

No. 08-22

IN THE
Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORP.,
AND SOVEREIGN COAL SALES, INC.,

Petitioners,

v.

A.T. MASSEY COAL CO., INC., *ET AL.*,

Respondents.

**On Writ of Certiorari to the
Supreme Court of Appeals of West Virginia**

**BRIEF OF AMERICAN ASSOCIATION FOR
JUSTICE AS *AMICUS CURIAE*
SUPPORTING PETITIONERS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE*..... 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. DUE PROCESS REQUIRES A FAIR
AND IMPARTIAL TRIBUNAL 3

II. WITHIN THE SPECTRUM OF
CUSTOMARY PARTICIPATION,
FINANCIAL SUPPORT OF JUDICIAL
CANDIDATES POSES NO DUE
PROCESS ISSUE MERITING
RECUSAL..... 4

III. OUTSIZED CONTRIBUTIONS, EVEN
IN THE FORM OF INDEPENDENT
EXPENDITURES OR ISSUE
ADVOCACY TRENCH UPON
LITIGANTS’ DUE PROCESS RIGHTS 8

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	10, 11
<i>Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley</i> , 454 U.S. 290 (1981)	11
<i>Federal Election Commission v. National Conservative Political Action Committee</i> , 470 U.S. 480 (1985)	11
<i>Federal Election Commission v. Wisconsin Right to Life, Inc.</i> , 127 S.Ct. 2652 (2007).....	11
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978)	7
<i>McConnell v. Federal Election Commission</i> , 540 U.S. 93 (2003)	12
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966)	10
<i>Monitor Patriot Co. v. Roy</i> , 401 U.S. 265 (1971).....	7
<i>Republican Party of Minnesota v. White</i> , 536 U.S. 765 (2002)	4, 8
<i>United States v. Mistretta</i> , 488 U.S. 361 (1989)	3

Other Authorities

Croley, Steven P., <i>The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law</i> , 62 U. CHI. L. REV. 689 (1995)	4
Dec. of Ind.	4
Gibeaut, John, <i>Taking Aim</i> , 82 ABA J. 50 (Nov. 1996).....	6

Justice at Stake Campaign, <i>THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES, 2000-2008</i> (Jesse Rutledge ed. 2008).....	5
Reid, Traci V., <i>The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White</i> , 83 JUDICATURE 68 (1999)	6
Schotland, Roy A., <i>Comment: Judicial Independence and Accountability</i> , 61 LAW & CONTEMP. PROBS. 149 (1998)	5
Shestack, Jerome J., <i>President's Message: The Risks to Judicial Independence</i> , 84 ABA J. 8 (Jun. 1998)	6

INTEREST OF *AMICI CURIAE*¹

The American Association for Justice (“AAJ”) respectfully submits this brief as *amicus curiae*. The parties have filed letters of consent to the filing of amicus briefs.

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. AAJ has participated as *amicus curiae* before this Court in dozens of cases of importance to its members and to the public interest. AAJ members litigate matters on behalf of their clients, often in state courts, some of which have elective judiciaries. Some AAJ members participate in those elections by making financial contributions to judicial candidates.

SUMMARY OF ARGUMENT

This case presents a series of knotty problems involving clashing doctrines of uncertain application to the Question Presented. Due process guarantees all litigants a fair and impartial tribunal. Because public perception plays such an important role in the continuing legitimacy of the Judicial Branch, both the reality and the appearance of bias in favor of or against a party can threaten the ability of the courts to dispense justice while adhering to the rule of law.

¹ Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of 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.

