from the Court that due process requires recusal in a case like this would preserve the integrity of both the judiciary and judicial elections. It also would allow campaign contributions, as a practice, to continue without undermining confidence in the judiciary.

ARGUMENT

I. CLARIFYING THAT DUE PROCESS REQUIRES RECUSAL OF A JUDGE WHO HAS RECEIVED OUTSIZED CAMPAIGN CONTRIBUTIONS FROM A PARTY WILL PRESERVE CONFIDENCE IN THE JUDICIARY AND PROMOTE ECONOMIC STABILITY

Consistent with the command that a "fair trial in a fair tribunal is a basic requirement of due process,"

In re Murchison, 349 U.S. 133, 136 (1955), this Court has made clear that recusal may be required of a judge with a significant personal interest in a case, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986). However, the Court has not yet considered whether due process requires recusal of a judge who has received substantial campaign contributions from a party to a case or its representatives, and lower courts have diverged on the question. In view of the importance of maintaining confidence in the judiciary notwithstanding the increasing cost and politicization of judicial campaigns, CED urges the Court to grant the petition.

A. Confidence in the Judiciary Is Fundamental to a Fair Legal Climate and Promotes Economic Growth

Both the fact and the appearance that legal disputes will be resolved by unbiased, impartial judges are essential to preserving confidence in the judiciary. The belief among the business community that justice is even-handed affects economic decision-making, reduces the perception of risk, and encourages consistent adherence to transparent rules of law. As Justice O'Connor explained, "the point of due process . . . is to allow citizens to order their behavior." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting).

The integrity of the American judicial system allows economic actors to rely on existing legal frameworks in weighing the potential costs and benefits of business decisions. For American businesses, including CED's supporting

organizations, the ability to carefully assess risks and benefits is critically important.

Corporate actors appear frequently in a variety of courts. Although it may not be possible for a corporate litigant to predict the outcome of disputes with certainty, a corporation can nonetheless make informed business decisions – and take informed risks – based on its knowledge of a case, the court, and the judicial system as a whole. The due process concerns described in the petition threaten to undermine the ability of businesses to make such informed choices. Without exaggerating the predictability of judicial decisions, it certainly is true that where outsized judicial contributions by parties create the perception that legal outcomes can be purchased, economic actors will lose confidence in the judicial system, markets will operate less efficiently, and American enterprise will suffer accordingly.

There is much evidence that such confidence has already been impaired. In 2007, CED commissioned Zogby International to survey business leaders regarding state judicial election fundraising. Zogby surveyed 200 senior executives, primarily at companies with more than 500 employees. Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* 3–4 (2007). The results show that American business leaders are concerned that disproportionately large campaign contributions are influencing judges' decisions and creating an unacceptable appearance of such influence. Four in five business leaders expressed concern that

"financial contributions have a major influence on decisions rendered by judges," *id.* at 4, and survey respondents were nearly unanimous in the opinion that judges should recuse themselves from cases involving contributors, *id.* at 6.

These results are consistent with those in a 2002 survey of more than 2,400 state court judges, which found that 46% of such judges believe that judicial campaign contributions have at least "a little" influence on decisions by the recipients of those contributions. Greenberg Quinlan Rosner Research, Inc. & American Viewpoint, *Justice at Stake – State Judges Frequency Questionnaire* 5 (2002). A majority of state court judges believe judges should be prohibited from presiding over cases in which any party has contributed money to the judge's campaign. *Id.* at 11.

Both litigants and judges believe that campaign contributions influence judicial decisionmaking. Whether or not that is actually the case, the fact that the perception is so widespread makes it imperative that this Court clarify that due process requires recusal in cases like this.

B. Certiorari Is Warranted in Light of the Increased Cost and Politicization of Judicial Campaigns, Greater Likelihood of Campaign-Related Recusal Motions, and Disagreement Among Judges Deciding Such Motions

Additional clarity on this question of due process is particularly important now, as judicial campaigns become more expensive and more politicized. In the

four most recent election cycles, judicial candidates raised nearly twice the amount raised in the four election cycles preceding them. James Sample et al., *The New Politics of Judicial Elections* 15 (2006). In recent years, exceptionally expensive judicial campaigns have taken place in states such as Alabama, Eric Velasco, *TV Ads Drive Up Campaign Tab: Nabors-Cobb Race Costliest in Nation for Judicial Post*, Birmingham News, Oct. 15, 2006, at 17A; Georgia, Jill Young Miller & Jeremy Redmon, *Foes in Judicial Contest Go Dirty*, Atlanta Journal-Constitution, Oct. 31, 2006, at A1; Illinois, Abdon M. Pallasch, *Cash Pours in to Heated Downstate Judicial Battle*, Chicago Sun-Times, Nov. 1, 2004, at 18; and Wisconsin, Bill Mears, *Big Money, Nasty Ads Highlight Wisconsin Judicial Race*, CNN.com, Mar. 31, 2008, http://www.cnn.com/2008/POLITICS/03/31/wisconsin.judicial.race. As judicial campaign contributions continue to increase in the 39 states that elect some or all of their judges, Am. Judicature Soc'y, *Judicial Selection in the States* 4–7 (2008), the frequency of recusal motions stemming from contributions by parties or their officers or counsel can be expected to increase as well.

