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 Writ of Certiorari to the West Virginia Supreme Court of Appeals

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Petitioners sought the recusal of Justice Brent Benjamin of the West Virginia Supreme Court of Appeals on the ground that Don Blankenship, an officer of respondent A.T. Massey Coal Company and its parent (Massey Energy Company), had made large independent expenditures in an effort to defeat Justice Benjamin's opponent in an election several years before this case was decided. Apart from a $1,000 contribution by A.T. Massey's Political Action Committee, neither respondents nor Massey Energy made any expenditures in support of Justice Benjamin's election or in opposition to his opponent; Blankenship's only direct contribution to Justice Benjamin's campaign totaled $1,000; and Justice Benjamin has voted against Massey affiliates in at least five other cases, including one in which the judgment against Massey was almost five times that here.

The question presented is whether the Due Process Clause of the Fourteenth Amendment required Justice Benjamin's disqualification on the theory that he must have felt a "debt of gratitude" to Blankenship that created a "probability of bias" in favor of respondents.

RULE 29.6 STATEMENT

Respondent A.T. Massey Coal Company, Inc. is wholly owned by Massey Energy Company, which is publicly traded. Massey Energy Company has no parent corporation; BlackRock Advisors, LLC owns 10% or more of its stock. Respondents Massey Coal Sales Company, Inc. and Elk Run Coal Company, Inc. are wholly owned by A.T. Massey Coal Company, Inc. Respondents Independence Coal Company, Inc., Marfork Coal Company, Inc., and Performance Coal Company, Inc. are wholly owned by Elk Run Coal Company, Inc.

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS
(continued)

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

BRIEF FOR RESPONDENTS

During the 2004 campaign for a seat on West Virginia's highest court, Don Blankenship, the CEO of Massey Energy Company, was actively engaged in the effort to defeat the incumbent, Justice Warren McGraw. Blankenship spent approximately $3 million of his own money in support of that effort, all but $1,000 of which was expended independently of the campaign of Justice McGraw's opponent, Brent Benjamin. Benjamin ultimately won the election.

Petitioners requested Justice Benjamin's recusal in this case because Massey subsidiaries (respondents here) are parties. Petitioners argued that Blankenship's independent expenditures in opposition to Justice McGraw's reelection created an "appearance" that Justice Benjamin was biased in favor of the Massey defendants. Justice Benjamin denied the request, reasoning in part that an "appearance of bias" is not constitutionally disqualifying. In their petition for certiorari, petitioners contended that the question whether an "appearance of bias" is constitutionally disqualifying was one of broad general importance.

Petitioners have now abandoned the "appearance" theory. In their merits brief, they contend that Blankenship's expenditures required recusal under the Constitution because they created a "probability" that Justice Benjamin was "actually biased" in favor of the Massey subsidiaries—a standard petitioners acknowledge is different from the "appearance" standard they previously advocated. Petitioners should not be permitted to induce the Court to grant certiorari on one theory, only to ask it to adopt a different theory after review has been granted. The writ

should be dismissed as improvidently granted. Otherwise, the decision below should be affirmed, because petitioners are not entitled to relief even under their new theory.

This Court has never held that a judge's disqualification is required by the Fourteenth Amendment—as opposed to recusal statutes or canons of judicial conduct—for "bias" in general, let alone for a "probability of bias." The Court has found disqualification constitutionally required only when—unlike here—the judge had a pecuniary interest in the outcome of the case, or in certain situations arising in contempt proceedings, where special rules apply.

Even if "probability of bias" were the constitutional standard, that standard could not be satisfied merely because, as petitioners contend, the judge might feel a "debt of gratitude" to a litigant. Such a theory is only loosely linked to probable bias, would have no limiting principle, would be entirely unworkable, and would create serious administrative problems for courts.

Finally, even if a "debt of gratitude" could give rise to a constitutionally disqualifying "probability of bias," the presumption that Justice Benjamin acted impartially cannot be overcome, and thus disqualification would not be required here. The expenditures at issue were not solicited by Benjamin and, except for a $1,000 contribution to his campaign, were made entirely independently; there is no evidence of any past or present friendship or other relationship between the two men; Blankenship is not a party to this case; and Justice Benjamin has voted against Massey affiliates in at least five other cases, including one involving a $243 million judgment against the company. Unless "probably" means no more

than "possibly," Justice Benjamin was not "probably biased" in respondents' favor.

STATEMENT

A. The 2004 Election

1. The citizens of West Virginia, like those of 38 other States, select their judges by popular vote. In 2004, Brent Benjamin challenged the incumbent, Justice Warren McGraw, for a seat on the West Virginia Supreme Court of Appeals. Don Blankenship, the CEO of Massey Energy and its subsidiary A.T. Massey Coal, disapproved of Justice McGraw's jurisprudence. He believed Justice McGraw's decisions harmed West Virginia's economy, depressed wages, and drove up "insurance costs for the working man." Tom Diana, *W. Va. Coal Executive Works to Oust McGraw*, THE INTELLIGENCER, 10/25/04. He also believed that the "most important donation [he] could make to [his] fellow West Virginians was to help defeat Warren McGraw," because, in his view, Justice McGraw was not "for the working man" but rather was "for the trial lawyers." Brad McElhinny, *Massey chief pours $1.7 million into race*, CHARLESTON DAILY MAIL, 10/15/04, at 1A. Blankenship's views about Justice McGraw caused him to become actively involved in the 2004 election; he did not and does not have any friendship or other personal connection with Benjamin, and his support was not solicited by him.

Blankenship spent approximately $500,000 on literature and advertising to convince the electorate that Justice McGraw was not the right person for the job. JA187a-200a, 301a-313a. In accordance with West Virginia law, Blankenship conducted those ac-

tivities "without the cooperation or consent" of the Benjamin campaign. JA187a.

Blankenship also made significant contributions to And for the Sake of the Kids (ASK), an organization established under 26 U.S.C. § 527(e). ASK ran ads and held events opposing Justice McGraw's reelection. JA117a-141a. Blankenship gave approximately $2.5 million to ASK, while others gave a total of more than $1 million; an organization representing physicians, Doctors for Justice, contributed $750,000. JA127a.

Other 527 groups also opposed Justice McGraw. Citizens for Quality Health Care, funded in part by the West Virginia Chamber of Commerce, spent nearly $370,000 on anti-McGraw advertisements. See Paul Nyden, *Coal, doctors' groups donated to anti-McGraw effort*, CHARLESTON GAZETTE, 1/7/05, at 5A. Citizens Against Lawsuit Abuse also ran critical ads. See Juliet Terry, *Benjamin Hopes to Shine Light on Justice*, STATE J., 11/5/04, at 4.

Blankenship contributed only $1,000 directly to Benjamin's campaign. JA208a. Apart from a $1,000 contribution by A.T. Massey Coal Company's PAC (JA242a), neither Massey nor any of its subsidiaries contributed money to Benjamin's campaign, provided any funding to ASK, or made any other independent expenditures.

Millions of dollars were also spent opposing Benjamin. One opponent, a 527 group called West Virginia Consumers for Justice, received approximately $2 million in contributions, including approximately $1.5 million from members of the plaintiffs' bar, as well as $10,000 from petitioner Caperton and $15,000 from a law firm that represents petitioners

here (Buchanan Ingersoll). See John O'Brien, *Caperton was anti-Benjamin from the start*, W. VA. RECORD, 1/24/08.

2. Concern that West Virginia courts had become "unfair and unpredictable" was a central plank in Benjamin's campaign. Mannix Porterfield, *Benjamin faults McGraw's "extreme judging,"* REGISTER-HERALD, 10/21/04. Benjamin welcomed the support of those who wanted a judge who "would follow the law" but warned that "if you want something in return, I'm not your candidate." JA319a.[1] On Labor Day 2004, Justice McGraw delivered a widely discussed speech in which he made a number of bizarre claims, including that this Court had "approved gay marriage." JA678a-679a & nn.35-38. Shortly before the election, Benjamin received the endorsement of all but one of the West Virginia daily newspapers to offer endorsements. JA674a n.27. Benjamin ultimately won the election.

On January 1, 2005, Justice Benjamin began his 12-year term. In his first few years on the court, he often voted against Massey companies, at both the merits stage (see *U.S. Steel Mining Co.* v. *Helton*,

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[1] It has been insinuated that Blankenship expended these large sums for the purpose of influencing the outcome of this case. In this regard, petitioners emphasize throughout their brief that this case meant a lot to Blankenship because he had a financial stake in the outcome. The insinuation is nothing more than rank speculation—and is implausible to boot. Blankenship owns only 0.35% of Massey's stock (see *infra* p. 53-54), so that his personal stake in the judgment (at most $175,000) was a small fraction of the money he expended. Moreover, the 2004 election was not unique; Blankenship has made expenditures to espouse his favored causes in West Virginia elections on issues entirely unrelated to Massey's business. See *infra* p. 6.

631 S.E.2d 559 (W. Va. 2005); *Helton* v. *Reed*, 638 S.E.2d 160 (W. Va. 2006)), and the petition stage (see *McNeely* v. *Independence Coal Co.*, No. 042156 (W. Va. Feb. 9, 2005); *Brown* v. *Rawl Sales & Processing* Co., No. 070889 (W. Va. Sept. 11, 2007)).

Blankenship—who has lived in the State for most of his life—has continued to participate actively in West Virginia elections when issues important to him are at stake. For example, he spent millions of dollars of his own money to unseat candidates who opposed the abolition of a sales tax on food and to defeat a bond referendum. See Juliet Terry, *Feeling Blue*, STATE J., 11/10/06, at 1; Brad McElhinny, *Who is the real Don Blankenship?*, CHARLESTON DAILY MAIL, 07/11/05, at 1A.

B. Proceedings Below

1. The underlying dispute in this case arose out of a coal-supply contract between Wellmore Coal Corporation, which was owned by respondent A.T. Massey, and two subsidiaries of petitioner Harman Development Corporation, owned by petitioner Caperton. Wellmore bought coal from the Harman subsidiaries and sold it to LTV Steel. LTV eventually stopped buying coal from Wellmore, leading Wellmore to invoke a *force majeure* clause in its contract with the Harman subsidiaries. The latter filed a breach-of-contract action against Wellmore in Buchanan County, Virginia, and obtained a $6 million judgment. JA491a-496a.

