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

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BRIEF FOR RESPONDENTS IN OPPOSITION

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SEPTEMBER 3, 2008

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment required Justice Brent D. Benjamin of the Supreme Court of Appeals of West Virginia to recuse himself from participating in a case because of lawful campaign expenditures where (a) there is no allegation that the campaign expenditures created any actual bias; (b) the campaign expenditures allegedly creating the appearance of bias were made by an officer of a party, not the party itself; (c) the expenditures were made independently of Justice Benjamin's campaign; and (d) the expenditures occurred before Justice Benjamin became a member of the Supreme Court of Appeals and before the underlying case was pending at that court.

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 A.T. Massey Coal Company, Inc. is wholly owned by Massey Energy Company, which is a publicly traded company. Massey Energy Company has no parent corporation, and Fidelity Management & Research owns 10% or more of its stock. Massey Coal Sales Company, Inc. is wholly owned by A.T. Massey Coal Company, Inc. Elk Run Coal Company, Inc. is wholly owned by A.T. Massey Coal Company, Inc. Independence Coal Company, Inc., Marfork Coal Company, Inc., and Performance Coal Company, Inc. are wholly owned by Elk Run Coal Company, Inc. No other publicly traded company has any ownership interest in Massey Coal Sales Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., or Performance Coal Company, Inc.

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Respondents A.T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc. (collectively "Respondents" or "Massey"), respectfully submit this brief in opposition to Petitioners' petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (Pet. App. 1a-147a) is not yet published but is electronically reported at 2008 WL 918444. Justice Benjamin filed a concurring opinion on July 28, 2008 (Pet. Supp. App. 1a-64a), which Petitioners submitted with a supplemental brief. Justice Benjamin's orders declining to recuse himself

(Pet. App. 148a-51a, *id.* at 152a-56a, and *id.* at 157a-59a) are not reported.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered judgment on April 3, 2008 (Pet. App. 1a-94a). The petition for a writ of certiorari was filed on July 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

This case involves an attack on a judgment by the Supreme Court of Appeals of West Virginia, which, applying everyday principles of res judicata and forum selection, twice reversed a $50 million compensatory and punitive damages award. Petitioners here do not challenge the correctness of the court's application of the law in the case. Rather, Petitioners seek review on the ancillary ground that one of the justices *appeared* to be biased.

Petitioners claim that Justice Brent Benjamin's refusal to recuse himself deprived them of due process. They do not claim that Justice Benjamin was actually biased, which is required to trigger recusal under due process. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 776 (2002) (explaining the Court's due process cases as "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"). Instead, Petitioners ask this Court to hold that the Due Process Clause is triggered by bad appearances and that—as "evidenced" by newspaper editorials and a push

poll—to some it appeared inappropriate for Justice Benjamin to sit after a corporate officer made independent expenditures during his election several years earlier.

But the "Supreme Court has never rested the vaunted principle of due process on something as subjective and transitory as appearance." *Del Vecchio v. Ill. Dep't of Corrections*, 31 F.3d 1363, 1371-72 (7th Cir. 1994) (en banc). And courts repeatedly have rejected the claim that a lawful campaign contribution to a judge mandates recusal under the Due Process Clause or even the lower bar set by state statutes and canons. Because there was no due process violation, and because there is no conflict in the courts regarding when campaign expenditures require recusal under the Due Process Clause, this Court should deny the Petition.

A. The 2004 Election

As in 38 other States, the people of West Virginia have chosen to elect their judges. In 2004, Brent Benjamin ran for and won a seat on the Supreme Court of Appeals, defeating incumbent Justice Warren McGraw.

Petitioners' due process claim focuses on the 2004 election expenditures of one of Massey's officers, Don Blankenship. The Petition attempts to paint the picture that Mr. Blankenship personally set out to "buy a seat" on the appellate court in order to influence a case involving Massey that was pending in the trial court and that had only a chance years later of being accepted for appellate review.

The *complete* facts thoroughly rebut this grand conspiracy theory.

Mr. Blankenship is and was at the relevant time Massey's board chairman, CEO, and president. Massey is a publicly traded company, and Mr. Blankenship has owned less than 1% of its stock from 2004 to the present. *See, e.g.*, Massey Energy Company 2008 Proxy Statement at 16 (Apr. 15, 2008). Mr. Blankenship has long been active in politics in West Virginia. In 2004, he—like many others from *both* parties—opposed the reelection of Justice Warren McGraw, an extremely polarizing figure in West Virginia. Motion of Petitioner Corporations for Disqualification of Justice Benjamin ("Corp. Disqualification Mtn.") Ex. 36. Mr. Blankenship's reason for expending his personal funds in the election are best summed up by his mantra that "[a]nybody would be better than McGraw for the state." *Id*. Ex. 9.

Mr. Blankenship made a single $1,000 contribution to Justice Benjamin's campaign. *Id.* Ex. 28. Mr. Blankenship also directly expended $517,707 on the election, primarily in opposition to Justice McGraw. *Id.* Exs. 24, 28. By law, these expenditures were made "independently of [Justice Benjamin's] campaign and without the cooperation or consent, or in consultation with, the candidate or the candidate's agents." *Id.* Ex. 18 (W. Va. Official Form F-7B (revised 7/03)).

The Petition focuses, however, on Mr. Blankenship's separate contributions totaling $2,460,500 to an Independent Expenditure Group ("527" Group) called "And for the Sake of the Kids"

("ASK"). Corp. Disqualification Mtn. Exs. 10-12. ASK was opposed to Justice McGraw in the election, focusing on his record on criminal law issues. *Id.* Ex. 44. Justice Benjamin's campaign was "completely independent" of ASK and had no connection with or control over what ASK did or said. Pet. Supp. App. 39a, 51a. In fact, Justice Benjamin's campaign specifically announced that it "absolutely [was] not" working with ASK. Corp. Disqualification Mtn. Ex. 44.[1]

As he noted in his denials of the recusal motions, since his election in 2004 Justice Benjamin has participated in a number of cases involving Massey and/or Massey subsidiaries. *See U.S. Steel Mining Co., LLC v. Helton*, 631 S.E.2d 559 (W. Va. 2005); *Helton v. Reed*, 638 S.E.2d 160 (W. Va. 2006); *Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, No. 080182 (W. Va. May 22, 2008). And in all of those cases, Justice Benjamin voted *against* Massey. They include a case involving a $220 million compensatory and punitive damages award against Massey—well over four times the size of the damages here—in which Justice Benjamin voted to deny review. *See Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, No. 080182 (W. Va. May 22, 2008), *petition for cert. filed*, No. 08-218, 2008 WL 3884291 (U.S. Aug. 20, 2008).

