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 Supreme Court of Appeals of West Virginia

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE* [1]

The Center for Competitive Politics ("CCP") is a non-profit 501(c)(3) organization founded in August 2005, by Bradley A. Smith, a professor of law at Capital University Law School and a former chairman of

[1] The parties have consented to the filing of this brief. Both Petitioners and Respondents filed letters with this Court consenting to the submission of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

the Federal Election Commission, and Stephen M. Hoersting, a campaign finance attorney and a former general counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and information flow.

SUMMARY OF THE ARGUMENT

Petitioners and their supporting *amici* should not be permitted to use this case as a backdoor attempt to undermine this Court's holdings in *Buckley v. Valeo,* 424 U.S. 1 (1976) and *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). For simple analysis leads to an inescapable conclusion: If this Court rules that independent expenditures create an unconstitutional "bias," its "probability," or even its "appearance," in elected judges that do not recuse, then lower courts will, in the fullness of time, infer that independent expenditures create "corruption or its appearance" in elected legislators that do not abstain, contrary to this Court's 33-year-old holding in *Buckley*, with *Buckley* being the inevitable casualty.

This Court should find no violation of the Fourteenth Amendment's Due Process Clause in this case. West Virginia's remedy—should it choose to rid itself of an unwanted, though not unconstitutional, "appearance"—is in appointing its judges, or, more likely, in recusal standards more rigorous than constitutional due process requires.

ARGUMENT

This case harbors a potentially unwise and unworkable expansion of this Court's due process jurisprudence. But it carries an equally serious and troubling potential to damage this Court's First Amendment jurisprudence in the context of campaign finance and elections dating back to at least the time of *Buckley v. Valeo,* 424 U.S. 1 (1976), including, among numerous other cases and lines of authority, this Court's recent decision on free speech in judicial elections, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). It is the implications for free speech and association through campaign financing both in legislative and judicial campaigns that *Amicus* will discuss here.

From the perspective of campaign finance law, the important facts are these: A West Virginia jury returned a verdict against Respondents, A.T. Massey Coal Company, Inc., *et al.* ("Massey"), for "tortious interference with . . . contractual relations, fraudulent misrepresentation, and fraudulent concealment," and assessed compensatory and punitive damages in the amount of more than $50 million, all for actions taken by Massey at the direction of its CEO, Don L. Blankenship. Pet'rs' Br. at 5. Mr. Blankenship swore publicly that he would appeal. *See id.* The record shows that subsequently, Mr. Blankenship, (a personal owner of 250,000 shares, or 1%, of Massey stock), made independent expenditures[2] of approx-

[2] *Amicus* will describe Mr. Blankenship's independent speech and his contributions (or donations as the case may be) to "And for the Sake of the Kids" as "independent expenditures," though *Amicus* understands from the record that not all of the communications may have contained express words of election or defeat. *See Buckley,* 424 U.S. at 44 n.52. While the express

imately $3 million of his personal funds (*i.e.,* not Massey funds), to support the election of Brent Benjamin (and oppose the reelection of incumbent Justice Warren McGraw) to the West Virginia Supreme Court of Appeals. *See id.* If the jury and record are to be believed, and *Amicus* has no reason to believe otherwise, Mr. Blankenship appears to have treated his business competitors in a manner that blackens the names of honest industrialists everywhere. But there is no evidence that Mr. Blankenship ever conferred with Brent Benjamin about his decision to run for Justice, or about Mr. Blankenship's decision to spend the money, or how to spend his money, or indeed on any subject at all.

Such easy facts as bribing a judicial candidate or sale of public office do not makeup the record in this case. Petitioners may assert that Brent Benjamin was "a previously unknown lawyer," perhaps in the hope that this Court will infer Mr. Blankenship plucked Brent Benjamin from obscurity to run against Mr. Blankenship's nemesis, incumbent Justice Warren McGraw, all for the price of voting for Massey when the time came.[3] But this record supports no such inference and such unsupported innuendo cannot inform the Court's holding in this case.[4]

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advocacy distinction is of critical importance to campaign finance law, clarifying the distinction in this case is less critical.

[3] Petitioners, however, fail to explain how "a previously unknown lawyer" could receive the endorsements of all but one of the major West Virginia daily newspapers to offer endorsements shortly before the election, as did Candidate Benjamin. J.A. 674a n.27; *see also* Resp'ts' Br. at 5 & 54.

[4] If Brent Benjamin were handpicked by Mr. Blankenship and asked to run for Justice on the West Virginia Supreme Court of Appeals in exchange for an eventual vote in this case,

Contemptible as Mr. Blankenship's treatment of Petitioners may be, this Court ought not hold, first, that Mr. Blankenship's independent expenditures triggered a constitutional duty in Justice Benjamin to recuse in the Massey litigation, and, second, that Justice Benjamin's failure to recuse resulted in a denial of due process to Petitioners. Such a holding would not only be an unwise extension of this Court's due process jurisprudence, it would overturn *sub rosa* this Court's consistent holdings in *Buckley*, *Massachusetts Citizens for Life*, through *Randall,* that independent political speech does not pose the threat of "corruption or the appearance of corruption," *see Randall v. Sorrell,* 548 U.S. 230 (2006); *Federal Election Comm'n v. Mass. Citizens for Life, Inc.* ("*MCFL*")*,* 479 U.S. 238 (1986); *Buckley v. Valeo,* 424 U.S. 1 (1976); and undermine this Court's ruling in *White* that States must respect the First Amendment in judicial elections. *Republican Party of Minn. v. White,* 536 U.S. 765 (2002).

