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 THE CONFERENCE OF CHIEF JUSTICES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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521 F. Supp. 2d 351 (E.D. Pa. 2007) 13

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Turner v. *Louisiana*, 379 U.S. 466 (1965).......... 21

Ungar v. *Sarafite*, 376 U.S. 575 (1964) 21

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In re Watson, 794 N.E.2d 1 (N.Y. 2003)............. 12

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Wis. Stat. § 11.50... 7

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Minn. Code of Judicial Conduct Canon 5(A)(3)(d)(i) (2000).. 12

Mont. Code of Judicial Conduct R. 2.12 (2008).. 17

Tex. R. Civ. P. 18b(2).. 17

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2005 Annual Report of the Illinois Courts: Administrative Summary 24

In the Matter of the 2008 Montana Code of Judicial Conduct, No. AF 08-0203 (Mont. Dec. 12, 2008) 17

ABA Model Code Canon 3(E)(1) (1990)............... 17

Shirley S. Abrahamson, *Speech: The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973 (2001).. 10

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Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55 (2000) 17

Admin. Office of the U.S. Courts, *Judicial Business 2007*, http://www.uscourts.gov/judbus2007/2007judicial%20business.pdf 3

Am. Bar Ass'n, *Report of Task Force on Lawyers' Political Contributions (Part Two)* (1998) 8

Am. Bar Ass'n, *Report of the Commission on Public Financing of Judicial Campaigns* (2002), http://www.abanet.org/judind/pdf/commissionreport4-03.pdf 7

Am. Judicature Soc'y, *History of Reform Efforts*, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm 5, 6

Am. Judicature Soc'y, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm 5

Am. Judicature Soc'y, *Press Release: Voters in Four Jurisdictions Opt for Merit Selection on November 4* (2008), http://www.ajs.org/selection/sel_voters.asp 6

Asker, *'82 Supreme Court Races Signal End of Era, Assert Winners, Losers*, Houston Post, May 3, 1982 24

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Associated Press, *Chief Justice Asks U.S. Chamber of Commerce to Stop Running TV Ads*, Comm. Appeal, Oct. 22, 2000............ 27

Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. Tex. L. Rev. 911 (2007).................................... 17

Bert Brandenburg & Leo A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 Geo. J. Legal Ethics 1229 (2008)................................. 24

Br. of Conference of Chief Justices as *Amicus Curiae* in *Republican Party of Minn.* v. *White*, No. 01-521 (Feb. 19, 2002) 10, 11

Benjamin Cardozo, *The Nature of the Judicial Process* (1921)................................... 9

Anthony Champagne, *Interest Groups and Judicial Elections*, 34 Loy. L.A. L. Rev. 1391 (2001).. 27

Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53 (1986) 24

Conference of Chief Justices, Resolution of February 7, 2007, http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html...................................... 6

Susan Finch, *Tulane Law School Issues Apology to Louisiana Supreme Court*, Times-Picayune, Sept. 16, 2008....................... 25

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Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* (2d ed. 2007)................................ 2, 3, 14, 17

Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L. Rev. 563 (2004).......................... 16

Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached a "Tipping Point"—And How To Keep Our Courts Fair and Impartial* (Justice at Stake Campaign 2004) 8

Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 Washburn L.J. 503 (2007) 24

Thomas A. Gottschalk, *Judicial Recusal as a Campaign Finance Reform* (Sandra Day O'Connor Project on the State of the Judiciary, 2008 Conference: Our Courts and Corporate Citizenship) 24

Dan Kane, *Fund 'Rescued' Candidates from Themselves*, News & Observer, Oct. 24, 2008.. 8

Andrew L. Kaufman, *Cardozo* (1998) 9

R. LaFountain, *et al.*, *Examining the Work of State Courts, 2007: A National Perspective from the Court Statistics Project* (Nat'l Ctr. for State Courts 2008)...... 3

TABLE OF AUTHORITIES—Continued

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Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. Times, Jan. 29, 2008 25

M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. App. Prac. & Process 45 (2005) 17

Vernon Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul. L. Rev. 1291 (2008) 25

Per Curiam Opinion Concerning Amendments to Canons 5 and 6 of the Code of Judicial Conduct, 61 Tex. B.J. 64 (Tex. 1998) 11

Pet. in *Avery* v. *State Farm Mut. Auto. Ins. Co.*, No. 05-842 (Dec. 27, 2005) 24