At the same time, the vast majority of states have chosen to fill judicial offices through some form of election. That exercise of popular sovereignty necessarily imposes a need to raise campaign funds and brings with it at least the theoretical possibility of bias in favor of financial supporters. The natural sources of funding in these races are those who have a heightened knowledge of the courts, the judges, and the would-be judges—in other words, those who appear before these tribunals with some frequency: lawyers and frequent litigants. Their participation in these elections ought not be condemned. It is the discharge of a high civic duty. Nor should the judges they support normally be rendered ineligible to preside over or participate in decisions affecting those parties or those legal representatives. No due process violation occurs from the participation in judicial elections within the scope of legislated limits on financial support. In fact, in today's contentious judicial elections, where fact is often supplanted by wild accusations, there may well be a duty on the part of members of the bar to rally to the support of the courts and a truthful electoral record.

The balance, however, tips decisively in favor of a due-process requirement of recusal when great financial resources, well beyond the scope of legislated limits, are contributed by those involved in a pending matter that the candidate may be called upon to decide if elected. It should not matter whether that largess comes in the form of an outsized direct campaign contribution or an enormous independent expenditure designed to promote the candidate's election. Both can pose the same danger that the public would perceive that justice will be skewed in favor of the judge's

unusually significant political patron. It also should not matter if the financial support comes in the form of so-called issue advocacy. That type of political speech, which typically urges constituents to tell the officeholder how to vote on some pending matter, has no place in our system of justice. Unlike decisions in the political branches which are designed to be responsive to ebbs and flows of public sentiment, judicial determinations are not guided by the results of a popularity contest but by the application of the rule of law to facts in the record.

This is an unusual case. It does not involve electoral participation within the normal spectrum of financial support. Contributions within those normal limits, do not warrant recusal. However, the record in this case makes plain that the exorbitant financial efforts to influence the election of a judge who would inevitably sit on the appeal of the principal's pending litigation required that judge's recusal as a matter of due process.

ARGUMENT

I. DUE PROCESS REQUIRES A FAIR AND IMPARTIAL TRIBUNAL

This case presents a series of knotty problems involving clashing doctrines of uncertain application to the Question Presented. It is beyond peradventure that public respect and confidence in the judiciary is critically important to its place and function in our society. *See United States v. Mistretta*, 488 U.S. 361, 407 (1989) (TA \l "United States v. Mistretta, 488 U.S. 361 (1989)" \s "Mistretta" \c 1 } ("The legitimacy of the Judicial Branch ultimately depends on its reputation

for impartiality and nonpartisanship.”). Without public confidence that disputes will be fairly adjudicated, there can be no system of justice. For that reason, as Justice Kennedy has observed, judicial integrity constitutes “a state interest of the highest order.” *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). At a minimum, as this Court has repeatedly held, Due Process, assures an impartial tribunal dedicated to applying the law the same way to one set of litigants as it would be applied in similar matters involving other litigants. *See, e.g., id.* at 776.

II. WITHIN THE SPECTRUM OF CUSTOMARY PARTICIPATION, FINANCIAL SUPPORT OF JUDICIAL CANDIDATES POSES NO DUE PROCESS ISSUE MERITING RECUSAL

An elective judiciary, as found in the vast majority of the states, poses unique challenges to that guarantee, even as it embodies the ideal of self-determination. The widespread adoption of judicial elections grew out of the Jacksonian democracy movement, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 716 (1995) (Croley, Steven P., *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995)). Indeed, the distrust Americans had of a judiciary too responsive to the appointive power has even deeper roots that were expressed in the Declaration of Independence. Dec. of Ind. ¶ 11

(“[The King] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”).

Where judges are subject to election, both incumbents and challengers must undertake political campaigns, which, in recent years, have metastasized from comparatively docile and low-budget obligations to something far “nastier, noisier, and costlier.” Roy A. Schotland, *Comment: Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998){ TA \l "Schotland, Roy A., *Comment: Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149 (1998)" \s "Schotland" \c 3 }. Some judicial elections have become brutally contentious and grossly expensive undertakings. *See generally* Justice at Stake Campaign, THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES, 2000-2008 (Jesse Rutledge ed. 2008){ TA \l "Justice at Stake Campaign, THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES, 2000-2008 (Jesse Rutledge ed. 2008)" \s "Justice at Stake Campaign" \c 3 }, <http://www.justiceatstake.org/node/14>.

