

No. 08-22

IN THE
Supreme Court of the United States

HUGH M. CAPERTON, *et al.*,
Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., *et al.*,
Respondents.

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

**BRIEF OF AMICUS CURIAE
PUBLIC CITIZEN IN SUPPORT OF
PETITIONERS**

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INTRODUCTION¹

This case concerns \$3 million spent by a single contributor to support a single candidate for a seat on a state supreme court and the appeal of a \$50 million verdict against that contributor's company. The support of the contributor, respondent A.T. Massey Coal Co.'s chief executive officer, constituted more than 60% of the total amount spent to support the candidate's campaign. Given these extraordinary facts, the Court could resolve this case by holding simply that these facts create an appearance of impropriety so great as to violate due process.

Although just reversing the denial of Petitioners' recusal motion would convey the important message that campaign contributions can, in some circumstances, create an unconstitutional appearance of partiality and hence require recusal, and that proof of actual bias is not necessary to show a due process violation, Public Citizen urges the Court not only to reverse the decision below. The essential problem presented here often arises in cases that do not present such remarkable facts. Rather than issuing a fact-specific holding that resolves only this case and invites repeated petitions asking this Court to assess the due process implications of contributions in case after case, the Court should use this case as an opportunity to set forth factors for state courts to use in evaluating the due process issue in cases in which contributions to

¹Counsel for amicus Public Citizen authored this brief, and no entity other than Public Citizen made a monetary contribution to its preparation or submission. All parties have consented to the filing of this amici brief, and letters reflecting their blanket consent to the filing of amicus briefs in this case are on file with the Clerk.

judges and judicial candidates may present an appearance of partiality. After outlining some of the many ways in which the underlying issue arises, this brief offers suggestions about some of the guidelines that the Court could offer to state courts confronting similar issues.

INTEREST OF AMICUS CURIAE

Public Citizen is a nonprofit consumer advocacy organization headquartered in the District of Columbia, with approximately 80,000 members nationwide. Public Citizen is active before Congress, administrative agencies, and courts throughout the country on a wide variety of issues, including access to the civil justice system, campaign finance reform, and protection of the right to due process. Public Citizen and its members have been and will continue to be parties to and appear as amici curiae in litigation in state courts presided over by elected judges. As a corporation, Public Citizen is prohibited by the law of most states from contributing to political campaigns. Even if it were not prohibited from doing so, it could not afford to make substantial contributions and, in any event, would not do so because of its view that such contributions create the appearance that justice is for sale.

For many years, Public Citizen has been concerned about the due process implications of judges presiding over cases in which a party or a party's lawyer has made significant campaign contributions to a judge presiding over the case. In 2000, Public Citizen was one of the plaintiffs in a section 1983 case entitled *Public Citizen v. Bomer*, Civil No. A-00-CA-218 (N.D. Tex.). *Bomer* was brought by five Texas lawyers, Public

Citizen, and another non-profit organization, on behalf of themselves, their clients, and their members who had litigated and would litigate in Texas courts. Some of the lawyer-plaintiffs had contributed to judicial elections, and some had not. Most of their current and prospective clients were not repeat players in the judicial system and had no incentive to make contributions to judges, whether or not they could afford to do so. All the plaintiffs believed that the system of financing judicial elections in that state created the appearance, if not the reality, of partiality and impropriety by Texas state judges, to the detriment of the legal profession, the individual plaintiffs' law practices and their clients' interests, and the interests of the non-profit organization plaintiffs and their members.

The complaint in *Bomer* asked for a declaration that the current system, including the refusal of Texas courts even to consider campaign contributions from a party or its lawyer to a judge as a basis for recusal, is unconstitutional, leaving to the State of Texas the decision of what constitutional system should be adopted in its place. In September 2000, the district court granted defendant's motion to dismiss for failure to state a claim. In November 2001, the Fifth Circuit affirmed the dismissal on the ground that the plaintiffs lacked standing. 274 F.3d 212 (5th Cir. 2001). The outcome of this case shows the difficulty of addressing the due process issue presented here in a systemic challenge and the important opportunity this case offers for the Court to supply standards for state courts to apply in individual cases.