I. INDEPENDENT EXPENDITURES IN ELECTION CAMPAIGNS DO NOT CAUSE "BIAS" AS DEFINED BY THIS COURT

Generally speaking, "bias" is incompatible with due process where an adjudicator has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against [a litigant] in the case." *Tumey v. Ohio,* 273 U.S. 510, 523 (1927). "Bias" also occurs in special

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this matter would not be before this Court, and the law would have dealt with both men severely. *See generally* W. VA. CODE §§ 61-5-4 (making bribery unlawful); 61-5-5 (making demanding bribes unlawful); 61-5A-1 (Bribery and Corrupt Practices Act), 61-5A-3 (making bribery in official and political matters unlawful), 61-5A-4 (unlawful rewarding of public servants for past behavior).

cases, such as contempt proceedings, where the adjudicator has "been the target of personal abuse or criticism from the party before him." *Withrow v. Larkin,* 421 U.S. 35, 47 (1975).[5] Independent expenditures cannot be determined to create such bias without overruling this Court's longstanding jurisprudence that independent expenditures are not and cannot be corrupting.

A. Independent Expenditures In A Judicial Election Do Not Create A Direct, Personal, Substantial, Pecuniary Interest In A Candidate That Becomes A Judge

Justice Benjamin did not have a direct, personal, substantial, pecuniary interest in Mr. Blankenship's independent expenditures. Furthermore, Justice Benjamin was not the target of personal abuse or criticism from Petitioners when they appeared before him in the underlying appeal. The record shows no relationship or interest between Mr. Blankenship and Justice Benjamin other than $1,000 contributions to Justice Benjamin's campaign committee by Mr. Blankenship (J.A. 208a) and Massey's PAC (J.A. 242a). Petitioners concede that these lawful contributions are not evidence of bias on the part of Justice Benjamin. *See* Pet'rs' Br. at 16, 26.

Nothing in the record suggests that Mr. Blankenship handpicked Brent Benjamin to run against incumbent Justice Warren McGraw, either directly or through an intermediary. Brent Benjamin chose to campaign to be a Justice of the West Virginia Su-

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[5] For a detailed explanation of due process, the bias standard, and the infirmity of any so-called "appearance of bias" or "probability of bias" standards, *see* Respondents' Brief at 15-27.

preme Court of Appeals independently of Mr. Blankenship. *See* Pet'rs' Br. at 1-2. Likewise, Mr. Blankenship chose to speak through independent expenditures independently of Candidate Benjamin, and may have done so regardless of the identity of incumbent Justice McGraw's opponent. *See id.* at 2. There is no suggestion that Mr. Blankenship coordinated his independent spending with Brent Benjamin or with any member of Justice Benjamin's campaign. *See id.* at 17, 34 (acknowledging that "Justice Benjamin['s] . . . 'campaign was completely independent of any independent expenditure group,' including And For The Sake Of The Kids") (citing J.A. 673a). Mr. Blankenship's independent spending did not go to Brent Benjamin personally, or even to Candidate Benjamin's campaign account, beyond the $1,000 personal contribution and a $1,000 contribution from Massey's PAC's that Petitioners concede raise no due process concern. *See id.* at 7.

This independence and separation is in marked distinction from this Court's line of due process cases, which require a "direct, personal, substantial, pecuniary interest" on the part of a judge or adjudicator before constitutional due process is offended. *See*, *e.g.*, *Tumey,* 273 U.S. at 523. Indeed, this Court's due process jurisprudence marks a difference in kind to the situation involving Justice Benjamin, not a mere difference of degree.

Case after case demonstrates the difference. *Tumey* involved a mayor/adjudicator who earned a percentage of every fine he assessed against bootleggers. *See generally Tumey v. Ohio,* 273 U.S. 510 (1927). *Lavoie* involved a state supreme court justice who would receive damages in a pending bad-faith claim against his insurer only if he first upheld the

constitutionality of bad-faith claims against all insurers. *See generally Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986). And, *Mayberry* involved a judge who had a personal stake in protecting his reputation from a litigant that attacked him in court, personally and repeatedly, calling the judge a "dirty, tyrannical old dog," a "dirty sonofabitch." *See generally Mayberry v. Pennsylvania,* 400 U.S. 455, 456-57 (1971). Even in *Ward,* the mayor was certain that by fining more traffic offenders he would further his responsibilities for revenue production and law enforcement. *See generally Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Whether Justice Benjamin would have won but for Mr. Blankenship's actions is highly speculative. Candidate Benjamin did, in fact, raise nearly $850,000 for his campaign. *See* Pet'rs' Br. at 28 n.4. Other groups and individuals besides Mr. Blankenship made hundreds of thousands of dollars in independent expenditures. Every major daily newspaper in the state save one endorsed Benjamin for the office. *See* J.A. 674a n.27; *see also* Resp'ts' Br. at 5, 54. Moreover, having been elected to office with no *quid pro quo* or even vague understanding owed to Mr. Blankenship, Justice Benjamin could not be at all certain that his reelection more than eight years hence would result if he ruled for Massey—particularly if Mr. Blankenship is the unscrupulous and ruthless character lacking in loyalty or fair play that Petitioners portray. The idea that Justice Benjamin would obtain a "'direct, personal, substantial, pecuniary'" benefit by finding for Massey is at best "highly speculative." *Lavoie*, 475 U.S. at 822 (citation omitted), 826.

