

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 OF LAW PROFESSORS
RONALD D. ROTUNDA AND MICHAEL R.
DIMINO AS AMICI CURIAE IN
SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST¹

Amici curiae, listed by name in the Appendix, are professors of law at law schools in the United States, who teach, research, write and speak about professional and judicial ethics and constitutional law. As such, amici curiae have an interest in ensuring that the law is developed consistently with fundamental ethical principles that underlie our system of jurisprudence. Specifically, amici curiae submit this brief to highlight the dramatic break that Petitioners want this Court to make from existing precedent and some of the numerous problems that would occur if this Court proceeded down the path suggested by Petitioners. The Amici are submitting this brief in support of the Respondents.

SUMMARY OF ARGUMENT

Most issues related to judicial disqualification do not reach the level where the parties' constitutional rights need to be adjudicated. Historically, this Court has found a violation of the Due Process Clause only if a judge has an interest, almost exclusively financial, in the outcome of the case. In other words, due process requires the drastic remedy of recusal only when the traditional prohibition that Blackstone and Coke described – that a judge cannot sit on his own case – applies.

Now, however, Petitioners and their Amici ask

¹ The parties have consented to the filing of this brief. Petitioners and Respondents have each filed a letter of consent to all amicus briefs with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel contributed monetarily to the preparation or submission of this brief.

this Court to create a new test, variously described as “probability of bias,” “appearance of bias,” “appearance of impropriety,” or even “reasonable appearance of impropriety.” If these concerns were raised to the level of constitutional prohibitions, they would engraft an unmanageable system of federal review onto the state court system. In the end, the problems created by any of these standards would likely do far more to undermine the public’s confidence in the judiciary than the current rules.

Moreover, if adopted, these proposals would swiftly threaten the practice of electing state court judges even though there have been state judicial elections for longer than the Due Process Clause of the Fourteenth Amendment has existed. Finally, this proposal threatens one of the most vibrant examples of federalism, as the states currently exhibit an diverse and evolving set of methods for selecting judges, deciding how and whether they should retain their positions and deciding when they cannot hear particular cases. Consequently, this Court should reaffirm its traditional rule and affirm the judgment below.

STATEMENT OF FACTS

Many of the Amici supporting the Petitioners state that a party in this case made contributions to the campaign of West Virginia Justice Brent Benjamin. (*See, e.g.*, ABA Amicus Brief, p. 20). In fact, no party made any donations to his campaign, with the exception of a \$1,000 contribution by the PAC of A.T. Massey Coal. Instead, one individual, Don Blankenship, made a \$1,000 contribution to Justice Benjamin’s campaign. (JA 208a). Mr. Blankenship also made independent expenditures and donated his

own money to a 527 organization, which made its own independent expenditures to support the election of Justice Benjamin. (JA 117a-141a). Although Mr. Blankenship is the Chairman, CEO and President of Massey Energy, which owns the Respondents, the distinction between corporations and their officers is a matter of hornbook law. In addition, while Mr. Blankenship is a shareholder of Massey Energy, he owns less than 0.5% of this publicly-traded corporation. Therefore, as a shareholder, Mr. Blankenship's share of the judgment in this case (if the corporate veil was pierced) that was reversed by the West Virginia Supreme Court of Appeals was \$175,000, which is a small fraction of what he contributed to the 527 organization during the 2004 election cycle. *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).

ARGUMENT

I. Petitioners Are Proposing That this Court Make a Drastic Break from Precedent, Which Imposed the Drastic Remedy of Recusal for Due Process Violations Only in Very Limited Circumstances.

“All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion.” *Tumey v. Ohio*, 273 U.S. 510, 520 (1927). Following this distinction, this Court has found that due process requires recusal only in two specific circumstances.

- A. This Court has found that the Due Process Clause requires recusal of a judge only when the judge has a direct financial interest in the outcome or when the judge has a party's or prosecutor's interest in the outcome of criminal contempt hearings.**

The first category of due process cases are those in which the judge or magistrate has a “direct, substantial, pecuniary” interest in the outcome of the dispute. Most notably, in *Tumey*, the mayor, sitting as a municipal judge, had the financial incentive to convict defendants because there was “no way by which the mayor may be paid for services as judge, if he did not convict those who are brought before him.” 273 U.S. at 520. In other words, the judge was being paid a contingency fee based on his conviction rate. Therefore, this Court held that the defendants whose cases were heard by the mayor/municipal judge were deprived of due process under the Fourteenth Amendment because “the judge . . . has a direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant] in his case.” *Id.* at 523.