Necessarily, today’s campaigns place a heavy premium on raising campaign funds. It is only natural that those contributions will come from the people most familiar with the workings of the courts and the performance of the candidates: lawyers and frequent litigants. No judicial candidate can realistically hope to raise significant funds for a campaign outside the legal profession. In fact, members of the legal profession may well have an *obligation* to participate in some of these campaigns in order to preserve the integrity of the courts. For

example, a notorious retention campaign took place in Tennessee in 1996. State supreme court justice Penny White was blindsided by a virulent, eleventh-hour campaign against her retention that falsely gave voters the impression that she had singlehandedly ordered the release of a rapist who then repeatedly stabbed his 78-year-old victim. The reality was that Justice White was merely a member of a supreme court, unanimous in its opinion that error required the resentencing of the defendant, just as the unanimous court of appeals decision below did. See John Gibeaut, *Taking Aim*, 82 ABA J. 50 (Nov. 1996){ TA \l "Gibeaut, John, *Taking Aim*, 82 ABA J. 50 (Nov. 1996)" \s "Gibeaut" \c 3 }. Justice White's subsequent defeat at the polls was widely taken as a defeat for judicial independence—and the distorted accusations should have merited a response from the organized bar. Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70-71 (1999){ TA \l "Reid, Traci V., *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (1999)" \s "Reid" \c 3 }; Jerome J. Shestack, *President's Message: The Risks to Judicial Independence*, 84 ABA J. 8 (Jun. 1998){ TA \l "Shestack, Jerome J., *President's Message: The Risks to Judicial Independence*, 84 ABA J. 8 (Jun. 1998)" \s "Shestack" \c 3 }.

Similarly, members of the organized bar were the only likely financiers of the campaign against a South Dakota initiative last year that proposed the convening of citizen grand juries to review the performance of judges. Those whose decisions did not gain the approval of the citizen volunteers could be

subjected to civil liability and criminal conviction. It was the work of the bar, according to the proponents of the initiative that turned polls favoring the initiative by a three-to-one margin into a final vote of 90 percent against, ten percent in favor. See *SD-Jail4Judges*, <http://www.sd-jail4judges.org>. The financial participation of members of the bar was critically important to repelling this misguided effort.

As long as states continue to select or retain their judges by privately financed elections, lawyers and others concerned with the courts will—and should—participate actively and monetarily in these elections. Doing so fulfills a high civic duty anticipated by the First Amendment’s free-speech guarantee. Cf. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971){ TA \l "Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)" \s "Monitor Patriot" \c 1 } (the First Amendment has “its fullest and most urgent application precisely to the conduct of campaigns for political office”). It would be the height of folly in a system that cherishes popular sovereignty to bar or impair the professional standing of those most familiar with judicial officeholders because of their willingness to participate fully in public campaigns for judgeships. See *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978){ TA \l "First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)" \s "Bellotti" \c 1 } (citation and internal quotation marks omitted) (“freedom of speech . . . embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”).

Under normal circumstances, that participation should not entail adverse consequences, neither disqualifying the contributing lawyers from representing clients before the tribunal over which the judge they favored presides nor requiring recusal of that judge. In this respect, “normal circumstances” means those activities such as campaigning for a candidate, serving on a campaign finance committee to encourage others to support the candidate of their choice, or providing financial support that is well within state campaign contribution limits. These types of participation within the normal spectrum of customary participation ought not engender a slew of recusal motions.