Pet. in *Consol. Rail Corp.* v. *Wightman*, No. 99-950 (Mar. 6, 2000) 28

James Sample, *et al.*, *The New Politics of Judicial Elections 2006: How 2006 Was the Most Threatening Year Yet to the Fairness and Impartiality of Our Courts—And How Americans Are Fighting Back* (Justice at Stake Campaign 2006) 8

James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards* (2008) 16, 17

TABLE OF AUTHORITIES—Continued

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Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. M.S.U.-D.C.L. 849 27

Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L.J. 1077 (2007).. 6

Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059 (1996).. 19

Bradley A. Siciliano, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 Hofstra L. Rev. 217 (1991)............. 17

Wis. Gov't Accountability Bd., *Reports Filed Electronically*, http://elections.state.wi.us/financereport.asp 7

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BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*[1]

The Conference of Chief Justices is comprised of the Chief Justices or Chief Judges of the highest courts of each State, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam and the Virgin Islands. Since 1949, the Conference has been a leading

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, and its counsel made such a contribution.

national voice on important issues concerning the administration of justice.

The Board of Directors of the Conference of Chief Justices unanimously authorized the filing of an *amicus curiae* brief in this case by a special vote. Where, as here, an appeal is from a decision of a state Supreme Court, Conference policy provides that the Conference may file an *amicus* brief *only* if critical interests of the state courts are at stake, as they are in this case. In such cases, it is the policy of the Conference that it not take a position on the specifics of the decision of the state Supreme Court at issue. This *amicus* brief, therefore, does not take a position on whether the Due Process Clause of the Fourteenth Amendment required a Justice of the West Virginia Supreme Court to step aside in this appeal. This brief has been reviewed and approved by a special committee of the Conference chaired by the Chief Justice of North Dakota and composed of the Chief Justices of Indiana, Massachusetts, Ohio, South Carolina, Texas and Utah.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and the concomitant due process or due course of law provisions of various state constitutions set a floor for when a judge must be disqualified or recused from sitting in a case. See *Bracy* v. *Gramley*, 520 U.S. 899, 904 (1997) (Due Process Clause establishes "constitutional floor, not a uniform standard" for judicial disqualification); *Fed. Trade Comm'n* v. *Cement Inst.*, 333 U.S. 683, 702 (1948) ("most matters relating to judicial disqualification [do] not rise to a constitutional level").[2] Each State sets more rigor-

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[2] In some jurisdictions, the terms "disqualification" and "recusal" are used interchangeably in all situations where a judge steps aside from hearing a case; elsewhere, one term or the other is used for all such situations; and in some, each term has a distinct meaning. See Rich-

ous requirements for disqualification and recusal within its own jurisdiction, through state constitutional provision, statute, court rule, judicially promulgated canon of ethics, local practice and/or legal precedent.[3] As heads of their respective judicial systems, the members of the Conference work to assure that their own jurisdictions, and the nation as a whole, have court systems that give, and are seen as giving, access to fair and impartial tribunals for all litigants to resolve their disputes.[4] At the same time, the members want their courts to treat all disputes efficiently and expeditiously, with minimal opportunities for parties to use delay or obfuscation to frustrate justice.

Accordingly, the Conference submits this *amicus* brief to urge the Court (1) to articulate the circumstances and conditions under which the Due Process Clause of the Fourteenth Amendment may prevent a state judge from presiding over a particular matter because of campaign support, and (2) to consider carefully the criteria that may be relevant in determining whether a particular judge is constitutionally disqualified in a particular matter. In an effort to assist the Court, this brief first

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ard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 3-4 (2d ed. 2007). Because of the variety of usages, this brief uses the terms interchangeably.

[3] See Flamm, *supra*, at 34-35, 824.

[4] These concerns are especially important because the majority of litigation in the U.S. occurs in state courts. Each year 47 million new non-traffic trial court cases and 283,000 appellate court cases are filed in the state courts. By contrast, in the federal courts, 320,000 new trial court cases and 5,500 appeals are filed, as are 1.8 million bankruptcy cases. See R. LaFountain, *et al.*, *Examining the Work of State Courts, 2007: A National Perspective from the Court Statistics Project* (Nat'l Ctr. for State Courts 2008); Admin. Office of the U.S. Courts, *Judicial Business 2007*, http://www.uscourts.gov/judbus2007/2007judicial%20business.pdf.

(1) surveys the diversity among the States in how judges are selected and when they may be recused from participating in a case, then (2) reviews the relevant constitutional principles articulated by this Court in prior disqualification challenges, and finally (3) sets forth some of the practical considerations that may be relevant in resolving a constitutional challenge involving campaign support.