In *Ward v. Village of Monroeville*, 409 U.S. 57, 58 (1972), this Court considered whether due process concerns prevented a mayor from also sitting as a magistrate to hear ordinance violations and traffic offenses. Between 1964 and 1968, the Village of Monroeville had received between one third and one half of its annual revenue from “fines, forfeitures, costs and fees imposed . . . in the mayor's court. 409 U.S. at 58. Therefore, this Court concluded that recusal was required because the mayor had an interest in

“maintain[ing] the high level of contribution from the mayor’s court.” *Id.* at 59.

Aetna Life Insurance Company v. Lavoie, 475 U.S. 813 (1986), illustrates the distinction between potential bias, which does not require recusal on due process grounds, and direct, personal, financial interest, which does. Alabama Supreme Court Justice Embry was a party to two cases against insurance companies that raised the substantially similar legal issues as those raised in *Aetna*. *Id.* at 817. Despite this, Justice Embry did not recuse himself, but instead joined the majority opinion of that court. *Id.*

The *Aetna* petitioners first claimed that their due process rights were violated by Justice Embry’s participation in their case because he had expressed “general hostility toward insurance companies that were dilatory in paying claims . . . in his deposition. . . .” 475 U.S. at 820. This Court rejected this argument, holding that “allegations of bias and prejudice on this general basis, however, are insufficient to establish any constitutional violation.” *Id.* at 821.

But, the decision that Justice Embry joined also controlled the resolution of the legal issues in the cases in which he was a party. Therefore, this Court held that:

while recognizing that the Constitution does not reach every issue of judicial qualification, . . . “it certainly violates the Fourteenth Amendment . . . to subject [a person’s] livery or property to the judgment of a court the judge of which has a direct, personal, pecuniary interest

in reaching a conclusion against him in his case.”

475 U.S. at 821-822 (citing *Tumey*) (all alterations except first in original).

The second category of cases finding due process violations sufficient to justify recusal involve criminal contempt proceedings in which the judge conducting the contempt hearing had another interest in the outcome of the criminal contempt case.² For example, the Court in *In re Murchison*, 349 U.S. 133, 134 (1955), considered whether a judge who had served as a one-man grand jury from which the criminal contempt charges arose could also preside over the contempt case. Recognizing that the interest of such a judge was substantially similar to that of a prosecutor, the Court found that it would violate the defendants’ due process rights for the same judge to serve as the one-man grand jury and preside over the criminal contempt hearing. *Id.* at 137, 139.

Following *Murchison*, this Court has also found “that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor.” *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971). In *Mayberry*, then, the judge reviled by the alleged contemnor could not preside over the hearing because the judge was essentially both a victim of and

² None of these criminal contempt cases “involve[d] . . . the long-exercised power of courts summarily to punish certain conduct occurring in open court.” *In re Murchison*, 349 U.S. 133, 134 (1955).

witness to the alleged crime.

The unifying thread in these cases, then, is not whether there was actual, potential or probable bias. Instead, recusal was required because the judicial officer faced the competing interests of adjudicating the case fairly and benefitting from one result. Therefore, the “due process clause sometimes requires a judge to recuse himself without a showing of actual bias,” *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363, 1371 (7th Cir 1994) (*en banc*), because actual bias is not the test for recusal on due process grounds.

The Court created easily applied rules for these cases. It did not adopt a vague “appearance of impropriety” rule because that language is too vague to form a rule. It may be the reason why the legislature or the court creates a disqualification rule, but it is not a rule in itself³ – it is too ambiguous for that. The organized bar knows that it does not want to be governed by such an indeterminate standard, which is why the ABA no longer uses that language as a rule governing lawyers.⁴ Therefore, this Court should find that similar language is also too vague for judges.

³ Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code* (The Howard Lichtenstein Lecture in Legal Ethics), 34 Hofstra L. Rev. 1337 (2006).