In the meantime, petitioners sued respondents in Boone County, West Virginia, alleging fraudulent misrepresentation and tortious interference with contract. Respondents moved to dismiss on the basis of (a) a forum-selection clause in the coal-supply con-

tract requiring suit to be filed in Virginia and (b) res judicata. The trial court denied the motion, and a jury awarded petitioners approximately $50 million in compensatory and punitive damages. JA496a-497a.

2. In October 2006, respondents sought review of the Boone County judgment from the West Virginia Supreme Court of Appeals. Nearly a year earlier, petitioners had requested that Justice Benjamin recuse himself when this case reached the court. JA104a-114a, 323a-335a. Relying almost entirely on the West Virginia Code of Judicial Conduct, they argued that Blankenship's expenditures in the 2004 campaign created an "appearance of unfairness" because he is Massey's CEO. JA108a. Petitioners' claim was premised primarily on newspaper articles and editorials. JA331a-334a. Justice Benjamin denied the motions. JA336a-338a.

The court voted unanimously to hear respondents' appeal, and, in November 2007, ruled in respondents' favor in a 63-page opinion by Chief Justice Davis, joined by Justices Maynard and Benjamin. JA340a-431a. Justices Albright and Starcher dissented.

3. Petitioners sought rehearing. While their petition was pending, petitioners renewed their request for Justice Benjamin's recusal, on "appearance of bias" grounds. JA432a-439a. The motion relied entirely on state law and did not mention the Due Process Clause. Justice Benjamin again denied the request. JA442a-445a.

The court subsequently voted unanimously to rehear the case. JA449a-452a. Before reargument, however, Justices Maynard (who had assumed the

chief-justiceship in the interim) and Starcher recused themselves. JA447a, 454a-462a. In his role as Acting Chief Justice, Justice Benjamin appointed circuit judges Cookman and Fox to fill the vacancies.

Petitioners then made a third request for Justice Benjamin's recusal. JA464a-468a. This request, again based entirely on state law, relied on a survey petitioners had commissioned that supposedly demonstrated a public perception that Justice Benjamin would not be fair in considering respondents' appeal. Justice Benjamin denied the motion (JA482a-483a), noting that a "push poll" specifically designed to support a recusal motion was "neither credible nor sufficiently reliable" (JA483a).

On the same day, April 3, 2008, the court issued its decision on rehearing, again reversing the verdict. JA485a-634a. Justice Davis wrote the 94-page majority opinion, joined by Justice Benjamin and Judge Fox; Justice Albright and Judge Cookman dissented. The court held that petitioners' suit should have been dismissed because the forum-selection clause was mandatory, covered the claims raised and the parties involved, and was not unjust or unreasonable. JA503a-537a. It further ruled the suit barred by res judicata, holding that petitioners sought similar remedies in both actions; the claims arose from the same conduct, transaction, or occurrence; there was sufficient identity of parties; and petitioners were similarly postured in both proceedings. JA567a-580a.

In a concurring opinion, Justice Benjamin addressed the disqualification issue at length. JA635a-700a. He rejected petitioners' assertion that "appearance-driven conflicts" can have "due process implications" and concluded that he was not disquali-

fied under this Court's decisions, because he has "no pecuniary interest in the outcome of this matter," "no conflicting dual role," and "no personal involvement with * * * [or] personal antipathy toward any party or counsel." JA665a. Justice Benjamin also explained that his recusal would not be required even under an "appearance" standard, because, among other things, "neither ASK nor Mr. Blankenship are parties," ASK "was completely independent" of his campaign, he "voted against Massey's position" in several "significant * * * cases," Justice McGraw's Labor Day speech "devastated" his own campaign, and the court's decision "was issued over three years after [the] election." JA673a-674a & n.29, 686a.

4. Approximately one month after the decision on rehearing, Justice Benjamin voted to deny Massey's petition for appeal in another case, *Massey Energy Co.* v. *Wheeling-Pittsburgh Steel Corp.*, No. 080182 (W. Va. May 22, 2008), cert. denied, 129 S. Ct. 626 (2008). That action left standing a $243 million judgment against Massey, the Nation's seventh largest verdict in 2007. See VerdictSearch, *Top 100 Verdicts of 2007*, *available at* http://www.verdictsearch.com/index.jsp?do=top100.

SUMMARY OF ARGUMENT

I. The writ of certiorari should be dismissed as improvidently granted. The theory that petitioners pressed in the court below, that Justice Benjamin passed upon, that petitioners advanced in their certiorari petition, and that this Court granted review to address is that the campaign expenditures at issue created an "appearance of bias" that required Justice Benjamin's disqualification. Tacitly acknowledging that an "appearance of bias" provides no *constitutional* basis for disqualification, petitioners have jet-

tisoned that theory and now contend that the expenditures were constitutionally disqualifying because they created a "probability of actual bias," a standard concededly different from the "appearance" standard previously advocated. By first raising this "probability of bias" theory at this juncture, petitioners deprived Justice Benjamin of the opportunity to pass on it; deprived respondents of the opportunity to convince the Court that the theory provides no basis for certiorari; were able to claim the existence of a lower-court conflict that does not exist with respect to their new theory; and induced the Court to accept the case on a false premise.

II. Alternatively, the decision below should be affirmed.

A. There is no basis in history, precedent, or this Court's practice for the notion that "bias" *in general*—much less a "probability of bias"—mandates disqualification under the Due Process Clause.

As to history: The common-law rule, in both England and America, was that a judge was disqualified if he had a pecuniary interest in the outcome of the case. "Bias" as such was not a basis for disqualification, and it did not become a generally accepted one in this country until the 20th century, when legislatures began to enact statutes requiring recusal on that ground.

As to precedent: Consistent with the common-law rule, this Court's due-process decisions have required disqualification based on a pecuniary interest in the outcome. Outside the context of contempt, where special rules apply, the Court has never held that disqualification is constitutionally required for any other reason.

As to this Court's practice: Justices have passed judgment on the constitutionality of statutes they helped write and reviewed decisions they rendered on lower courts. They hear cases in which their religious views, prior political affiliations, or friendships with counsel make it as reasonable as it is here to infer a "probability of bias," yet they are generally deemed capable of putting aside those influences. Sitting in those cases would become constitutionally problematic if "probability of bias" were the due-process standard.

B. Even if "probability of bias" *were* the constitutional standard, it could not be satisfied by the supposition that a judge might feel a "debt of gratitude" to a supporter, as petitioners maintain. To begin with, such a theory would have no limiting principle. There are countless forms of support for a judge that are at least as valuable as financial support—for example, a newspaper's endorsement, the backing of a prominent political figure or labor organization, or, in the case of an appointed judge, a nomination to the bench. Petitioners' theory would also be unworkable, because there is no certain or predictable way to identify the point at which a judge's "debt of gratitude" renders a case sufficiently "exceptional" (Br. 36) to require disqualification. A "debt of gratitude" theory would also create administrative problems for courts, which would be deluged with recusal motions if this vague and malleable theory were endorsed. Finally, petitioners' constitutional theory cannot be justified on the ground that it is necessary to ensure judicial impartiality. Every State already has a broad recusal law, and West Virginia, like many other States, has enacted further reforms to address such issues.

C. Even if petitioners' theoretical construct were accepted, disqualification would not be required here. Justice Benjamin voted *against* Massey affiliates in at least five other cases. There is no personal relationship between him and Blankenship. The money at issue was not solicited by or given to Justice Benjamin's campaign but was spent independently of it. And the expenditures were not made by any party to the case (but rather by an individual officer of one of the defendants). Those facts, and others, leave petitioners far short of overcoming the presumption of impartiality with which judges are and have for centuries been invested.

ARGUMENT

I. THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Petitioners' disqualification motions were based on the contention that Justice Benjamin had an impermissible "appearance of bias" under state law. JA104a-114a, 323a-335a, 432a-438a, 463a-468a. In denying the recusal motions, therefore, Justice Benjamin understandably addressed only "this matter of 'apparent conflict.'" JA658a. Among other things, his opinion rejected the proposition that "appearance-driven conflicts" can have "due process implications." JA665a.

In their certiorari petition, petitioners urged this Court to grant review to "clarify the circumstances" in which campaign expenditures can create a constitutionally disqualifying "appearance of bias" (Pet. 1-2); argued that this is one of the rare cases in which they do (Pet. 17); asked the Court to resolve an asserted lower-court conflict on whether "due process prohibits * * * the appearance of bias" (Pet. 21-22);

and asserted that Justice Benjamin's refusal to recuse himself "directly conflicts" with *Pierce* v. *Pierce*, 39 P.3d 791 (Okla. 2001), which found campaign contributions constitutionally disqualifying under an "appearance" theory (Pet. 24). Petitioners relied on the same theory in their supplemental and reply briefs. Over respondents' objection that "[a]ppearances are the stuff of codes and canons—not the Constitution" (Opp. 27), the Court granted certiorari.

Petitioners have now abandoned their "appearance" theory. They contend that the constitutional standard for judicial disqualification is not an "appearance of bias" but "a 'probability' that the judge is actually biased." Pet. Br. 18; compare Pet. Br. 3, 15-36, with Pet. 1-3, 16-28. "[T]he reality of bias or prejudice [and] its appearance" are different things. *Liteky* v. *United States*, 510 U.S. 540, 548 (1994). Indeed, petitioners' merits brief explicitly acknowledges (at 23) that an "appearance" standard is "more stringent" (*i.e.,* more broadly requires recusal) than the "probability of actual bias" standard they now advocate. By abandoning an "appearance" standard, moreover, their brief effectively acknowledges what lower courts have recognized with near unanimity: that "bad appearances alone do not require disqualification" under the Constitution. *Del Vecchio* v. *Ill. Dep't of Corrections*, 31 F.3d 1363, 1372 (7th Cir. 1994) (en banc).

Under these circumstances, the writ of certiorari should be dismissed.

First, by failing to raise their "probability of bias" theory in the court below, petitioners deprived Justice Benjamin of the opportunity to address it, and would have this Court be the first to do so. But this

is "a court of review, not of first view" (*Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)); it rarely decides issues "not raised or briefed below" (*TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001)).