SUMMARY OF ARGUMENT

The Conference takes the position that under certain circumstances, the Constitution may require the disqualification of a judge in a particular matter because of extraordinarily out-of-line campaign support from a source that has a substantial stake in the proceedings. As judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled. Disqualification is an increasingly important tool for assuring litigants that they will receive a fair hearing before an impartial tribunal, particularly since First Amendment attacks have been leveled against several provisions of the States' judicial conduct codes.

A judge may be constitutionally disqualified from presiding over a particular matter for reasons other than actual bias or a financial interest in the outcome. These two categories alone are simply not broad enough to assure the due-process guarantee, which protects the right to a fair hearing if extreme facts create a "probability of actual bias * * * too high to be constitutionally tolerable,"[5] encompasses concerns about "possible temptation to the average * * * judge,"[6] "probability of unfairness,"[7] and

[5] *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).

[6] *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).

[7] *In re Murchison*, 349 U.S. 133, 136 (1955).

not being "likely to maintain that calm detachment" necessary for a judge to deliver a fair adjudication.[8] In particular, political support for a judge may be so extremely extraordinary that due-process concerns are implicated.

Such instances will be rare, and must be evaluated pursuant to criteria applied concretely to the particular facts. Among the aspects to be analyzed are the size, nature, timing and effectiveness of the support, the supporter's prior political efforts, the pre-existing relationship between the supporter and the judge, and the relationship between the supporter and the litigant in the particular suit if they are not identical.

ARGUMENT

I. The Context Of Modern Judicial Campaigns

A. How Judges Are Chosen In The States

If distinctions are parsed finely enough, one can identify almost as many different methods of judicial selection as there are States in the Union. Unlike the federal system, which from its inception has selected judges by Presidential appointment and Senate confirmation for life terms during good behavior, the States have never used a common method of judicial selection. Moreover, most States have changed the way they choose judges at some point in their history, often more than once.[9]

Despite the many differences in state judicial selection systems, all but a handful of States hold popular elections to choose at least *some* judges to *some* benches at *some* stage of a judge's career.[10] And in many States, those

[8] *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971).

[9] See generally Am. Judicature Soc'y, *History of Reform Efforts*, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm.

[10] See generally Am. Judicature Soc'y, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm.

elections are freely and at times fiercely contested by rival candidates.[11] In many of those States, candidates run with the explicit label or at least the implicit imprimatur of a political party. And while in other States the elections are merely retention votes (that is, a "yes" or "no" on a judge's continued service) following an initial appointment—the so-called merit-selection plan—only one jurisdiction (Green County, Missouri) has moved to merit selection by popular vote in more than two decades.[12] That reality led the Conference of Chief Justices to adopt a Resolution in 2007 declaring, in part: "Whatever one's view of the desirability of judicial elections, a generation of experience (including recent rebuffs by the voters of Florida, Ohio, and South Dakota of attempts to eliminate [contested] judicial elections), makes it clear that elections will stay in many and perhaps all of the States that have that system."[13] Thus, if judicial elections create problems with the fairness—real and perceived—of judicial outcomes, the Conference of Chief Justices and other groups dedicated to enhancing the effective administra-

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[11] Nationwide, 60% of all appellate judges and 80% of all trial judges face either a partisan or nonpartisan contestable election. See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L.J. 1077 apps. 1, 2 (2007) (National Center for State Courts data as of 2004).

[12] Am. Judicature Soc'y, *Press Release: Voters in Four Jurisdictions Opt for Merit Selection on November 4* (2008), http://www.ajs.org/selection/sel_voters.asp (noting that the decision of a fifth Missouri county to adopt merit selection for local judges in 2008 "marks the first time since 1985 that a jurisdiction has moved from contestable elections to merit selection").

[13] Conference of Chief Justices, Resolution of February 7, 2007, http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html. Voters rejected merit selection in Ohio in 1987 and had declined to extend merit selection from appellate to trial courts in Florida in 2000 and South Dakota in 2004. See Am. Judicature Soc'y, *History of Reform Efforts*, *supra*.

tion of justice in America must address those problems in ways that go beyond mere advocacy for judicial selection reform.

B. How Judicial Campaigns Are Funded

Most elections, whatever their type, share at least one commonality—if voters are presented with more than one candidate or have an opportunity to vote "no," the candidates themselves and their supporters bear primary responsibility for presenting the electorate with sufficient information to cast an informed vote. Only one State—Wisconsin—has any long-standing tradition of public financing, and that only for its Supreme Court.[14] While Wisconsin's system initially worked well, taxpayer participation in the voluntary income-tax check-off program that funds the campaigns has declined so dramatically that many candidates now reject public funding altogether.[15] Two States—North Carolina and New Mexico—have recently adopted voluntary partial public funding for appellate court elections.[16] But even if more

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[14] See Wis. Stat. § 11.50.