⁴ Ronald D. Rotunda, *Alleged Conflicts of Interest Because of the “Appearance of Impropriety,”* 33 Hofstra L. Rev. 1141 (2005).

B. Petitioners’ new test is such a significant break from prior precedent that it would require recusal on due process grounds in situations where the federal statute does not require disqualification.

“[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level.” *Aetna, supra*, 475 U.S. at 820 (citing *FTC v. Cement Institute*, 333 U.S. 683 (1948) (alterations in *Aetna*). For example, *Tumey* classified “matters of kinship, personal bias, state policy, remoteness of interest . . . [as] matters merely of legislative discretion.” 273 U.S. at 520.

Congress has exercised its discretion and enacted a federal statute mandating disqualification in situations that do not require recusal as a matter of due process. Federal law expressly provides that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Disqualification is also required when the judge “has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” 28 U.S.C. § 455(b).

Petitioners and their Amici use phrases similar to this statutory language to describe their proposed standards. Therefore, if their standard requires disqualification of Justice Benjamin, then federal judges should already be disqualifying themselves in similar circumstances under this federal statute.

In their brief on the merits, Petitioners argue that there was a “probability of bias” arising out of a

“debt of gratitude” owed by Justice Benjamin because of Mr. Blankenship’s efforts to defeat Justice Benjamin’s opponent. The Amici supporting the Petitioner argue that the independent expenditures funded by Mr. Blankenship,⁵ create an “appearance of bias,” an “appearance of impropriety,” or a “reasonable appearance of impropriety” that requires recusal as a matter of constitutional law.

But, if such indirect expenditures during a previous election create a “debt of gratitude,”⁶ then help in being nominated or confirmed to a lifetime appointment on the federal bench should create at least as great a “debt of gratitude.” Moreover, if a “debt of gratitude” for past assistance creates a probability of bias or the appearance of either bias or impropriety, then ongoing or potential assistance in obtaining a new position should also create this same probability and improper appearances. This would especially be the case in the federal judicial system, where justices and judges have life tenure. After all,

⁵ Often mischaracterized as a contribution by a party to Justice Benjamin’s campaign.

⁶ It is generally assumed that contributions to a judge’s campaign will influence the judge’s decision making. But, this assumption may not be warranted. A review of three studies has led one academic to conclude that campaign contributions do not influence results. Ronald D. Rotunda, *A Preliminary Empirical Inquiry into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates*, *The Professional Lawyer*, Winter 2003, at 16, 18-19. In fact, some of the statistical evidence in those studies suggests that contributors are more likely to lose than win their cases before judges that they supported. *Id.* at 17-18.

no matter how much help a state court judge receives in winning one election, the judge will usually have to face the electorate again.

Associate Justices of this Court have become Chief Justice, and both Circuit and District Court judges have been elevated to higher federal courts. *See generally* Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse when Being Considered for Another Position*, 19 Geo. J. Legal Ethics 1187, 1202-04 (2006). In addition, federal judges have been appointed to positions within the administration, including Solicitor General, Director of the Federal Bureau of Investigation, Secretary of Labor, Security of Homeland Security, and Ambassador to the United Nations. *See generally id.* at 1204-08.

Therefore, if the “probability of bias” or the “appearance of impropriety” arising out of a “debt of gratitude” mandates recusal, then federal judges ought to disqualify themselves from cases involving issues vital to an administration after the administration advises them that they are under consideration for appointment to another positions. But, federal judges have not recused themselves as a matter of general course. 19 Geo. J. Legal Ethics 1187, *supra*, at 1204-08. This is because these situations do not create a reasonable basis for questioning the judge’s impartiality and do not create a personal bias in favor of a party.

Furthermore, the President of the United States has far greater impact upon those who become Justices of this Court or lower federal court judges than anyone (other than the candidates) could have upon the election of a state court judge. Therefore, if the due process clause prohibits Justice Benjamin from sitting

on cases involving companies in which Mr. Blankenship has an interest, then the federal disqualification statute should have prevented Justices of this Court or other federal court judges from hearing cases in which the President who nominated them is a party or in which issues important to that President are at stake.