Second, by failing to raise a "probability of bias" theory in their certiorari petition, petitioners unfairly deprived respondents of the opportunity to explain why review should not be granted to decide whether recusal was necessary under that theory. Cf. *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 171 (1999).

Third, by failing to raise their "probability of bias" theory at the petition stage, petitioners induced this Court to grant review on the false premise that the issue was whether due process prohibits a judge laboring under an appearance of bias from sitting and whether campaign expenditures can create a constitutionally disqualifying "appearance." To "maintain the integrity of the process of certiorari" (*Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992)), this Court ordinarily does not permit a party to petition on one theory, only to press a different theory after the Court has granted the petition. See also *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 353 n.* (1995). This is true even when the question presented is stated generally enough to encompass the new theory.

Fourth, by relying at the petition stage on the now-abandoned "appearance" theory, petitioners were able to assert a conflict among the lower courts. *Pierce*, the only decision to have held that financial support in judicial elections can be constitutionally disqualifying, did so under an "appearance" theory. See 39 P.3d at 798-799. Without *Pierce*, petitioners lack even a colorable claim that the lower courts are

divided on the question they are now asking the Court to decide: whether campaign expenditures can create a constitutionally disqualifying "probability of bias."

II. IF THE COURT REACHES THE MERITS, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

If the Court does not dismiss the writ, it should affirm, for three independent reasons. *First*, contrary to petitioners' contention, "probability of bias" is not the constitutional standard for judicial disqualification. *Second*, even if "probability of bias" were the constitutional standard, it could not be satisfied by supposition that the judge might feel a "debt of gratitude" to a supporter. *Third*, there is here no sufficient "probability of bias" to support recusal.

A. "Probability Of Bias" Is Not The Constitutional Standard.

Petitioners' due-process claim depends on the premise that, when there is "a 'probability' of bias on a judge's part, the judge is constitutionally barred from participating in a case." Br. 20. That premise is unsound. As we explain below, there is no basis in history, precedent, or the practice of this Court for the notion that a judge's "bias" *in general*—let alone a mere "probability of bias"—mandates disqualification under the Due Process Clause. On the contrary, at common law disqualification was required only when the judge had a pecuniary interest in the outcome of the case and in certain contempt proceedings. This Court has never held that a judge is constitutionally barred from sitting for any other reason. And throughout the history of the Court, Justices

have sat on cases in which they had no financial interest but a "reasonable observer" might think that there was a "probability of bias." Under the correct standard, Justice Benjamin had no constitutional obligation to recuse himself.

1. A "probability of bias" standard has no basis in history.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). Under both English and American common-law practice during the 18th and 19th centuries, a judge was disqualified "for possessing a direct financial interest in the cause before him, and for absolutely nothing else." RICHARD FLAMM, JUDICIAL DISQUALIFICATION § 1.2, at 6 (2d ed. 2007). Disqualification for bias—and, *a fortiori*, for a *probability* of bias—is "a complete departure from common law principles." John Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 618-619 (1947).

a. "English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest." Frank, *supra*, at 611-612. The English rule reflected the age-old maxim that "no man shall be a judge in his own case." *Id.* at 610; see 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *141a (1797). Disqualification was thus required, for example, in cases in which the judge stood to profit from any fines assessed (*e.g.*, *Dr. Bonham's Case*, 77 Eng. Rep. 646 (K.B. 1609); *Between the Parishes of Great Charte & Kennington*, 93 Eng. Rep. 1107 (K.B. 1726)) and in ejectment actions where the judge was the landlord (*e.g.*, *Earl of Derby's Case*, 77 Eng. Rep.

1390 (K.B. 1614); *Anonymous*, 91 Eng. Rep. 343 (K.B. 1698)).

While 17th- and 18th-century English common law disqualified a judge with a pecuniary interest, "[n]o other disqualifications were permitted." Frank, *supra*, at 612. In particular, "[r]equired judicial recusal for bias did not exist in England at the time of Blackstone." *Liteky*, 510 U.S. at 543. Indeed, bias "was rejected entirely" as a ground for disqualification. Frank, *supra*, at 612. As Blackstone himself put it, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *361 (1765).

b. "The United States took over that tradition." *Del Vecchio*, 31 F.3d at 1390 (Easterbrook, J., concurring). "In the pre-Revolutionary American Colonies, as in England, the only accepted ground for disqualifying a judge was pecuniary interest in a pending cause * * *." FLAMM, *supra*, § 1.4, at 8. Otherwise, a presumption of impartiality prevailed. That remained the common-law rule in the years leading up to the Fourteenth Amendment and beyond. See, *e.g.*, *Board of Justices* v. *Fennimore*, 1 N.J.L. 190 (1793); *Pearce* v. *Atwood*, 13 Mass. 324 (1816); *Bates* v. *Thompson*, 2 D. Chip. 96 (Vt. 1824); *Gregory* v. *Cleveland, Columbus & Cincinnati R.R. Co.*, 4 Ohio St. 675 (1855); *Wetsel* v. *State ex rel. Holland*, 5 Tex. Civ. App. 17 (1893).

While "interest [wa]s a sufficient ground for disqualification, prejudice [wa]s not." Note, *Disqualification of a Judge on the Ground of Bias*, 41 HARV. L. REV. 78, 79 (1927). During this same period, Ameri-

can courts consistently held that "bias and prejudice constituted no legal incapacity to sit in the trial of a cause." *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and The Oregon Experience*, 48 OR. L. REV. 311, 327 (1969).[2] Indeed, as late as 1891, a "comprehensive review of American precedent" revealed that there was "only a 'solitary authority for the principle' that, in the absence of a statute, bias or prejudice should be a ground for disqualification." *Id.* at 330 (quoting *In re Davis' Estate*, 27 P. 342, 345 (Mont. 1891)).

c. It was not until a few decades into the 20th century that disqualification for bias enjoyed anything approaching widespread acceptance in the United States. See Robert Levinson, *Peremptory Challenges of Judges in the Alaska Courts*, 6 UCLA-ALASKA L. REV. 269, 271 (1977). Even then, disqualification on that ground was generally prescribed by statute rather than common law. See *Disqualification of Judges*, 48 OR. L. REV. at 332-348. In the federal system, for example, district judges were not

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[2] See, *e.g.*, *Boswell* v. *Flockheart*, 8 Leigh 364, 364 (Va. 1837) (no disqualification though "great hostility had existed on the part of the judge towards [the party]"); *McCauley* v. *Weller*, 12 Cal. 500, 523 (1859) (no disqualification though judge had "expressed himself so strongly in favor of plaintiff's right to recover, as to occasion remonstrance from bystanders"); *Lovering* v. *Lamson*, 50 Me. 334, 334 (1863) (no disqualification though judge "had been the friend and legal adviser of the [party], in the matter"); *Jones* v. *State*, 32 S.W. 81, 83 (Ark. 1895) (no disqualification though judge admitted that "he had a fixed opinion as to the guilt or innocence of the defendant"); *Bryan* v. *State*, 41 Fla. 643, 657 (1899) (no disqualification though "the[re] existe[d] * * * extreme bitter feeling and animosity between the judge and the defendant, [which] had become so notorious as to attract the attention of the people generally").

subject to disqualification for bias until 1911, when Congress amended the recusal statute. See *Liteky*, 510 U.S. at 544.

One of the stated purposes of another federal recusal statute, 28 U.S.C. § 455, is "to promote public confidence in the impartiality of the judicial process." H.R. Rep. No. 1453, 93rd Cong., 2d Sess. 5 (1974). Petitioners contend that the Due Process Clause should be interpreted to require disqualification for a "probability of bias" for the same reason: to preserve the "legitimacy of the judicial branch" and the "public's confidence" in it. Br. 24. That assertion finds no support in either history or logic. The Due Process Clause protects the rights of individuals, not the public reputation of state judiciaries. That is one of the reasons why questions of "bias" have historically been regulated by statute rather than the Constitution, and by the States rather than through federal intervention.

2. A "probability of bias" standard has no basis in precedent.

a. In his treatise, Professor Cooley explained that due process encompasses the "maxim of the common law" that one may not "act judicially when interested in the controversy." THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 411-412 (1868). This Court's due-process decisions likewise apply "exactly the common law rule: a judge with a financial interest in the outcome of the case may not sit." *Del Vecchio*, 31 F.3d at 1391 (Easterbrook, J., concurring). Those decisions do not recognize "bias"—much less "probability of bias"—as a general ground for disqualification under the Constitution.

i. In its first decision on the subject, *Tumey* v. *Ohio*, 273 U.S. 510 (1927), this Court held that it was unconstitutional for a judicial officer to hear a criminal case when the officer personally received fees and costs only in the event of a conviction. The Court concluded that due process requires disqualification when the judge has "a direct, personal substantial pecuniary interest" in deciding the case against a party. *Id.* at 523. "[I]n determining what due process of law is," the Court looked to "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors." *Ibid.* Citing common-law cases from England and the United States, the Court explained that "the general rule" in both countries was that judges were "disqualified by their interest in the controversy" and that, in England, a decision was "voidable" when the judge had a "pecuniary interest" in the outcome. *Id.* at 522, 524. The Court was careful to point out, however, that not "[a]ll questions of judicial qualification * * * involve constitutional validity"—and, in particular, that "personal bias" is generally a matter of "*legislative discretion*." *Id.* at 523 (emphasis added).

Relying on *Tumey*, the Court applied the same constitutional rule in three cases in the 1970s. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (village mayor prohibited from adjudicating certain criminal cases when fines resulting from conviction constituted half of village's finances, for which mayor had responsibility); *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973) ("pecuniary interest" disqualified members of administrative board from conducting license-revocation hearings); *Connally* v. *Georgia*, 429 U.S. 245 (1977) (per curiam) (due-process violation where

justice of the peace was paid only if search warrant issued).

ii. In its most recent due-process decision on judicial disqualification, *Aetna Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), this Court applied both aspects of the common-law rule. The challenged judge was found not constitutionally disqualified from participating in a case against an insurance company because of "bias or prejudice" arising from the judge's "hostility" towards insurance companies that were dilatory in paying claims. *Id.* at 820. But the Court then ruled that the judge *was* disqualified because of a "pecuniary interest" arising from the pendency of the judge's "very similar" lawsuit against another insurance company. *Id.* at 822.