B. Even If The Court Adopted An "Appearance Of Bias" or "Probability of Bias" Standard, Independent Expenditures In A Judicial Campaign Do Not Cause An "Appearance" or "Probability" Of Bias In The Judge Elected

Brent Benjamin did not "get" $3 million. The most that can be said that he "got" was elected, though this was necessarily the result of many factors, not the least of which were the intervening decisions of hundreds of thousands of West Virginia voters. While Candidate Benjamin can control contributions made directly to his campaign account (and has the ability to refund them), he has no control over independent expenditures made by third parties, and no ability to refuse or refund them. The record does not support the conclusion that Justice Benjamin's ruling in this underlying case was a payoff (*quo*) for Mr. Blankenship's spending (*quid*). And as the independent expenditures—made two years before this case ever reached the West Virginia Supreme Court of Appeals—could not be undone, Mr. Blankenship could neither withhold nor demand refund of the $3 million he had spent if Justice Benjamin had ruled against Massey, and for Petitioners, in the underlying appeal. As it is said in contract law, more in recognition of reality than as an aspiration, "it is . . . well settled that past consideration is no consideration." *See*, *e.g.*, *Murray v. Lichtman*, 339 F.2d 749, 752 n.5 (D.C. Cir. 1964) (citing *Glascock v. Comm'r of Internal Revenue,* 104 F.2d 475, 477 (4th Cir. 1939); 1 WILLISTON ON CONTRACTS § 142 (3d ed. 1957)). That statement is no less true where, as in the case here, there is not even the allegation of an agreement or relationship between the parties.

Furthermore, if election or defeat is all that is at stake for Justice Benjamin eight years hence, Justice Benjamin's actions in this case, the resulting media firestorm, and anger throughout West Virginia and many quarters of this nation, may far from ensure his reelection but rather damage his prospects for it. In short, Justice Benjamin's failure to recuse in the Massey matter may actually make him vulnerable at reelection time.[6] Moreover, Justice Benjamin was almost certainly aware of this at the time he heard the Massey case, both on the merits and the recusal motions. As Justice O'Connor stated while criticizing the election of judges generally, "[e]lected 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." *White*, 536 U.S. at 789 (O'Connor, J., concurring). For years, in

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[6] *See*, *e.g.*, Allan N. Karlin & John Cooper, Editorial, *Perception that justice can be bought harms the judiciary*, THE SUNDAY GAZETTE MAIL (Charleston, W. Va.), Mar. 2, 2008, at 3C; Editorial, *Finally*, REGISTER HERALD (Beckley, W. Va.), Feb. 18, 2008; Editorial, *Bravo*, CHARLESTON GAZETTE (W. Va.), Feb. 16, 2008, at 4A; William Kistner, *Justice for Sale*, AMERICAN RADIOWORKS (2005) (available at <http://americanradioworks.publicradio.org/features/judges/>); Cecil E. Roberts, Editorial, *Blankenship's hollow rhetoric: His money defeated McGraw, now he must help miners*, CHARLESTON GAZETTE (W. Va.), Dec. 13, 2004, at P5A; Edward Peeks, Editorial, *How Does Political Cash Help Uninsured?*, CHARLESTON GAZETTE (W. Va.), Nov. 9, 2004, at 2D; Brad McElhinny, *Next court race could be just as nasty*: *Justice Larry Starcher could be a target in 2008 if he seeks to stay on bench*, CHARLESTON DAILY MAIL (W. Va.), Nov. 4, 2004, at 1A; Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, WASH. POST, Nov. 4, 2004, at A15; *Cf.* Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at A1; Paul J. Nyden, *Coal companies provide big campaign bucks*: *Brent Benjamin raking in heaviest contributions*, CHARLESTON GAZETTE (W. Va.), Oct. 15, 2004, at 1A.

the face of numerous studies that have found that campaign contributions play no statistically significant role in legislator behavior, those favoring restrictions on political speech in the form of limitations on campaign contributions and independent expenditures have argued that the influence to be feared comes in issues, out of the limelight. *See e.g.,* E. Joshua Rosenkranz, *Faulty Assumptions in 'Faulty Assumptions',* 30 CONN. L. REV. 867, 879 (1998) (arguing that studies showing that campaign contributions have little effect on a legislator's behavior should be disregarded because the influence of contributions is found in "stealth issues . . . on which public attention is not focused.") If, however, there was ever a judicial "issue" of high public interest, this case is it. Justice Benjamin will face a tough reelection contest for his alleged role in the Massey affair and his failure to recuse—and Justice Benjamin knew it at the time he decided not to recuse, just as he knows it now. *See*, *e.g.*, J.A. 667a-672a, 691a-697a (Benjamin, Acting C.J., concurring). Thus, Justice Benjamin is not indebted to Mr. Blankenship or to Massey. And if we are to presume a bias, a "probability" of bias, or even the "appearance" of one, it would as likely have been to rule *against* Massey in the underlying action, not for it.

II. UNDER THIS COURT'S LONGSTANDING FIRST AMENDMENT JURISPRUDENCE, NEITHER THE "INTENT" OF THE SPEAKER, NOR ANY PURPORTED "BENEFIT" TO, OR "GRATITUDE" OF, A CANDIDATE RESULTING FROM INDEPENDENT EXPENDITURES CREATES "BIAS," ITS "APPEARANCE," OR ITS "PROBABILITY" IN A JUDGE

A State may regulate the "procedures under which its laws are carried out . . . and its decision in this re-

gard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Lavoie*, 475 U.S. at 820-21. Independent expenditures in judicial elections, however, do not "offend" a "principle . . . so rooted in the traditions . . . of our people." Independent expenditures in elections *are* an embedded tradition of our people and a fundamental part of our political process. Nonetheless, Petitioners claim that "[t]he likelihood that Justice Benjamin harbored, and sought to repay [a] debt of gratitude . . . is *not diminished* by Mr. Blankenship's use of independent expenditures, rather than direct contributions, to furnish his financial support." Pet'rs' Br. at 17 (emphasis added). But this Court in *Buckley* has said it is, indeed, diminished, and any expansion of "bias" under this Court's due process jurisprudence would erode the Court's First Amendment jurisprudence on campaign expenditures, affirmed most recently in *Randall*, 548 U.S. at 241-46.

