

No. 08-22

In The
Supreme Court of the
United States

HUGH M. CAPERTON, ET AL., *Petitioners*,

v.

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

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

**Brief of Amicus Curiae James Madison Center
for Free Speech Supporting Respondents**

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Question Presented

1. Whether the Due Process clause of the Fourteenth Amendment requires mandatory recusal based on the 'debt of gratitude' a judge might feel on account of campaign contributions or independent expenditures made on the judge's behalf?

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Statement of Interest¹

The mission of the James Madison Center for Free Speech (“Madison Center”) is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison’s belief that “the right of free discussion . . . [is] a fundamental principle of the American form of government.” The Madison Center also provides non-partisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). See <http://www.jamesmadisoncenter.org>. The Madison Center and its counsel have been involved in numerous election-law cases, including the challenges to the Bipartisan Campaign Act of 2002 (“BCRA”) in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (“*WRTL I*”), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) (“*WRTL II*”).

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Summary of Argument

Requiring recusal based on campaign spending represents a break from longstanding American tradition. States have long preferred elections as the means of selecting their judges because of the special role that state judges play in developing a state's law. With rare exceptions, judicial elections have been funded through campaign contributions. Yet despite the fact that these elections have been funded almost exclusively through private spending, campaign spending has traditionally not been taken to justify mandatory recusal where the spending party appears before a judge as a litigant.

This is doubly true of mandatory recusal under due process, which sets only a minimal standard for mandatory recusal, and is limited to where a judge has a direct pecuniary interest in the case. Requiring judges to recuse themselves based on campaign spending would replace the presumption of impartiality traditionally accorded to judges with a presumption of corruption, and by basing recusal on past rather than present circumstances, would limit a judge's ability to control the circumstances under which she must recuse.

Attempts to justify mandatory recusal as a means of preventing corruption fail, as they typically confuse correlation with causation. Contributions might be used as a means of influencing judges, or it might be that people contribute to candidates who they believe share their values and views. There is no compelling evidence that judicial decision-making is improperly influenced by contributions, and the case that judges

are improperly influenced by independent expenditures is even weaker. In any event, any risks posed to judicial impartiality by campaign spending are inherent in a state's choice to opt for judicial elections, so that any argument that such spending violates due process is functionally an argument that judicial elections are unconstitutional.

Nor can mandatory recusal be justified as a means of preserving public confidence in the judiciary. In addition to threatening actual impartiality, campaign spending is said to threaten the perception of impartiality by the general public. While polling data reveals a healthy skepticism from the public as to the role of money in politics, the same surveys indicate that this generalized cynicism has not translated into a loss of public confidence in the courts. The courts are consistently among the highest ranked institutions in terms of public confidence.

Far from preserving judicial impartiality, mandating recusal based on campaign spending has the potential to impede the swift execution of justice and undermine public confidence in the judiciary. Mandating recusal based on campaign spending could increase exponentially the cases where recusal is required, which would not only pose severe burdens on litigants and judges, but could bring the judiciary into disrepute. Requiring mandatory recusal based on campaign spending also leaves judges vulnerable to strategic action by potential parties and their attorneys.

These problems cannot be avoided by requiring recusal only in exceptional cases. In fact, adopting an amorphous test for when recusal is required would add a new level of uncertainty to the legal process, and

could lead to an even greater increase in recusal requests. And if recusal is required based on campaign spending, then it is hard to see why the same principle would not require recusal of a judge based on the support they received during a confirmation battle or during the appointment process.

Argument

I. Mandatory Recusal Based on Campaign Spending is Contrary to Long Standing Legal Traditions and Principles.

A. Campaign Contributions Play an Essential Role in Judicial Selection.

Judicial elections have a long history in the United States. Election of judges began in Georgia localities in 1789, and by the Civil War twenty-one of the thirty states in the Union elected their judges. Roy A. Schotland, *New Challenges To States' Judicial Selection*, 95 Geo. L.J. 1077, 1093 (2007). This tradition has continued to the present day, with thirty-nine states currently selecting some or all of their judges via election. *Id.* at 1094.

