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.

MASSEY COAL COMPANY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS[1]

Amicus curiae American Bar Association ("ABA") respectfully submits this brief in support of the petition for writ of certiorari. Having examined judicial impartiality issues and contributed to the fields of legal and judicial ethics for over one hundred years, the ABA believes that the facts and circumstances of this case demonstrate the need for guidance from this Court as to applicable constraints imposed by the Due Process Clause of the Fourteenth Amendment to the Constitution upon judicial recusal determinations where a party has contributed significantly to the judge's election campaign.

With approximately 400,000 members, the ABA is the largest voluntary professional membership organization in the United States and the leading organization of the American legal profession. ABA members come from each of the 50 states, the District of Columbia, and the U.S. territories. Its voluntary membership includes lawyers in private practice, government service, corporate law departments, and public interest and other nonprofit organizations, as

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters or e-mails on file with the Clerk's office. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief.

well as legislators, judges, law professors, law students, and non-lawyer associates in related fields.[2]

The ABA's mission "is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law."[3] One of its goals is "[t]o preserve the independence of the legal profession and the judiciary as fundamental to a free society."[4] In furtherance of its mission and this goal, the ABA has devoted extensive research and effort to addressing aspects of judicial elections that threaten or appear to threaten the integrity, impartiality, and independence of the judiciary. This work serves the critical functions of promoting the rule of law, the separation of powers, public confidence in the judiciary, and the ability of state courts to guarantee due process of law to all litigants before them.

The instant case presents questions that implicate long-standing codes of ethics developed and adopted by the ABA over the past 100 years. In particular, it raises important issues regarding the extent to which

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html.

[4] *Id.*

judicial officers should recuse themselves from cases involving substantial contributors to their judicial campaigns when failure to do so could reasonably compromise public confidence in the impartiality and integrity of the Courts.

The ABA's 1908 Canons of Professional Ethics recognized the profession's obligation to "protect against appointment or election" to the bench of those who would not forgo "other employments, whether of business, political, or other character, which may embarrass their free and fair consideration of questions before them for decision."[5] The ABA's first Canons of Judicial Ethics, adopted in 1924, were replaced by the Code of Judicial Conduct in 1972. This, in turn, became the Model Code of Judicial Conduct (the "Model Code") in 1990, which underwent substantial revisions in 1997, 1999, 2003, and 2007.

Canon 1 of the Model Code states, "A judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Canon 2 states, "A judge shall perform the duties of judicial office impartially, competently, and diligently." Under Canon 2, Rule 2.11 deals specifically with disqualification, stating at 2.11(A), "A judge shall disqualify himself or herself in any

[5] CANONS OF PROF'L ETHICS Canon 2 (1908). *See also id.*, Canon 3 ("A lawyer deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor.").

proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances." Among those circumstances, 2.11(A)(4) concerns the judge's receipt of campaign contributions.[6] Both the Model Code in general and Rule 2.11(A) in particular have become templates from which individual states have enacted their own judicial codes and disqualification rules.[7]

In addition to developing the Model Code, the ABA actively promotes public understanding of, and respect for, the judiciary through various initiatives. In 2007, the ABA's Standing Committee on Judicial Independence inaugurated a Judicial Disqualification Project, which has researched disqualification rules around the country; the forthcoming final report will include a discussion of concerns regarding judicial proceedings involving large campaign donors, which may be of value to the Court in its consideration of this matter should review be granted in this case.

SUMMARY OF ARGUMENT

Public confidence in the fairness and impartiality of the judicial process is essential to the efficacy and legitimacy of the courts and the judiciary. Even the appearance of judicial impropriety can undermine that confidence, as both the Model Code and this

[6] *See* ABA MODEL CODE OF JUDICIAL CONDUCT (2007), *available at* http://www.abanet.org/judicialethics/approved_MCJC.html.

[7] *See* ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct, State Judicial Ethics Resources, *available at* http://www.abanet.org/judicialethics/resources/resources_state.html.

Court's jurisprudence under the Due Process Clause of the Fourteenth Amendment have recognized. The ABA submits that such an appearance of impropriety may be created where, as in the present case, a judicial officer denies a recusal motion and continues to sit on a case where one of the parties has made significant contributions to the judge's election campaign. With the cost of judicial campaigns increasing, these issues are arising throughout the country, and there is need for guidance from the Court as to the boundaries imposed by the Due Process Clause in these circumstances.