Since *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court has repeatedly shown that it will only find corruption or its appearance in situations that involve direct contributions to candidates or to groups intimately associated with candidates.[7] Contribution limits "prevent[ ] corruption and the appearance of

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[7] The single narrow exception to this statement, so-called "corporate-form corruption," is not applicable to this case. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (identifying the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" as "a different type of corruption").

corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions," *id.* at 25, "while leaving persons free to engage in independent political expression and to associate actively through volunteering their services," *id.* at 28.

"Unlike [direct candidate] contributions, . . . independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 46. As the Court explained, the "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 46-47.[8] The Court's analysis retains its validity to-

[8] In their brief, Petitioners mischaracterize and attempt to rely on a statement from *Federal Election Commission v. Wisconsin Right to Life, Inc.* ("*WRTL II*"), 127 S. Ct. 2652 (2007), to assert "there is no reason to believe Justice Benjamin is any less likely to feel a debt of gratitude to Mr. Blankenship because . . . his financial support was provided through" wholly independent, rather than direct, means. *See* Pet'rs' Br. at 34 (citing *WRTL II*, 127 S. Ct. at 2672). In *WRTL II*, Chief Justice Roberts wrote: "We have suggested that this interest [in preventing corruption] might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.'" 127 S. Ct. at 2672 (quoting *Buckley*, 424 U.S. at 45). Chief Justice Roberts, in turn, was quoting *Buckley*, which stated: "First, assuming, *arguendo*, that large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions, [FECA's expenditure limit] does not provide an answer that sufficiently relates to the elimination of those dangers." 424 U.S. at 45. So what this Court has really said on the topic is not the unequivocal

day. For example, Professor Roy Schotland has documented instances in which independent expenditures in state judicial elections have "backfired" against the preferred candidates. *See*, *e.g.*, Roy A. Schotland, *Comment on Professor Carrington's Article "The Independence and Democratic Accountability of the Supreme Court of Ohio",* 30 CAP. U. L. REV. 489, 490 (2002). Judicial elections are elections, no less so than any other. *See generally White*, 536 U.S. at 784-88 (including statements noting that "the difference between judicial and legislative elections" is "greatly exaggerate[d]," and that "the First Amendment does not permit . . . leaving the principle of elections in place while preventing . . . discussi[on concerning] what the elections are about"). Therefore, even if an "appearance of bias" were the standard appropriate to determine whether judicial recusal was mandated by the Fourteenth Amendment's Due Process Clause, independent expenditures do not create an "appearance of bias," just as independent expenditures do not create an "appearance of corruption." *See*, *e.g.*, *Buckley*, 424 U.S. at 46; *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). So long as a State chooses its judges by popular election, those elections must permit the speech of independent speakers. The "'power to dispense with elections altogether does not include the

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statement (cited by Petitioners) that "in some circumstances, large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions," but rather the ridiculously equivocal statement that, *for the purpose of argument*, the Supreme Court has *suggested* that the interest in combating corruption *might* justify *some* limits on expenditures because it *may* be, in *some* circumstances, that they pose a risk of corruption. And then this Court proceeded to strike down expenditure limits in FECA.

lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'" *White*, 536 U.S. at 788 (quoting *Renne v. Geary,* 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) (citation omitted). According participants the free speech and association rights that attach to their roles in judicial elections is no violation of due process, for "[j]udicial elections were generally partisan during" the "19th and [early] 20th centur[ies]," with "the movement toward nonpartisan judicial elections not even beginning until the 1870's." *White*, 536 U.S. at 785.

A. A Purported "Benefit" To Candidate Benjamin From Independent Expenditures Is Not Enough To Create "Bias" In Justice Benjamin, And A Finding That Any Purported "Gratitude" Creates "Bias" Would Prove Too Much

Petitioners claim that Mr. Blankenship's "strong personal and professional interest in the outcome of the case . . . created a compelling reason for Justice Benjamin to [have and] repay [a] debt of gratitude to Mr. Blankenship by casting the deciding vote in Massey's favor." Pet'rs' Br. at 17. In short, Petitioners argue that Candidate Benjamin "benefited" from Mr. Blankenship's spending, was "grateful" for it, and, thus, was *compelled* to repay Mr. Blankenship for it. This last leap in logic, however, is unsupported by either the record or the law.

First, this Court has explicitly rejected the argument that Congress may restrict the funding of independent activity that merely "benefits" a candidate.

See, *e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 156 n.51 (2003) ("Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate.") (emphasis in original)[9]; *see also id.* at 354-55 (Rehnquist, C.J., dissenting).

Second, Petitioners' related argument—that Justice Benjamin's alleged "gratitude" for Mr. Blankenship's independent expenditures caused Justice Benjamin to be unconstitutionally biased on behalf of Massey—would prove too much. Its logic can be extended to find "bias" in any of a range of other independent political activity, in multiple forms and from multiple sources, long recognized as vital to democracy. A group of community organizers that work to get out the vote in neighborhoods that disproportionately support a candidate would "benefit" that candidate and may make him "grateful." But would it violate due process to have those organizations appear in a case before him? How about the community members who lead or participate in the organizations?