Where the public has been given the option to replace judicial elections with some other system, such proposals have been roundly rejected. Since 1969, attempts to abolish or restrict judicial elections by ballot measure have been rejected by the voters in Pennsylvania, Illinois, Nevada, Tennessee, Florida, Oregon, Arkansas, Ohio, Louisiana, and South Dakota, in some cases multiple times. See Am. Judicature Soc'y, *Chronology of Successful and Unsuccessful Merit Selection Ballot Initiatives*, available at http://www.judicialselection.us/uploads/documents/Merit_s

election_chronology_1C233B5DD2692.pdf; *see also* Anita Kumar, *Referendum--Judicial Selection: Floridians Keep Right to Elect Judges*, St. Petersburg Times, Nov. 8, 2000, available at <http://pqasb.pqarchiver.com/sptimes/index.html?ts> (Florida referendum allowing merit selection and retention election of Florida trial court judges was defeated 61% to 38%). In fact, aside from a popular referendum approving merit selection for judges in Green County, Missouri, no referendum moving a jurisdiction from popular election to some other method of judicial selection has been approved in over twenty years. Am. Judicature Soc'y, *Press Release: Voters in Four Jurisdictions Opt for Merit Selection on November 4* (2008), available at http://www.ajs.org/-selection/sel_voters.asp.

The public's continued support for judicial elections is based in part on the special role that state judges play in developing a state's law. "Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well." *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002). Elections ensure that judges are held accountable to the people, rather than to political elites and insiders, and provide a mechanism to keep judges within their legitimate bounds. Because judges are given a predominant role in setting public policy, popular sovereignty and democracy require that the people play a role in determining the make-up of the courts. *See generally* James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 First Amend. L. Rev. 180 (2007).

With rare exceptions, judicial elections have been funded through campaign contributions. While three states have recently enacted limited public funding for some judicial elections,² the main source of funding for judicial elections, as with elections generally, has been campaign contributions. *See Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) (noting that “campaigning for elected office necessarily entails raising campaign funds”); *see also White*, 536 U.S. at 789 (O’Connor, J., concurring) (“[u]nless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising”).

Despite being an ubiquitous feature of judicial elections, campaign spending, whether in the form of contributions or independent expenditures made on a candidate’s behalf, have traditionally not been taken to justify mandatory recusal where the party who has spent money on behalf of a judge appears before him as a litigant, even where the amount of spending has been substantial. *See, e.g., Shepherdson v. Nigro*, 5 F. Supp. 2d 305 (E.D. Pa. 1998); *Massongill v. County of Scott*, 991 S.W.2d 105 (Ark. 1999); *Ex Parte Kenneth D. McLeod, Sr. Family Ltd. Partnership XV*, 725 So. 2d 271 (Ala. 1998); *Anguilar v. Anderson*, 855 S.W.2d 799 (Tex. App. 1993); *Keane v. Andrews*, 555 So. 2d 940 (Fla. Dist. Ct. App. 1990). Given this “universal and long-established’ tradition” of not requiring recusal

² *See* N.C. Stat. §§ 163-278.61 to 163-278.70; N.M. Stat. §§ 1-19A-1 to 1-19A-17; Wis. Stat. § 11.50.

based on campaign spending, this Court should maintain its “strong presumption” that mandatory recusal is not required in such cases. *See White*, 536 U.S. at 785 (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 375-377 (1995) (Scalia, J., dissenting)); *see also Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (“As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis.”)

B. Due Process Sets Only a Minimum Standard for Recusal.

At common law, disqualification standards were narrow and simple: “[A] judge was disqualified for direct pecuniary interest and for nothing else.” John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947). The standard, borrowed from English law, stated that no man shall be a judge in his own case. *See, e.g., Dr. Bonham’s Case*, 77 Eng. Rep. 638 (K.B. 1609) (holding by Lord Coke that members of a board determining physicians’ qualifications could not both impose and personally receive fines). Beyond disqualification for pecuniary interests, according to Blackstone, a judge was free to hear any matter before him. William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND, *361 (1765).