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[1] Just as Mr. Blankenship gave money to ASK, many others—including Petitioner Caperton, one of Petitioners' lawyers, and one of the law firms representing Petitioners—gave money to the West Virginia Consumers for Justice, which spent $1.5 million in support of Justice McGraw's campaign. *See* Supplemental Brief of Appellants on Rehearing at 30 n.6.

Before the instant case, no party—including the Attorney General of West Virginia, Darrell McGraw (Justice McGraw's brother and a prior Chief Justice of the Supreme Court of Appeals)—had ever sought Justice Benjamin's recusal from a case involving Massey. Pet. App. 153a-54a. In fact, the head of the West Virginia Department of Environmental Protection said she "would not have entertained" attempting to recuse Justice Benjamin in a matter involving Massey. *Id.* at 154a.

B. The Appeal And Recusal Motions

The underlying case involves a battle over coal supply. The basis of Petitioners' substantive legal claim was that Massey purchased Wellmore Coal Corporation ("Wellmore"), through which Petitioner Harman supplied coal to LTV Steel ("LTV"), in order to sell Massey coal to LTV and to eliminate Harman as a competitor. When LTV stopped buying coal from Wellmore in 1997, Massey caused Wellmore to invoke a *force majeure* clause in its supply contract with Harman. This, along with other conduct by Massey, allegedly forced Harman out of business. *Id.* at 7a-11a.

In October 1998, Petitioners sued Massey in Boone County, West Virginia—despite the mandate in the relevant contract's forum selection clause that any suit under the contract be brought in Virginia (where there is a $350,000 cap on punitive damages, *see* Va. Code § 8.01-38.1). In fact, corporate Petitioners already had filed suit in Virginia in May 1998 based on the same course of events and ultimately won a jury verdict of $6 million in damages. On August 1, 2002, a Boone County jury

awarded Petitioners approximately $50 million in compensatory and punitive damages. Pet. App. 12a-13a. Over two years later, on March 17, 2005, the trial court denied Massey's post-trial motions. *Id.* at 13a.

On October 24, 2006, nearly two years after Justice Benjamin's election, Massey filed a Petition for Appeal seeking review by the Supreme Court of Appeals. A year earlier, on October 19, 2005, Petitioners had filed separate "pre-petition" motions seeking Justice Benjamin's recusal. Petitioners claimed that Mr. Blankenship's expenditures created an appearance that Justice Benjamin would not be impartial in considering Massey's appeal. *See* Corp. Disqualification Mtn. at 22 (titling the "Legal Argument": "IN THE EYES OF THE PUBLIC, JUSTICE BENJAMIN'S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED IN THIS CASE; THEREFORE, RECUSAL IS NECESSARY.").[2] As "evidence" of the supposed bad appearances, Petitioners relied on a number of exhibits, primarily newspaper articles and editorials.

On April 7, 2006, Justice Benjamin denied the motions. He explained that the Petitioners presented no objective basis for his recusal and

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[2] Given that these recusal motions and all subsequent recusal motions rested solely on an alleged appearance of bias, it is not surprising that the recusal motions focused on West Virginia's Canons governing judicial recusals and only casually mentioned due process. *See* Corp. Disqualification Mtn. at 22-26; Hugh M. Caperton's Motion for Disqualification Directed to Justice Brent D. Benjamin at 7 (arguing there was a "perception of partiality" requiring recusal under Canons 3(E)(1) and 2(B) and not even mentioning due process).

instead rested on "surmise, conjecture, and political rhetoric." Pet. Supp. 148a.

On April 5, 2007, two-and-one-half years after Justice Benjamin's election, the Supreme Court of Appeals unanimously granted review on Respondents' appeal.[3] Having their Petition for Appeal granted was far from certain for Respondents: In 2007, the Supreme Court of Appeals granted only 17% of the discretionary appeals that it reviewed. *See* Supreme Court of Appeals of West Virginia - 2007 Statistical Report at 5.

On November 21, 2007, three years after Justice Benjamin's election, the Supreme Court of Appeals reversed the decision of the trial court on two independent grounds: the forum selection clause and res judicata. The majority's 63-page opinion, which was authored by then-Chief Justice Davis and joined by Justices Maynard and Benjamin, carefully analyzed every element of both claims and cited settled federal and state authority in support. *Caperton v. A.T. Massey Coal Co., Inc.*, No. 33350 (W. Va. Nov. 21, 2007).

Justice Starcher filed a three-page dissent calling the majority opinion "Horse Puckey!" *Id.*, slip op. at 2 (Starcher, J., dissenting). Justice Albright also filed a dissent that acknowledged the majority's "numerous cases for its various propositions" but derided the majority for ignoring the "essential

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[3] In deciding whether to accept an appeal, all five Justices vote, and their votes are recorded. Three votes are required to grant an appeal. W. Va. Const. art. 8.4; W. Va. Code §§ 51-1-1, 51-3-4.

justice of plaintiffs' suit." *Id.*, slip op. at 4, 7 (Albright, J., dissenting).