[15] In 2007, the available public funds for their Supreme Court candidates totaled $60,816, which turned out to be 2% of the candidates' $2,655,423 spending. Taxpayer participation in the Wisconsin check-off system declined from 19.9% in 1979 to 8.7% in 1998. The number of candidates (for various statewide offices) opting into the public funding program dropped from 150 in 1986 to 92 in 1999. The 2007 funding data is from the Wisconsin Government Accountability Board (Richard.Bohringer@Wisconsin.gov); the candidates' reports are available at Wis. Gov't Accountability Bd., *Reports Filed Electronically*, http://elections.state.wi.us/financereport.asp. The earlier data is from Am. Bar Ass'n, *Report of the Commission on Public Financing of Judicial Campaigns* 27-29 (2002), http://www.abanet.org/judind/pdf/commissionreport4-03.pdf.

[16] See North Carolina Judicial Campaign Reform Act of 2002, N.C. Stat. §§ 163-278.61 to 163-278.70 (appellate judges only); New Mexico Voter Action Act, N.M. Stat. §§ 1-19A-1 to 1-19A-17 (amended in 2007 to include judges subject to statewide elections).

States adopt similar schemes, independent spending by private sources will continue unabated. Increasingly, in hotly-contested contests these uncoordinated independent efforts are dwarfing the amounts raised and spent by the candidates' individual campaigns.[17] The quaint notion that "judicial campaigns must focus their solicitations for funds on members of the bar," *Stretton* v. *Disciplinary Bd. of the Sup. Ct.*, 944 F.2d 137, 145 (3d Cir. 1991), has given way to high-dollar free-for-alls marked by dueling campaign salvos by organized interest groups, often located outside the State of the election.[18]

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[17] In North Carolina in 2008, Democratic Party spending resulted in the affected candidates being granted "rescue funds." Dan Kane, *Fund 'Rescued' Candidates from Themselves*, News & Observer, Oct. 24, 2008. And if the independent spending does not use "express advocacy," rescue funds are unlikely and perhaps unconstitutional. See *Fed. Election Comm'n* v. *Wis. Right to Life*, 127 S. Ct. 2652 (2007); see also Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached a "Tipping Point"—And How To Keep Our Courts Fair and Impartial* 8 (Justice at Stake Campaign 2004) (in the 2004 Supreme Court elections in Michigan and West Virginia, interest groups outspent candidates almost 4 to 1 on television advertising); James Sample, *et al.*, *The New Politics of Judicial Elections 2006: How 2006 Was the Most Threatening Year Yet to the Fairness and Impartiality of Our Courts—And How Americans Are Fighting Back* 20 (Justice at Stake Campaign 2006) (in the 2006 Supreme Court election in Washington, independent expenditures totaled more than $2.7 million, nearly doubling the amount raised by the candidates).

[18] Wide variations have always existed from State to State, depending on local culture and on formal campaign contribution laws. Thus, as a 1998 ABA Task Force Report showed, "[A]lthough often attorneys account for large proportions * * * it is also true that often attorneys' contributions total only a minor fraction. Given the diversity of our jurisdictions, of candidates and of campaigns, the lack of a general pattern is no surprise." Am. Bar Ass'n, *Report of Task Force on Lawyers' Political Contributions (Part Two)* 89 tbl.2 (1998).

C. The Dangers Of Judicial Elections

These more expensive, more visible judicial campaigns have undoubtedly placed new strains on the accepted norms of judicial behavior, both on the bench and on the stump. As more judicial races come to resemble campaigns for executive and legislative office, it becomes harder for both the candidates and the public to perceive the fundamental distinction between the neutral and reactive role of the judiciary and the policy-initiating branches of government. Yet these distinctions are fundamental to our system of assuring freedom through separated powers and checks and balances. Judge (later Justice) Cardozo described the judicial function in these terms:

> [A]n important distinction separates * * * judicial from legislative activity. * * * [T]he judge * * * ought, in adherence to the spirit of our modern organization, and in order to escape the dangers of arbitrary action, to disengage himself, so far as possible, of every influence that is personal or comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.[19]

As the Conference of Chief Justices asserted in its *amicus* brief to this Court in *Republican Party of Minnesota* v. *White*:

> The States know that if candidates for judicial office appeal for voters' support on the same basis as legislative candidates—if they answer to the same

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[19] Benjamin Cardozo, *The Nature of the Judicial Process* 120-121 (1921). Although Cardozo ran unopposed for Associate Judge and then Chief Judge of the New York Court of Appeals, Andrew L. Kaufman, *Cardozo* 163, 181-182 (1998), he won his initial judicial race to the New York Supreme Court by defeating an incumbent judge on a party ticket in a very close race, *id.* at 125.