Candidates may enjoy disproportionate popularity among environmentalists, or women, or union members, or residents of a certain geographical area, etc.;

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[9] That the independent groups addressed were members of the institutional press is of no constitutional significance. "'[The] purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ". . . the liberty of the press is no greater and no less . . ." than the liberty of every citizen of the Republic.'" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) (quoting *Pennekamp v. Fla.*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)).

the votes of such interest groups are also valuable to the candidate. Does it violate due process for a judge to sit in a case where these groups, or their members or supporters, appear before him?

Millions of dollars were spent by non-profit organizations in West Virginia opposing Candidate Benjamin. One independent opponent organization, 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 in this case (Buchanan Ingersoll). *See* John O'Brien, *Caperton was anti-Benjamin from the start,* W. VA. RECORD, Jan. 24, 2008 (available at <https://wvrecord.com/news/206942-caperton-was-anti-benjamin-from-the-start>). And there were other independent groups beside And for the Sake of the Kids that opposed incumbent 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 J. Nyden, *Coal, doctors' groups donated to anti-McGraw effort: Massey President Donald Blankenship remains largest donor,* CHARLESTON GAZETTE, Jan. 7, 2005, at P5A. Citizens Against Lawsuit Abuse also ran critical ads. *See* Juliet A. Terry, *Benjamin Hopes to Shine Light on Justice*, STATE J., Nov. 5, 2004, at 4. Would it violate the Fourteenth Amendment's Due Process Clause if Justice Benjamin—or Justice Warren McGraw had he won—were to hear a case involving any of these parties? Or heard a matter involving any of their contributors, members, volunteers, or supporters?

Judicial candidates and officeholders often feel gratitude toward media outlets that endorse their candidacies. Studies of the electoral effects of newspaper endorsements indicate that such endorsements are typically worth between one and five percentage points to a candidate. Stephen Ansolabehere, Rebecca Lessem & James M. Snyder, Jr., *The Orientation of Newspaper Endorsements in U.S. Elections, 1940-2002*, 1 Q. J. OF POL. SCI. 393, 394 & n.2 (2006) (collecting citations and data from a number of studies, and observing that a "range of studies of aggregate election results, survey data, and laboratory experiments find that when endorsements occur they typically increase the vote share of the endorsed candidate by about 1 to 5 percentage points"). Again, by Petitioner's logic media outlets could not be permitted to appear before the West Virginia Supreme Court of Appeals—or, for that matter, any elected bench—against another party while they continue their tradition of judicial candidate endorsements, lest the media outlets open the door to "bias" or its "appearance."

Evidence, however, suggests that the public does not perceive "gratitude" or an "appearance of gratitude" to be the pervasive problem that Petitioners assert. A telephone survey conducted by Rasmussen Reports in 2008 "found that 55% believe media bias is more of a problem than big campaign contributions," while 36% disagree. Rasmussen Reports, *55% Say Media Bias Bigger Problem than Campaign Cash*, Aug. 11, 2008 (available at <http://www.rasmussenreports.com/public_content/politics/election_20082/2008_presidential_election/55_say_media_bias_bigger_problem_than_campaign_cash>). The survey also found that just "22% believe it would be a good idea to ban all campaign commercials so that voters could

receive information on . . . campaign[s] only from the news media and the internet. Sixty-six percent (66%) disagree and think that . . . it's better to put up with an election-year barrage of advertising rather than rely on the news media." *Id.*

Nonetheless, Petitioners assert that "if a litigant's or attorney's campaign support for a judge generates an objective probability of bias in favor of one of the parties to a case, due process requires the judge's recusal." Pet'rs' Br. at 27. In one sense, Petitioner's assertion merely begs the question: Does campaign support "generate[ ] an objective probability of bias"? This Court's jurisprudence has so far said no. In another sense, Petitioners' assertion has already been addressed and rejected by this Court in *White,* when it ruled that "[i]f . . . it violates 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." *White,* 536 U.S. at 782. But the practice of electing judges is not a violation of due process. *See id.* at 782-83. Indeed, as Justice Kennedy has observed, states "may choose" to exercise their prerogative "to have an elected judiciary," *id.* at 794 (Kennedy, J., concurring), and that choice is wholly consistent with not only the federalism principles embodied in the U.S. Constitution, but also its commands as the "the supreme Law of the Land," U.S. CONST. art. VI., cl. 2, including the Due Process Clause of the Fourteenth Amendment.

The dead end into which Petitioners would take this Court can be found in considering what would have occurred had incumbent Justice McGraw won the election. Petitioners intimate, perhaps entirely unintentionally, that this Court must find a due

process violation in this case to correct an improper relationship between Mr. Blankenship and Justice Benjamin. But whatever recusal standard Petitioners would apply to Justice Benjamin would have to apply equally to his opponent, Justice McGraw, for in a system of winner-take-all elections, whether the $3 million was spent independently to support the judicial candidate or to oppose him matters little to the perceived impartiality of the judge. The flip side of spending for Candidate Benjamin is spending against Candidate McGraw; the flip side of "gratitude" is anger and revenge; the flip side of "benefit" is harm. Surely if Justice Benjamin's involvement creates an appearance of bias, so would that of Justice McGraw, the target of Mr. Blankenship's expenditures.