In finding no constitutionally disqualifying "bias," the Court repeated what it had said nearly 60 years earlier in *Tumey*—that "personal bias" is generally a matter of "legislative discretion" rather than "constitutional validity." 475 U.S. at 820 (quoting *Tumey*, 273 U.S. at 523). The Court then cited "the traditional common-law rule * * * that disqualification for bias or prejudice was not permitted." *Ibid.* While noting the "recent trend * * * towards the adoption of statutes that permit disqualification for bias or prejudice," the Court emphasized that "that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Ibid.* Due process is violated, the Court explained, only when a practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 821 (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)). The Court ultimately did not decide whether "bias or prejudice" could ever require dis-

qualification under the Constitution, because, even assuming that it could, the "bias and prejudice" alleged there would not rise to the level of unconstitutionality. *Ibid.*

In ruling that the judge *did* have a constitutionally disqualifying "interest," the Court applied the same principle as in *Tumey*. Disqualification was required because a decision against the insurance company could "enhanc[e] both the legal status and the settlement value of [the judge's] own case" (475 U.S. at 824), thereby giving the judge a "direct, personal, substantial, pecuniary interest" in the outcome of the case in which he participated (*id.* at 822 (quoting *Tumey*, 273 U.S. at 523)).

b. This Court has held recusal constitutionally required in only three cases *not* involving a pecuniary interest: *In re Murchison*, 349 U.S. 133 (1955); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); and *Taylor* v. *Hayes*, 418 U.S. 488 (1974). But the rules applied in those cases are limited to the specific context of contempt and lack applicability to an ordinary civil or criminal case. The decisions are also consistent with the common-law distinction, recognized in the *Tumey-Lavoie* line of decisions, between personal "interest" and "bias."

i. Mayberry and *Taylor* held that due process bars a judge from adjudicating contempt charges when the contemptuous conduct occurred during a proceeding at which the alleged contemnor and the judge had become "embroiled in a running controversy." *Mayberry*, 400 U.S. at 465; *Taylor*, 418 U.S. at 501. That rule, which is ultimately traceable to *Cooke* v. *United States*, 267 U.S. 517 (1925), a case involving this Court's supervisory authority, reflects the concerns that the exercise of the contempt power

is "a delicate one" (*id.* at 539); that that power has a "heightened potential for abuse" (*Taylor*, 418 U.S. at 500); and that "care is needed to avoid arbitrary or oppressive conclusions" in contempt cases (*Cooke*, 267 U.S. at 539).

The rule adopted in *Murchison* is even narrower. The holding of that case is that "a judge acting as a one-man grand jury investigating crime could not [try] for contempt witnesses who he believed testified falsely or inadequately before him in secret grand jury proceedings." *Ungar* v. *Sarafite*, 376 U.S. 575, 585 (1964). Although *Murchison*'s holding rested in part on the view that "the judge in effect [had] bec[o]me part of the prosecution and assumed an adversary position," the decision "has not been understood to stand for the broad rule" that due process is violated in other contexts by the simultaneous exercise of prosecutorial and adjudicative powers. *Withrow* v. *Larkin*, 421 U.S. 35, 53 (1975).

ii. Apart from being contempt-specific, the rules applied in *Murchison*, *Mayberry*, and *Taylor* do not rest on any generalized acceptance of a constitutional "probability of bias" standard.

Insofar as *Murchison* applied a version of the rule that "prosecut[ors] [may not] be trial judges of the charges they prefer" (*Murchison*, 349 U.S. at 137) that rule is a close relative of the no-pecuniary-interest rule applied in the *Tumey-Lavoie* line of cases, because a judge who is in effect a party to a case has an *interest* in the outcome. Indeed, *Murchison* explicitly invoked the principle that "no man is permitted to try cases where he has an interest in the outcome." *Id.* at 136.

What is true of *Murchison* is equally true of *Mayberry* and *Taylor*. As Judge Easterbrook has observed, the rule applied in the latter cases, at bottom, is that "a judge should not preside in a case in which he was the *victim* of [the] crime" being prosecuted. *Del Vecchio*, 31 F.3d at 1392 (concurring opinion).

c. Petitioners' proposed standard is ultimately based on a single sentence from *Tumey* and a single sentence from *Murchison*. See Br. 19-22. But neither can reasonably be read to have established the open-ended and ahistorical "probability of bias" test that petitioners advocate.

The language from *Tumey* is this: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused, denies the latter due process of law." 273 U.S. at 532. This was not a general observation about judicial bias, however, but a statement focused on an aspect of pecuniary-interest disqualifications. By that point in the opinion, the Court had already established the constitutional rule that disqualification is mandated when a judge has a *pecuniary interest* in the outcome. *Id.* at 522-526. The sentence at issue appeared in connection with defining the scope of an additional aspect of pecuniary-interest disqualification: that the financial interest not be so "minute, remote, trifling, or insignificant" that it "may properly be ignored as within the maxim *de minimis non curat lex*." *Id.* at 531-532.

Petitioner also relies on this language from *Murchison*: "[O]ur system of law has always endeavored to prevent even the probability of unfairness." 349

U.S. at 136. Putting aside that this was dictum, and that "unfairness" is not the same as "bias," this general language does not suggest a constitutional rule that a judge must recuse whenever there can be said to be a "probability of bias," as is clear from the very next sentence: "To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Ibid.* The Court's use of the "probability of unfairness" language may explain why disqualification is required when a judge has an interest in the outcome or would be judging his own case, but it cannot reasonably be understood to mean that a "probability of unfairness" requires disqualification even when those circumstances are not present.

Petitioners also rely on out-of-context quotations from *Withrow* and *Taylor*. Br. 21 n.3. *Withrow*—in which disqualification was found *not* required—said that a "probability of actual bias" is "constitutionally [in]tolerable," not in all cases, but in "various situations," specifying those in which the judge "has a pecuniary interest in the outcome" (the *Tumey-Lavoie* situation) or "has been the target of personal abuse or criticism from the party" (the *Mayberry-Taylor* situation). 421 U.S. at 47. Similarly, *Taylor* described "likelihood of bias" as the relevant "inquiry," not in deciding whether disqualification is constitutionally required as a general matter, but in deciding whether particular "contemptuous conduct" that "embroil[s] [a judge] in controversy" requires disqualification. 418 U.S. at 501.

3. A "probability of bias" standard has no basis in the practice of this Court.

If "probability of bias" were the constitutional standard, many Members of this Court would quite

likely have been acting unconstitutionally by participating in numerous cases decided over the past 200 years. For example, "[o]ur legal culture's most revered judicial decision, *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (1803), was rendered by John Marshall—who just happened to be the cause of the litigation." *Del Vecchio*, 31 F.3d at 1390 (Easterbrook, J., concurring). Justices have also passed judgment on legislation they helped write. See *Laird* v. *Tatum*, 409 U.S. 824, 831-832 (1972) (Rehnquist, J., in chambers); *Del Vecchio*, 31 F.3d at 1390 (Easterbrook, J., concurring). For example, Chief Justice Chase, who devised the greenback legislation, determined its legality in *The Legal Tender Cases*, 12 Wall. (79 U.S.) 457 (1871); Justice Black, the principal author of the Fair Labor Standards Act, joined in upholding its constitutionality in *United States* v. *Darby*, 312 U.S. 100 (1941); and Justice Frankfurter, who played a critical role in drafting the Norris-LaGuardia Act, interpreted its scope in *United States* v. *Hutcheson*, 312 U.S. 219 (1941). For more than a century after the first Judiciary Act, moreover, Justices "hear[d] appeals from their own decisions on circuit." *Del Vecchio*, 31 F.3d at 1390 (Easterbrook, J., concurring). Even after the abolition of that practice, Justice Holmes "sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court." *Laird*, 409 U.S. at 836.

Although it could easily be said that Members of this Court harbored a "probability of bias" in each of the cases described above, disqualification was thought to be unnecessary because the Justices had no pecuniary interest in the outcome. Unlike in *Marbury*, Chief Justice Marshall did have such an

interest in *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), which explains his recusal there. See G. Edward White, *The Marshall Court and Cultural Change*, 1815-35, in 3 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 165-168 (Paul Freund & Stanley Katz eds. 1988).

It could just as easily be said that a "probability of bias" can arise from personal friendship with a party or counsel; political or religious affiliation or affinity; and the like. But Members of this Court have never considered disqualification to be constitutionally required for such reasons. See, *e.g.*, *Cheney* v. *District Court*, 541 U.S. 913, 916-920 (2004) (Scalia, J., in chambers).

4. Under the correct constitutional standard, recusal was not required.

Because he had no pecuniary interest in the outcome, Justice Benjamin was not constitutionally barred from participating in the decision below. Nor is this case governed by *Murchison*, *Mayberry*, or *Taylor*, because it does not involve a charge of contempt; Justice Benjamin was not simultaneously serving as judge, prosecutor, and complaining witness; he was not a "victim" of anything that happened in the case; and he was not embroiled in a "running controversy" with any of the parties.

It is telling, in this connection, that one set of petitioners' amici candidly acknowledges that Justice Benjamin was not required to recuse himself under the Due Process Clause as it has always been understood. Instead, on the basis of "[n]ovel practices" and "recent innovation[s]" in judicial elections that they consider problematic, these amici call for a "new paradigm[] of due process" and ask the Court to "ex-

tend the common law prohibition" embodied in the Due Process Clause. 27 Former Chief Justices & Justices (FCJJ) Br. 10, 13. But recusal statutes adopted by every State already go well beyond the "common law prohibition." See Am. Bar Ass'n (ABA) Br. 14 & nn.28-29. If those statutes are thought inadequate to the challenges posed by judicial elections, then additional legislation may be appropriate; in fact, numerous reforms are already underway. See *infra* pp. 47-48. But the developments that concern petitioners' amici provide no warrant to say that the Constitution now means something it has never meant before.

B. Even If "Probability Of Bias" Were The Constitutional Standard, A Judge's Supposed "Debt Of Gratitude" To A Supporter Could Not Satisfy The Standard.