This Court has clearly adopted the common law rule as the standard for determining when recusal is required under the Due Process clause. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824–25 (1986) (supporting disqualification of a judge whose ruling would impact the relevant law in two cases in which the judge was a plaintiff); *Ward v. Vill. of Monroeville*,

409 U.S. 57, 61–62 (1972) (holding that a city mayor could not serve as a traffic court judge because the matters coming before such a judge involved funding for town finances); *Tumey v. Ohio*, 273 U.S. 510, 531 (1927) (finding a judge should be disqualified because he would only be paid if the defendant was convicted).

The federal courts, however, have been reluctant to hold that due process necessitates disqualification for other types of bias. *See, e.g., Tumey*, 273 U.S. at 523 (finding recusal was not constitutionally mandated where kinship or personal bias were at issue). Instead, other types of bias are left as matters of legislative discretion. *Id.* (“[M]atters of kinship [or] personal bias . . . would seem generally to be matters merely of legislative discretion.”); *see also FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) (“[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level”). As the Seventh Circuit has noted:

[T]he constitutional standard the Supreme Court has applied in determining when disqualification is necessary recognizes the same reality the common law recognized: judges are subject to a myriad of biasing influences; judges for the most part are presumptively capable of overcoming those influences and rendering evenhanded justice; and only a strong, direct interest in the outcome of a case is sufficient to overcome that presumption of evenhandedness.

Del Vecchio v. Ill. Dep’t of Corr., 31 F.3d 1363, 1372–73 (7th Cir. 1994).

Due process sets only a minimal standard for mandatory recusal, while leaving states free to adopt more stringent standards where no other constitutional right is implicated. *White* 536 U.S. at 794 (Kennedy, J., concurring) (noting that states “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”)

C. Mandatory Recusal Based on Campaign Spending Turns Traditional Recusal on Its Head.

Petitioners’ proposal that judges be required to recuse themselves based on campaign spending would alter traditional recusal standards in several respects. First, the American judicial system has traditionally granted judges a presumption of impartiality, which can be overcome only by objective evidence of actual bias. See *Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) (“[W]e accept the notion that the conscientious judge will, as far as possible, make himself aware of his biases of their character, and, by that very self-knowledge, nullify their effect. The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office”) (internal citations and quotations omitted); see also *Del Vecchio*, 31 F.3d at 1372 (“We expect—even demand—that judges rise above their potential biasing influences, and in most cases we presume judges do.”). Requiring recusal based on campaign spending would replace this presumption of impartiality with a presumption of corruption.³

³ In this regard, a number of the amici attempt to justify mandatory recusal based on campaign spending by

Second, while recusal has traditionally been required where a judge has a pecuniary interest in the outcome of a case, disqualification was mandatory only for a presently existing pecuniary interest, not for a previously received financial benefit. A judge, for example, could not hear a case involving a company in which he owned stock. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1)(c), 3C(3)(c) (1972) (requiring a judge to disqualify himself when he “has a financial interest . . . in a party to the proceeding” where “financial interest” is defined to include “ownership of a legal or equitable interest, however small”). This impediment, however, continued only as long as the judge retained ownership of the stock. *See, e.g.*, 28 U.S.C. § 455(f) (2000). As soon as the judge sold the stock, the impediment was removed, and no basis for disqualification would remain. Recusal is not required where a judge had owned party stock at some point in the past (on the theory that the judge might feel indebted to the party based on the financial benefits he had received from the company).

Where recusal has been held to be required by due process, it has been premised on present rather than past circumstances. In *Tumey*, for example, the Supreme Court held that a village mayor could not

citing to a World Bank study of the effects of judicial corruption in the developing world. *See* Brief of the Committee for Economic Development, et al. at 12; Brief of the Center for Political Accountability, et al. at 15. Such attempts to justify recusal by comparing American judges to judges in countries known for having high levels of corruption evinces a rather low opinion of the members of the American judiciary.

preside over criminal proceedings where the mayor was paid only if the defendant was convicted and where the village received a share of the fine. The inability of the mayor to hear these cases, however, continued only so long as these provisions remained in effect. *Tumey*, 273 U.S. at 534. Likewise, *Aetna* involved a state supreme court justice who was, apart from his judicial duties, pursuing a bad-faith suit against an insurance company. *Aetna*, 475 U.S. at 817. This Court held that it violated due process for the judge to participate in a similar case involving bad-faith refusal to pay an insurance claim because the court's decision could have had a direct impact on the outcome of his own case. This Court gave no indication, however, that the justice would be prevented from hearing such cases once his own suit had been resolved.⁴

