

No. 08-22

IN THE  
SUPREME COURT OF THE UNITED STATES

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

V.

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

ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA

BRIEF OF *AMICUS CURIAE* THE SUPREME  
COURT OF THE STATE OF LOUISIANA IN  
SUPPORT OF NEITHER PARTY

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at  
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## STATEMENT OF INTEREST

The Supreme Court of the State of Louisiana is comprised of seven popularly-elected Justices, with one Justice elected from each of the seven judicial districts. The Louisiana Supreme Court is the court of last resort in the State of Louisiana.

While the Louisiana Supreme Court favors no party in this litigation,<sup>1</sup> the Louisiana Supreme Court has learned that certain *amicus curiae* briefs have referenced a Tulane Law Review article and suggested that this article found a link between campaign contributions and judicial votes in favor of contributors' positions before the Court.

Without question, this Tulane Law Review article has been refuted because of its flawed methodology, its error-laden data selection, and its faulty analysis. Due to the article's many and serious errors, the Dean of the Tulane Law School issued a formal written apology to the Louisiana Supreme Court and its Justices, and the Tulane Law School issued an Erratum, deeply regretting the article's errors.

Because the Louisiana Supreme Court believes this Court's decision in this case should rest upon the facts and law uninfluenced by a discredited law review article, the Louisiana Supreme Court files

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<sup>1</sup> The parties have filed letters with the Court consenting to all *amicus* briefs. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

The Louisiana Supreme Court as *amicus curiae* takes no position with respect to any issue or argument presented other than those expressed in the Louisiana Supreme Court's own *amicus curiae* brief.

this *amicus curiae* brief to set forth briefly the Tulane Law Review article's errors and to refer this Court to the authorities which explains the Tulane Law Review article's many and fundamental mistakes.

## SUMMARY OF THE ARGUMENT

The article the Tulane Law Review published, authored by Vernon Valentine Palmer and John Levendis, entitled *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), has been discredited because of its flawed methodology, see Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 307 (2009); and because of its erroneous data collection, selection and analysis, see Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281 (2009). Indeed, due to the serious errors in the authors' article, the Dean of the Tulane Law School issued a formal, written apology to the Louisiana Supreme Court and to its Justices and the Tulane Law Review posted an Erratum on its website.

This Court, therefore, should accord the thoroughly discredited Tulane Law Review article no weight when this Court decides the case presently before the Court.

## ARGUMENT

It has come to the attention of the Louisiana Supreme Court that in one or more of the *amicus curiae* briefs, reference is made to an article authored by Vernon Valentine Palmer & John Levendis entitled, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, published at 82 TUL. L. REV. 1291 (2008), along with the suggestion that this article had found a correlation between campaign contributions to particular justices' campaign committees and a particular justice's voting pattern.<sup>2</sup> Because the article and its authors' conclusions have been thoroughly discredited, the article should play no part in this Court's consideration of the discrete factual and legal issues before it.

Without belaboring too much detail, when the Louisiana Supreme Court learned of the scheduled publication of Palmer's and Levendis's argument – made public by the two authors' interviews with the radio and print media – the Louisiana Supreme Court retained counsel to review the Palmer and Levendis article, when published, and to respond to the authors' contentions, if appropriate.

Palmer's and Levendis's data collection and analysis contained astonishing errors and led to the

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<sup>2</sup> See, e.g., Brief of *Amicus Curiae* The Brennan Center for Justice at NYC School of Law, the Campaign Legal Center, and the Reform Institute in Support of Petitioner, pages 15-16, filed on January 5, 2009. One other *amicus curiae* brief references the Palmer and Levendis article, but notes the article's errors had prompted an apology from to the Court from the Dean of The Tulane Law School. See Brief of the Conferences of Chief Justices as *Amicus Curiae* in Support of Neither Party, pages 24-25, fn 47.

publication of rebuttal articles by scholar-economists Robert Newman, Janet Speyrer and Dek Terrell and by attorneys E. Phelps Gay and Kevin R. Tully. Both articles were posted on the internet and then, as further refined, published by the Louisiana Law Review. *See* Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 307 (2009); and Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281 (2009).

The errors in Palmer's and Levendis's article were so profound that the Dean of Tulane Law School issued a formal, written apology to the Louisiana Supreme Court and to its individual Justices,<sup>3</sup> and The Tulane Law Review issued and posted an Erratum on its Website.<sup>4</sup>

While the rebuttal articles speak for themselves, perhaps most notable of all the flaws in Palmer's and

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<sup>3</sup> *See* Lawrence Ponoroff September 10, 2008, letter at [http://www.lasc.org/press\\_room/press\\_releases/2008/AR-TU\\_APOLOGY\\_LETTER.pdf](http://www.lasc.org/press_room/press_releases/2008/AR-TU_APOLOGY_LETTER.pdf)

<sup>4</sup> *See* The Erratum, <http://www.law.tulane.edu/lawriew/> The Erratum reads: "The Louisiana Supreme Court in Question: An Empirical Statistical Study of the Effects of Campaign Money on the Judicial Function, published in Volume 82 of the Tulane Law Review at 1291 (2008), was based on empirical data coded by the authors, but the data contained numerous coding errors. Tulane Law Review learned of the coding errors after the publication. Necessarily, these errors call into question some or all of the conclusions in the study as published. The Law Review deeply regrets the errors."