According to petitioners, there was a "probability of bias" in this case because "it would only be natural for Justice Benjamin to feel a debt of gratitude to Mr. Blankenship" for his expenditures in opposition to Justice McGraw's reelection, and Justice Benjamin had "reason to repay his debt of gratitude to Mr. Blankenship" by voting in favor of Massey's subsidiaries. Br. 31, 33. Even if this Court's decisions could be thought to have swept aside the presumption of judicial impartiality in favor of "probability of bias" as the general standard for judicial disqualification under the Constitution, that standard would not be satisfied by the possibility that the judge would feel a "debt of gratitude" to a litigant.

Every lower court but one to consider the question has held that campaign expenditures by a party or attorney do not require disqualification under the

Due Process Clause. See *Shepherdson* v. *Nigro*, 5 F. Supp. 2d 305, 310-311 (E.D. Pa. 1998) (collecting cases). The one case that reached a different conclusion employed a rationale—"appearance of bias"—that petitioners no longer defend. See *Pierce*, 39 P.3d at 798-799. Indeed, consistent with this Court's holdings, many lower courts have concluded that, whatever the precise constitutional standard, disqualification is required only when the judge has a pecuniary interest in the outcome, has a dual role, or has become embroiled in a running controversy with a party. See, *e.g.*, *Richardson* v. *Quarterman*, 537 F.3d 466, 475 (5th Cir. 2008); *Crater* v. *Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007).

There is good reason for this judicial consensus. A feeling of "gratitude," which all candidates have towards their supporters, differs fundamentally from a feeling of "debt," especially debt of a kind to be repaid by distortion of the judicial task. Moreover, as we explain below, the theory that a "debt of gratitude" can create a constitutionally disqualifying "probability of bias" would have no limiting principle, would be entirely unworkable, and would create serious administrative problems for courts. Nor is petitioners' broad constitutional rule even necessary, because the States have proven themselves quite capable of policing this area.

1. A "debt of gratitude" theory would have no limiting principle.

A judge's "debt of gratitude" arising from an election expenditure is analytically indistinguishable from a "debt of gratitude" arising from countless other forms of support for a judge's election or appointment, many of which are as valuable as money—or more valuable. If expenditures could cre-

ate a debt that necessitated recusal under a "probability of bias" standard, therefore, other debts would have to be treated the same way. But debts of this type are endemic, and petitioners' "brand of argument" therefore "cannot be cabined." *Del Vecchio*, 31 F.3d at 1389 (Easterbrook, J., concurring).

a. One obvious example of non-financial support for which an elected judge might be supposed to feel a strong "debt of gratitude" is a newspaper's endorsement, which "many voters look to" in judicial elections. Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 671 (2002). Indeed, a key endorsement may be worth more than large monetary expenditures. See, *e.g.*, *ibid.* (judicial candidates who received newspaper endorsements enjoyed "an increase of 6.11 percentage points" over candidates who did not). Yet it has never been thought that disqualification is necessary in a case in which a newspaper that endorsed the judge is a party, even under statutory recusal provisions broader in reach than the constitutional standard advocated by petitioners. See, *e.g.*, *Schultz* v. *Newsweek, Inc.*, 668 F.2d 911, 919 (6th Cir. 1982).

In the contentious 2004 Mississippi Supreme Court election, for example, Mississippi's leading daily newspaper, the *Clarion-Ledger*, endorsed Justice James Graves, who eventually won. *Supreme Court*, CLARION-LEDGER, 10/28/04, at 10A. Justice Graves nevertheless participated in several subsequent cases in which the *Clarion-Ledger* was a party. *E.g.*, *Gannett River States Publ. Co.* v. *Entergy Miss., Inc.,* 940 So. 2d 221 (Miss. 2006). Similarly, in the 2004 Ohio Supreme Court election, the highest-circulation newspaper in Cincinnati, the *Enquirer*,

endorsed Justices Moyer, O'Donnell, Pfeifer, and Lanzinger. *Keep incumbents on Supreme Court*, CINCINNATI ENQUIRER, 10/27/04, at 6C. Those justices nevertheless participated in subsequent cases involving the paper. *E.g.*, *State ex rel. Cincinnati Enquirer* v. *Daniels*, 844 N.E.2d 1181 (Ohio 2006).

Nor could the theory be limited to newspapers. An important endorsement by a labor organization, trade association, or civic group could also be as valuable to a judicial candidate as substantial financial expenditures, and thus could likewise require disqualification under petitioners' theory when the endorser is a party or amicus. The same is true of support from a political party or politician. For example, if a State's governor endorsed a judicial candidate, the candidate, if elected, would ordinarily feel a very strong "debt of gratitude" to the governor, and thus, under petitioners' theory, would be disqualified from sitting at least in cases involving policies that were a high priority of the governor. The debt owed to a popular governor might well be far greater than that owed even to a large financial contributor, and yet it has never been thought that "sponsorship" or "other indicia of political support" require disqualification—under any standard—when the sponsor or supporter comes before the court. *In re Mason*, 916 F.2d 384, 387 (7th Cir. 1990).

b. Indeed, petitioners' theory cannot be confined even to elected judges. The logic of the theory would lead to disqualifying appointed judges, including federal judges, in many circumstances in which recusal has never been thought necessary.

If substantial financial support for an elected judge can create a constitutionally disabling "debt of gratitude," for example, then surely the act of nomi-

nating an appointed judge would do so even more emphatically, given the indispensable role of the appointer in the process. Members of this Court, however, have not recused themselves merely because the President who nominated them was a party, even in cases in which the Court's decision was certain to be far more consequential to the President personally than the decision in this case was to Blankenship. For example, three Justices appointed by President Nixon participated in *United States* v. *Nixon*, 418 U.S. 683 (1974), which led to the President's resignation.[3] Two Justices appointed by President Clinton participated in *Clinton* v. *Jones*, 520 U.S. 681 (1997), which determined whether a sexual-harassment suit against him could go forward while he was in office. And four Justices appointed by President Truman participated in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), which involved the government's seizure of steel mills, an issue of extraordinary importance to the President. Far from deeming themselves constitutionally disqualified from sitting in these cases, the Justices did not believe that disqualification was necessary even under the broader recusal *statute*.

c. If a judge could be disqualified under the Due Process Clause from hearing a case in which he allegedly had an incentive to repay a "debt of gratitude" to a party for its support, then a judge should equally be disqualified from hearing a case in which he had an incentive to exact *revenge* against a party

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[3] A fourth Justice—then-Justice Rehnquist—did recuse himself, but not because he was the President's appointee. See Jay Bybee & Tuan Samahon, *Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor*, 58 STAN. L. REV. 1735, 1748 n.76 (2006).

for its *opposition*. Here, for instance, it is at least as likely that McGraw is biased *against* Massey as a result of Blankenship's expenditures as that Benjamin is biased in its favor. McGraw was recently elected a circuit judge in Wyoming County. See Justin Anderson, *Warren McGraw, Rick Staton sweeping back into local offices*, CHARLESTON DAILY MAIL, 5/16/08. Accordingly, under petitioners' theory, the Due Process Clause would require his recusal in all cases in which a Massey affiliate was a party.

As amicus Conference of Chief Justices points out (at 26 n.49), these are two sides of the same coin: "efforts to defeat a judge are every bit as likely to affect that judge's attitudes toward a party as are efforts to support that judge." Yet it has never been thought that disqualification might be even *statutorily* required because a party or attorney opposed the judge's election or appointment. See, *e.g.*, *United States* v. *Helmsley*, 760 F. Supp. 338 (S.D.N.Y. 1991) (Walker, J.) (denying disqualification motion by lawyer who testified against district judge's nomination to court of appeals), aff'd, 963 F.2d 1522 (2d Cir. 1992); *Grievance Adm'r* v. *Fieger*, 714 N.W.2d 285, 286 (Mich. 2006) (Markman, J.) (denying disqualification motion by lawyer who opposed supreme court justice's reelection).

That is true even when the opposition is very substantial. When Justice Thomas was nominated to this Court, for example, several of the Nation's most prominent and influential organizations, including the NAACP and AFL-CIO, opposed his nomination. See, *e.g.*, Steven Holmes, *N.A.A.C.P. and Top Labor Unite to Oppose Thomas*, N.Y. TIMES, 8/1/91, at A1. Several of the same organizations, including the ACLU, Planned Parenthood, and the Si-

erra Club, opposed the nomination of Justice Alito. See, *e.g.*, David Kirkpatrick, *Liberal Coalition is Making Plans to Take Fight Beyond Abortion*, N.Y. TIMES, 11/14/05, at A1; Letter from ACLU to U.S. Senate (1/27/06), *available at* http://www.aclu.org/scotus/2005/23964leg20060127.html. Many of these organizations frequently appear before the Court as parties or amici (who often have as much stake in a legal issue as the parties), and yet neither Justice has thought it necessary to recuse himself in such cases. See, *e.g.*, *NAACP* v. *City of Columbia*, 513 U.S. 1147 (1995); *AFL-CIO* v. *FEC*, 539 U.S. 912 (2003); *Mass.* v. *EPA*, 549 U.S. 497 (2007) (Sierra Club); *Gonzales* v. *Carhart*, 550 U.S. 124 (2007) (Planned Parenthood); *ACLU* v. *NSA*, 128 S. Ct. 1334 (2008).[4]

Disqualification is thus not constitutionally required in such circumstances even though it would "only be natural" (Pet. Br. 31) for Justices to resent—and therefore, under petitioners' theory, have a "probability of bias" towards—major organizations that sought to prevent them from becoming Members of this Court. See also Richard Neumann, Jr., *Conflicts of Interest in* Bush v. Gore*: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 408-409 (2003) (concluding that Justice Thomas was not statutorily disqualified from participating in *Bush* v. *Gore*, 531 U.S. 98 (2000), even though then-Senator Gore had voted against his confirmation).