Petitioners sought rehearing in December 2007. While these petitions were pending, Chief Justice Maynard recused himself based on personal contacts he had had with Mr. Blankenship. So, too, did Justice Starcher, who had publicly and repeatedly manifested substantial, actual bias against Massey.[4] Justice Benjamin, as the next justice in line for the chief justiceship, appointed two circuit judges, Judge Cookman and Judge Fox, to fill the places of Chief Justice Maynard and Justice Starcher.[5] The

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[4] For example, Justice Starcher called Massey's chairman "stupid," a "clown," and an "outsider," and criticized Massey itself as detrimental to West Virginia. *See* Motion for Disqualification of Justice Starcher at 4-7 and Exs. A-G. Despite his admitted bias against Massey, Justice Starcher reversed direction in the subsequent *Wheeling* case involving Massey, refused to recuse himself, and declared that, if his participation created a due process problem, "so be it." Petition for Certiorari, *Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, No. 08-218, at 4 (filed Aug. 20, 2008). Massey is seeking this Court's review in the *Wheeling* case on the ground, *inter alia*, that Justice Starcher's participation in the decision to refuse review of Massey's appeal violated due process because he was *actually* biased. Because the *Wheeling* Petition concerns *actual* bias (which is covered by the Due Process Clause), while the Petition here is based solely on an alleged *appearance* of bias (which is not covered by the Due Process Clause), there would be no inconsistency in denying this Petition while granting and reversing in *Wheeling*.

[5] Citing a newspaper article as authority, the Petition suggests that Chief Justice Maynard, Justice Davis, and Justice Benjamin—the three who originally voted in favor of Respondents—manipulated the rotation for the chief justiceship to move Justice Benjamin ahead of Justice Albright. Pet. 13 n.4. But as Justice Benjamin explained in detail in his

reconstituted court voted to rehear the case, and the appeal was considered anew. *See State ex rel. Moats v. Janco*, 180 S.E.2d 74, 83 (W. Va. 1971) (explaining that the "granting of a rehearing withdraws an opinion previously rendered and destroys its force and effect").

In addition to seeking Chief Justice Maynard's recusal, the corporate Petitioners "renewed" their motion to recuse Justice Benjamin based on the 2004 campaign expenditures. Justice Benjamin denied the motion for the same reasons he expressed earlier and because of the additional passage of time from the 2004 election. Pet. App. 152a-53a.

Later, on March 28, 2008, Petitioners filed a "Second Renewed Joint Motion for Disqualification of Justice Benjamin." This motion was based solely on a survey commissioned by Petitioners, which they claimed showed that citizens perceived Justice Benjamin to be biased in favor of Massey. *Id.* at 158a. On April 3, 2008, Justice Benjamin denied the motion as untimely. *Id.* Justice Benjamin further explained that the basis of the motion—a "push poll"—was "specifically designed with limited information for the purpose of supporting the instant joint motion; [and] is, as a matter of law, neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification." *Id.*

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concurrence (with reference to an attached Exhibit setting out the rotation), this suggestion is "frankly, absurd" and "grossly unfair to the two outstanding jurists, Judges Fox and Cookman." Pet. Supp. App. 62a n.49. Notably, Judge Cookman voted against Massey on rehearing.

On April 3, 2008, the Supreme Court of Appeals again reversed the trial court based on the forum selection clause and res judicata. Justice Davis authored the 94-page majority opinion, which was joined by Judge Fox and Acting Chief Justice Benjamin. *Id.* at 1a-94a. As the previous majority opinion did, this majority opinion carefully reviewed every element of each claim and cited an overwhelming body of legal authority. The court adopted the Second Circuit's four-part test for determining whether a claim should be dismissed based upon a forum selection clause. *Id.* at 19a-20a (outlining the test articulated in *Phillips v. Audio Active Limited*, 494 F.3d 378, 383-84 (2d Cir. 2007), which is based upon the test articulated by this Court in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). The court then applied settled law to hold that the forum selection clause was reasonably communicated, mandatory, applied to the claims and parties at issue, and that Petitioners did not rebut the presumption of enforceability of the clause.

In addition, the court held "that, assuming arguendo the forum-selection clause did not apply here, this case is nevertheless barred by the doctrine of res judicata." Pet. App. 72a. The court again carefully analyzed the law governing the preclusive effect of foreign judgments, *see id.* at 73a (discussing and applying the Full Faith and Credit Clause, U.S. Const. art. IV, § 1), and held that Petitioners' action was barred by the prior judgment in Virginia.

Justice Albright (joined by Judge Cookman) filed a dissent with the same tone as Justice Albright's previous dissent. *Id.* at 95a-147a. As the

Petition notes, the dissenters in a footnote cited *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), and *In re Murchison*, 349 U.S. 133 (1955), in reference to Justice Benjamin's participation in the case. Pet. App. at 146a-47a n.16. The Petition omits, however, the next sentence from the dissent: "On the record before us, we cannot say with certainty that those cases have application here." *Id.* at 147a n.16.

Justice Benjamin filed a concurrence rejecting the suggestion that his participation violated due process. He explained that no one had claimed that there was "any actual bias or prejudice on my part in this case." Pet. Supp. App. 20a. He further rejected Petitioners' "appearance-based" due process test that focused on "subjective perceptions." *Id.* at 25a, 29a. Finally, Justice Benjamin explained that a complete set of the pertinent facts and a review of his record undermined any claim for recusal. *Id.* at 38a-40a.

ARGUMENT

Justice Benjamin's participation did not deprive Petitioners of due process. Neither this Court nor any other court has ever held that a popularly elected judge must recuse himself when an individual, who is neither a party nor an attorney appearing before the judge in pending litigation, makes campaign expenditures independent from and outside the control of the judge's campaign. Petitioners make no claim of any actual bias on Justice Benjamin's part, and their claim that an appearance of bias rises to the level of a due process violation has no merit. The Court should deny review for five reasons.

First, Justice Benjamin's participation in this case fully comported with due process. Petitioners have never even claimed (at least until a footnote in their Petition here) that Justice Benjamin had a "'direct, personal, substantial, [or] pecuniary interest'" in the outcome of the case, which is required under this Court's due process recusal cases. *Aetna*, 475 U.S. at 821-22 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

Second, there is no split of authority on the actual question presented: whether Justice Benjamin's participation was barred by due process because of Mr. Blankenship's independent campaign expenditures. A number of cases have rejected due process challenges to a judge's participation in a case when the judge received campaign contributions (to say nothing of independent expenditures) from a party or a lawyer. By contrast, the Petition and the five *amicus curiae* briefs supporting the Petition have identified only one case where a court has held that due process required recusal of a judge who received campaign contributions. *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001). But the court in *Pierce* limited its holding to the situation where contributions are made to a judge's campaign while the judge is overseeing an *ongoing* case of the contributor—a situation not implicated here.