SUMMARY OF ARGUMENT

In the abstract, it is well established that due process prohibits not only a partial judge but the appearance of partiality as well. And it cannot be seriously disputed that, in some circumstances, campaign contributions from interested parties to the judge presiding over a case can create such an appearance. Yet as a practical matter, most state-court judges have refused to grant recusal motions based on campaign contributions, no matter the amount involved. This amicus brief highlights the breadth of the problem, which extends well beyond cases involving eye-catching contribution amounts or multi-million dollar verdicts. In deciding this case, the Court should make clear that, while the analysis in any particular case calls for a fact-specific consideration, actual bias need not be shown for judicial campaign contributions to create an unconstitutional appearance of impropriety. The Court should also provide guidelines for state courts to consider when faced with motions to recuse based on interested parties' judicial campaign contributions.

ARGUMENT

I. The Variety Of Situations In Which The Due Process Issue Arises And The State Courts' Responses Show The Need For The Court's Guidance.

This case involves contributions made directly by an interested person to support the campaign of a candidate for state supreme court justice. Other cases involving judicial campaign contributions have also fit

this description. *See, e.g.*, Petition for Writ of Certiorari, *Consolidated Rail Corp. v. Wightman*, No. 99-950 (while personal injury case was pending on petitions for discretionary review, plaintiff's counsel and his close family members contributed 4.4% and 4.7% of total contributions received by each of two Ohio justices), *cert. denied*, 529 U.S. 1012 (2000).

However, the due process issue can also arise when the contributor has a more indirect interest in the outcome of the litigation. *See, e.g.*, Ill. Elec. Code, 10 ILCS 5/9-1, *et seq.* (no limits on contributions, including from corporations and unions); Petition for Writ of Certiorari, *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 05-842, at 5-6 (while case was pending, successful candidate for Illinois supreme court justice received more than \$1 million from groups with which the party was affiliated, as well as more than \$350,000 in campaign donations from one party, its lawyers, amici, and their lawyers), *cert. denied*, 547 U.S. 1003 (2006) (denying petition for certiorari).

And although the facts of this case—the dollar amount of the contributions made and the dollar amount of the verdict on appeal—make it particularly noteworthy, the due process issue presented here also arises in cases involving less conspicuous facts. *See, e.g.*, *Curvin v. Curvin*, __ So. 2d __, 2008 WL 400364 (Ala. Civ. App. 2008) (divorce proceeding); *Bissell v. Baumgardner*, 236 S.W.3d 24 (Ky. Ct. App. 2007) (child custody proceeding); *Inlow v. Henderson, Daily, Withrow & DeVoe*, 787 N.E.2d 385 (Ind. Ct. App. 2003) (case involving claims of negligence, legal malpractice, and breach of contract); *Pierce v. Pierce*, 39 P.3d 791,

799 (Okla. 2001) (divorce proceeding); *In re Disqualification of Jackson*, 704 N.E.2d 1236 (1998) (divorce proceeding); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) (trial judge personally solicited and received contribution while case pending, in matter involving real estate transaction between individuals).

Although contributions to the campaigns of state supreme court justices often receive the most attention, campaign contributions by interested parties are not limited to supreme court elections. *See, e.g.*, state-court decisions cited *supra* page 5. For instance, in the family courts of Tarrant County, Texas—where “judges [not a jury] decide all but a handful of cases”—lawyers with pending cases comprise the vast majority of the contributors to the campaigns of sitting judges. *Lawyers give, judges take, ethics experts worry*, Ft. Worth Star Telegram, June 11, 1994.

Not surprisingly, individuals and organizations with substantial interests in litigation, including lawyers, businesses, and interest groups with a significant number of cases pending before the courts, are the primary contributors to campaigns for judicial office. For example, a study of recent contributions to Ohio Supreme Court candidates found that the insurance and healthcare industries “dominated contributions to the incumbents.” Turcer & Holzen, *Contributions to Candidates for Justice of Ohio Supreme Court from November 5, 2007-April 4, 2008*, at 1 (available at <http://www.ohiocitizen.org/money/judicial/candidates08/candidates08.html>). And the parties and lawyers involved in six of the nine cases heard by the Texas Supreme Court in February 2004 had contributed

\$716,279 to the nine justices. Texans For Public Justice, *Dollar Docket* (Mar. 2004), available at www.tpj.org/publication_list.jsp?typeid=1. Such figures are not unusual. See *id.* (contribution totals from Feb. 2002 - Apr. 2004).