III. OUTSIZED CONTRIBUTIONS, EVEN IN THE FORM OF INDEPENDENT EXPENDITURES OR ISSUE ADVOCACY TRENCH UPON LITIGANTS’ DUE PROCESS RIGHTS

Despite the propriety of the usual type of financial participation in elections, one cannot turn a blind eye to the potential danger that “relying on campaign donations may leave judges feeling indebted to certain parties or interest groups.” *White*, 536 U.S. at 790 (O’Connor, J., concurring). The challenge, however, is how to permit those most knowledgeable about judges and the legal system to participate fully in the judicial selection/retention process, while providing both litigants and the public with the assurance that cases will be fairly judged regardless of the identities of the judge’s political patrons.

Under the facts of this case, the answer is yet more complicated. Mr. Blankenship, chair, CEO, and president of Respondent A.T. Massey Coal Co., and the principal in the dispute between the parties, did not contribute \$3 million directly to the campaign of Justice Benjamin. Instead, Mr. Blankenship's direct contribution was \$1,000, as permitted by West Virginia's campaign contribution limit. If that was as far as the controversy went, there would be no issue that warranted this Court's attention. Instead, the bulk of his financial participation in the election, which generated the controversy, was made in independent expenditures or to an organization he helped found to influence the outcome of the election through a thinly veiled form of "issue advocacy."²

Mr. Blankenship spent more than a half million dollars in independent expenditures on behalf of now-Justice Benjamin's candidacy. J.A. 186a. He also contributed nearly another \$2.5 million to an organization, For the Sake of the Kids, he helped found to engage in similar electioneering against Justice Benjamin's opponent, though it qualified as a "527 organization" by framing its campaign as "issue advocacy." J.A. 150a.

In most elections, these types of expenditures are not subject to campaign finance regulation. Thus,

² Petitioners also note that Blankenship put in considerable additional effort by recruiting additional financial contributors. Pet. Br. 29. *Amicus* does not find that type of First Amendment activity problematic in that it does not suggest a colorable means of engendering the type of indebtedness that might lead to accusations of impropriety.

this Court has recognized that independent expenditures are one of the fullest forms of citizen political expression. See *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976){ TA \l "*Buckley v. Valeo*, 424 U.S. 1 (1976)" \s "Buckley" \c 1 }. At the same time, this Court has questioned the efficacy of such personally mounted campaigns:

[I]ndependent expenditures may well provide little assistance to the candidate's campaign and indeed may well prove counterproductive. The absence of prearrangement and coordination . . . undermines the value of the expenditure to the candidate."

Id.{ TA \s "Buckley" }. at 47.

Despite that supposition, those who engage in independent expenditures and issue advocacy of the type at issue here persist in their belief that the efforts make a critical difference and appear to have influenced the outcome of the McGraw-Benjamin election that is at the heart of this controversy.

Similarly, issue advocacy constitutes a pure form of First Amendment activity. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218 (1966){ TA \l "*Mills v. Alabama*, 384 U.S. 214 (1966)" \s "Mills" \c 1 } ("a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs").

When does that participation overstep reasonable bounds and implicate the due-process rights of litigants to an impartial tribunal? The answer appears to lie in an adaptation of the principles that undergird this Court's campaign

finance jurisprudence. In those cases, this Court found that “preventing corruption *or the appearance of corruption*” to be the only “legitimate and compelling government interest[]” sufficient to justify restricting campaign contributions. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985){ TA \l "*Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985)" \s "FEC v. National Conservative" \c 1 } (emphasis added). The danger of quid pro quo corruption between a contributor and a candidate exists only when decidedly “large contributions” are at issue. *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 297 (1981){ TA \l "*Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981)" \s "Berkeley" \c 1 }.

Amicus submits that similar compelling interests weigh in favor of recusal when the danger of quid pro quo bias between an outsized contributor and a judicial candidate are at issue. That these contributions are made through independent expenditures or issue advocacy should not demand a different analysis in the specialized context of judicial elections. As the Chief Justice observed, “in some circumstances, ‘large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions.’” *FEC v. Wisc. Right to Life, Inc.*, 127 S.Ct. 2652, 2672 (2007){ TA \l "*Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007)" \s "FEC v. Wisc. Right" \c 1 } (opinion of Roberts, C.J.) (quoting *Buckley*{ TA \s "*Buckley*" }, 424 U.S. at 45.