Third, the Petition does not offer the Court a workable constitutional standard for when recusal will be constitutionally required. If anything, requiring recusal based on the vague "substantial" expenditure test suggested by the Petition would raise serious First Amendment concerns. Moreover, the facts of this case provide a poor vehicle to resolve

when financial support reaches a level that constitutionally requires recusal.

Fourth, the Petition urges the Court's intervention due to the changing dynamics of State judicial elections. But the respective States are well-positioned to handle—and are in fact handling—these changing dynamics. It would be unwarranted and at least premature for the Court to enter this area of traditional state concern, wielding the blunt instrument of a federal due process ruling.

Fifth, the Petition attempts to paper over the lack of a split of authority by asking the Court to rule *generally* on whether the Due Process Clause requires recusal where there is a mere *appearance* of bias. This Court has never adopted a "looks bad" due process test. Moreover, the alleged split on whether bad appearances require recusal under due process is exaggerated, and this is not in any event a suitable vehicle to consider this generalized question.

I. CERTIORARI IS NOT WARRANTED ON THE QUESTION PRESENTED

Justice Benjamin's participation was consistent with the due process cases of this Court and of all the state and lower federal courts. As it has done in the past, *see, e.g., Avery v. State Farm Mut. Auto. Ins.*, 547 U.S. 1003 (2006), the Court should deny certiorari on the question presented.

A. Justice Benjamin's Participation Was Consistent With Due Process

There are two fundamental tenets in this Court's constitutional recusal cases, both of which

are ignored by the Petition. *First*, there is a heavy "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). *Second*, "most 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); *see also Aetna*, 475 U.S. at 820 ("'[M]atters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.'") (quoting *Tumey*, 273 U.S. at 523).

Based on these principles, this Court has strictly limited the space in which the Due Process Clause—as opposed to codes and ethical canons—mandates disqualification. Specifically, a judge cannot constitutionally hear a case where the judge has a "'direct, personal, substantial, [or] pecuniary interest'" in the outcome of the case—*i.e.,* where the judge harbors some form of substantial actual bias. *Aetna*, 475 U.S. at 821-22 (quoting *Tumey*, 273 U.S. at 523). By contrast, due process does *not* require recusal where the judge has a mere "general" interest in the case that is "too remote and insubstantial to violate the constitutional constraints." *Id.* at 826 (internal quotation marks and citation omitted).[6]

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[6] Thus, in *Aetna* the Court held that a justice's general antipathy toward insurance companies did not require recusal under due process. 475 U.S. at 820-21. Indeed, the Court expressed doubt whether this type of "general" bias would ever trigger due process concerns. *Id.*

Justice Benjamin's participation was consistent with this Court's due process standard and did not implicate any of the classes of cases in which the Court has mandated recusal under that standard. Justice Benjamin had no pecuniary interest in the outcome of the case. *Id.* at 824 (recusal required where justice's ruling "enhanc[ed] both the legal status and the settlement value of" the justice's own pending lawsuit); *Tumey*, 273 U.S. at 523 (accord); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (accord). Nor did he serve two inconsistent roles, such as prosecutor and adjudicator. *See Murchison*, 349 U.S. at 137 (recusal required where the judge was a "one-man grand jury" accusing defendants then presiding over their trial). Nor was he subjected to a litigant's contemptuous abuse or "embroiled in a running, bitter controversy" with a litigant. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971). To the contrary, Justice Benjamin did not manifest any inclination of dislike or favoritism with respect to any party in the case. There is no basis for believing that Petitioners failed to receive what due process guarantees: an actually impartial judge who "will apply the law to [these parties] in the same way he applies it to any other party." *White*, 536 U.S. at 776.[7]

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[7] For the first time in this case, and without any further analysis, Petitioners claim in a footnote that "Mr. Blankenship's expenditures on Justice Benjamin's campaign were so significant they implicate . . . this Court's decisions regarding actual pecuniary interests." Pet. 20-21 n.5. This argument is waived and, in any event, meritless. If the Petition is arguing that Justice Benjamin was influenced to vote for Massey to curry financial support for a reelection campaign many years in the future (W. Va. Const. art. 8-2 (justices serve 12-year terms)), the argument is factually baseless, and the

A more complete account of the relevant facts reinforces the conclusion that Justice Benjamin's participation in this case was consistent with due process. Indeed, his participation was likewise consistent with the standards established by codes and canons, which (unlike the Due Process Clause) generally require recusal based on a mere appearance of bias.

First, the case was not pending before Justice Benjamin, or even the Supreme Court of Appeals, during the time the expenditures were made by Mr. Blankenship. *See, e.g.*, *Gluth Bros. Constr., Inc. v. Union Nat'l Bank*, 548 N.E.2d 1364, 1368 (Ill. App. Ct. 1989) (recusal not required under Illinois canon because there was no "present, ongoing" relationship; explaining that the "common theme" in cases requiring recusal based on campaign activity is the judge's "present, ongoing relationship with the attorney while the case [is] still pending").

Second, the Supreme Court of Appeals accepted the appeal almost two-and-one-half years after the election, and the decision from which Petitioners are appealing occurred over three years after the election. *See, e.g.*, *Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1457, 1458 (D. Colo. 1997) (recusal not required under 28 U.S.C. § 455 where alleged biasing event occurred years earlier).

Third, the allegations focus not on the expenditures of a lawyer or party, but an officer of a party. *Cf. Gilbert v. DaimlerChrysler Corp.*, 669 N.W.2d 265, 266 (Mich. 2003), *cert. denied*, 546 U.S.

Petition cites no authority remotely supportive of that suggestion.

821 (2005) (recusal not required under Michigan code based on campaign contributions and expenditures made by a non-party *amicus*).