When *unopposed* judicial candidates receive campaign contributions from individuals or law firms with cases pending before them, the appearance that contributors are donating to curry favor with the judge, rather than expressing a view on the merits of the candidates, is strong. For instance, in the 1997-98 election cycle in Texas, three incumbent supreme court justices ran in primaries that were uncontested or practically uncontested (one opponent raised \$134), yet they raised 7.6 to 68 times the amounts raised by their general election opponents. Texans For Public Justice, *Checks & Imbalances: How the Texas Supreme Court Raised \$11 Million*, Part IV at 2 (Apr. 11, 2000), available at <http://www.tpj.org/reports/checks/toc.html>. And each won easily. See <http://elections.sos.state.tx.us/elchist.exe> (election results posted by Texas Secretary of State). On the other hand, contributions in a hotly contested election also raise concern, as a judge may feel particularly beholden to those who helped him or her to prevail in a tight race. See, e.g., *Avery*, discussed *supra* page 5.

In the absence of effective recusal guidelines, judicial campaign contributions by people with interests before the courts—including parties, their lawyers, their law firms, trade associations, and labor unions—have a negative impact on the public's faith in the impartiality of the judicial system. Indeed, numerous

surveys show that a large majority of the public believes that contributions to state judicial campaigns influence judges' decisions. See, e.g., Minn. Jud. Branch, *The Minnesota Difference: The Minnesota Court System and the Public* 16 (2007), available at www.mncourts.gov/?page=519; *Report from the Commission to Promote Public Confidence in Judicial Elections* 13 (N.Y. June 29, 2004), available at www.nycourts.gov/press/; National Center for State Courts, *How The Public Views The State Courts, A 1999 National Survey* 3 (May 1999), available at www.ncsc.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf. This concern was the thrust of the amicus brief filed by 40 major U.S. corporations in support of the petition for certiorari in *Dimick v. Republican Party of Minnesota*. See Brief of Amici Curiae Concerned Corporations in Support of Petitioners, *Dimick*, No. 05-566, cert. denied, 546 U.S. 1157 (2006).

Unfortunately, while the public, including litigants and lawyers, generally perceives an appearance of impropriety in many situations, state court judges have been extremely reluctant to acknowledge when a campaign contribution creates an appearance that rises to the level of a due process violation, no matter the circumstances. Thus, a New York Times study of the Ohio Supreme Court found that, “[i]n the 12 years that were studied, the justices almost never disqualified themselves from hearing their contributors’ cases.” Liptak & Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. Times, Oct. 1, 2006. “In the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times.” *Id.* In other states, recusal may be even rarer. For

example, Texas courts have repeatedly rejected the notion that acceptance of campaign contributions from a party or its lawyer may *ever* constitute a due process violation or provide grounds for recusal. *See, e.g., Williams v. Viswanathan*, 65 S.W.3d 685, 689 (Tex. App. 2001) (argument that “bias is shown because appellants’ opposing counsel made contributions to [judge’s] campaign . . . has been rejected by the courts of this state”).

Through its Model Code of Judicial Conduct, the American Bar Association has encouraged states to take a step toward containing the appearance of impropriety sometimes caused by campaign contributions. The Model Code has long provided that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” ABA Model Code of Jud. Conduct, R. 2.11(A) (2007); *id.*, Canon 3(E) (1990). And the Model Code has long stated that in-person solicitation of campaign contributions by a judge or judicial candidate should be prohibited, *id.*, R. 4.1(A)(8) (2007); *id.*, Canon 5(C)(2) (1990), although a handful of states have not adopted that Canon. *See, e.g., Tex. Code of Jud. Conduct*, Canon 4(D)(1).

In the 2007 amendments to the Model Code, the ABA accepted the argument that is at the heart of this case—that campaign contributions may, in some cases, require recusal. The ABA thus added to the Model Code, as a specific basis for recusal, campaign contributions above a minimum amount (not specified in the Model Code) from a party, his or her lawyer, or the law firm. ABA Model Code of Jud. Conduct, R. 2.11(A)(4).