Limiting mandatory disqualification to presently existing pecuniary interests serves several salutary purposes. Requiring a judge's recusal whenever she had received a financial benefit from a party at some point in her life would, of course, be highly impractical. Confining recusal to presently existing pecuniary

⁴ Aside from *Tumey* and *Aetna*, Petitioners cite *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), a case in which it was held that a judge could not preside over criminal contempt proceedings involving verbal abuse of the judge. This case, however, did not involve any potential financial gain or loss on the part of the judge, but rather turned on the common sense principle that "a judge should not preside in a case in which he was the victim of a crime." *Del Vecchio*, 31 F.3d at 1392.

interests thus prevents disqualification from becoming a method of paralyzing justice, rather than of preserving it. Basing mandatory disqualification on present circumstances also gives judges a means of remedying the circumstances requiring recusal if they so choose. This provides judges with both a means and an incentive to limit the instances in which they would have to recuse, which served the smooth application of the judicial process.

The same is not true of mandatory recusal based on past campaign spending. Since a judge cannot undo a contribution once made, such impediments cannot be remedied. And insofar as recusal is mandated based on independent expenditures made on the judge's behalf, the circumstances requiring a judge's recusal will be totally out of her control. Thus, requiring recusal based on campaign spending destroys a judge's ability to limit the circumstances requiring her recusal, and adds a level of uncertainty into the judicial process.

More importantly, a presently existing pecuniary interest differs fundamentally from a previously received financial benefit in that only in the former case is the benefit conditioned on the judge's decision in a case. If a judge who has received a substantial contribution from a particular party later rules against that party, the judge need not return the money. Whereas in *Tumey* and *Aetna*, the judges in question did stand to lose out financially if they ruled in a certain way.⁵

⁵ One might argue that ruling against a party might make them less likely to contribute to a judge in the future, but this will be true of *any* party, regardless of whether this

Finally, the recusal in cases involving pecuniary interests traditionally followed a bright-line rule: unless the amount involved was truly *de minimus*, any pecuniary interest, regardless of its size, was considered disqualifying. Petitioners' proposal, by contrast, seeks to replace this bright-line standard with an amorphous test in which recusal is required only for "substantial" campaign spending. Given the practical difficulties involved in requiring recusal whenever a contributor appears before a judge, this is understandable. But if the fact that a judge has received contributions or benefitted from independent expenditures made by a party really does amount to having a pecuniary interest in the outcome of the case, then it is hard to see as a matter of constitutional principle why recusal should be required only based on "substantial" campaign spending.

In fact, if recusal is to be required based on campaign spending on the theory that contributions and independent expenditures might improperly influence the judge, then it would be hard to see why the same principle would not require recusal of a judge in many other cases as well. The confirmation process for federal judges, for example, often involves large independent expenditures made in support of or in opposition to the confirmation of a given judge. *See* Press Release, Brennan Center for Justice, TV Advertising Data Reveals Group Adopting Different Strategies in Alito Confirmation Battle (Jan. 26, 2006), *available at* [http://www.brennancenter.org/press_detail.asp? key=100&subkey=34246](http://www.brennancenter.org/press_detail.asp?key=100&subkey=34246). Any threat to

party has contributed to the judge in the past.

judicial impartiality posed by such independent expenditures would appear to be present regardless of whether the expenditures are made in support of a judge's election or if they are made in support of her confirmation. Yet due process clearly does not require a judge to recuse herself every time a group that supported or opposed her candidacy appears before her as a litigant.