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[4] Similarly, amicus Public Citizen opposed the nomination of Justice Breyer (see Nancy E. Roman, *Breyer opposed by wide range of interest groups*, WASH. TIMES, 7/16/94, at A3), who has not recused himself in cases—including this one—in which that organization has been an amicus or party (see, *e.g.*, *DOT* v. *Public Citizen*, 541 U.S. 752 (2004)).

d. In addition to advancing a backward-looking "debt of gratitude" theory, petitioners stretch to suggest that there can be a "probability of bias" where a judge might fear that a vote against a financial supporter "may foreclose the possibility of similar financial support when the judge seeks reelection" in the future. Br. 31. But the possibility that a judge "may be tempted to defer unduly to the decisions or preferences of potential supporters * * * does not require disqualification" even under the broader statutory standard. *In re Mason*, 916 F.2d at 387. That is particularly so when, as in this case, the judge would not be up for reelection for many years, has not announced any intention to run again, and has no basis to anticipate recurrence of the special circumstances that prompted the large expenditures in the prior election. Cf. *Laxalt* v. *McClatchy*, 602 F. Supp. 214 (D. Nev. 1985) (disqualification of magistrate not required though she had previously sought support of plaintiff Senator for district-court seat and might do so again).

If the possibility that a judge might curry favor with a party to obtain a substantial future benefit were a constitutional ground for disqualification, then the Due Process Clause would "require a judge who learns that he is being considered for an appointment to the U.S. Supreme Court * * * to recuse himself from cases where the Government represents one side" and the case "is 'hotly contested' and of particular interest to the Administration." Ronald Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 GEO. J. LEGAL ETHICS 1187, 1197 (2006). As Professor Rotunda, one of the foremost authorities on legal ethics, has concluded, however, disqualification is not even *statutorily* required in that circumstance. See *id.* at

1196-1204, 1211. And the judge in the real-world case that prompted these views on the subject—then-Judge (now Chief Justice) Roberts in *Hamdan* v. *Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), rev'd, 548 U.S. 557 (2006)—drew the same conclusion: he did not recuse himself.

2. A "debt of gratitude" theory would be unworkable.

In addition to being limitless, petitioners' "debt of gratitude" theory would be unworkable. Petitioners contend that campaign expenditures would be constitutionally disqualifying under their theory only in rare cases. Br. 26-27. They have no choice but to take that position, because a broader disqualification rule would make it all but "impossible for [elected judiciaries] to function" (*Adair* v. *Mich. Dep't of Educ.*, 709 N.W.2d 567, 580 (Mich. 2006) (Taylor, C.J., and Markman, J.)) and thus would be tantamount to saying that States may not elect their judges. There is no remotely workable method, however, for distinguishing the "exceptional" cases (Pet. Br. 36) in which expenditures would create a disqualifying "debt of gratitude" from cases in which they would not.

a. In opposing certiorari we pointed out that the petition failed to offer "a workable constitutional standard" for when disqualification would be required. Opp. 13. In reply, petitioners defended that failure by asserting that "the articulation of a specific 'constitutional standard' is generally best left for a brief on the merits." Reply Br. 9. Petitioners have now filed their brief on the merits, and still they offer no workable constitutional standard.

Indeed, one of the more remarkable features of petitioners' brief is that it does not suggest *any* test for distinguishing what the Constitution prohibits from what it permits. Petitioners say merely that, "[w]hen viewed together, the facts surrounding" Blankenship's expenditures establish that Justice Benjamin probably felt a sufficient "debt of gratitude" to him to create an impermissible "probability of bias" in favor of Massey's subsidiaries. Br. 16. As far as a constitutionally disqualifying expenditure is concerned, in other words, petitioners apparently "know it when [they] see it" (*Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)), and the expenditures here are to their eyes constitutionally disqualifying. Petitioners failed to deliver on their promise to provide a workable constitutional standard, not because they forgot, or because they changed their minds, but because they were unable to craft one.

The briefs filed by petitioners' amici confirm that there is no workable standard. Those briefs do propose tests, but they offer three different ones, and all are of the multi-factor variety. The number of factors ranges from four (ABA Br. 19-20), to six (Ctr. for Political Accountability (CPA) Br. 18-19), to ten (Public Citizen Br. 15)—conveniently grouped, as in the Texas sharpshooter fallacy (http://en.wikipedia.org/wiki/Texas_sharpshooter_fallacy), around the facts of this particular case—although each amicus candidly admits that the factors in its test are non-exclusive. Amicus Conference of Chief Justices, which has filed a brief in support of neither party, also proposes a test (at 25-29), this one with seven non-exclusive factors. After proposing its test, which includes such factors as whether the spending was "significant" and whether the "nature" of the spend-

ing was "likely" to affect the election, one set of amici emphasizes—without apparent irony—the need for a "clear, practical due process standard" in this area. CPA Br. 18-20.

In contrast to these proposed tests, and consistent with this Court's recusal decisions, the nearly uniform view of the lower courts has been that campaign expenditures by a party or attorney cannot disqualify a judge under the Due Process Clause. "As against this approach, so familiar and * * * easy, the proposed * * * [multi]-factor test would be hard to apply, jettisoning * * * predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a [lower] court and a virtually inevitable appeal." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Moreover, judicially created multi-factor constitutional tests in this area entail "the type of policy making more appropriately undertaken by the pertinent state authorities." *Shepherdson*, 5 F. Supp. 2d at 311. That type of "line-drawing process" is "properly within the province of legislatures, not courts." *Hutto* v. *Davis*, 454 U.S. 370, 374 (1982) (per curiam) (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 275-276 (1980)).

b. Even if the facts identified by petitioners as supporting their recusal claim (Br. 27-30) could be understood to suggest some sort of generally applicable test, and putting aside the problems associated with multi-factor tests, the test still would not be a workable one.

i. As an initial matter, the facts on which petitioners rely provide no principled basis for deciding when the circumstances of a particular case place it on the wrong side of the constitutional line.

Size. Petitioners rely mainly on the "sheer volume" and relative size of the financial support. Br. 27. They obviously take the position that the amount here was too high, but they offer no guidance for determining the point at which expenditures might become constitutionally disqualifying. Some amici do seek to provide guidance, but their adjectives are hopelessly unenlightening: one says that the sum must be "significant" (CPA Br. 18); another that it must be "substantial" (FCJJ Br. 12); two others that it must be "outsized" (Am. Ass'n for Justice Br. 11; Comm. for Econ. Dev. Br. 14); and another that it must be "unusually large," in either "absolute or relative terms" (ABA Br. 19). Indeed, amicus Conference of Chief Justices all but concedes that it is impossible to provide any guidance on the subject. "Even within a single State, from year to year, from court to court, or from county to county," it says, "an amount that might possibly offend due process in one instance will simply not in another." CJC Br. 26. Under these "standards," contributors, parties, attorneys, and judges will simply be left to guess how much is too much.[5]

Solicitation. Petitioners also rely on the (asserted) fact that Blankenship "solicited donations" on behalf of the judge. Br. 29. But see *infra* n.8. Solicitation of donations obviously has some value, but it is hard to see how this can be considered a separate factor in the analysis rather than, at most, some additional amount to be added to the supporter's own

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[5] Here, for instance, Doctors for Justice contributed $750,000 to ASK in an effort to unseat Justice McGraw. Would that amount be large enough, under petitioners' theory, to require Justice Benjamin to recuse himself in medical-malpractice cases?

expenditures. Whether or not "solicitation" was considered a separate factor, however, it would carry its own uncertainties, there being no obvious formula for allocating the contribution between the soliciting supporter and the contributor.

Timing. Petitioners also point to the fact that the expenditures here were made when an appeal was anticipated to the court on which the candidate would sit. Br. 29. If petitioners' theory is that expenditures can cause a judge to feel a "debt of gratitude" to the person who makes them, however, it is very hard to understand why this should be a relevant consideration. Petitioners say that the proximity of expenditures to the filing of a case may "strongly suggest" that the expenditures were "intended to influence the outcome." *Ibid.* Apart from the implausibility of such speculation here (see *supra* note 1), any such intent on the part of a *supporter* is unrelated to whether the *judge* will feel a "debt of gratitude." If anything, a judge would be *less* likely to allow himself to be influenced by any feeling of indebtedness for an expenditure made close in time to the filing of a case, precisely *because* of the possible public "perception that the contribution was made to influence the judicial decision." ABA Br. 20. In short, petitioners have here unwittingly lapsed into an "appearance" argument quite disconnected from any probability of actual bias.

Reviewability. Petitioners also point to the fact that the judge's decision to participate "was not subject to review by the other members of his court." Br. 29-30. This is the same practice followed by this Court. In any event, the availability of further review bears no relation to whether particular campaign expenditures will cause a judge to feel a "debt

of gratitude" to the person who makes them, and in turn a bias to favor that person or his associates. At most, this consideration implicates a distinct procedural issue.

ii. In the end, the only fact identified by petitioners that has any real relevance to their "debt of gratitude" theory concerns the size of the expenditure, and neither petitioners nor their amici offer a workable test for determining how much is too much. Numerous other considerations would make any attempt to place a value on a "debt of gratitude" even more complex and unmanageable, and in many cases simply impossible.

Direct vs. independent. As amicus Conference of Chief Justices points out (at 26-27), independent expenditures like those at issue are materially different from direct contributions to a candidate. Because a candidate has no control over the former, a judge would feel a lesser "debt of gratitude" than he or she would for the latter. Indeed, independent spending "may prove counterproductive" (*Buckley* v. *Valeo*, 424 U.S. 1, 47 (1976) (per curiam)); it can "backfire[] against the [judicial] candidate it was intended to advance" (Conference of Chief Justices (CCJ) Br. 27 n.50); see *ibid.* (providing examples)). In that circumstance, the judge might feel *no* "debt of gratitude" towards the party who made the expenditures.

Corporation vs. employee. Petitioners' theory would also have to account for the situation, also present here, in which expenditures are made by an individual who is an officer or employee of a corporation (or one of its many affiliates) that is or becomes a party before the judge. In that circumstance, the quantum of "gratitude" to the supporter could not

automatically be carried over to the party. Amicus Conference of Chief Justices flags the problem but does not offer any solution, suggesting only that "the closer the identity between the supporter and the party, the more likely that due process concerns will be implicated." Br. 29.

Coordinated collective contributions. A similar problem would arise in the reverse situation: where the expenditures were made by an organization and the party or attorney before the court was a member of or contributor to the organization. Here, for instance, plaintiffs' lawyers contributed approximately $1.5 million to West Virginia Consumers for Justice, a group that supported Justice McGraw's reelection. Anyone at all familiar with the politics of judicial elections would realize that there is every bit as much "probability of bias" in these circumstances as in those of the present case. If Justice McGraw had won, would he have been obligated to recuse himself in cases in which one of those lawyers represented the plaintiff? Would Justice Benjamin be required to recuse himself in such cases because of a "probability" of *negative* bias?