But, the Chief Justice appointed by President Nixon wrote an opinion adverse to him in *United States v. Nixon*, 418 U.S. 683 (1974), and Justice Powell participated in the case.⁷ Similarly, neither of the two Justices appointed by President Clinton to this Court disqualified themselves when he was a party to a case before this Court. *Clinton v. Jones*, 520 U.S. 681 (1997). Chief Justice Roberts and Justice Alito recently participated in *Boumediene v. Bush*, ___ U.S. ___, 128 S.Ct. 2229 (2008), a case dealing with a contentious issues that was very important to the President that appointed them.

Therefore, in the past, federal judges, including Justices of this Court, have concluded that neither a “debt of gratitude” for their current position nor the ongoing potential for appointment to a different position justify disqualification under the federal statute. The federal statute requires disqualification in situations that this Court has held are not a matter of constitutional law, but instead are left to legislative discretion. *Tumey*, 273 U.S. at 520. As a result, Petitioners’ new standard would require recusal as a

⁷ Justice Rehnquist did not participate in the decision, reportedly because of his association with criminal defendants who had a stake in the outcome of *Nixon*, rather than because of any debt of gratitude he owed to the President himself.

matter of due process in situations where statutory disqualification has not been required. Therefore, it is clearly a significant departure from the prior decisions of this Court, not the logical extension of them.

II. Although the Petitioners Seek a Clear Result for Themselves, Their Proposed Standards Would Not Create a Manageable Method for Determining Whether Due Process Requires That Future Judges Recuse Themselves.

The Petitioners want what all private parties to a lawsuit want. They have already exhausted all judicial review before the West Virginia state courts. Since this Court cannot review the state law bases for the decision, no matter how many new points of law were made or how different the new points of law were from existing West Virginia case law, they must have a basis in federal law for seeking reversal. They have chosen the due process clause of the Fourteenth Amendment as their vehicle for that review.

But, while their desired result is clear, the potential rules for achieving that result are not and would create significantly more problems than they would solve. In fact, they might even exacerbate the problem whose solution they claim to be proposing.

A. The proposals offered by Petitioners and their Amici will expand to cover a wide array of situations.

At the present time, the due process inquiry is rather simple. Due process does not require recusal unless (1) the judge will receive a significant personal financial benefit if the case is decided one way instead of another or (2) the judge is playing multiple roles in a criminal contempt hearing. But, if any of the

proposals submitted by the Petitioners or their Amici are adopted, then the due process inquiry will become much more difficult, its outcome will be much more uncertain, and it will affect many more cases.

If substantial independent expenditures made during a past judicial election campaign create such a “probability of bias” that disqualification of the candidate who benefitted from them is required to ensure due process, then the same is true if the opposing candidate prevailed. After all, revenge is at least as powerful a motivator of human conduct as gratitude. Moreover, this Court has already recognized that the due process clause is implicated when a judge is the victim of contemptuous conduct. *Mayberry*, 400 U.S. at 465-466. Therefore, the first logical extension of Petitioners’ new rule is that judges can hear only the cases in which neither significant supporters nor significant opponents of their past campaigns are parties. However, there are many cases where the courts have refused to disqualify judges because they know the party or the lawyer.⁸ Courts will have to reevaluate all of these state and federal cases if the Petitioners have their way.

In addition, as a practical matter, judges rarely see the actual parties in a case. The individuals that judges usually see during the proceedings are the attorneys for the parties. Therefore, if the due process clause prohibits a judge from hearing a case because a party has made a significant expenditure, then judges should recuse themselves from cases in which any

⁸ See discussion of cases in, Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: the Lawyer’s Deskbook on Professional Responsibility* (ABA/Thomson-West, 2008 edition), at § 10.3-28.

attorney has made a significant expenditure. This logically means that judges also cannot hear cases involving attorneys that opposed the judge's election.

Creativity is also an important part of lawyering. If Petitioners' rule is adopted, creative (and cynical) attorneys might conclude that the easiest way to avoid specific judges is to give the judge a campaign contribution. In fact, a "clever" attorney could try to game the system by supporting both sides in a state supreme court race. "Whenever we create rules, we can expect that there will be those who use them to game the system," to disqualify judges as the case law recognizes.⁹ If one justice whose legal position was favored by the attorney won, then future precedent might prove favorable. But, if the other justice won, then the attorney might disqualify that justice so that the justice would not be able to sit on cases involving that attorney. Either way, this attorney would "win."