Fourth, virtually all of the money spent by Mr. Blankenship was independent of Justice Benjamin's campaign, and Justice Benjamin had no ability to control whether or how those funds were spent.

Fifth, no one, other than counsel for Petitioners in this case, has ever sought to have Justice Benjamin recused from cases involving Massey.

Finally, except for this case, Justice Benjamin's voting record is uniformly *against* Massey, including a case involving many times the damages here. *See Jackson v. Ft. Stanton Hosp. and Training Sch.*, 757 F. Supp. 1231, 1242 (D.N.M. 1990) (rejecting plaintiffs' recusal motion under 28 U.S.C. § 455 where "in the main, [the judge] ruled in favor of the plaintiffs and granted them very significant relief"). These facts, especially when combined with the "presumption of honesty and integrity in those serving as adjudicators," *Withrow*, 421 U.S. at 47, refute any possible basis for recusal under even the codes and canons, much less the Constitution.

B. There Is No Split Of Authority On The Question Presented

Petitioners cite *one* case addressing whether due process requires recusal due to campaign contributions. In fact, a wealth of cases have rejected the argument that due process requires recusal because of campaign contributions. *See, e.g.*, *Public Citizen, Inc. v. Bomer*, 115 F. Supp. 2d 743,

746 (W.D. Tex. 2000) ("[T]he Court finds campaign contributions by parties with cases pending before the judicial candidate or by attorneys who regularly practice before them is not so irregular or 'extreme' as to violate the Due Process Clause of the Fourteenth Amendment."); *Georgeadis v. County of Franklin*, No. C-2-99-1027, 2000 WL 1459369, at *3 (S.D. Ohio Sept. 22, 2000) (same); *Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 310-11 (E.D. Pa. 1998) (same and collecting cases where state courts "have held that a judge is not ethically, let alone constitutionally, required to recuse" due to campaign contributions); *see also Ainsworth v. Combined Ins. Co. of America*, 774 P.2d 1003, 1020 (Nev. 1989) (accord), *abrogated on other grounds by Powers v. United Services Auto. Ass'n*, 962 P.2d 596 (Nev. 1998).

The lone case cited in the Petition or uncovered by our research in which a court, under any scenario, has ever found a due process violation related to a judge's failure to recuse himself because of campaign contributions is *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001). But even this outlier is not inconsistent with Justice Benjamin's participation in this case. *Pierce* found that due process required a trial judge's disqualification where the litigant's attorney and the attorney's father made campaign contributions to the judge's campaign while the litigant's case was pending before that judge. *Pierce* is plainly not implicated here.

First, the court in *Pierce* carefully limited its holding to contributions that "occur during a pending case in which the lawyer is appearing before that judge." *Id.* at 798. This "ongoing case" limitation is

consistent with the only other case to even suggest (in dictum) that campaign contributions might require recusal under due process. *See MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1337-38 (Fla. 1990) ("[I]t would be highly anomalous if . . . *prior participation* in a justice's campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process sufficient to require the justice's recusal.") (emphasis added; citation and quotation marks omitted); *see also Gluth Bros.*, 548 N.E.2d at 1368 (explaining the ongoing case limitation in the cases applying state canons and codes). Here, the case was not pending in the Supreme Court of Appeals—much less pending before Justice Benjamin, who was not yet on the court—when the expenditures were made.

Second, *Pierce* involved *direct contributions to a judge's campaign*. *Id.* at 793. By contrast, with the exception of a $1,000 contribution to Justice Benjamin's campaign, the money spent here was in the form of *independent expenditures* that were not connected with Justice Benjamin's campaign or otherwise under his control or authority.

Finally, whereas in *Pierce* the contributions were made by a party's attorney, here the money spent came from the personal funds of one of Massey's many officers, whose interest in the outcome of this case was greatly diluted compared to that of the parties themselves. Even if *Pierce* is correct, it is not relevant here.

C. The Petition Does Not Offer A Workable Constitutional Standard And Raises Serious First Amendment Concerns

Review is particularly unwarranted here, because the Petition cannot offer a workable constitutional standard that would practicably guide future cases. The Petition claims that the Constitution should require recusal where expenditures are "substantial." Pet. 28. This is hardly a precise formulation. The various rules suggested by *amici* are no clearer. *See* ABA Amicus Br. 5 ("significant"); Brennan Center, *et al.* Amicus Br. 9 ("massive"); Committee for Economic Development Amicus Br. 2-3 ("disproportionately large," or "outsized,"); Public Citizen Amicus Br. 3 ("eye-catching"). As the Washington Appellate Lawyers Association candidly acknowledges: "It is probably impossible to establish a bright line test for the level of contribution or independent expenditure that would give rise to a due process violation." Washington Appellate Lawyers Ass'n Amicus Br. 16. That the Petition and *amici* cannot come up with a useful standard for courts to implement is not surprising. As this Court noted in addressing caps on campaign contributions: "[A] court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (per curiam) (internal quotation marks and citation omitted).

The vague recusal standard suggested by the Petition raises serious First Amendment concerns. The First Amendment protects contributions and expenditures in judicial elections. *See, e.g.*, *Buckley*,

424 U.S. at 14 (explaining that contribution limitations "operate in an area of the most fundamental First Amendment activities"); *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) ("Spending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association."). If lawyers and litigants knew that their contributions or expenditures might force a judge's recusal, then they could be chilled from exercising their First Amendment rights. And the chilling effect would extend beyond the limited class of actually disqualifying contributions or expenditures because there would be no way for the lawyers and litigants to know *ex ante* what "substantial" means—especially if "substantial" were to be governed by appearances.[8] *See, e.g.*, *Federal Election Comm'n v. Wisconsin Right To Life, Inc.*, 127 S.Ct. 2652, 2682 n.5 (Scalia, J., concurring in part and concurring in the judgment) (rejecting a "wait-and-see approach" in determining the risk that "a standard will have an impermissible chilling effect on First Amendment protected speech" in favor of the Supreme Court's "normal practice" of assessing the risk *ex ante*). These First Amendment concerns

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[8] This is far from hypothetical. For example, in some localities, there is only one elected trial judge. If financially supporting that judge would trigger recusal under due process, many lawyers who practice in that locality would have no choice but to refrain from exercising their First Amendment rights. *See Roe v. Mobile County Appointment Board*, 676 So. 2d 1206, 1233 (Ala. 1995) ("If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts.").

are further caution that the Court should not enter this field without a clear standard, which Petitioners are unable to provide.