Petitioners argue that Mr. Blankenship set out to "change the composition" of the West Virginia Supreme Court that would hear Massey's appeal, which they impliedly suggest is an illegitimate goal. Pet'r's Br. at 1. But it should be apparent that under Petitioners' due process and recusal theory, Mr. Blankenship would be guaranteed success in this endeavor, as Mr. Blankenship's independent speech would have rid him of incumbent Justice Warren McGraw whether he lost or won. If this Court holds that Mr. Blankenship's past independent spending creates a due process violation of constitutional dimension where the elected judge fails to recuse, then the Blankenships of the world will always know how to rid themselves of their Justices McGraw.

B. "Bias" In An Elected Judge Cannot Be Inferred From The "Intent" Of An Independent Speaker In A Judicial Election Campaign

Petitioners allege also that we may infer from Mr. Blankenship's actions that he intended to defeat incumbent Justice McGraw. *See* Pet'rs' Br. at 29 ("Mr. Blankenship did more than spend vast sums of money to support Justice Benjamin's campaign. He also actively campaigned for Justice Benjamin and solicited donations on his behalf . . . urging doctors to [contribute] . . . because '[i]f Warren McGraw gets re-elected . . . your insurance rates will almost certainly be higher . . .'"). Petitioners also allege that "the timing of Mr. Blankenship's campaign support strongly suggests that it was intended to influence the outcome of this $50 million appeal." *Id.* One may conclude that Mr. Blankenship *intended* to defeat incumbent Justice McGraw. One may even conclude that Mr. Blankenship *intended* that his spending would result in the election of a judge more likely than Justice McGraw to overturn a verdict in the Massey case. This is, in essence, the "intent" of any independent speaker in any election campaign: to defeat one candidate for office and elect another. And many such speakers often "intend," or at least hope, that, after an election the policy or approach of one public official will end and that another will take its place. But "a speaker's motivation is entirely irrelevant to the question of constitutional protection." *WRTL II,* 127 S. Ct. at 2665-66.

This Court "in *Buckley* ha[s] already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates." *WRTL II*, 127 S. Ct. at 2665 (citing *Buckley*, 424 U.S. at 43-44). It

should reject a test that measures the intent of speakers acting wholly independently of an adjudicator to decide which recusal motions must be granted or rejected under the Fourteenth Amendment's Due Process Clause. Echoing the Chief Justice in *WRTL II*, a due process test "focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time" and costing the same amount would cause no bias and require no recusal for one group of litigants, but would create bias and demand recusal for another. 127 S. Ct. at 2666.

III. PETITIONERS AND THEIR *AMICI* SHOULD NOT BE PERMITTED TO USE THIS CASE AS A BACKDOOR ATTEMPT TO UNDERMINE THE COURT'S HOLDINGS IN *BUCKLEY, WHITE*, AND THEIR PROGENY

Simple analysis leads to an inescapable conclusion: If independent expenditures now create "bias" they must create "corruption." But such a holding would be contrary to this Court's 33-year-old holding in *Buckley,* with *Buckley* the inevitable casualty.

A. The "Bias" Standard Must Mark Activity And Interests More Personal, Substantial, Pecuniary, And Direct Than Does The "Corruption" Standard

"Corruption," as defined in *Buckley,* is the danger of *quid pro quo* arrangements. *See* 424 U.S. at 26-27. "Bias," as delineated in this Court's opinions, seems strikingly similar, as when an adjudicator finds bootleggers guilty *for* a percentage of the penalty, *see generally Tumey v. Ohio*, 273 U.S. 510 (1927); or a judge upholds the constitutionality of bad-faith claims against all insurers *for* damages in his pending bad-faith claim against his insurer, *see generally*

Aetna Life Ins. Co. v. Lavoie, 465 U.S. 813 (1986); or adjudges a man guilty *to burnish* the judge's reputation as a one-man grand juror, *see generally In re Murchison*, 349 U.S. 133 (1955); or fines a man, as adjudicator, *to burnish* the adjudicator's reputation as the municipality's revenue generator and law enforcer, *see generally Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

The activity captured in the "bias" standard, however, is more acute or more insidious than the activity captured by the "corruption" standard because bias always involves a direct, personal, substantial, or pecuniary interest in reaching a conclusion against [a litigant] in the case. *See*, *e.g.*, *Tumey*, 273 U.S. at 523; *accord Lavoie*, 475 U.S. at 822. Campaign contributions, however, *cannot* convey a direct, personal, or pecuniary interest in the legislative candidate. Bribery, the sale of votes for personal benefit, covers legislators and is already illegal, as the *Buckley* Court acknowledged when it held that limiting campaign contributions serves a compelling state interest that goes beyond bribery statutes. 424 U.S. at 27-28. What's more, federal campaign finance law prohibits the use of contributions for the personal benefit of any person, *see* 2 U.S.C. § 439a, and still the Court held, as a matter of constitutional law, that contributions may be limited to prevent the "corruption" of candidates and officeholders or the "appearance" of that corruption.

Independent expenditures, however, do not pose a threat of "corruption" or the "appearance of corruption"; the *Buckley* Court was clear about that. 424 U.S. at 46-47 ("independent expenditures . . . do[ ] not . . . appear to pose dangers of real or apparent corruption," and "[u]nlike contributions, . . . indepen-

dent expenditures may . . . provide little assistance to the candidate and . . . may prove counterproductive"). Therefore, this Court must square the following propositions:

> (1) If independent expenditures cannot pose a threat of "corruption or its appearance" to a legislator who won't abstain;
>
> (2) And if "corruption or its appearance" must mark activity short of conferring personal benefits on the legislator supported;
>
> (3) While "bias" in the judiciary always requires a direct, personal, pecuniary benefit;
>
> (4) Then how can independent expenditures cause "bias or its appearance" in a judge who will not recuse?