Moreover, financial expenditures are only one form of support. Endorsements by newspapers, labor unions, chambers of commerce, professional associations, political parties, well known politicians, and advocacy groups could also be a decisive factor in a judge's election to the bench. They also may play a significant role in determining who is nominated or who is confirmed to a court. Their opposition may prevent a individual from being either elected or confirmed to a different judicial position. Therefore, under Petitioners' theory, the participation of any of these organizations or persons in the process, whether

⁹ Rotunda & Dzienkowski, *Legal Ethics: The Lawyer's Deskbook*, at § 10.2-2.11(d)(2)(iv)(3). See also *id.* at note 84, discussing cases.

for or against, could require the judge not to hear cases involving them. If a newspaper supported a judge, he would not be able to sit in a case involving a libel suit against that newspaper.

Furthermore, if the proposed rules are adopted, there is no rational basis for limiting the application of these rules to cases in which the judges have been elected. Everyone who has been confirmed as a federal judge has received significant support to become a judge. The nomination of some federal judges has generated significant opposition. This support or opposition should create at least the same “probability of bias” or “appearance of bias” as independent expenditures during an election, and perhaps more. The judge may feel “grateful,” or it will “appear” to the public that the judge is responding to the those who supported his nomination. Or, the federal judge may be interested in being elevated to a higher bench, so that there is the “appearance” that he is deciding a particular way because that ruling would be appreciated by the President or a Senator who would promote his elevation. Therefore, if one of these tests were adopted, its application could not be limited to state court elected judges, but should also apply to the federal court system.

B. Adopting one of the ambiguous standards offered by Petitioners or their Amici will create a dramatic increase in the amount of litigation regarding whether judges should recuse themselves.

As several Amici note, motions to disqualify are infrequently filed and rarely granted. Under any of the new, ambiguous, and possibly multi-part tests offered by Petitioners and their Amici, this will certainly

change, which, overall, is a step in the wrong direction.

If a “probability of bias” requires the recusal of a judge, then there are many situations in which an attorney could legitimately argue that such a probability exists. Attorneys are required to be zealous advocates for their clients. They may believe that a different judge would be better for their case than the judge or judges originally assigned. Under any of the proposed new due standards or tests, attorneys would have much broader grounds on which to argue that a judge has a “probability of bias” against them, their client or their client’s position. Even if they conclude that such a “probability of bias” does not exist, opposing counsel may reach the opposite conclusion.

This will dramatically expand the length of litigation, with the first phase of too many cases being the case against the judge, the last phase being a petition for certiorari to this Court requesting the due process clause review, with more motions and hearings on the subject found in between.¹⁰ Moreover, the possibility that the entire state court proceeding could be set aside, with the case remanded to begin anew in the trial court, would hang over significantly more state court proceedings than it current does.

Time and cost may not be the biggest problem. As many courts and commentators have stated, our system is based upon the principle that judges will follow their oaths of office and attempt to preside fairly over matters that come before them. *See, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765,

¹⁰ There is no rational reason why due process challenges would cease after the first trial court judge is disqualified.

796 (2002) (Kennedy, J., concurring). Under any of the new standards, many more attorneys would be quite properly advising clients that their constitutional rights are at risk if a certain judge hears their case. These multiple new methods of challenging the integrity of the judiciary will negatively affect the public's perceptions of the legal system.

C. Given the vast differences in state court judicial systems, it would be extraordinarily difficult to establish a clear test for ascertaining a due process clause violation.

States “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.” *White, supra*, 536 U.S. at 794 (Kennedy, J., concurring). In addition, states may adopt rules that govern how attorneys act, both inside and outside the courtroom, and they may create alternatives to outright recusal.

One of the primary purposes of legal standards is to set guidelines for determining how one should act. For example, statutes for recording interests in real property provide clear rules so that all participants in real estate transactions know who owns what interests in particular parcels of real property. This is the case even though the rules related to recording interests and the precedence of recorded interests differ from state to state.

The methods of selecting and retaining judges are much more diverse than the rules for recording interests in real property. Therefore, a Missouri retention election is different from a judicial campaign in which political parties nominate the candidates.

Both are different from elections in which the judges appear on a “non-partisan” section of the ballot. Different substantive legal issues will be considered important in different states. As a result, the methods of campaigning will be different, and the perceived problems will be different.

