No. 08-22

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,000 members nationwide and 35,000 affiliate members in all 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the fair and proper administration of justice.

Consistent with these objectives, NACDL has an interest in preserving both the actuality and the appearance of an independent and impartial judiciary, charged with making crucial decisions that can result in the loss of liberty or even life for a

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[1] The parties have filed letters with the Court consenting to all *amicus* briefs. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

criminal defendant. NACDL has a particular interest in ensuring that a constitutional remedy exists to protect criminal defendants from judges who are or appear to be biased against criminal defendants.

SUMMARY OF ARGUMENT

Under the Due Process Clause, every litigant is entitled to a fair hearing before a fair tribunal. This mandate is particularly crucial to criminal defendants who face the loss of liberty or life and depend on judges to protect their constitutional rights.

There is a tension between an elected judge's accountability to those constituencies who assisted in his or her election and the judge's role as independent and impartial arbiter. This tension is particularly pronounced in criminal cases because elected judges often run on "tough on crime" platforms. This Court can reverse the judgment of the West Virginia Supreme Court of Appeals in this case without reaching the question of when, if ever, campaign promises or contributions could require recusal in the criminal context. But unless the Court rules for Petitioners in this case and establishes that there are at least some excesses associated with judicial campaigns that compel recusal as a matter of constitutional law, there will as a practical matter be no due process constraints at all. Litigants, including criminal defendants facing the loss of liberty or even life, will have no constitutional recourse if they are before judges who

are or appear to be biased as a result of activities associated with their election campaigns.

ARGUMENT

I. THE CONSTITUTIONAL MANDATE THAT LITIGANTS BE HEARD BY A JUDGE WHO APPEARS TO BE FAIR, IMPARTIAL AND WITHOUT BIAS IS VITAL TO SAFEGUARDING THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Moreover, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp.* v. *Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968); *see also In re Murchison*, 349 U.S. at 136 (holding that "to perform its high function in the best way justice must satisfy the appearance of justice") (internal quotation omitted).

Criminal defendants are especially dependent on the Due Process Clause of the Fourteenth Amendment to protect them from judges who are or appear to be biased against them. Because their liberty and even their lives hang in the balance, criminal defendants have even more at stake than civil litigants, who at most might be required to pay a monetary judgment if unsuccessful. Because judges must safeguard a criminal defendant's constitutional rights, the due process mandate that

judges both be and appear to be impartial is especially important in this context.

II. IN LIMITED CIRCUMSTANCES, JUDICIAL ELECTIONEERING CAN CREATE THE ACTUALITY OR APPEARANCE OF BIAS, VIOLATING A LITIGANT'S DUE PROCESS RIGHTS.

An independent and impartial judiciary is the cornerstone of the justice system in the United States. Judges must be "independen[t] of mind and spirit . . . to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty." *United States* v. *Hatter*, 532 U.S. 557, 568 (2001) (internal quotation omitted). "[I]deally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment." *Chisom* v. *Roemer*, 501 U.S. 380, 400 (1991).

More than eighty-nine percent of state judges stand for election in order to obtain or retain office. Bert Brandenburg et al., *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 Geo. J. Legal Ethics 1229, 1230 (2008). Because elections are an intrinsic part of a democratic process, judicial elections are lauded as a way to make judges, like other public officials in the United States, accountable to the citizenry. *See, e.g.*, David E. Pozen, *The Irony of Judicial Elections*, 108 Colum. L. Rev. 265, 271 (2008). There is, however, a

fundamental tension between judicial independence on the one hand and judicial accountability on the other, *id.* at 271-72, "between the ideal character of the judicial office and the real world of electoral politics." *Chisom*, 501 U.S. at 400. Judges subject to regular elections are "likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 788-89 (2002) (O'Connor, J., concurring).

This tension is particularly acute in the criminal context because the electorate often subjects judges to heightened scrutiny in criminal cases. Citizens, worried about crime, may put political pressure on judges for more convictions and harsher sentencing. They are frequently joined by police, prosecutors and victims' rights groups in agitating for such measures. Criminal defendants, on the other hand, are politically unpopular and lack the political power to respond in kind.

But in order to enforce the rights granted to criminal defendants by the Constitution, judges must at times make unpopular decisions. Decisions upholding a criminal defendant's rights—by, for example, excluding a coerced confession or evidence obtained unconstitutionally; barring out of court statements against the defendant under the Confrontation Clause; or granting a motion to

dismiss for lack of evidence—often provoke a decidedly negative reaction among the voting public. The media frequently contribute to the response, portraying such decisions as "letting a criminal defendant off on a technicality." The political pressures faced by judges persist at the appellate level, where elected appellate judges must review these same issues while also confronting defendants' claims of ineffective assistance of counsel and bias by the trial court.