Although most states have adopted the general standard of ABA Rule 2.11(A),² instances in which state judges recuse themselves or are disqualified based on an appearance of impropriety for any reason are exceedingly rare. *But see, e.g., Pierce*, 39 P.3d at 799; *Dean v. Bouderant*, 193 S.W.3d 744, 752 (Ky. 2006) (chief justice granting motion to recuse himself where he received numerous campaign contributions from many of a party’s attorneys and party requesting recusal was party harmed by recusal decision). And only Alabama has adopted the Model Code’s language requiring recusal or disqualification when campaign contributions of parties and lawyers exceed a specified amount. *See Ala. Code* §§ 12-24-2(c) (requiring disqualification when contributions exceed \$4,000 to an appellate judge or \$2,000 to a circuit judge). Mississippi’s Code of Judicial Conduct states that a party or attorney’s status as a “major donor” may be grounds for such recusal, although it does not define “major donor.” *See Miss. Code of Jud. Conduct*, Canon 3E(2).

Moreover, the recusal provision of the ABA Model Code does not address contributions from people who are not parties, such as amici, political action committees, or, as in this case, an officer of a corporate

²*E.g.* Conn. Code of Jud. Conduct, Canon 3(c)(1); Fla. Code of Jud. Conduct, Canon 3E(1); Idaho Code of Jud. Conduct, Canon 3E(1); Kan. Sup. Ct. R. 601A, Canon 3E(1); Minn. Code of Jud. Conduct, Canon 3D(1); Ohio Code of Judicial Conduct, Canon 3E(1), 3G(1); Okla. Code of Jud. Conduct, Canon 3E(1); S.C. R. App. P. 501 at Canon 3E(1); S.D. Code of Jud. Conduct, Canon 3E(1); Tex. R. Civ. P. 18b(2)(a); W. Va. Code of Jud. Conduct, Canon 3E(1).

party to the case, as opposed to the party itself. The ABA Model Code also does not include the other factors discussed below that are related to, but separate from, the amount of the contribution itself.

II. The Court Should Make Clear That A Showing Of Actual Bias Is Not Required And Offer Parameters For Considering The Due Process Issue.

A. The Right To Due Process Includes The Right To A Decisionmaker Who Both Is And Appears To Be Impartial.

Parties to civil cases have a constitutional right to a fair trial. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986). And “[t]rial before an ‘unbiased judge’ is essential to due process.” *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); accord *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (“due process requires a ‘neutral and detached judge in the first instance’”) (citation omitted).

Moreover, “justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 14 (1954). “[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *Concrete Pipe & Prods.*, 508 U.S. at 618 (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980)).³ The Due Process Clause forbids even the “possible temptation to the average man as judge”

³*Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (“goal” of federal recusal statute, 28 U.S.C. § 455(a), “is to avoid even the appearance of partiality”).

not to be neutral and detached. *Id.* at 617 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court reversed a conviction in a case adjudicated by a town mayor who was paid for his service as a judge from fines he assessed when acting in a judicial capacity, although no showing of actual bias was made. More recently, in *Aetna Life Insurance Co.*, the Court held that due process required a judge's recusal because issues in the case were also presented in litigation to which the judge was a party. 475 U.S. at 823, 825. The Court emphasized that, in these circumstances, the judge's participation violated the appellant's due process rights, regardless of whether the judge was actually influenced by his personal interest. *Id.* at 825.

“[T]he [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*.” *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (administrative board composed of optometrists could not preside over hearing against competing optometrists). *See, e.g., Ward*, 409 U.S. at 58-59 (invalidating scheme whereby mayor responsible for revenue production also adjudicated traffic and ordinance violations, where fines and other money derived from proceedings in mayor's court accounted for substantial portion of village's revenue); *Marshall*, 446 U.S. at 243 & n.2 (citing cases); *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (“Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the

opportunities for abuse inherent in a regime of large individual financial contributions.”).⁴

Notwithstanding this Court’s precedents, lower courts, including the court below, “have consistently rejected the contention that appearance-driven conflicts, without more, raise due process implications.” JA 665 (Chief Justice Benjamin, concurring) (citing decisions from the Third, Eleventh, and Seventh Circuits); *see also 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, 682 (Kan. 2006); *Hirning v. Dooley*, 679 N.W.2d 771, 780-81 (S.D. 2004); *Kizer v. Dorchester County Voca. Educ. Bd. of Trs.*, 340 S.E.2d 144, 148 (S.C. 1986); *Williams*, 65 S.W.3d at 689; *Curvin*, 2008 WL 400364.