B. If The Court Finds "Bias" In This Case, It Must Of Necessity Reconsider Its Opinions In *Buckley* And *White*

The Court should not pass quickly over these propositions and the resulting question. If this Court rules that independent expenditures can create "bias" or its "appearance" in a judge who will not recuse, then the edifice this Court has painstakingly erected to shelter independent political speakers from the threat of government-imposed limitations would collapse. For if independent expenditures would create the greater, more direct, personal, substantial, pecuniary benefit necessary to a finding of "bias," then independent expenditures must always create the lesser potential benefit necessary to a finding of "cor-

ruption," leading inexorably to the overruling of *Buckley and MCFL.*[10]

Furthermore, this Court should not be lured into thinking that the difference between the judicial and legislative functions permits a finding that independent expenditures that cannot create a threat of *quid pro quo* in a legislator *must* create a direct, personal, substantial, pecuniary interest in a judge. While it is true that a judge has absolutely no interest in the outcome of the dispute between the parties before the bench, and that a legislator is supposed to enact policy for constituents and the public at large, the role of independent expenditures in judicial and legislative campaigns is the same. They are both speech—indeed, constitutionally protected speech—within candidate elections. *See*, *e.g.*, *White*, 536 U.S. at 795 (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech."); *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497; *Buckley*, 424 U.S. at 45-51.

While this Court has never "assert[ed] or impli[ed] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office," *White*, 536 U.S. at 783, this Court must recognize that if the mere existence of an independent expenditure campaign in a judicial election creates an unconstitutional threat of "bias" or its

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[10] Moreover, should independent expenditures become limited or prohibited on such a basis, *Buckley's* holding regarding limits on contributions to candidate campaigns must be re-examined, for that holding relied in part on the idea that First Amendment burdens were minimized because speakers could still make independent expenditures. 424 U.S. at 28.

"appearance" in a judge who rejects recusal, then inferior courts will, over time, infer that the mere existence of independent expenditures in legislative elections must create the threat of "corruption" or its "appearance" in legislators who won't abstain. This Court should avoid the confusion and the unavoidable weakening of protections for core independent political speech that will inevitably result from such a holding under the Fourteenth Amendment's Due Process Clause.

Amicus respectfully suggests that for some of the *amici* supporting Petitioners, this case is less about due process than it is about getting the Court to overrule *sub rosa Buckley's* protections for independent expenditures in election campaigns[11] despite this Court's repeated rejection of their overtures in *Randall v. Sorrell,* 548 U.S. 230 (2006) (expenditure lim-

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[11] Such *amici* have participated in most any and every effort to impose or further campaign expenditure and/or contribution limits for independent speakers. *See*, *e.g.*, *Randall v. Sorrell*, 548 U.S. 230 (2006) (Brennan Center for Justice Amicus Br.) (Campaign Legal Center, Democracy 21, and Public Citizen Amicus Br.); *Federal Election Comm'n v. Beaumont*, 539 U.S. 146 (2003) (Public Citizen, Common Cause, Democracy 21, Campaign and Media Legal Center, and Center for Responsive Politics Amicus Br.); *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087 (9th Cir. 2008) (Campaign Legal Center Amicus Br.); *Duke v. Leake*, 524 F.3d 427 (4th Cir. 2008) (Campaign Legal Center Amicus Br.); *North Carolina Right to Life, Inc. v. Leake*, 482 F. Supp. 2d 686 (E.D.N.C. 2007) (Campaign Legal Center and Democracy 21 Amicus Br.), *aff'd in part and rev'd in part*, 525 F.3d 274 (4th Cir. 2008); *SpeechNow.org v. Fed. Election Comm'n*, 567 F. Supp. 2d 70 (D.D.C. 2008) (Campaign Legal Center and Democracy 21 Amicus Br.). *See also* Brennan Center for Justice, *If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics* (2000).

its on candidate speech unconstitutional); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (contribution limits on independent expenditures funded by individuals unconstitutional); *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981) (plurality op. and Blackmun, J., concurring) (same); back to *Buckley v. Valeo*, 424 U.S. 1 (1976) (expenditure limits on speech funded by individuals unconstitutional).

These *amici* now say to this Court, almost breezily, that "*[d]istinctions* between contributions and expenditures have only a marginal salience when it comes to the fundamental fairness concerns at the core of due process," and that "[t]his case . . . allows the Court to resolve the due process issues *without any need for inquiry* into the permissibility of restrictions on expenditures supporting a candidate vis-à-vis contributions to a candidate." Brief of *Amicus Curiae* The Brennan Center for Justice at NYU School of Law, The Campaign Legal Center, and The Reform Institute In Support of Petitioners, at 23 (emphasis added). Enter the Trojan horse.