Lower court judges, who in West Virginia and many other states are the sole arbiters of motions seeking their recusal, look to this Court to set the "outer boundaries of judicial disqualifications" required by federal due process. *Aetna*, 475 U.S. at 828. Currently, elected judges faced with recusal motions stemming from campaign contributions by parties or their officers or counsel have little guidance on where those boundaries lie. A statement from this Court that the outsized contributions made

by Massey's CEO to Justice Benjamin's campaign "might lead him not to hold the balance nice, clear and true between the" parties, *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)), would provide lower courts with a much-needed benchmark against which to measure more frequent requests for recusal.

Divergent decisions by lower courts also show the need for guidance on this issue. In *Pierce v. Pierce*, the Supreme Court of Oklahoma disqualified a trial judge from presiding over divorce proceedings where one party's attorney had, during the pendency of those proceedings, donated $5,000 to the judge's reelection campaign and solicited additional contributions on the judge's behalf. 39 P.3d 791, 793–94 (Okla. 2001). The court, applying federal due process principles, concluded that "due process must include the right to a trial without the *appearance* of judge partiality arising from counsel's campaign contributions and solicitation of campaign contributions on behalf of a judge during a case pending before that judge." *Id.* at 799. Another state supreme court has stated that due process may require recusal where a party makes "substantial" campaign contributions to a judge. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1337 n.4 (Fla. 1990) (noting a political contribution may become "substantial enough that it would create a well-founded fear of bias or prejudice"). These decisions directly conflict with Justice Benjamin's refusal to recuse himself.

By granting the petition, this Court can clarify the law in this important area for state court judges,

who handle the vast majority of cases brought throughout the country. On the other hand, if Justice Benjamin's interpretation of federal due process is permitted to stand, state court judges may draw the conclusion that due process imposes no meaningful limits on their recusal decisions, and public confidence in judicial decisionmaking will continue to suffer.

II. CLARIFYING THAT DUE PROCESS REQUIRES RECUSAL IN THIS CASE WILL PRESERVE FAIRNESS WITHOUT LIMITING POLITICAL SPEECH

As frequent litigants in state courts and participants in judicial campaigns, American businesses have an interest in ensuring both the appearance of even-handed justice and the protection of their First Amendment rights to participate vigorously in judicial elections. Recusal provides an effective and necessary means of avoiding an impermissible appearance of bias without restricting free speech. In fact, it serves to reinforce the legitimacy of widespread participation in judicial elections by demonstrating that campaign contributions are not a means for parties to purchase votes in their own cases.

This Court has made clear that "[i]mpartiality" in the sense of "guarantee[ing] 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" is not merely a state interest that might justify regulation, but is "essential to due process." *Republican Party of Minn. v. White*, 536 U.S. 765, 775–76 (2002). Indeed,

Justice Kennedy's concurrence in *White* explicitly acknowledged that a federal due process floor exists independent of state recusal standards. *Id.* at 794 (noting a state's ability to "adopt recusal standards more rigorous than due process requires" in order to preserve the integrity of its elected judiciary).

Although some attempts to reconcile judicial impartiality and electoral accountability inappropriately infringe First Amendment rights, *see id.* at 787–88, recusal preserves due process and alleviates perceived bias without offending our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *FEC v. Wis. Right to Life*, 127 S. Ct. 2652, 2665 (2007) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Many of the firms who support CED exercise their constitutional right to political expression through contributions to judicial candidates and organizations who support them. This case does not call into question the propriety of such participation.

To the contrary, if the Court grants the petition and holds that Justice Benjamin's refusal to recuse himself from Massey's appeal violated federal due process, it would in no way limit the rights of Massey's CEO or others to support candidates for judicial office. Nor would it restrict the ability of those candidates, like Justice Benjamin, to campaign vigorously for office. Moreover, such a holding would not preclude judges from presiding over cases involving legal issues that generally have an impact on their largest supporters.

By granting the petition in this case, the Court can underscore a fundamental premise of our judicial system: that cases are decided based on their merits, not on campaign contributions. At the same time, all participants in judicial campaigns, including the business community, will benefit when contributions are properly seen as support for ideas and philosophies in the public forum rather than as attempts by particular parties to buy votes in pending or future cases.

CONCLUSION

The petition should be granted.

Respectfully submitted,

DANIEL F. KOLB
Counsel of Record

EDMUND POLUBINSKI III
DAVID B. TOSCANO
SARAH S. MCDONALD
JASON M. SPITALNICK
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

Attorneys for Amicus Curiae