The Petition also does not answer other difficult questions implicated by the facts of this case. Notably, some of these questions are predicate to the question allegedly warranting this Court's review—when financial support reaches a level that constitutionally requires recusal—and therefore make this a poor vehicle to consider that question. Pet. 28. These include, *first*, whether due process recusal extends beyond a corporate party itself to corporate officers or even shareholders; *second*, whether due process mandates recusal in a case that is not before the judge whom the party or attorney supported, but may come before the judge at some point in the future; and *third*, whether due process mandates recusal based on independent expenditures outside of the judge's control, as opposed to contributions made to the judge's campaign—the only context in which a court has ever suggested that recusal may be constitutionally required.[9]

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[9] Moreover, there are host of other questions that this Court would need to answer in order to provide meaningful guidance to state courts, for which the Petition has no answer. These include, *first*, whether the due process threshold should be the same for both supreme court justices, who must often run a state-wide campaign, and other state judicial officers, who may have to run only in a particular locality; *second*, whether due process mandates recusal where parties or attorneys have given money used to oppose the judge's campaign; and *third*, how if at all due process will regulate an enterprising litigant that uses the recusal rules opportunistically by, for example, giving to

The issues outlined above have challenged state legislative and regulatory bodies defining state codes and canons. *See* Thomas R. Phillips, Comment, *Judicial Independence and Accountability: Judicial Independence and Democratic Accountability in Highest State Courts*, 61 Law & Contemp. Probs. 127, 131-32, 136-37 (1998). But, as discussed below, the task of sorting these out—and the general task of addressing developing campaign dynamics—should be left to those bodies and not constitutionalized and taken over by courts. *See Shepherdson*, 5 F. Supp. 2d at 311 ("If questions about campaign contributions and recusal are to be constitutionalized, federal courts will be required to engage in the type of policy making more appropriately undertaken by the pertinent state authorities.").

D. It Is Unnecessary And At Least Premature For The Court To Invade This Area Of Primary State Concern

The Petition claims that the Court should step into this area now because of the recent increase in money spent on judicial elections. Pet. 26-28. But the Petition would have the Court ignore the fact that States are addressing that trend. There is no need for emergency constitutional relief.

For example, States that elect judges have regulations governing judicial campaigning and how campaigns are financed. Moreover, States are modifying those laws to address the state-election shortcomings perceived by the Petition. Notably,

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judges that seem antagonistic to the litigant's cause, in order to secure their recusal.

following the 2004 election at issue here, West Virginia amended its campaign finance laws related to judicial elections. *See* West Virginia H.B. 402, 2005 W. Va. Acts 4th Ex. Sess., ch. 9, eff. Sept. 13, 2005. Among its provisions, the new law requires registration of 527 Groups, requires financial disclosures from 527 Groups, and sets a $1,000 cap per election on what an individual can contribute to a 527 Group operating in West Virginia. W. Va. Code § 3-8-12.

In addition, three states—New Jersey, North Carolina, and Wisconsin—now have some form of public financing system for judicial campaigns. *See* American Judicature Society, *Judicial Campaigns and Elections: Campaign Financing*, *available at* http://www.judicialselection.us/ (last accessed Aug. 30, 2008). And many other state legislatures (including West Virginia's) are actively considering a public finance system for judicial elections. *See* National Center for State Courts, *Gavel to Gavel: A Review of State Legislation Affecting the Courts*, at 1, 3 (June 2008) (explaining that in 2008 Georgia and West Virginia established committees to investigate public financing and that public financing bills have also been filed in other States). Indeed, there are even States that, by code, do what Petitioners ask the Court to do by constitutional mandate: require recusal because of campaign contributions.[10]

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[10] *See* Ala. Code §§ 12-24-1, -2 (recusal linked to campaign contributions under certain circumstances); Miss. Code of Jud. Conduct Canon 3E(2) (same); *see also* Wash. Code of Jud. Conduct, comment to Canon 7(B)(2) (contributions relevant to recusal); N.D. Code of Jud. Conduct, comment to Canon 5(C)(2) (same); Tenn. S. Ct. R. 10 (Code of Jud. Conduct), commentary

This Court has always been reluctant to invade an area traditionally reserved for state regulation, such as state judicial elections and state recusal policy. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (rejecting a due process challenge to a state statute in an area traditionally regarded as in the "province of the States"). But especially where States are actively addressing the concerns that allegedly justify Court intervention—and there is no one-size-fits-all regulation that will address those concerns—the request for intervention is unwarranted. The States are actively at work preserving and promoting both judicial integrity and popular election of judges. This Court should allow them to continue this work.[11]

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to Canon 5(C)(2)(b) (same); W. Va. Code of Jud. Conduct, comment to Canon 5(C)(2) (same). Nineteen states also permit each party a peremptory disqualification of a trial judge, which enables a party to disqualify one judge per proceeding—including a judge the party perceives to be biased due to campaign activity. *See* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 789-822 (2d ed. 2007) (hereinafter "*Judicial Disqualification*").

[11] The types of judicial offices subject to election and the ways in which judges are elected vary widely both across States and even within States. *See, e.g.*, The Council of State Governments, *The Book of the States* 133-35 (1996-97 ed.) (listing selection and retention methods for judges). A federal due process ruling would implement a nationwide standard that would be heedless of all the differences among States respecting their judicial elections.