This rejection of the principle that “justice must satisfy the appearance of justice” threatens the due process rights of litigants. Here, for example, whether or not the decisions below were in fact affected by the sizable campaign contributions described in the petition, neither petitioners nor the public can have faith that the outcome of the case was not affected by the contributions to the judge who ruled in favor of his supporter. Indeed, the appearance of partiality in this case—where A.T. Massey Coal’s chief executive officer spent \$3 million to support the campaign of a candidate

⁴Justice O’Connor raised the question whether “the very practice of electing judges undermines” the interest in a judiciary that both is and appears to be impartial, and she emphasized that the need to raise substantial funds to campaign for judicial office exacerbates this problem. *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (O’Connor, J., concurring).

for the state supreme court while his company was preparing to appeal a \$50 million verdict against it, and that \$3 million was more than 60 percent of the total support for the Justice—is much stronger, and the connection between the money and the appearance of impropriety is far more direct, than in *Ward*.

Accordingly, in deciding this case, the Court should firmly reiterate the “stringent rule” that due process may sometimes require recusal or disqualification of judges “who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *Concrete Pipe & Prods.*, 508 U.S. at 618.

B. Several Factors Are Relevant To Determining Whether Campaign Contributions Create An Unconstitutional Appearance Of Impropriety.

An unconstitutional appearance of partiality does not arise in every case in which a party has made a contribution to a judge. However, as this case illustrates, and with few exceptions, state-court judges fail to acknowledge the possibility of a due process violation in even the most egregious of cases. Accordingly, to ensure that state courts apply reasonable and effective approaches to evaluating motions for recusal based on this due process concern, the Court should provide a framework or list of factors to be applied when considering such motions. In any given case, the due process analysis will require a nuanced consideration of the facts and circumstances, as due process analyses tend to do. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). Nonetheless, a set of factors to guide

the state courts will ensure that the burden of deciding these issues will generally not fall on this Court.

Factors pertinent to the due process analysis should include who made the contributions at issue (*e.g.*, the parties, the lawyers, amici); the amount of the monetary support and the percentage of that amount relative to the total amount the judge received; whether the contribution was made to the candidate or a political committee, and if the latter, whether the committee supported many candidates or, as here, was devoted solely to defeating one candidate (and hence electing the other); the timing of the contributions vis-a-vis the litigation (*e.g.*, how recent was the contribution, whether the case was already pending and at what stage); whether the judicial candidate was unopposed or faced a competitive race; whether the contributor gave non-monetary assistance through fundraising efforts or by assuming a leadership position in the campaign; whether the decision to deny recusal was made only by the judge being challenged or was joined by others on the court; and whether similar contributions were made by people with interests on both sides of the litigation (or by the same person to all candidates) or just one. The court may also wish to indicate whether some factors—for example, the percentage of the contribution relative to the total received by the judge—should weigh more heavily than others.

The Oklahoma Supreme Court looked to several of these factors in ordering recusal in *Pierce*, 39 P.3d at 798. There, the court concluded that “[w]hen, as in [that] case, (1) a lawyer makes a campaign contribution

to that judge in the maximum amount allowed by statute, and (2) a member of that lawyer's immediate family makes a comparable maximum contribution, and (3) that lawyer further assists the judge's campaign by soliciting funds on behalf of the judge, and the contributions and solicitations occur during a pending case in which the lawyer is appearing before that judge," disqualification is required. *Id.* Although the amount of the party's contributions relative to the total collected was not presented to the court, the opinion recognized the potential relevance of such evidence, noting that the party resisting the motion to disqualify could "defend the motion by showing that the contributions and solicitations were a minimal part of the judicial campaign." *Id.*