In addition, media markets are far different from state to state, and it will cost much more to run a statewide campaign in California than in North Carolina. In some states, newspaper endorsements may carry great weight, while, in others, the endorsement by a particular union might carry the day. From time to time, the endorsement by a specific politician might be the key to electoral success.

Given the vast differences in the states and their judicial systems, there will be different problems in each state. As a result, there is no one-size-fits-all solution that this Court can create for these different problems, only vague standards that will determine whether judges should be recused or not. Increasing the possibility and number of cases in which judges are recused will not target specific types of problems that different states believe exist.

Individual states, however, can target the perceived problems occurring in those states much more effectively through specific statutory requirements. The States may enact different rules for determining which family members, or law firms in which a family member is employed, can appear before a judge. They may enact requirements specific to their state’s unique judicial system regarding what amount and type of campaign expenditures and contributions are acceptable and which require recusal. Moreover, they may create remedies and procedures short of

recusal to deal with appearances and potential biases that do not justify recusal. A state can always provide that a contribution of more than a fixed amount to the campaign for a judge will allow the other party to disqualify the judge. That is a bright line rule, and the legislature or court rule can create it, but the due process clause cannot.

Finally, Petitioners and their Amici argue that there are recent developments that require this Court's intervention. Some make eloquent arguments about how principles reflected in the due process cases could be extended to try to deal with these problems. But, it takes a great deal of time for the judicial system to create a workable body of precedent to deal with the variety of human conduct that may fall within a general rule. State legislatures can decide how to deal with the specific types of perceived problems affecting judicial selection and retention far more effectively through enacting new statutes. Similarly, state courts of last resort can do the same by adopting rules of conduct for judges or attorneys far more efficiently than this Court can create case law sufficient to handle the myriad situations that could arise.

In fact, a very good example of a state acting quickly to enact a clear rule to target a specific perceived problem occurred in West Virginia. After the 2004 election, West Virginia amended its election law to place the same \$1,000 limit on contributions to 527 organizations that had previously applied to contributions directly to a candidate's campaign. W. Va. Code § 3-8-12(g). In other words, "democracy" has already been its "own correctiv[e]." *White*, 536 U.S. at 795 (Kennedy, J., concurring).

D. While granting the relief requested by Petitioners would provide only limited guidance for future courts, it would create an enormous threat to the practice of electing state court judges.

Under the vague standards offered by Petitioners and their Amici, any past assistance, or opposition, to a judge's election would come under increased scrutiny to determine whether it rises to the level at which due process requires recusal of the judge. In addition, the possibility of future reward for the "right" decision, or punishment for the "wrong" decision, also creates probabilities and appearances of bias. If anything, concerns about the future seem more likely to affect future conduct than concerns about the past.

Therefore, it will be extraordinarily difficult for these standards to co-exist with state court elections. But, this Court has only recently recognized that:

[I]f . . . it violates the due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then-quite simply-the practice of electing judges is itself a violation of due process. . . . [This is not] the views reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with

the election of judges ever since it was adopted. . . .

White, supra, 536 U.S. at 783.

Moreover, this Court also recognized in *White* that it is perfectly reasonable for a state to opt for judicial elections. “Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well. . . . Which is precisely why the election of state judges became popular.” 536 U.S. at 784.

There are perceived benefits and perceived detriments to any system of selecting and retaining judges. Many commentators praise the federal systems, and some are critical of state court elections. But, there are also competing benefits that result from the election of judges, such as increased accountability. In the past, this Court has recognized that the states are free to select their judges through elections. It should not now adopt a rule that will make it extraordinarily difficult for states that select their judges through election to manage that system.

Of course, we should not assume that the relief that petitioners request will always be limited to the election of judges. The appointment of federal judges is really an election, where the nominator is the President and the universe of voters is limited to the United States Senate. Any rule fashioned in this case will eventually work its way into the federal system, with unknown results.

RELIEF REQUESTED

This Court should affirm the judgment below.

Respectfully submitted,

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APPENDIX

List of Amici Curiae

Ronald D. Rotunda, who is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University School of Law.

Michael R. Dimino, who is a Visiting Associate Professor at Florida State University College of Law and an Associate Professor at the Widener University School of Law.