Levendis's data collection was their inexplicable failure to know that during a large period included within their data collection, the Louisiana Supreme Court had not seven Justices but *eight*, one of whom would not take part in deciding a case.<sup>5</sup> Palmer's and Levendis's failure to know or recognize this significant fact prompted them to attribute a "vote" to a Justice who did not sit on the panel deciding a particular case in over twenty percent of the cases included in their data set. This critical error alone skewed and invalidated any statistical conclusions Palmer and Levendis sought to draw.<sup>6</sup> Palmer's and Levendis's article contained numerous other flaws and omissions, including their failure to cite a single

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<sup>5</sup> Pursuant to Act 512 of 1992, the Legislature created an additional judgeship for the Court of Appeal for the Fourth Circuit to be elected from the First District of the Fourth Circuit. The new judge was immediately assigned to the Louisiana Supreme Court and remained on the Louisiana Supreme Court until a special election was held for a newly-created Orleans Parish Supreme Court District. To accommodate this eighth justice until the Court reverted to seven justices, the Louisiana Supreme Court adopted amendments to Louisiana Supreme Court Rule IV that, in effect, caused the justices to be assigned on a rotating basis to panels of seven justices with the cases also randomly assigned to the seven-justice panels for decision. This system lasted between 1993 until September 2000, eight years of the fourteen year period included in the Palmer and Levendis data set. See Tully & Gay, *The Louisiana Supreme Court Defended*, 69 LA. L. REV. at 287-288.

<sup>6</sup> Although the body of their article suggests otherwise, in footnote 14 Palmer and Levendis admit that "[i]t is worth observing that this Article does not claim that there is a cause and effect relationship between prior donations and judicial votes in favor of donors' positions." Palmer & Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, published at 82 TUL. L. REV. at 1294 n. 14.

case, let alone describe how any case may have been wrongly influenced and decided. *See* Tully & Gay, *The Louisiana Supreme Court Defended: A Rebuttal of The Louisiana Supreme Court in Question*, 69 LA. L. REV. 281, for a full discussion on the Palmer and Levendis data collection and analysis errors.

In addition to the critical data collection and analysis errors Palmer and Levendis made, they also employed faulty methodology as explained in the study authored by economics professors Robert Newman, Janet Speyrer and Dek Terrell in their study and entitled, *A Methodological Critique of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 307 (2009).

Professors Newman, Speyrer and Terrell explain that Palmer and Levendis ignored or were unaware of the extensive empirical economic literature studying the impact of campaign contributions of the recipients. *Id.*, at 308. Palmer and Levendis, according to these authors, failed to account for the pioneering studies done by Henry Chappell and Thomas Stratman which led Palmer and Levendis to overlook the “simultaneity issue,” that is “whether contributions influence the voting behavior or whether the expected voting behavior influences contributions.” *Id.*, 309-309. Palmer’s and Levendis’s failure to cite these studies or take into account this key econometric principle, “reveals a fundamental flaw” in Palmer’s and Levendis’s study. *Id.*, 309. This oversight led Palmer and Levendis to “employ” a statistical analysis “dismissed over twenty-five years ago as inadequate” for examining the issue. *Id.*, 315. Newman, Speyrer and Terrell also noted that Palmer’s and Levendis’s error rate as

described by Tully and Gay, *The Louisiana Supreme Court Defended*, 69 LA. L. REV. 281, was of a “magnitude . . . unacceptable for a scientific study and raises questions about the care taken with other parts of their [Palmer’s and Levendis’s] study.” Newman, Speyrer and Terrell, *A Methodological Critique of The Louisiana Supreme Court in Question*, 69 LA. L. REV. at 311. In sum, these professors of economics deemed the Palmer and Levendis article to “consist[. . .] essentially of totally invalid statistical results and unsubstantiated assertions.” For a full and scholarly econometric review of the Palmer and Levendis article see Newman, Speyrer and Terrell, *A Methodological Critique of The Louisiana Supreme Court in Question*, 69 LA. L. REV. 307.

## CONCLUSION

The discredited Palmer and Levendis article has no place in this Court's consideration of the discrete factual and legal issues before it. The Louisiana Supreme Court, having no position on the merits of the case before this Court, asks this Court to give no credence to the unsupported assertions Palmer and Levendis made in their now-discredited and invalidated article.

Respectfully Submitted:

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