REASONS FOR GRANTING THE WRIT

This case presents an important and unresolved question regarding an issue of increasing concern in courts across this country – namely, whether the constitutional right to due process places limits upon a judge's consideration of a legal matter in which one party was a substantial contributor to that judge's election to the bench.[8] Here, the Chairman and CEO of Respondent Massey, one of the nation's largest coal companies, which had lost a $50 million fraud verdict to Petitioners, contributed (both directly and indirectly) $3 million supporting the 2004 campaign of Justice Brent D. Benjamin for a seat on the

[8] Motions to disqualify on grounds of campaign contributions "hardly ever succeed." John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2000); *see also* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 26.6 at 776 (2d ed. 2007) (the argument for disqualification "has repeatedly been rejected by appellate courts").

Supreme Court of Appeals of West Virginia.[9] These campaign contributions, representing more than 60% of the total money spent on Justice Benjamin's campaign, were made at the very time Massey was preparing to appeal that verdict. After an initial decision was vacated for another judge's failure to recuse, the fraud verdict was ultimately overturned in a 3-2 decision, with Justice Benjamin casting the deciding vote after refusing to recuse himself. In light of the frequency with which such situations arise, and in light of language in past decisions of this Court, the ABA respectfully submits that state courts at all levels need guidance from this Court on the boundaries imposed by the Due Process Clause.

[9] Some press accounts have reported higher amounts for the contribution. *See, e.g.,* Potpourri, CHARLESTON GAZETTE (WV), July 7, 2008, at 4A ("Massey Energy's president spent $3.5 million for "attack ads" that enabled . . . Benjamin to win a seat on the state supreme court. . . ."); Justin D. Anderson, *Court Race Ad Sparks Controversy; French Riviera Photos Resurface in Campaign Spot,* CHARLESTON GAZETTE (WV), May 5, 2008, at 1A ("[Massey CEO] Blankenship spent about $3.5 million for advertisements, helping to get Justice Brent Benjamin elected"); Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash "in the Courtroom,"* N.Y. TIMES, Apr. 15, 2008, at A22 (reporting that Benjamin, who cast the deciding vote, declined to recuse himself despite owing his election to "more than $3 million" spent by Blankenship). Amicus, however, will not separately recite the facts of this case but will rely on the statement of facts in the Petition.

A. Substantial Judicial Campaign Contributions May Create An Appearance Of Bias And Undermine The Legitimacy Of The Judicial System.

This Court has recognized in a variety of contexts that the judiciary's legitimacy and efficacy derives largely from the public's confidence in its fairness and fidelity to the law. *See, e.g., Alden v. Maine*, 527 U.S. 706, 752 (1999) (a state court's "legitimacy derives from fidelity to the law"); *United States v. Mistretta,* 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("public confidence [is] essential" to the judicial branch) (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). That public confidence is being eroded by activities such as those at issue in this case and in other cases like it.[10]

Large campaign expenditures have become a virtual prerequisite for election to state judicial office. To meet this demand, judicial candidates increasingly depend on large contributors.[11] These elections are

[10] The most recent is *Dupre v. Telxon Corp., petition for cert. filed,* No. 08-41 (U.S. July 7, 2008).

[11] This phenomenon is not limited to state high court elections. Candidate fundraising is also on the rise in elections for trial and intermediate appellate judgeships. For example, two candidates running for an Illinois intermediate appellate court judgeship in 2006 quadrupled the previous state record by raising a combined $3.3 million. *See* JUSTICE AT STAKE

no longer "low key affairs, conducted with civility and dignity," *see* Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns,* 35 IND. L. REV. 819, 819 (2002) (quotation omitted), but involve highly reported,[12] politicized campaigns marked by million-dollar budgets and heated competition. This massive influx of money may pose a threat of judicial impropriety, both actual and apparent.

A substantial majority of the public – often 80% or higher – believes that campaign contributions influence judicial decisions, according to a variety of surveys conducted at both the national[13] and the

CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 at 24, *available at* http://www.justiceatstake.org/files/NewPolitics ofJudicialElections2006.pdf. Fundraising records will continue to be broken as more interest groups do the same mental calculus candidly acknowledged by an Ohio AFL-CIO official: "[W]e figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators." J. Christopher Heagarty, *The Changing Face of Judicial Elections,* N.C. ST. B. J. 19, 20 (Winter 2002).

[12] Intense contemporary state and local media attention accompanied the judicial disqualification determination below, signaling public concern for the appearance of impropriety presented in this case.