The result is that many candidates for elected judicial office run on "tough on crime" platforms. To demonstrate their dedication to the cause of putting criminals behind bars, judicial candidates often highlight past rulings that show the requisite "toughness" on crime or promise—at varying levels of specificity—to be tough on crime if elected. The examples below illustrate these campaign tactics:

- In campaigning for an Illinois Supreme Court position, one candidate bragged in his literature that he had "never written an opinion reversing a rape conviction." *Buckley* v. *Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 226 (7th Cir. 1993).
- A candidate for an Indiana judgeship pledged to "stop suspending sentences" and to "stop putting criminals on probation." *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997).
- A judicial candidate in Florida running a "tough on crime" campaign "pledged her

support and promised favorable treatment for certain *parties and witnesses* who would be appearing before her (*i.e.*, police and victims of crime)." *In re Kinsey*, 842 So. 2d 77, 89 (Fla. 2003) (per curiam).

- A judge running for election in Ohio stated she wasn't afraid to use the death penalty and *favored* it for convicted murderers. *In re Burick*, 705 N.E.2d 422, 425 (Ohio 1999).

- In his reelection campaign, a judge on the Texas Court of Criminal Appeals stated "I'm very tough on crimes where there are victims who have been physically harmed. In such cases I do not believe in leniency. I have no feelings for the criminal. All my feelings lie with the victim." Clay Robison, Editorial, *Judge's Politics an Exception to Rulings*, Hous. Chron., Feb. 4, 2001, at 2.

By the same token, many judicial candidates attack their opponents as being "soft on crime." For example, in the 2008 campaign for the Wisconsin Supreme Court, Judge Michael Gableman ran television ads that labeled his opponent Justice Louis Butler "'Loophole Louis' for rulings favoring defendants in criminal cases." Debra Cassens Weiss, ABA J., *Wisconsin Justice Dubbed 'Loophole Louis' in TV Ads*, http://abajournal.com/news/wisconsin_justice_dubbed_loophole_louis_in_tv_ads (last visited Dec. 29, 2008). In the 2006 primary campaign for Chief Justice of the Alabama Supreme Court, Justice Tom Parker excoriated the Alabama

Supreme Court for its decision "to passively accommodate—rather than actively resist" this Court's decision in *Roper* v. *Simmons*, 543 U.S. 551 (2005), which held that it is unconstitutional to execute someone for a crime he committed when he was a minor. David White, *Chief Justice Race Hinges on Respect for U.S. Supreme Court*, Birmingham News, May 22, 2006, at B1. Indeed, the judicial campaign in this very case is a classic (if exceptionally well funded) example: television advertising accused Justice Warren McGraw of "[l]etting a child rapist go free" and labeled him, "too soft on crime. Too dangerous for our kids." Deborah Goldberg et al., *The New Politics of Judicial Elections 2004*, at 4-5 (2005).

In extreme circumstances, perhaps including those discussed above, statements made by judges during the course of judicial electioneering may jeopardize a criminal defendant's due process rights by depriving him of the actuality or at least the appearance of an unbiased judge. *See, e.g.,* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 760, 765-67 (1995) (citing statistics and anecdotal evidence indicating judges facing election are (1) more likely to sentence a defendant to death and (2) less likely to enforce constitutional protections to a fair trial); *see also* Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due*

Process Rights, 81 N.Y.U. L. Rev. 1101, 1109-12 (2006) (citing statistics indicating a correlation between increased sentences and proximity to reelection and between affirming sentences of death and proximity to reelection).

It is not NACDL's position in this case that judicial elections, judicial campaign speech, judicial campaign contributions and judicial electioneering generally violate the Due Process Clause. Nor does NACDL ask the Court to determine in this case when "tough on crime" promises by judicial candidates become so problematic that they create the actuality or appearance of bias in criminal cases and require recusal under the Due Process Clause. But, unless this Court recognizes that the extraordinary circumstances of this case—and, at a minimum, the clear appearance of bias resulting from Mr. Blankenship's massive contributions to Justice Benjamin's campaign—violate the Due Process Clause absent recusal, future litigants will have no constitutional recourse before a judge who is or appears to be biased as a result of conduct relating to a judicial campaign. Ruling for Petitioners here, even on narrow and fact-specific grounds, will send a much-needed signal that judicial electioneering, though generally valid, may in some particular cases cross a constitutional line and require recusal to ensure the actuality and appearance of an unbiased judge. Conversely, if this Court were to rule for Respondents even on the extraordinary facts of this case, judges and litigants

will believe—and appropriately so—that judicial electioneering can never implicate the Due Process Clause and require recusal. Such a result would leave elected judges and the states in which they sit with no incentive to reconsider or reform their own recusal standards in the light of constitutional concerns and would ultimately jeopardize criminal defendants' right to a "fair trial in a fair tribunal." *In re Murchison*, 349 U.S. at 136.

CONCLUSION

For the foregoing reasons, NACDL respectfully urges the Court to reverse and remand for further proceedings without Justice Benjamin's participation.

Respectfully submitted,

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