II. CERTIORARI SHOULD NOT BE GRANTED ON THE BROADER QUESTION WHETHER APPEARANCE OF BIAS IS SUFFICIENT TO REQUIRE RECUSAL UNDER DUE PROCESS

Recognizing the lack of a split of authority on the specific question presented by this case—whether due process mandated recusal based on campaign expenditures—the Petition seeks to turn the Court's attention to the broader question of whether a mere appearance of bias can ever be sufficient to require recusal under due process, a question on which there is likewise no serious split of authority. Appearances are the stuff of codes and canons—not the Constitution. But even if this generalized question were worthy of review, this case is a poor vehicle to consider the question.

A. The Constitutional Standard Is Distinct From The Appearance Standard In Codes And Canons

In arguing that an appearance of bias violates due process, Petitioners' fundamental error is that they have confused the *constitutional* recusal standard with recusal standards imposed by *codes* and *canons*. *See Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level."); *Tumey*, 273 U.S. at 523 (similar).

The Due Process Clause ensures an individual litigant an actually fair trial and therefore an actually impartial adjudicator. *See White*, 536 U.S. at 775-76. By contrast, the federal recusal statute

and many state judicial canons, including West Virginia's, have broader aims—including ensuring that the adjudicator *appears* impartial to the litigant and the public. *See, e.g.*, *Liteky v. United States*, 510 U.S. 540, 548 (1994) (explaining that, under the federal recusal statute, 28 U.S.C § 455, "what matters is not the reality of bias or prejudice but its appearance"); *In re Reese*, 495 S.E.2d 548, 550 (W. Va. 1997) (discussing that West Virginia's Canons prohibit "the appearance of impropriety"). As the Eighth Circuit explained: "In contrast to the due process clause, the recusal statute is concerned largely with insuring that the federal judiciary appears to be impartial, in addition to actually being impartial. It thus reaches farther than the due process clause, which is concerned primarily with the individual rights of parties." *United States v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003).[12]

If the Court were to hold that the appearance of bias triggers recusal under due process, that would in effect constitutionalize the federal recusal statute and many state codes and canons, a step that in other contexts the Court has been loath to take. *See, e.g.*, *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). Such a holding also would turn the courts into the new rulemakers on recusals, and open the floodgates to new and unending constitutional bias claims. *Del*

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[12] *See also Judicial Disqualification* 35-36 (explaining that, while the Due Process Clause has "been interpreted to require only an absence of actual bias on the judge's part . . . under the ABA Code of Judicial Conduct—as well as the judicial disqualification jurisprudence that is in force in many states—an appearance of bias alone may be sufficient to warrant disqualifying a judge").

Vecchio, 31 F.3d at 1389 (Easterbrook, J., concurring) (explaining "'[a]ppearance' problems lurk everywhere, for they are in the eye of the beholder. . . . This brand of argument cannot be cabined.").

The deficiency in the Petition is evident from its sweeping position that mere appearances control, thus eviscerating the long-standing distinction between actual and apparent bias. The Petition reasons that when there is an appearance of bias (*i.e.,* when it "looks bad" for the judge to sit) there must be a possibility of actual bias, and this possibility requires the judge to step aside in order to avoid even the chance of actual bias. *See* Pet. 18 (arguing due process requires recusal where there is an appearance of bias "because such a *possibility* of judicial impropriety creates a constitutionally unacceptable risk of *actual* impropriety") (emphasis in original). But if the appearance of bias were deemed tantamount to the possibility of actual bias,[13] and the possibility of actual bias were to require recusal, then the historic distinction between apparent and actual bias would evaporate.

B. This Court's Cases Do Not Hold Appearances Sufficient To Require Recusal

Petitioners' due process theory—that bad appearances alone compel recusal—is not supported by this Court's cases. The Petition relies primarily on dicta from a handful of this Court's due process cases that mention "appearances," including cases that do not involve judicial recusal at all. *See Peters*

[13] As discussed below, appearance of bias is *not* tantamount to even the possibility of actual bias.

v. Kiff, 407 U.S. 493, 502 (1972). But in every case in which the Court has held that due process mandates a judge's recusal, that *holding* has been based on actual bias: the judge in *Aetna* had an actual pecuniary interest in the outcome, 475 U.S. at 824-25; the judge in *Murchison* was structurally biased, 349 U.S. at 138-39; and the judge in *Mayberry* was the victim of the crime—extraordinary contemptuous verbal abuse—which rendered him unable to preside at the defendant's trial, 400 U.S. at 466. The due process holdings in these cases were based on the actualities, not simply on appearances.

Petitioners also rely on dicta from the Court's cases that they read to suggest that the "possibility" of actual bias is enough to require recusal under due process. Pet. 18-19. But this "Court's cases . . . go beyond generalizations about 'possible bias.'" *Del Vecchio*, 31 F.3d at 1375. Regardless, the "possibility" language in the Court's cases does not support the Petition's requested holding that due process prohibits the mere "appearance of bias" on the part of a judge. Pet. 21. Petitioners offer no justification for how the *appearance* of bias is equivalent to or a proxy for the possibility of actual bias, as their theory suggests. Even where it may *appear* to someone that a judge will be biased, there often will not be any real likelihood that judge will actually be biased.

The Court's most recent pronouncement on this issue, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), confirms that due process guarantees an actually—not an apparently—impartial judge. *White* explained the line of due process recusal cases as "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." *Id.* at 776. Nothing in *White*'s articulation of the standard suggests that an appearance of applying the law with this impartiality is relevant, much less constitutionally required.

C. The Alleged Split Is Exaggerated

That this Court has never *held* that appearances require recusal under due process is confirmed by a recent line of federal appeals court cases applying 28 U.S.C. § 2254(d)(1) (allowing habeas relief where a state court judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). In each of these cases, the courts specifically considered and rejected the proposition that the Supreme Court's references to appearances are anything more than dicta, "let alone 'clearly establish[ing]' that the mere appearance of bias" violates due process. *Welch v. Sirmons*, 451 F.3d 675, 701 (10th Cir. 2006) (quoting *Johnson v. Carroll*, 369 F.3d 253, 263 (3d Cir. 2004)); *see also Davis v. Jones*, 506 F.3d 1325, 1336 n.20 (11th Cir. 2007) (discussing "the Supreme Court's dicta" regarding appearances); *Del Vecchio*, 31 F.3d at 1371-72. A host of State cases are in accord. *State v. Canales*, 916 A.2d 767, 781 (Conn. 2007); *Cowan v. Bd. of Comm'rs*, 148 P.3d 1247, 1260 (Idaho 2006); *State v. Reed*, 144 P.3d 677, 681-83 (Kan. 2006); *Hirning v. Dooley*, 679 N.W.2d 771, 780-81 (S.D.