> electoral majorities—the courts run the grave risk of becoming second legislatures. As electoral twins to the legislatures, courts would stand to lose the essential independence required for them to discharge their high constitutional duty of judicial review. See, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958); *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803).[20]

Yet some have argued that contested elections without vigorous campaigns are the worst of all worlds. See, *e.g.*, Shirley S. Abrahamson, *Speech: The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973, 992, 994 (2001) ("Low voter turnout in judicial elections and inadequate information regarding judicial qualifications diminish the democratic significance of a judicial election. * * * Rather than scuttling elections because we fear voter ignorance, we should capitalize on elections as a vehicle for voter education."); *Adair* v. *State*, 709 N.W.2d 567, 580 (Mich. 2006) (Taylor, C.J., and Markman, J.) ("[G]iven the premise of our system of judicial selection that there *should* be periodic elections for judicial office, it would seem that it is better that campaigns be well-funded and informative, and that candidates be afforded the fullest opportunity to explain their differing perspectives on the judicial role, than that campaigns be poorly funded and result in candidates securing election on the basis of little more than a popular surname.").

D. State Regulation Of Judicial Campaign Conduct

Aware that the necessity of campaigns and campaign fundraising produces "[a] fundamental tension between the ideal character of the judicial office and the real world of electoral politics," *Chisom* v. *Roemer*, 501 U.S.

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[20] Br. of Conference of Chief Justices as *Amicus Curiae* in No. 01-521, at 18 (Feb. 19, 2002).

380, 400 (1991), all 39 States with elective judiciaries have devised certain safeguards to help maintain the judiciary's unique role in the democratic process. The constitutions of every State with any kind of judicial elections impose unique requirements on judges, most of which would be unthinkable for other elected officials. In 38 of the States, judges' terms are longer than any other elective officials'.[21] In 37, only judges are subject to both impeachment and special disciplinary processes.[22] In 33, judges are the only elective officials, aside from attorneys general or prosecutors, who must meet special requirements of training and/or experience.[23] In 23, only judges are subject to mandatory age retirement.[24] In 21, only judicial nominations go through nominating commissions.[25] In 18, only judges cannot run for a nonjudicial office without first resigning.[26]

The principal safeguard against judicial campaign abuses, however, has been the States' codes of judicial conduct. In every State, the highest court has adopted such a code, usually modeled closely on the Model Code of Judicial Conduct of the American Bar Association. Every elective State has adopted some variant of the model code canon that specifically addresses judicial campaign conduct.

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[21] Br. of Conference of Chief Justices as *Amicus Curiae* in No. 01-521, at 6 (Feb. 19, 2002).

[22] *Id.* at 6-7.

[23] *Id.* at 7.

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.* In addition, *all* other States have a non-constitutional requirement of "resign to run." See *Per Curiam Opinion Concerning Amendments to Canons 5 and 6 of the Code of Judicial Conduct*, 61 Tex. B.J. 64 (Tex. 1998) (adopting resign to run in Texas and noting that every other State already required all or most judges to resign when seeking a non-judicial elective office).

E. Recent Challenges To Judicial Conduct Codes

The various provisions of the different States' codes went largely unchallenged until *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002). In that case, this Court struck down the "announce" clause of Minnesota's Code of Judicial Conduct, which prohibited judicial candidates from "'announc[ing] his or her views on disputed legal or political issues.'" *Id.* at 768 (quoting Minn. Code of Judicial Conduct Canon 5(A)(3)(d)(i) (2000)). The Announce Clause was taken from the 1972 ABA Model Code, but it had been deleted from the 1990 Model Code and remained in force in only eight other States. Because of its limited reach, and because the opinion explicitly cautioned that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office," *White*, 536 U.S. at 783, the Court's decision had little immediate effect on state regulation of judicial elections. In the ensuing years, however, challenges have sometimes succeeded against other, more widespread provisions restricting judicial candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,"[27] and