In reiterating that due process protects against an appearance of partiality and providing guidance as to how to assess whether campaign contributions create an unconstitutional appearance in a particular case, the Court need not be concerned that recognizing that campaign contributions can create an unconstitutional appearance of partiality will make a system of elected judges unworkable. Oklahoma's elected judiciary co-exists with the principle that "due process must include the right to a trial without the appearance of judge partiality arising from counsel's campaign contribution on behalf of a judge during a case pending before that judge." *Id.* at 799. Yet no practical problems appear to have resulted because, although in Oklahoma due process may require disqualification in an individual case, a "lawyer's contribution to a judge's campaign does not *per se* require that judge's disqualification when the lawyer comes before him." *Id.* at 798.

More generally, every state requires recusal or disqualification under some circumstances. *See* ABA, Draft Report of the Judicial Disqualification Project, App. C (Sept. 2008), *available at* http://www.abanet.org/judind/pdf/JDP_9-9-08_Appendices_i.pdf (listing disqualification provisions by state). And every state has procedures in place for reviewing motions for recusal and disqualification and for replacing a judge after recusal or disqualification. In most states the procedures are set forth in statutes or rules, but in some they are established through case law. *See, e.g.*, 16 Ariz. Rev. Stat., Ariz. R. Civ. P. 42(f); Cal. R. Civ. P. §§ 170.1(c), 170.3; *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008).

For example, in Texas, a judge “shall” recuse himself when “he or a lawyer with whom he previously practiced law had been a material witness concerning [the subject matter].” Tex. R. Civ. P. 18b(2)(c). If the judge has not recused himself but a party believes that recusal is warranted, the party may file a motion for recusal. *Id.* 18a(a); Tex. R. App. P. 16.3(a). If a trial-court judge denies such a motion, the presiding judge of the district assigns another judge to hear the motion, and, if the motion is granted, the presiding judge or Chief Justice of the Supreme Court assigns another judge to hear the case. Tex. R. Civ. P. 18a(d), (f)-(g). If the challenged judge or justice is an appellate judge, and the judge or justice declines to recuse himself, the motion is reviewed by the remainder of the court sitting en banc. Tex. R. App. P. 16.3(b). State courts in Mississippi follow similar procedures. *See* Miss. Uniform R. Circuit & County Ct. Prac. 1.15; Miss. R. App. P. 48B; Miss. R. App. P. 48C; *see, e.g.*, *Dodson v.*

Singing River Hosp. Sys., 839 So. 2d 530, 533-34 (Miss. 2003) (recusal required where partners in firm representing one party had represented judge in previous matters and one partner had served as treasurer in judge's campaign, thus creating reasonable doubt about judge's impartiality).

States may also consider as a starting point the approach taken in Alabama, where a state statute requires parties and lawyers to disclose the amount of their contributions to the assigned judge(s), and mandates recusal on the request of a party if either the opposing party or opposing counsel contributed more than \$4,000 to a supreme court justice or court of appeals judge, or more than \$2,000 to a circuit court judge. *See* Ala. Stat. § 12-24-2(a), (b). *But see Curvin v. Curvin*, __ So. 2d __, 2008 WL 400364, *5 (Ala. Civ. App. 2008) (appeal from denial of motion to recuse trial judge; "the party seeking recusal must come forward with evidence establishing the existence of bias or prejudice"). Or states may consider taking steps to alleviate the instances in which the issue arises, as, for example, by adopting a public financing system for judicial elections. *See, e.g., N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008) (rejecting challenge to North Carolina statute creating system of optional public funding for candidates seeking election to state supreme court and state court of appeals), *cert. denied*, 129 S. Ct. 490 (2008).

* * *

At bottom, the question presented here is whether campaign contributions from interested parties to the

campaigns of the judges presiding over their cases or cases presenting issues of importance to them can ever create an unconstitutional appearance of impropriety. This case presents an opportunity for the Court to make clear that, although the totality of the circumstances matter and the issue is not susceptible to rigid rules, the answer to that question is yes. The Court should provide standards for state courts to apply in evaluating whether campaign contributions to judicial candidates create an unconstitutional appearance of partiality in particular cases. And because under any standard an unconstitutional appearance of impropriety exists in this case, the Court should reverse the decision below.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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