IV. WEST VIRGINIA'S REMEDY IS TO RENOUNCE JUDICIAL ELECTIONS OR ERECT "RECUSAL STANDARDS MORE RIGOROUS THAN DUE PROCESS REQUIRES"

If this Court holds that independent expenditures in judicial elections create a violation of due process where the targeted candidate—or his opponent—later fails to recuse, it will signal that recusal must come, not because of a rigorous judicial canon designed to prevent an unwanted appearance, but as a matter of constitutional law. It would create an untenable and unnecessary conflict of constitutional

rights and jurisprudence. One citizen's right to due process, another's right to free speech through independent expenditures, and a State's choice of judicial elections over judicial appointments could not exist together. In time, either the Due Process right or the First Amendment right would have to go, or the well-established prerogative of States to elect their judges would have to give way.[12]

The finding of a due process violation in this case will invite some State, somewhere, quickly to test the limits of the finding with legislation banning or limiting independent expenditures in judicial elections. Foes of independent speech would then be in the catbird seat, and speech defenders might wish this Court had this case back.[13] Speech defenders would seek to save independent expenditures from limita-

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[12] Due process rights would not be the casualty; nothing is more fundamental to our system of government than the due process of law. *See New York State Bd. of Elections v. Lopez Torres,* 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring) ("The rule of law, presupposes a functioning judiciary"). Nor is it likely that judicial elections would be the casualty. The casualty will be the First Amendment right, in the form of fully protected independent expenditures in judicial elections and, by an inevitable extension of logic, in elections generally.

[13] This Court harbors no illusions that test cases may come and come quickly, even from statehouses. *See*, *e.g.*, *Landell v. Sorrell*, 382 F.3d 91, 156 n.2 (2d Cir. 2002) (Winter, J., dissenting) ("The desire to challenge *Buckley* . . . is exemplified by an astonishing statement of Vermont's Secretary of State . . . [in which] she cautioned against any amendment . . . that would . . . 'frustrate the express legislative goal of giving the Supreme Court an opportunity to reevaluate its decision in *Buckley v. Valeo*.'"), *rev'd sub nom*, *Randall v. Sorrell*, 548 U.S. 230 (2006); *see also Landell v. Sorrell*, 406 F.3d 159, 177 (2d Cir. 2005) (Jacobs, J., joined by Walker, Cabranes & Wesley, JJ., disenting from denial of rehearing en banc) (same).

tions, perhaps by arguing that the narrowly tailored option is in rigorous recusal canons, not in bans or limits on independent expenditure campaigns. But that assertion would surely ring hollow if this Court had already held that a litigant's independent expenditures in a past judicial election causes "bias," its "probability," or its "appearance," that results in a due process deprivation.

Better for this Court to avoid such a conflict by determining now that the State's remedy (should it want one) against an unwanted, but not unconstitutional, appearance is in recusal canons more rigorous than due process requires, and thus take a preemptive step toward the preservation of independent expenditures in elections. There need not be a due process violation for West Virginia to have a remedy. *See*, *e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Court need not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (citations omitted). West Virginia's remedy[14] is provided in the

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[14] W. VA. CODE § 3-8-12(g) prohibits contributions in excess of $1,000 to a so-called 527 organization operating in West Virginia. This Court should neither suggest that provision to be the remedy here, nor consider that provision's constitutionality without development and briefing in another case where the issues and questions involved have been fully aired. Indeed, a recent decision by a district court in West Virginia calls that statutory provision into question, *see Center for Individual Freedom v. Ireland*, Nos. 1:08-CV-00190 & 1:08-CV-01133, 2008 U.S. Dist. LEXIS 83856 (S.D. W. Va. 2008), and this Court's own precedents suggest the same, *see*, *e.g.*, *WRTL II,* 127 S. Ct. at 2671-73 (speech not the functional equivalent of express advocacy is not regulable, despite the nature of the organization speaking); *Buckley,* 424 U.S. at 45-48 (independent expenditures pose no threat of corruption or its appearance); *Citizens Against*

words of Justice Kennedy. It may either appoint its judges or adopt recusal standards *more rigorous* than the Fourteenth Amendment's Due Process Clause *requires*[15]:

> [West Virginia] may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. *It may adopt recusal standards more rigorous than due process requires*, and censure judges who violate those standards. *What* [*West Virginia] may not do*, however, is censor what the people hear as they undertake to decide for

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Rent Control v. City of Berkeley, 454 U.S. 290, 298-300 (1981) (limitations on contributions to issue advocates unconstitutional).

[15] Respondents, in a brief opposing *certiorari*, mentioned that if, under operation of a rigorous recusal canon, "lawyers and litigants knew that their contributions or [independent] expenditures might force a judge's recusal, then they could be chilled from exercising their First Amendment rights." Brief for Resp'ts in Opp'n at 22. But this is incorrect. The interest of the citizen who runs independent expenditures in judicial elections is in convincing his fellow citizens of the better judge(s) to sit on the bench in his state, not in having a particular judge hear his case, just as a judge has no right to hear a particular case. Indeed, a litigant possesses no right to have his case heard by a particular judge, *see Sinito v. United States,* 750 F.2d 512, 515 (6th Cir. 1984) (collecting cases); *see also* 46 AM. JUR. 2d Judges § 25 ("litigants have no right to have, or not have, any particular judge of a court hear their cause"), and a judge possesses no right to hear or decide a particular case unless it is assigned to him pursuant to the standard procedures used in his jurisdiction. As this Court said in passing over 80 years ago, "[i]n [being recused from a case] there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in particular case; of what concern to other parties to have him so preside?" *Berger v. United States,* 255 U.S. 22, 36 (1921).

> themselves which candidate is most likely to be an exemplary judicial officer.

White, 539 U.S. at 794 (Kennedy, J., concurring) (emphasis added). "The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech." *Id.* at 795. Likewise, the State cannot opt for an elected judiciary and then assert that judicial impartiality can occur only in the absence of speech. Petitioners' argument, if successful, would undercut longstanding and recently reaffirmed holdings in campaign finance law—holdings that cannot be cabined to judicial elections, thus undermining speech in elections generally.

CONCLUSION

For the foregoing reasons, the decision of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted,

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