

No. 08-22

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IN THE  
*Supreme Court of the United States*

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

v.

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

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**On Writ Of Certiorari  
To The Supreme Court  
Of Appeals Of West Virginia**

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**OPPOSITION TO RESPONDENTS' MOTION FOR  
LEAVE TO FILE A SUPPLEMENTAL BRIEF**

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**RULE 29.6 STATEMENT**

The corporate disclosure statement included in the Brief for Petitioners remains accurate.

**OPPOSITION TO RESPONDENTS'  
MOTION FOR LEAVE TO FILE  
A SUPPLEMENTAL BRIEF**

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This Court's Rule 25.5 "restrict[s]" supplemental briefs to "new matter"—specifically, "late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief." Such "new matter" might include a statement made by the CEO of a litigant—made after the litigant's brief expressly denied that the CEO and a particular judge "even knew one another, before or after the election," much less that the judge "solicited or encouraged [the CEO's] activities"—acknowledging that the CEO and the judge had met privately before the election and discussed, specifically, "raising money." *Compare, e.g.,* Resp. Br. 55-56, *with* Adam Liptak, *Justices Hear Arguments on Money-Court Nexus*, *New York Times*, Mar. 4, 2009, at A18. That would be new information "that was not available in time to be included in a brief," S. Ct. R. 25.5, and it would tend to reinforce petitioners' argument that the CEO had set out to pick a judge for his own case and that any reasonable observer would conclude that a judge selected under those circumstances quite probably would be biased in favor of the CEO who spent so much to elect him.

The only thing that is remotely "new" about the information proffered by Massey is that it was repackaged in a self-serving news release on the eve of the oral argument before this Court. The "news" Massey's supplemental brief purports to present—information concerning Justice Benjamin's voting pattern in the fifteen Massey cases that have come before him in the four years since his taking the bench—was discussed at length in Justice Benja-

min’s opinion explaining his refusal to recuse himself (J.A. 674 n.29), in petitioners’ brief (at 32-33), and in the brief filed by Massey just five weeks ago. *See* Resp. Br. 5-6, 9, 50-51.

The “news” today—just as it was five weeks ago—is that, *after* he denied petitioners’ first motion for recusal, Justice Benjamin voted against Massey in several other cases, in each of which his vote was *not* outcome-determinative. Yet neither Massey nor the “news release” it proffers refutes that, in the only cases in which his vote *was* outcome-determinative—among them, petitioners’ \$50 million case in which “conduct of Massey CEO Don Blankenship was at issue” (Resp. Supp. Br. 1)—Justice Benjamin voted for Massey. That information clearly was “available in time to be included in a brief”—so available that Massey did, in fact, include it—and accordingly is not properly the subject of a supplemental brief.

### CONCLUSION

Respondents’ Motion for Leave to File a Supplemental Brief should be denied.

Respectfully submitted.

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