[13] Michael Hennessy & Bruce Hardy, *The Annenberg Public Policy Center of the University of Pennsylvania, Public Understanding of and Support for the Courts: Judicial Survey Results* (2007), *available at* http://www.appcpenn.org/Downloads /20071017_JudicialSurvey_Survey_Questions_10-17-2007.pdf/ (finding that 69% of the public "thinks that raising money for elections affects a judge's rulings to a moderate or great extent"); Christian W. Peck, Zogby International (*commissioned by* The Committee for Economic Development), *Attitudes and*

state[14] level. Tellingly, many state court judges feel the same way: A 2002 national survey of elected

Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges (2007), *available at* http://www.ced.org/docs/report/report_2007judicial_survey.pdf (finding that 79% of business executives believe "campaign contributions have an impact on judges' decisions").

[14] **Texas:** Sup. Ct. of Tex., State Bar of Tex. & Tex. Office of Ct. Admin., *The Courts and the Legal Profession in Texas: The Insider's Perspective: A Survey of Judges, Court Personnel, and Attorneys* (1999) (finding that 83% of Texans believe money has an impact on judicial decisions); Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* (2001), *available at* http://www.tpj.org/docs/2001/04/reports/ paytoplay/index.htm (finding Texas Supreme Court 750% more likely to grant discretionary petitions for review filed by contributors of at least $100,000 than by non-contributors, and 1,000% more likely to grant them for contributors of $250,000 or more).

Pennsylvania: Lake Sosin Snell Perry & Associates (*commissioned by* The Pennsylvania Special Commission to Limit Campaign Expenditures), *Banners from a Survey of 500 Registered Voters in the State of Pennsylvania* (1998) (finding that 90% of voters believe judicial decisions were influenced by large campaign contributions); *see also* Sandra Day O'Connor, *Justice for Sale,* WALL ST. J., Nov. 15, 2007, at A25 (noting that statistic).

Ohio: T.C. Brown, *Majority of Court Rulings Favor Campaign Donors,* CLEVELAND PLAIN DEALER, Feb. 15, 2000, at 1A (reporting 1995 Ohio survey where 90% of respondents believed campaign contributions influenced judicial decisions). *See also* Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings,* N.Y. TIMES, Oct. 1, 2006, at A1 (finding that Ohio's Supreme Court justices "routinely sat on cases after receiving campaign contributions from the parties involved or

state judges showed that 26% of them believe campaign contributions have at least *some* influence on judge's decisions, and another 9% believe such contributions have a *great deal* of influence.[15]

In short, the growing role of private money in judicial elections has created the perception that, in state courts, "large donors call the tune." *McConnell v. Fed. Election Comm'n,* 540 U.S. 93, 144 (2003) (quotation omitted). Granting the writ here will give this Court a timely opportunity to clarify the boundaries imposed upon judicial disqualification decisions in such circumstances by the Fourteenth Amendment's guarantee of due process.

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from groups that filed supporting briefs," and "voted in favor of contributors 70 percent of the time."

Louisiana: Vernon Valentine Palmer, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008) (showing striking statistical bias toward contributors by state supreme court justices over 14-year period).

[15] Greenberg Quinlan Rosner Research, Inc. (*commissioned by* the Justice at Stake Campaign), *Justice at Stake—State Judges Frequency Questionnaire* (2001-2002) 5, *available at* http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf.

B. This Case Presents The Court With An Opportunity To Clarify What Due Process Requires Of Disqualification Determinations In Judicial Campaign Contribution Cases.

The ABA recognizes that "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986). "[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." *Bracy v. Gramley,* 520 U.S. 899, 904 (1997). Nonetheless, this Court has consistently required disqualification when judicial conduct has fallen below the constitutional floor.[16]

The ABA respectfully submits that this case affords the Court an important opportunity to clarify whether this due process constitutional floor applies to cases involving judicial campaign contributions. The magnitude and timing of the campaign contributions here gave Justice Benjamin, in

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[16] *See Tumey v. Ohio,* 273 U.S. 510 (1927) (judge's assessment of civil fines went into his pocket); *In re Murchison,* 349 U.S. 133 (1955) (judge who presided over a "one-man grand jury" also presided over contempt proceedings related thereto); *Mayberry v. Pennsylvania,* 400 U.S. 455 (1971) (judge reviled by defendant also presided over his contempt trial); *Ward v. Village of Monroeville,* 409 U.S. 57 (1972) (mayor's adjudication of traffic fines contributed to city finances); *Aetna, supra* (judge voting for novel state cause of action against insurer had similar claim against an insurance company pending in a lower court).

appearance if not in fact, a personal interest in the outcome of this case similar to those this Court deemed to require recusal in *Tumey* and *Murchison*. Here as well the "situation is one 'which would offer a possible temptation . . . not to hold the balance nice, clear and true.'" *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). Indeed, Justice Benjamin's interest seems to have been "'direct, personal, substantial, [and] pecuniary.'" *Id.* (quoting *Tumey*, 273 U.S. at 523). If the facts of this case do not implicate due process concerns, then few judicial contribution cases ever will.