[27] Decisions striking down the Pledges and Promises Clause include at least *Bauer* v. *Shepard*, No. 3:08-CV-196, 2008 WL 1994868, at *3, *17-18 (N.D. Ind. May 6, 2008) (preliminary injunction); *Duwe* v. *Alexander*, 490 F. Supp. 2d 968, 976-977 (W.D. Wis. 2007) (enjoined as applied, not facially); *Pa. Family Inst., Inc.* v. *Celluci*, 489 F. Supp. 2d 447, 459-460 (E.D. Pa. 2007) (preliminary injunction) (later vacated, see below); *Ind. Right to Life* v. *Shepard*, 463 F. Supp. 2d 879, 888-890 (N.D. Ind. 2006) (later vacated, see below); *Kan. Judicial Watch* v. *Stout*, 440 F. Supp. 2d 1209, 1228-1232 (D. Kan. 2006) (preliminary injunction), questions certified, 519 F.3d 1107 (10th Cir. 2008), certified questions answered, No. 100,170, 2008 WL 5101311 (Kan. Dec. 5, 2008); *Alaska Right to Life Political Action Comm.* v. *Feldman*, 380 F. Supp. 2d 1080, 1082-1083 (D. Alaska 2005) (later vacated, see below); *N.D. Family Alliance* v. *Bader*, 361 F. Supp. 2d

from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[28] More to the point of this case, two circuits have struck down code provisions that prohibit judges from personally so-

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1021, 1035-1042 (D.N.D. 2005); and *Family Trust Found. of Ky., Inc.* v. *Wolnitzek*, 345 F. Supp. 2d 672, 690-704 (E.D. Ky. 2004), motion to stay injunction pending appeal denied, 388 F.3d 224 (6th Cir. 2004). Decisions upholding the clause include *Pa. Family Inst., Inc.* v. *Celluci*, 521 F. Supp. 2d 351, 387 (E.D. Pa. 2007); *In re Watson*, 794 N.E.2d 1, 8 (N.Y. 2003); and *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003), cert. denied, 540 U.S. 825 (2003). Still other decisions have failed to reach the merits of the constitutional challenge to the clause. See *Ind. Right to Life* v. *Shepard*, 507 F.3d 545, 550 (7th Cir. 2007); *Alaska Right to Life Political Action Comm.* v. *Feldman*, 504 F.3d 840, 849-850 (9th Cir. 2007); *Pa. Family Inst., Inc.* v. *Black*, 489 F.3d 156, 169 (3d Cir. 2007); *Wolfson* v. *Brammer*, No. 3:06-cv-02357, 2007 WL 2288024, at *5 (D. Ariz. Aug. 8, 2007).

[28] Decisions striking down the Commit Clause include at least *Bauer* v. *Shepard*, No. 3:08-CV-196, 2008 WL 1994868, at *20 (N.D. Ind. May 6, 2008) (preliminary injunction); *Duwe* v. *Alexander*, 490 F. Supp. 2d 968, 976 (W.D. Wis. 2007) (enjoined as applied, not facially); *Ind. Right to Life* v. *Shepard*, 463 F. Supp. 2d 879, 888 (N.D. Ind. 2006) (later vacated, see below); *Kan. Judicial Watch* v. *Stout*, 440 F. Supp. 2d 1209, 1228-1232 (D. Kan. 2006) (preliminary injunction), questions certified, 519 F.3d 1107 (10th Cir. 2008), certified questions answered, No. 100,170, 2008 WL 5101311 (Kan. Dec. 5, 2008); *Alaska Right to Life Political Action Comm.* v. *Feldman*, 380 F. Supp. 2d 1080, 1082-1083 (D. Alaska 2005) (later vacated, see below); *N.D. Family Alliance* v. *Bader*, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005); *Family Trust Found. of Ky., Inc.* v. *Wolnitzek*, 345 F. Supp. 2d 672, 711 (E.D. Ky. 2004), motion to stay injunction pending appeal denied, 388 F.3d 224 (6th Cir. 2004). Decisions upholding the clause include *Pa. Family Inst., Inc.* v. *Celluci*, 521 F. Supp. 2d 351, 387 (E.D. Pa. 2007); and *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003), cert. denied, 540 U.S. 825 (2003). Still other decisions have failed to reach the merits of the constitutional challenge to the clause. See *Ind. Right to Life* v. *Shepard*, 507 F.3d 545, 550 (7th Cir. 2007); *Alaska Right to Life Political Action Comm.* v. *Feldman*, 504 F.3d 840, 952-953 (9th Cir. 2007).

liciting campaign funds including from people likely to be litigants or lawyers in their courts.[29]

The Conference of Chief Justices believes that these rulings unduly extend this Court's holding in *White*. The Court should affirm the state courts' legitimate constitutional role in protecting the due process rights of all litigants to fair and impartial trials in elective judicial systems.