II. Mandatory Recusal Based on Campaign Spending Is Not Necessary to Protect Judicial Impartiality.

A. The Evidence Does Not Support a Corrupting Effect From Campaign Spending.

Arguments in favor of mandatory recusal based on campaign spending are generally based on the fear that such contributions and expenditures will improperly influence judicial decision-making, harming judicial impartiality and ultimately due process. A judge, it is feared, may feel indebted to a party whose financial assistance helped get her elected. *White*, 536 U.S. at 790 (O'Connor, J., concurring); *see also* Petitioner's Brief, at 31 (arguing that "[i]t would only be natural for Justice Benjamin to feel a debt of gratitude to Mr. Blankenship for his extraordinary efforts on the campaign's behalf"). Alternatively, there is concern that a judge may rule in favor of a particular party in order to receive additional contributions in the future. Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 Chi.-Kent L. Rev. 133, 138 (1998) ("There is a grave risk that a judge will be more favorably disposed to those who gave or spent

money and those who might be counted on for contributions or expenditures in the future.”).

Corruption is a serious charge, and serious charges demand serious evidence, particularly where, as here, one must overcome the presumption of impartiality accorded to judges. *Cf. Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000) (noting that “[t]his Court has never accepted mere conjecture as adequate to carry a First Amendment burden”). To date, however, evidence supporting claims of corruption based on contributions has been mixed at best.

It is difficult to test empirically whether campaign contributions influence official decision-making because of what is known as the endogeneity problem. Even assuming that votes by elected officials are correlated with the wishes of their contributors, this does not tell us anything about the direction of causation. An elected official might be influenced to vote in a certain way by a contribution; alternatively, a contributor might donate to a candidate because she perceives (correctly) that the candidate shares her position on a given issue. *See generally* Henry W. Chappell, Jr., *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 62 *Rev. Econ. & Stat.* 77 (1982). Any attempt to show a corrupting effect on the judiciary caused by campaign contributions, therefore, must show not only that judicial decisions are correlated with campaign contributions, but also that this correlation is due to contributions influencing votes, rather than the other way around.

A great deal of empirical work has been done on the connection between contributions and voting in the legislative context over the last few decades. Numerous studies have found that contributions have little to no influence on legislative decision-making.⁶ Others have claimed to find a more significant effect.⁷ Overall,

⁶ See Stephen Ansolabehere *et al.*, *Why Is There So Little Money in U.S. Politics?*, J. Econ. Persp., Winter 2003, at 105, 116; Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J.L. & Econ. 317, 346-47 (1997); Frank J. Sorauf, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 166-72 (1992); Stephanie D. Moussalli, CAMPAIGN FINANCE REFORM: THE CASE FOR DEREGULATION 4, 6 (1990); Janet M. Grenzske, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 Am. J. Pol. Sci. 1, 19-20 (1989); Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 Hofstra L. Rev. 369 377 (1989); Mary H. Vesenka, *Economic Interests and Ideological Conviction: A Note on PACs and Agriculture Acts*, 12 J. Econ. Behav. & Org. 259, 261-62 (1989); Frank J. Sorauf, MONEY IN AMERICAN ELECTIONS 316 (1988); Larry Sabato, *Real and Imagined Corruption in Campaign Financing*, in ELECTIONS AMERICAN STYLE 155, 159-62 (A. James Reichley ed., 1987); John R. Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 Am. Pol. Sci. Rev. 400, 410-11 (1985); Chappell, *Campaign Contributions and Congressional Voting*, 62 Rev. Econ. & Stat. at 83.

⁷ See, e.g., Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of*

however, the scholarly community has been unable to come to any firm consensus as to whether contributions have a corrupting effect on official decision-making.

With respect to judicial elections, the evidence for influence is even weaker. Some early research, for example, found no difference between the decisions of judges who are appointed and those who are elected.⁸ More recently, examination of contribution patterns for Supreme Court elections in Illinois, Michigan, and Wisconsin found that when large contributors came before the court as litigants, they were successful less than half the time. See Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2

Bias in Congressional Committees, 84 Am. Pol. Sci. Rev. 797 (1990); D. Magleby & C. Nelson, *THE MONEY CHASE* 78 (1990).