The ABA submits that the facts of this case would require judicial disqualification under the current version of the ABA's Model Code. The Model Code focuses as much on the appearance of bias as on actual bias. Canon 1 provides, "A judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Rule 1.2 provides that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[17] The conduct here – accepting contributions of this magnitude from a

[17] *See also* MODEL CODE, Canon 1, Rule 1.2, cmt [5] ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.").

litigant and refusing to recuse – certainly creates an appearance of impropriety.

The Model Code's general disqualification provisions fall under Canon 2, which states, "A judge shall perform the duties of judicial office impartially, competently, and diligently." Under this Canon, Rule 2.11(A) states that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances." Rule 2.11(A) then lists specific circumstances in which the need for disqualification is presumed, including one added in 1999[18] that requires disqualification when the judge has received election campaign contributions over a certain limit (to be set by the individual states) from parties or lawyers involved in a case. *Id.* Rule 2.11(A)(4).[19]

[18] West Virginia, however, appears still to be operating under the 1990 version of the Model Code. *See* W. VA. CODE OF JUDICIAL CONDUCT, *available at* http://www.state.wv.us/wvsca/JIC/codejc.htm.

[19] Rule 2.11(A)(4) requires disqualification when "[t]he judge knows or learns by means of a timely motion that a party, a party's lawyer or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]."

To date, only two states have adopted this approach.[20] To be sure, there are First Amendment implications in prescribing limits on campaign contributions[21] – concerns that have been heightened by the uncertainties that have arisen in the aftermath of this Court's decision in *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002).[22] The ABA submits that such concerns also heighten the need for guidance from this Court as to whether the Due Process Clause requires recusal in these circumstances.

The Court need not, however, prescribe any precise dollar campaign contribution amount as the constitutional floor to conclude that due process limitations apply on these facts. Nor need the Court determine whether Justice Benjamin was actually

[20] *See* ALA. CODE §§ 12-24-1, 2; MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(2).

[21] An alternative to mandating disqualification dollar amounts for very large private sector contributions is to deter them by providing for public campaign financing of judicial elections, though this approach also must overcome First Amendment hurdles. *See, e.g., N. Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake,* 524 F.3d 427 (4th Cir. 2008).

[22] *Compare Weaver v. Bonner,* 309 F.3d 1312 (11th Cir. 2002) *with In re Dunleavy,* 838 A.2d 338 (Me. 2003), *cert. denied sub nom. Dunleavy v. Maine Comm. on Jud'l Responsibility,* 541 U.S. 960 (2004), *and Republican Party of Minn. v. White,* 361 F.3d 1035 (8th Cir. 2004) (on remand, affirming district court on partisan activities clause and solicitation clause), *vacated & reh'g granted,* 2004 U.S. App. LEXIS 10232 (8th Cir. 2004), *rev'd,* 416 F.3d 738 (8th Cir. 2005) (en banc).

biased, just as the Court was "not required to decide whether in fact Justice Embry was influenced" in *Aetna*: "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias' . . . . But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" 475 U.S. at 824 (quoting *Murchison,* 349 U.S. at 136). Accordingly, the *Aetna* Court vacated the decision in which Justice Embry had cast the deciding vote, 475 U.S. at 828, just as Justice Benjamin did here.

Judicial elections and judicial campaign contributions in the normal course do not violate due process. However, implicit in the Model Code's Rule 2.11(A)(4) is that, at *some* contribution level, fundamental fairness concerns of actual or apparent bias are triggered.[23] Because the Court has held that the appearance, as well as the reality, of judicial impartiality animates the Due Process Clause, the ABA submits that this case presents an important opportunity for the Court to clarify the constitutional boundaries that govern the significant and recurring issue of judicial campaign contributions.

[23] *See also,* ABA, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 10 (2003), *available at* http://www/abanet.org/barserv/library/n/judiciary_and_the_courts/4543.pdf ("Appearances matter because the public's perception of how the courts are performing affects the extent of its confidence in the judicial system. . . . [P]ublic confidence in our judicial system is an end in itself.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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