2004); *Kizer v. Dorchester County Vocational Educ. Bd. of Trs.*, 340 S.E.2d 144, 148-49 (S.C. 1986).[14]

In contrast to the overwhelming authority that actual bias alone triggers due process, the Petition cites only one federal case that allegedly has held that appearances alone are sufficient to trigger recusal under due process. *See Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 678 (4th Cir. 1989). But the Fourth Circuit has never held, in *Aiken* or any other case, that a judge is constitutionally disqualified due to appearances, nor does the issue ever really matter in federal cases, given the statutory appearance-based recusal requirement. Indeed, more recently the Fourth Circuit correctly has considered appearances under the statutory standard of 28 U.S.C. § 455. *See, e.g.*, *United States v. Cherry*, 330 F.3d 658, 665 (4th Cir. 2003) (citing § 455 and stating that if "a judge

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[14] In alleging a "three-way split," the Petition claims that these federal cases differ from the State cases in that, unlike the State cases, the federal cases "acknowledge . . . that, even in the absence of actual bias, there may be circumstances that 'give rise to a presumption or reasonable probability of bias' sufficient to establish a due process violation." Pet. 23 (quoting *Welch*, 451 F.3d at 700). But the language that the Petition quotes from *Welch* merely explains that the *dicta from this Court's opinions* "appear to pertain to situations in which the circumstances are sufficient to give rise to a presumption or reasonable probability of bias." *Welch*, 451 F.3d at 700; *see also Davis*, 506 F.3d at 1336 n.20. To the extent the Petition is referring to *Del Vecchio*'s suggestion that, even if a judge subjectively believes he can resist any bias, the objective evidence may be so strong that actual bias must be presumed, *see* 31 F.3d at 1373, 1375, there is nothing in this suggestion inconsistent with the view that the Due Process Clause is concerned only with *actual* bias.

possesses actual or apparent prejudice either for or against a party, federal law provides the aggrieved party with a statutory remedy."); *United States v. Temple*, 162 F.3d 279, 286 (4th Cir. 1998) (citing *Aiken* and considering whether there was an appearance of bias only under § 455). In addition, the main State case relied on by Petitioners, *Archer v. State*, 859 A.2d 210 (Md. 2004), had nothing to do with recusal of a judge due to bias, but was concerned with whether due process was violated by a judge forcing a witness to testify. *See id.* at 227.[15] For these reasons, the alleged split is largely, if not completely, illusory.

D. This Case Is Not A Proper Vehicle To Consider The Question

This case is not a proper vehicle to consider whether appearances require recusal under due

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[15] The other cases cited by the Petition in a footnote are not clear support for the proposition that bad appearances require a judge's recusal under federal due process. In *Allen v. Rutledge*, 139 S.W.3d 491 (Ark. 2003), the court held that recusal was mandated because the judge's "comments and rulings indicate[d] that *he was biased*." *Id.* at 498 (emphasis added). In *Commonwealth v. Brandenburg*, 114 S.W.3d 830 (Ky. 2003), the court based its decision that recusal was required on Kentucky's Code of Judicial Conduct and the Kentucky Constitution. *See id.* at 835 (holding there was "a violation of Canon 2 of the Code of Judicial Conduct and Section 10 of the Kentucky Constitution"). Finally, while *State v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989), held that due process mandated recusal due to appearances, the Hawaii Supreme Court subsequently limited this decision, making clear, for example, that "'bad appearances alone do not require disqualification.'" *Hawaii v. Ross*, 974 P.2d 11, 20-21 (Haw. 1999) (quoting *Del Vecchio,* 31 F.3d at 1372)).

process. Even if there is a context in which a constitutional recusal standard based on appearances makes sense, this is not it.

Campaign contributions and expenditures are inherent to elected judiciaries. *See Adair v. Michigan*, 709 N.W.2d 567, 580 (Mich. 2006) ("Indeed, given the premise of our system of judicial selection that there should be periodic elections for judicial office, it would seem that it is better that campaigns be well-funded and informative, and that candidates be afforded the fullest opportunity to explain their differing perspectives on the judicial role, than that campaigns be poorly funded and result in candidates securing election on the basis of little more than a popular surname."). To suggest that this accepted conduct mandates a judge's disqualification because it *appears* bad is to suggest that elected judiciaries themselves are somehow invalid, which is historically and legally inaccurate. *See White*, 536 U.S. at 795 (Kennedy, J., concurring) ("In resolving this case . . . we should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence."); *see also Adair*, 709 N.W.2d at 580-81 ("If justices of the Supreme Court, in particular, were to recuse themselves on the basis of campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would be an increasing number of recusal motions designed to effect essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities.").

Furthermore, no court has ever held that the type of campaign expenditures here—made by a non-party, made before the judge was on the bench, made before the case was even at the court, and made years before the relevant decision—are sufficient to trigger recusal even under codes and canons that consider *appearances*. Indeed, Justice Benjamin himself specifically rejected that recusal was required under West Virginia's Judicial Canons, which incorporate an "appearance of impropriety" standard. *See, e.g.*, Pet. Supp. App. 21a n.13. There was no appearance of impropriety, and therefore this is not a case to decide whether due process is implicated by appearances.

Given the lack of a clear split of authority, this Court has recently and often denied certiorari on the question of whether appearances require recusal under due process. *See Guest v. McCann*, 128 S.Ct. 170 (2007); *Jefferson County Racing Ass'n, Inc. v. Barber*, 127 S.Ct. 2975 (2007); *Kettenbach v. Demoulas*, 545 U.S. 1128 (2005); *Johnson v. Carroll*, 544 U.S. 924 (2005). Especially given the vehicle problems, the same result should follow here.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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