⁸ See, e.g., Beverly B. Cook, *Should We Change Our Method of Selecting Judges?*, 20 Judges J. 20, 22 (Fall 1981) (“Political science research suggests that judges define their roles and decide cases independently of the selection process used.”); Victor E. Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make: Selection Procedures in State Courts of Last Resort*, 5 Just. Sys. J. 25, 39 (1979); Burton Atkins & Henry Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 Am. Pol. Q. 427, 440-48 (1974); R. Watson & R. Downing, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* 343-48 (1969); Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. Pub. L. 104, 117 (1964).

Elec. L. J. 79, 83-86 (2003). And even where a recent study claimed to find a correlation between campaign contributions and judicial decisions, its authors were ultimately forced to concede 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.” Veron Valentine Palmer & John Levendis, *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, 1294 n.14 (2008).⁹

Finally, evidence of a corrupting effect from independent expenditures, as opposed to contributions, is virtually nonexistent. As this Court noted in *Buckley v. Valeo*, 424 U.S. 1 (1976):

Unlike contributions . . . independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with

⁹ Aside from causation issues, the Palmer and Levendis study suffers from a number of methodological and other problems, which render its conclusions suspect. *See generally* 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); 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).

the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Buckley, 424 U.S. at 47.

B. Campaign Spending Does Not Threaten Public Confidence in the Judiciary.

In addition to threatening actual impartiality, campaign spending is said to threaten the perception of impartiality by the general public. This threat, it is claimed, is particularly acute in the case of the judiciary because of its inherent weakness as a constitutional actor. As famously stated by Alexander Hamilton, the judiciary is the “least dangerous” branch, as it has “no influence over either the sword or the purse.” *The Federalist No. 78* (Alexander Hamilton), at 393-94. Because courts have neither the power to levy taxes nor command armies, the only way for their decisions to have effect is if they are widely perceived as being impartial arbiters of justice, rather than mere political actors. James L. Gibson, *Nastier, Nosier, Costlier – And Better*, *Miller-McCune*, August, 2008, at 27 (“Because courts are weak, they require institutional legitimacy, the belief that an institution has the right to make binding decisions for a constituency and that such decisions must be complied with.”).

Some degree of political cynicism or skepticism of government, however, need not be corrosive of public institutions, and in fact can have a salutary effect. Skepticism about the actions and motives of government officials can serve as a powerful check on the

abuse of government power, including judges. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar. Found. Res. J. 521, 527 (1977) (noting the “the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials.”); *Bridges v. California*, 314 U.S. 252, 270-71 (1941) (“The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion . . . an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.”). And while some degree of perceived legitimacy is obviously necessary not only for the judicial but for other branches of government, experience has shown that democracy and skepticism about government institutions generally are capable of coexisting in the same society indefinitely.

Polling data consistently shows a generalized public skepticism about government institutions. For example, in surveys conducted since 1958 asking whether government officials were “crooked,” between one quarter and one half of all respondents have indicated their belief that “quite a few of the people running the government are crooked.” See *The American National Election Studies Guide to Public Opinion and Electoral Behavior, Are Government Officials Crooked 1958-2004*, available at www.election-studies.org/nesguide/toptable/tab5_a.htm (in 2004, 35% of respondents thought “quite a few of the people running the government are crooked,” while 53%

thought “not many” were crooked, and 10% said “hardly any” were crooked).

This long standing skepticism is likewise present in the public’s attitudes regarding the influence of campaign contributions and independent expenditures on the judiciary. It would be a mistake, however, to equate this generalized skepticism about the role of money in politics with a lack of public confidence in the courts. Despite the concerns about campaign spending, public confidence in the judiciary remains high. A 2002 poll by the American Bar Association, for example, found that 72% of respondents were at least “somewhat concerned” about whether “the impartiality of judges is compromised by the need to raise campaign money to successfully run for office.” Harris Interactive Telephone Survey, Prepared for the American Bar Association, August, 2002, attached as Exhibit 1. Yet the same poll found that 75% of respondents thought elected judges were more fair and impartial than appointed judges. *Id.*

Similarly, according to a recent poll, only 5 percent of respondents believed that campaign contributions made to judges had no influence at all on decisions judges made in Minnesota state courts. Decision Resources Ltd., *Justice at Stake Study, Minnesota Statewide*, Questions 9, 11 (January 2008), available at <http://www.justiceatstake.org/files/MinnesotaJustice-atStakesurvey.pdf>. Nonetheless, the same poll found widespread public confidence in the courts, with 74% of respondents saying that they had “a great deal” or “some” confidence in the courts, and 76% saying that they had “a great deal” or “some” confidence in judges