F. The Increasing Importance Of Recusal

Every State permits litigants who fear that they cannot receive impartial justice to ask for another judge to hear their case. American courts, like English courts before them, have always recognized the legal maxim *nemo debet esse iudex in propria causa*, or "no one should be the judge in his own cause." Thus, the federal system and every State have devised their own set of laws, rules, practices, procedures and/or precedents to govern challenges to judges in particular matters.[30] As might be expected, both the standards and procedures to disqualify a judge differ widely among the various jurisdictions.[31]

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[29] *Republican Party of Minn.* v. *White*, 416 F.3d 738, 763-767 (8th Cir. 2005) (en banc) (striking down clause as applied to solicitation to large groups); *Weaver* v. *Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002) (striking down Solicitation Clause because "we believe that the Supreme Court's decision [in *White*] * * * suggests that the standard for judicial election should be the same as the standard for legislative and executive elections"); see also *Yost* v. *Stout*, No. 06-4122 JAR (D. Kan. Nov. 16, 2008) (granting summary judgment striking down the Kansas Solicitation Clause).

[30] See Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 34-35 (2d ed. 2007).

[31] *Id.* at 488, 824 ("procedural prerequisites to disqualification vary greatly" and "precisely what a party needs to show in order to carry its burden on disqualification varies considerably from jurisdiction to jurisdiction").

Given the sharp rise in judicial campaign spending, the related increase in politicized judicial campaigns, and the emerging questions about the constitutionality of judicial conduct codes, recusal and disqualification have become ever more important in States with vigorously contested judicial elections. Justice Kennedy's concurrence in *White* notes that "[a]rticulated standards of judicial conduct may advance [judicial integrity]," which is "a state interest of the highest order."[32] States that choose an elected judiciary may "strive to define those characteristics that exemplify judicial excellence" and may "enshrine [their] definitions in a code of judicial conduct."[33] They may "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."[34] The same groups who have challenged the other code provisions with some success have, with but a single exception, failed in their attempts to have code disqualification standards struck down.[35] As one recent study opined:

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[32] 536 U.S. at 793.

[33] *Id.* at 794.

[34] *Ibid.*

[35] The challenges failed in *Ind. Right to Life* v. *Shepard*, 463 F. Supp. 2d 879, 887 (N.D. Ind. 2006); *Kan. Judicial Watch* v. *Stout*, 440 F. Supp. 2d 1209, 1234-1235, 1239 (D. Kan. 2006) (preliminary injunction); *Carey* v. *Wolnitzek*, No. 3:06-36, 2006 WL 2916814, at *15-16 (E.D. Ky. Oct. 10, 2006) (finding challenge to recusal requirements not ripe for judicial review because no injury in fact); *Wolfson* v. *Brammer*, No. 3:06-cv-02357, 2007 WL 2288024 (D. Ariz. Aug. 8, 2007); *Alaska Right to Life Political Action Comm.* v. *Feldman*, 380 F. Supp. 2d 1080, 1083-1084 (D. Alaska 2005); *N.D. Family Alliance* v. *Bader*, 361 F. Supp. 2d 1021, 1043-1044 (D.N.D. 2005); and *Family Trust Found. of Ky., Inc.* v. *Wolnitzek*, 345 F. Supp. 2d 672, 710 (E.D. Ky. 2004). The one successful challenge came in *Duwe* v. *Alexander*, 490 F. Supp. 2d 968, 977 (W.D. Wis. 2007).

> With the canons of judicial conduct looking increasingly precarious in the wake of *White*, courts and litigants are left with precious few reliable mechanisms to safeguard the constitutional right to due process. Recusal is one such remaining safeguard, and, because it is tailored to the specific factual circumstances of the case at issue, it does not trigger the same First Amendment scrutiny as canons limiting judicial speech.

James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards* 25 (2008).

Thus, disqualification is perhaps the States' most reliable weapon for maintaining both the reality and the appearance of a "fair hearing in a fair tribunal" for every litigant. Through tailored case-by-case recusals, decided under clearly articulated standards, States can accomplish the same goals they have sought to achieve through speech, contribution or spending limitations, yet with little risk of First Amendment challenges.