One of those circumstances must be judicial elections that take place while the progenitor of that independent campaign has a pending matter that is likely to reach the judge whose election hangs in the balance. The situation is easily distinguishable from elections involving candidates for office in the political branches of government. Independent expenditures made to support a legislative candidate are different because the work of legislators is supposed to represent the views of their constituents, expressed, among other ways, by financial support of campaigns. The Judicial Branch, however, is not one of the “political branches” intended to be responsive to popular opinion but instead the custodian of the rule of law. It is supposed to be shielded from majoritarian views. When the judiciary appears too responsive to popular sentiment, it is loosed from the moorings of fairness and impartiality with a resultant loss of public confidence. For that compelling reason, judicial elections must be held to a different standard.

That different standard also suggests that no distinction should be drawn between express advocacy and issue advocacy. This Court has “assume[d]” that interests sufficient to “justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.” *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 206, n.88 (2003){ TA \l "*McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)" \s "*McConnell*" \c 1 }. In judicial elections, there can be no genuine issue ads that are not tied to express election advocacy. The distinction between judicial and other offices is critical for evaluating this issue. It makes obvious sense, even in an election season, to permit advocacy

aimed at officeholders who are also candidates for legislative or executive office about some issue of public policy. The process of developing public policy is ongoing and may be especially and appropriately sensitive to public opinion during an election. It is illegitimate to engage in the same behavior to influence judicial decisionmaking. Thus, no proper purpose is served by urging citizens-voters to call Judge Jones and tell him to approve the conviction of a particular defendant or the liability of a company in a pending case the way that it is perfectly appropriate to use issue advocacy to urge those same citizen-voters to call Representative Smith and urge her to vote no on H.B. 25.

The fact that so-called issue ads mentioning the candidates' names are used solely to influence judicial elections is obvious. It is also a matter of record. For example, the U.S. Chamber of Commerce has boasted that its ads on judicial candidates are intended to serve that purpose. At a 2001 conference convened by the Chamber, the architect of their judicial election strategy played some of the issue ads (described as "public education efforts") used in the previous judicial election cycle. One condemned several actions by a judge seeking reelection and concluded with the tagline that she had "bad judgment for Indiana." Center for Legal Policy, Manhattan Institute, JUDICIAL ELECTIONS: PAST, PRESENT, FUTURE (transcript of proceedings of April 18, 2001 conference) at 26-27. Another supported a candidate for the Mississippi Supreme Court for bringing "common sense" to that court. *Id.* at 27-28. The efforts helped twelve of fifteen candidates endorsed by the Chamber win election and that result encouraged the Chamber to plan "a significant

expansion of our level of activity” in judicial elections. *Id.* at 28, 40 (remarks of James Wooten).

Amicus suggests a standard that would not restrict such advertising, even if the sponsor or sponsors might properly be subject to campaign disclosure laws. Nor should the standard open the floodgates to recusal motions for ordinary participation in judicial elections. However, when the contributions, including independent expenditures or contributions to “issue-advocacy efforts,” greatly exceed legislated limits and the contributor has pending litigation likely to come before that judge, the potential for bias becomes palpable and recusal should follow.

Under the facts of the instant case, Mr. Blankenship’s extraordinary financial efforts required recusal of Justice Benjamin as a matter of due process. The balance between clashing doctrines clearly tips in favor of recusal under these circumstances. Regardless of whether the bias is real or potential, the objective of a fair and impartial tribunal is sufficiently endangered to require the judge’s non-participation as a matter of due process.

CONCLUSION

For the foregoing reasons, the decision below should be vacated, and the case remanded for further proceedings without Justice Benjamin’s participation.

Respectfully submitted,

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