(higher rates than for any other category except the medical profession). *Id.*

The courts are consistently among the highest ranked institutions in terms of public confidence. According to a 2001-2002 survey, 94% of respondents rated the job being done by courts and judges of their state as being either “excellent” or “good.” Justice At Stake – State Judges Frequency Questionnaire, November 5, 2001 - January 2, 2002, attached as Exhibit 2. A 1999 survey found that 77% of respondents had either “a great deal” or “some” confidence in the United States Supreme Court, and 75% had similar confidence in local courts. National Center for State Courts - *How the Public Views the State Courts: A 1999 National Survey*, Table 1 (May 1999), attached as Exhibit 3. The same survey also found that 79% agreed with the statement that “[j]udges are generally honest and fair in deciding cases.” *Id.* Figure 17. And while the majority of Americans will express some level of concern about the potentially corrupting effect of money in elections, this does not appear to be their most pressing political concern. *See 55% Say Media Bias Bigger Problem Than Campaign Cash*, Rasmussen Reports, August 11, 2008, *available at* http://www.rasmussenreports.com/public_content/politics/election_20082/2008_presidential_election/55_say_media_bias_bigger_problem_than_campaign_cash (55% of respondents thought media bias posed a bigger problem in politics than large campaign contributions).

As these data indicate, public confidence in the judiciary is robust. There is little evidence that public concerns about the influence of money on politics have

lowered public confidence in the courts, or that these concerns have impaired the ability of the courts to carry out the judicial function. Such concerns are therefore not an adequate basis for mandating recusal for campaign spending under due process.

C. Any Impartiality Concerns Raised by Campaign Spending are Inherent in the State’s Decision to Hold Judicial Elections.

Federal courts have repeatedly held that where concerns about judicial impartiality arise out of ordinary campaign activities, the concerns are inherent in the state’s decision to elect judges in the first place, and thus cannot be used as a basis for restricting these campaign activities. In *White*, for example, this Court struck down a Minnesota judicial canon which prohibited judicial candidates from announcing their views on disputed legal or political issues. *White*, 536 U.S. at 788. Quoting Justice Marshall, the Court stated that “[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.” *Id.* (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). As Justice O’Connor elaborated in her *White* concurrence:

Minnesota has chosen to select its judges through contested popular elections In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling.

If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

White, 536 U.S. at 792 (O'Connor, J., concurring).

Similarly, in *Weaver* the Eleventh Circuit struck down a state judicial canon barring judges and judicial candidates from personally soliciting campaign contributions. The *Weaver* court followed *White* in holding that any impartiality concerns raised by the personal solicitation of campaign funds were inherent in the state's decision to elect judges, and thus could not be used as a rationale to limit candidates' First Amendment rights. See *Weaver*, 309 F.3d at 1322 ("The impartiality concerns, if any, are created by the State's decision to elect judges publicly"). Because private financing is such a pervasive feature of state judicial elections, any attempt to require recusal based on campaign spending can only result in a limitation on the states' ability to choose their method of judicial selection.

III. Mandatory Recusal Based on Campaign Spending Would Harm Judicial Impartiality.

A. Mandatory Recusal Based on Campaign Spending Would Exponentially Increase Recusal Motions.

Far from preserving judicial impartiality, mandating recusal based on campaign spending has the potential to impede the swift execution of justice and undermine public confidence in the judiciary. Because of the nebulous nature of Petitioners' proposed standard, requiring recusal based on substantial campaign

spending can only serve to vastly increase the number of recusal requests brought before the court. If recusal is granted in even a significant fraction of these cases, this would not only cause hardship for both litigants and judges, but would also serve to bring the judiciary itself into disrepute. *See Feichtinger v. State*, 779 P.2d 344, 348 (Alaska Ct. App. 1989) (noting that while judges may sometimes be tempted to recuse in order to avoid controversy, “[t]o surrender to such a temptation would justly expose the judiciary to public contempt based on legitimate public concern about judicial integrity and courage.”); *Adair v. Mich. Dep’t of Educ.*, 709 N.W.2d 567, 579 (Mich. 2006) (“Each unnecessary recusal adversely affects the functioning of the Court”).