Support vs. opposition. Petitioners' theory also requires accounting for the situation, as here, in which the expenditures were mainly for the purpose of opposing the judge's opponent, rather than supporting the judge. In that circumstance, the judge would likely feel a lesser "debt of gratitude" to the party making the expenditures.

Lapse of time. Petitioner's theory is ultimately based on "human nature" (Br. 30), and it is human nature for election-generated emotions to fade over time, another circumstance that is present here. A party's expenditure made years before the adjudica-

tion of a case therefore could not be accorded the same value in calculating the judge's "debt of gratitude" as an equal expenditure made a few months before. Here, too, Amicus Conference of Chief Justices flags the problem but does not offer any solution, suggesting only that "the more remote in time the support was given, the less likely it is to create problems of a constitutional magnitude." CCJ Br. 27-28.

Voting record. In some cases, the judge has voted *against* a party that provided support during his campaign. Evidence that a judge did not seek to repay a "debt of gratitude" in other cases would have to be an important factor in the analysis, as amicus Conference of Chief Justices recognizes. CCJ Br. 28-29. That would be particularly true if the test focused, as petitioners propose, on probability of actual bias and if, as here, the judge had voted against the party in *several* other cases.

Importance of the expenditures. There will often be good reason to think that a judge would have won the election without regard to the supporter's expenditures. Here, for example, Benjamin was endorsed by virtually all the leading newspapers in the jurisdiction, and his opponent made serious blunders during the campaign. It would likely be "human nature" for a judge to feel less indebted to the financial supporter in these circumstances, and it would therefore be necessary to reduce the value assigned to the "debt of gratitude" accordingly.

c. As complex as these issues are, the discussion above still vastly understates the extent to which any "debt of gratitude" theory would be unworkable, because we have identified only some problems inherent in the theory's application to campaign ex-

penditures. As we have explained (see *supra* pp. 29-32), any theory based on an inference of probable bias cannot be limited to campaign expenditures (or even to elected judges), because many forms of influential support for a judge are non-financial. If petitioners' theory were adopted, therefore, courts would presumably have to devise separate tests to address whether each form of support was substantial enough to create a "debt of gratitude" that gave rise to a constitutionally disqualifying "probability of bias." For the support of a newspaper, for example, courts might take into account the circulation of the paper and whether the endorsement was unqualified. For the support of a politician, courts might consider how well-known the supporter was, how popular he or she was when the endorsement was made, and how strong the endorsement was. And so on. This is the antithesis of a workable constitutional standard.

3. A "debt of gratitude" theory would create administrative problems for courts.

Petitioners contend that, under their due-process standard, campaign expenditures will only rarely require recusal. But because their "vague and malleable standard" cannot identify where the constitutional line should be drawn in any particular case, it would almost certainly "open the gates for a flood of litigation." *Baze* v. *Rees*, 128 S. Ct. 1520, 1542 (2008) (Alito, J., concurring).[6]

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[6] States' own recusal provisions have not had this effect, because state courts have nearly uniformly held that campaign expenditures do not require disqualification under those provisions. See, *e.g.*, *Shepherdson*, 5 F. Supp. 2d at 310-311 (citing cases).

Resolving disqualification motions consumes scarce judicial time and resources. As courts have recognized, an increase in the number of such motions would interfere with "the conduct of judicial business" (*In re Petition to Recall Dunleavy*, 769 P.2d 1271, 1275 (Nev. 1988)), and make it more difficult to "carry[] out [courts'] essential responsibilities" (*Adair*, 709 N.W.2d at 581 (Taylor, C.J., and Markman, J.)). Apart from slowing the judicial process, petitioners' opaque standard seems bound to lead many judges to recuse themselves, either on motion or *sua sponte*, even where it might ultimately have been determined that recusal was not constitutionally necessary. Particularly in smaller districts, staffing problems would frequently result. See *Fieger*, 714 N.W.2d at 286 (Markman, J.). The potential for strategic contributions, made "for the purpose of obtaining a recusal" (*Shepherdson*, 5 F. Supp. 2d at 311), would only exacerbate these problems. And because the disqualification standard would rest upon federal constitutional law, States would be unable to rectify the problems by adopting bright-line rules legislatively. Constitutionalizing this area of the law would also lead parties in recusal fights to beat a path to this Court's door, thereby increasing the workload of this Court as well.

The abolition of judicial elections appears to be the ultimate goal of some of petitioners' amici. See, *e.g.*, Justice At Stake (JAS) Br. 3 (arguing that "judicial campaigns and elections" pose "serious threats to judicial impartiality"). But the vast majority of States elect their judges, and have done so since the middle of the 19th century. See *Repub. Party of Minn.* v. *White*, 536 U.S. 765, 785 (2002). Election of

state judges became popular because judges have the power to "'make' common law" and "shape the States' constitutions." *Id.* at 784. And it remains popular today: no State that elects its judges has ever entirely abandoned the system. See Aman McLeod, *If At First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 523 (2005). Indeed, several States have rejected, by significant margins, referenda or proposed constitutional amendments that would have abolished judicial elections. See Roy Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L. J. 1077, 1082 (2007). West Virginia, in particular, has declined to alter its selection method. See, *e.g.*, Lawrence Messina, *State bar supports retention of partisan judicial elections*, CHARLESTON DAILY MAIL, 10/13/05, at 8A; Lawrence Messina, *W. Va. judiciary sticking with partisan elections*, ASSOC. PRESS, 12/3/08. While reasonable arguments can be made both for and against elected judiciaries, it is assuredly not the proper role of this Court to allow its resolution of the due-process issue presented here to be swayed by any distaste for judicial elections.

4. The broad constitutional rule advocated by petitioners is unnecessary.

A constitutional rule requiring disqualification whenever a judge can be deemed to have a sufficient "debt of gratitude" to a litigant cannot be justified as fulfilling an unmet need, because States are already addressing the issues that arise at the intersection of campaign finance and judicial disqualification. As Justice Kennedy has observed, "democracy" is its "own correctiv[e]." *Repub. Party of Minn.*, 536 U.S. at 795 (concurring opinion).

As an initial matter, the ABA Model Code's general disqualification rule, which requires recusal in any case in which "the judge's impartiality might reasonably be questioned," has been adopted in some form in virtually every State. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007); see ABA Br. 14 & n.29. A number of petitioners' amici express concern that judges do not always recuse themselves under state rules in circumstances in which they should. See ABA Br. 16-18; Br. of Brennan Ctr. 26-29. But the fact that one might disagree with a state judge's application of state law is obviously not a reason to invent a new rule of federal constitutional law, particularly in an area—the qualification of judges—that involves a core state function. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Indeed, if amici are concerned that state judges are failing to recuse themselves under state rules that require recusal, it is unclear why they believe that judges would be more likely to recuse themselves under a less stringent constitutional rule.

In any event, many States have enacted or are now considering reforms that will mitigate whatever recusal problems are perceived to exist. We mention several:

First, more than two-thirds of the States have contribution limits of some type. See American Judicature Society, *Judicial Campaigns and Elections*, *available at* http://tinyurl.com/a84fcf. One such State is West Virginia, which, after the 2004 election, extended the $1,000 limit on campaign contributions to include those made to 527 groups. See W. Va. Code § 3-8-12(g).

Second, a number of States now provide some form of public financing for judicial elections, and

still others, including West Virginia, have been considering such a system. See Opp. 25; JAS Br. 14-15.

Third, following the ABA's Model Code, at least two States have adopted disqualification provisions that require recusal if the judge received campaign contributions above a certain size from a party or lawyer. See Opp. 25 & n.10; JAS Br. 13-14.

Fourth, nearly half the States have "peremptory" recusal provisions that authorize parties to request the substitution of a judge without cause. See FLAMM, *supra*, § 26.1, at 753-56; *id.* § 27.1-.19, at 790-822; Schotland, *supra*, at 1102.

Fifth, States have contemplated altering recusal procedures in other respects. For example, West Virginia's Legislature recently proposed an amendment to the state constitution creating a judicial commission that would decide recusal requests. See H.R.J. Res. 104, 78th Leg., 2d Sess. (W. Va. 2008).

We note, in this connection, that the real concern of petitioners' amici may be that an "appeal based on state law issues" is generally unavailable when a member of a State's highest court denies a recusal motion. ABA Br. 16. Amici may therefore be seeking to constitutionalize recusal law to ensure at least the possibility of review by this Court. But the denial of a recusal motion by a Member of this Court is likewise unreviewable. In any event, if the absence of review in state courts is thought to be a problem, the solution is not to constitutionalize recusal law, but rather for States to amend their procedures. See FLAMM, *supra*, § 29.1-2, at 911-913 (describing available state procedures for resolution of recusal issues by full court).

These examples illustrate the array of tools at States' disposal; show that States have not been hesitant to use them; and demonstrate that there is no need for federal intervention. One set of petitioners' amici nevertheless urges this Court to adopt a broad constitutional rule to "inspire current state reformers to enact policies designed to restore the appearance and reality of * * * judicial independence." JAS Br. 9. The role of this Court, however, is to interpret the Constitution, not to "inspire" reformers to exercise their legislative responsibilities. In any event, as the multiple efforts already underway confirm, state reformers are adequately *self*-inspired.

C. There Is No Sufficient Probability Of Bias Here To Warrant Recusal Even Under Petitioners' Standard.

Even if one accepted the two foundational premises of petitioners' submission—that disqualification of a judge is constitutionally required when there is a "probability of bias," and that there is such a probability when the judge may feel a "debt of gratitude" to a litigant—Justice Benjamin's disqualification still would not be required. To establish that a judge is constitutionally barred from sitting, a party "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow*, 421 U.S. at 47. (In this regard, the Court will recall Justice Benjamin's statement while campaigning, welcoming support but warning that "if you want something in return, I'm not your candidate." JA319a.)