On the other hand, if a judge denies a recusal request based on campaign spending, then the issue of whether the denial violated due process will have to be litigated on appeal. Even otherwise routine cases will take on a constitutional dimension, as one party argues that the level of campaign spending involved in the case warranted the judge’s recusal. This will not only clog the courts, and especially the federal courts, with recusal related litigation, but because the recusal issue involves questions about a judge’s integrity and capacity to overcome potential threats to his impartiality, requiring judges to evaluate the recusal decisions of their fellow judges can only add strains to the collegiality between judges essential for the smooth operation of the justice system.

In the minds of the public, requiring a judge to recuse himself in certain circumstances is tantamount to a declaration that the judge is incapable of being impartial, at least in those circumstances. Any rule,

therefore, that would require judges to recuse in a significant number of cases—or which would lead to an exponential increase in the number of cases where recusal was requested but denied—has the potential of leaving the public with the impression that judges are generally corrupt or incapable of rendering justice dispassionately and fairly.

B. Mandatory Recusal Based on Campaign Spending Would Leave Judges Vulnerable to Strategic Recusal Requests.

Requiring recusal based on campaign spending leaves judges vulnerable to strategic action by potential parties and their attorneys. *See* Howard J. Bashman, *Recusal on Appeal: An Appellate Advocate's Perspective*, 7 J. App. Prac. & Process 59, 72 (2005) (noting that while “the subject of strategic recusal . . . is not often discussed, no doubt because the goal seems unfair and perhaps unethical . . . you can be sure that strategic recusals do occur”).

As noted above, those who spend money on a candidate's behalf fall into two groups. They may be spending on the candidate's behalf because they believe she shares their values and views, or they may be spending in an attempt to influence the candidate's views. Under the current system, those who simply wish to elect candidates who they believe share their values or views can donate to that candidate, or make independent expenditures on their behalf, though with no guarantee that the candidate they support will actually win.

A party who wishes to influence the views of a judge, by contrast, faces not only this uncertainty, but

also the prospect that his spending will fail to improperly influence the judge as he wishes. He can donate to a judicial candidate, but this is no guarantee that the candidate he backs will be elected, let alone that the candidate will rule in his favor as judge. A litigant who pursues this strategy also has to worry that he will be out-bid by another party pursuing the same strategy.

Mandating recusal based on campaign spending would ironically make it far easier for parties to influence the outcome of their litigation. Instead of worrying about whether a judge will change his vote in a case based on a given contribution or independent expenditure, a party can simply contribute to the campaigns of judges he believes are likely to rule against him, thus ensuring that these judges cannot hear his case. As then Judge Breyer wrote in *In re Allied-Signal Inc.*, 891 F.2d 967 (1st Cir. 1989), the standards governing recusal “must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.” *Allied-Signal*, 891 F.2d at 970.

While mandating recusal based on campaign spending would not impede those who wish to use spending as a means of influencing a judge’s vote, it would impede those who wish to spend on behalf of a candidate because they believe she shares their values and views. An individual who wishes to support a candidate out of a sense of shared judicial philosophy may be less likely to do so if he knows that doing so will require the judge’s recusal. Mandatory recusal in

these circumstances thus has the potential to chill individuals from making independent expenditures on behalf of candidates, or from getting involved in the political process. *Cf. Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (invalidating a Minnesota public funding scheme because of the chilling effect it had on independent expenditures).

Nor is the risk of strategic recusal requests avoided simply by mandating recusal only in cases where spending is “substantial.” If a party or attorney is willing to spend large amounts of money on behalf of a candidate in the hopes that this candidate will vote in accordance with his interests if elected, then there is no reason why he would not be willing to spend an equal amount of money on behalf of a candidate in order to secure his disqualification.

Conclusion

For the foregoing reasons, the decision of the West Virginia Supreme Court of Appeals should be affirmed.

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