The "five reasons" identified by petitioners (Br. 27) do not rebut that presumption here. As we have already explained (see *supra* pp. 40-41), two of the factors on which petitioners rely—that the expenditures were made when an appeal was expected, and

that the decision to participate was not reviewed by the full court—do not make whatever "debt of gratitude" Justice Benjamin might have felt any greater than it would otherwise have been. See Br. 29-30.[7] That leaves the three other factors, all of which relate to the size of Blankenship's expenditures. See Br. 27-29.[8] When considered in light of all the circumstances, those expenditures did not create a constitutionally disqualifying "probability of bias" in favor of Massey's subsidiaries.

First, Justice Benjamin has voted against Massey or one of its subsidiaries in at least five other cases—twice on the merits and three times at the petition stage. See *supra* pp. 5-6, 9; see also JA674a n.29. In the most recent such case, Justice Benjamin voted to deny review of a $243 million judgment against Massey, which was nearly five times the amount at issue here. If Justice Benjamin feels a "debt of gratitude" to Blankenship, and for that reason harbors a "probability of bias" in favor of Massey

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[7] Nor is there warrant for any insinuation that the pendency of the litigation is in fact what motivated Blankenship's expenditures. See *supra* note 1.

[8] The third factor petitioners invoke—that Blankenship "actively campaigned for Justice Benjamin and solicited donations on his behalf" (Br. 29)—appears to be based on nothing more than a single "Dear Dr." letter from Blankenship that was appended to one of the disqualification motions (JA181a-182a). Petitioners identify no evidence to substantiate their assertion that the letters were "widely distributed" (Br. 7-8) and "directly responsible for a portion of the more than $800,000 donated to Justice Benjamin's campaign committee" (Br. 29), much less that Justice Benjamin was aware of it.

companies, he certainly has a strange way of showing it.[9]

Citing *Bracy* v. *Gramley*, 520 U.S. 899 (1997), a bribery case, petitioners point out that the votes in the other cases were not "outcome-determinative," and suggest that, through the "expedient" of voting against Massey in those cases, Justice Benjamin may have been seeking to "deflect suspicion" that he would cast the deciding vote in Massey's favor in this case, and thereby "immunize his actions." Br. 32-33. This slander is beyond reason. Petitioners' theory is that there was a "probability of bias" because it is "human nature" and "would only be natural" (Br. 30-31) for Justice Benjamin to feel a "debt of gratitude" to Blankenship. In attempting to deal with the problem (for that theory) that Justice Benjamin voted against Massey in several other cases, petitioners imply that Justice Benjamin was not merely "probably biased" but in fact dishonest—that he devised an elaborate scheme to vote one way in several other cases, regardless of the merits, to make it easier for him to vote the other way in another case to repay Blankenship without detection. Apart from the fact that there is not a shred of evidence to support the outlandish notion that Justice Benjamin is so devious, any such claim contradicts petitioners' conces-

[9] The State of West Virginia does not seem to have shared petitioners' view as to the probability of bias. It was a party in at least two of those cases and did not seek Justice Benjamin's disqualification—despite the fact that it was opposing the Massey affiliate, and despite the fact that the State was represented by Attorney General McGraw, the brother of the candidate Blankenship so determinedly opposed. See JA675a n.31. Indeed, a state official involved in one of those cases said that she "would not have entertained" the idea of seeking Justice Benjamin's disqualification. *Ibid.*

sion in the court below that they were "[i]n no way * * * question[ing] Justice Benjamin's integrity." JA113a; see also JA108a.[10]

Second, virtually all the expenditures at issue were independent of Justice Benjamin's campaign. The only *direct* expenditure was a single campaign contribution of $1,000. JA208a. Approximately $500,000 went to advertising and mass mailings that Blankenship did not coordinate with the Benjamin campaign, and the balance was given to ASK, an independent 527 group that opposed Justice McGraw's reelection. JA187a-200a, 681a-684a.

Petitioners argue that "there is no reason to believe that Justice Benjamin is any less likely to feel a debt of gratitude to Mr. Blankenship because a majority of his financial support was provided through [ASK] * * * rather than directly." Br. 34. But there is every reason to believe that. It is a central premise of the law of campaign finance that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent * * * undermines the value of the expenditure to the candidate." *Buckley*, 424 U.S. at 47; see also *FEC* v. *Colorado*

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[10] Petitioners also challenge Justice Benjamin's integrity in another way: by asserting that he "disregard[ed] * * * longstanding procedures" and moved himself "ahead of Justice Albright in the order of succession to the chief justiceship." Br. 13 n.2. Petitioners' bizarre insinuation that Justice Benjamin conspired with certain of his colleagues to usurp normal procedures in order to enable him to appoint the replacements for the recused justices in this case is entirely baseless. The court changed the order of succession in October 2006 and November 2007, well before anyone had any idea that Chief Justice Maynard might recuse himself in this case, the circumstance that made Justice Benjamin Acting Chief Justice. Compare JA699a-700a, with Pet. Br. 12-13.

Repub. Fed. Campaign Comm., 533 U.S. 431, 446 (2001). At the same time, the absence of coordination "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. Thus, it is an accepted proposition that independent expenditures do not "pose[] the same risk of real or apparent corruption" as direct contributions. *McConnell* v. *FEC*, 540 U.S. 93, 121 (2003).

Third, the expenditures were not made by any party before the court. No Massey companies, including respondents, contributed to any candidate or group in the 2004 election (save for a single $1,000 contribution from A.T. Massey's PAC). Nor could they have, because West Virginia prohibits corporations from making campaign expenditures. W. Va. Code § 3-8-8(a). Instead, it was Blankenship, the CEO of Massey (respondents' ultimate parent) and of respondent A.T. Massey, who spent the money as part of an effort to unseat Justice McGraw. Blankenship did not make the expenditures on behalf of Massey or any of its subsidiaries; he did not make the expenditures in his capacity as CEO of Massey or A.T. Massey; and he did not use any money that belonged to a Massey entity.

Petitioners say that Justice Benjamin had an incentive to repay his "debt of gratitude" for Blankenship's own expenditures by voting in favor of Massey's subsidiaries, because Blankenship "holds more than 250,000 shares of the company's stock." Br. 33. What petitioners do not say is that those shares amount to an ownership interest of approximately 0.35%, giving him a $175,000 stake in the judgment. Compare Massey Energy Co., Quarterly Report (Form 10-Q) i (11/7/08) (85.1 million shares

outstanding), with Statement of Changes in Beneficial Ownership (Form 4) 1 (11/18/08) (296,935 shares owned by Blankenship). Given how small this was in relation to Blankenship's $3 million campaign expenditures, one can fairly infer that his motives were political rather than economic. Blankenship's stock holdings provide little basis for Justice Benjamin to "repay" any "debt" he supposedly felt to Blankenship.

Fourth, any "debt of gratitude" was greatly diminished by the fact that Justice Benjamin's election cannot be attributed primarily to Blankenship's financial support. For one thing, every major daily newspaper in West Virginia that made an endorsement, save one, endorsed Justice Benjamin. See JA674a n.27. To a large degree, moreover, Justice Benjamin's opponent cost himself the election. Justice McGraw was already a polarizing figure in West Virginia politics (see Juliet Terry, *Wheel of Justice*, STATE J., 12/10/04, at 1); his refusal to give interviews or debate Justice Benjamin before the election raised eyebrows (see Tom Diana, *Benjamin Vows Fairness on Supreme Court*, THE INTELLIGENCER (WV), 10/23/04); and a bizarre speech, in which McGraw accused Benjamin of trying to "destroy democracy" and claimed that this Court had "approved gay marriage," may well have tipped the balance (Justice Warren McGraw, Speech, Racine, WV (9/6/04), *available at* http://www.youtube.com/watch?v=TQ6nQaE2FM8; see JA678a & n.35). The speech was both widely disseminated and widely discussed, and many considered it to be the turning point in the election. See, *e.g.*, Brad McElhinny, *"Looking for Ugly" Campaign Ad Wins National Recognition*, CHARLESTON DAILY MAIL, 3/4/05, at 1A; see also JA678a-680a & nn.38-39. Justice Benjamin's largest

"debt of gratitude" may therefore have been to his opponent.

Petitioners do not dispute any of this (Br. 34-35), instead asserting that it "strains credulity" to suggest that Blankenship's financial support did not play a "meaningful role" in the election. Br. 35. That someone's support played a "meaningful role" in a judge's election, however, cannot be the constitutional standard. If it were, disqualification would be more the rule than the "exception[]." Br. 36.

Fifth, any "debt of gratitude" would have been further diminished by the fact that Blankenship's motivation was to defeat Justice McGraw, with Justice Benjamin being an incidental beneficiary. Blankenship believed that Justice McGraw's decisions harmed West Virginia's economy (see, *e.g.*, Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, WASHINGTON POST, 11/4/04, at A15), and that McGraw was "the most damaging to the state of any [person] who holds office" (Brad McElhinny, *Big-bucks backer felt he had to try*, CHARLESTON DAILY MAIL, 10/25/04, at 1A). The anti-McGraw—as opposed to pro-Benjamin—focus of Blankenship's efforts is confirmed by the fact that he sought to defeat Justice McGraw in the primary as well as the general election. See Jim Rowe, Pre-Primary Report, Schedule 1A (5/3/04) at 13, *available at* http://tinyurl.com/dzplud.

Sixth, a "debt of gratitude" will fade with time, and this case was decided several years after Justice Benjamin's election.

Seventh, there is no indication that Blankenship and Justice Benjamin even knew one another, before or after the election. Nor is there any indication that

Benjamin solicited or encouraged Blankenship's activities. The absence of any personal bond or solicitation reinforces the conclusion that the Justice would have had little reason to disregard the obligations of his office to favor respondents in this litigation.

Finally, it is notable that Justice Benjamin's disqualification would not have been required even under the ABA's Model Code provision addressing campaign expenditures. That provision requires disqualification when "a party, a party's lawyer, or the law firm of a party's lawyer has * * * made aggregate contributions to the judge's campaign" that are greater than some particular amount (unspecified in the rule). ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007). Blankenship is not a party or a lawyer for any party; and the expenditures at issue were not contributed to Justice Benjamin's campaign. It would be extraordinary if campaign expenditures required recusal under the Due Process Clause of the Fourteenth Amendment, which establishes only a "floor" (*Bracy*, 520 U.S. at 904), when they would not require recusal under the provision of a more stringent model code that was specifically designed to cover the subject.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. In the alternative, the judgment below should be affirmed.

Respectfully submitted.

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