G. Evolving Notions Of Disqualification

This new role for an old remedy has been enhanced by evolving notions of what circumstances properly require a judge to step aside. At common law, the only ground for disqualification was that the judge had a financial interest in the case at bar.[36] In modern times, instant communications, speedy travel, and, in most jurisdictions, a ready pool of available jurists now allow a substitute

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[36] *Liteky* v. *United States*, 510 U.S. 540, 543-544 (1994) ("Required judicial recusal for bias did not exist in England at the time of Blackstone. 3 W. Blackstone, Commentaries *361. * * * Not until 1911, however, was a provision enacted requiring district-judge recusal for bias *in general*."); see Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L. Rev. 563, 573 (2004).

judge to be assigned with little expense or delay.[37] Every jurisdiction now requires judges to consider not only whether bias or self-interest actually exists, but also whether appearances would lead a reasonable person to think they exist.[38] Thus, Canon 3(E)(1) of the ABA's 1990 Model Code (now Canon 2, Rule 2.11(A) under the 2007 revisions) succinctly provides: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."[39] This standard is now employed, either verbatim or in substance, by virtually every State, either by statute, procedural rule and/or code provision.[40] Canon 3(E)(1) of

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[37] Flamm, *supra*, at 600.

[38] See Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. Tex. L. Rev. 911 (2007); M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. App. Prac. & Process 45 (2005); Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55 (2000); Bradley A. Siciliano, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 Hofstra L. Rev. 217 (1991).

[39] Reflecting rising recognition of the need to protect fair hearing rights, the current provision affords greater protection than its predecessor in the 1972 Model Code: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned."

[40] See Sample, Pozen & Young, *supra*, at 17 (ABA's general standard incorporated into the judicial conduct codes of forty-seven States, counting Michigan, Montana and Texas as the exceptions). Texas, however, follows the ABA standard by rule. See Tex. R. Civ. P. 18b(2)(a) (a judge "shall recuse himself in any proceeding in which * * * his impartiality might reasonably be questioned"). Montana recently adopted the ABA standard. Montana adopted the 2008 Montana Code of Judicial Conduct, effective January 1, 2009, Rule 2.12 of which includes the "impartiality might reasonably be questioned" standard for disqualification. See *In the Matter of the 2008 Montana Code of Judicial Conduct*, No. AF 08-0203 (Mont. Dec. 12,

West Virginia's Code of Judicial Conduct, for example, incorporates this provision into its disqualification standard. In turn, West Virginia's appellate rules provide that "[a] justice shall disqualify himself or herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 3(E)(1) or, when sua sponte, for any other reason the justice deems appropriate." W. Va. R.A.P. 29(b).

II. Due Process Requires Judges Who Will "Hold The Balance Nice, Clear And True"[41]

The Conference submits that the Due Process Clause may require a judge to step aside in some circumstances because of campaign support.[42] If the Due Process Clause requires recusal only when a party could prove actual bias arising from personal animus in the judge's heart or cold cash in the judge's pocket, then the rights of parties to a fair and impartial judge would be imperiled. Probabilities of unfairness, likelihood of bias, and unacceptable perceptions are at the heart of circumstantial

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2008). Thus, only Michigan has yet to adopt the ABA standard by rule or code. Michigan's Code of Judicial Conduct Canon 3(D) provides: "A disqualification of a judge may be remitted as provided by Michigan Court Rule 2.003(D)." Rule 2.003(D) provides that a "judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which: [list including personal bias for or against party or attorney, personal knowledge of facts, prior role as attorney in matter, economic interest, or third degree relationship to party, attorney, witness, or interested party]." At least one Justice of the Michigan Supreme Court has publicly advocated that Michigan adopt the ABA "impartiality might reasonably be questioned" standard. *Adair* v. *State*, 709 N.W.2d 567, 581 (Mich. 2006) (statement of Cavanagh, J.).

[41] *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).

[42] Some litigants may "game" this system by filing meritless motions to secure delay, to run expenses, or to shop for a better forum. States employ various means to terminate baseless or bad-faith motions quickly and efficiently.

evidence, which is sometimes the only evidence available on the issue of whether a judge is constitutionally required to disqualify.[43] Few of this Court's cases involving due process challenges to a judge involve direct evidence of bias—instead, they involve circumstances where the probability of judicial bias is intolerable, regardless of the particular judge's actual state of mind.

When a challenge was lodged to a conviction rendered by a judge and mayor who received court costs in the event of conviction but nothing for acquittal, the Court held: "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof * * * or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). This Court did not consider whether the adjudicator was actually biased. Rather, the Court evaluated the circumstances and decided that the probability of bias for this judge was too great for the Constitution to countenance.

Due process would risk being a mere façade if it ignored all concerns about "the probability of unfairness." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) ("[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness'" (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *In re Murchison*, 349 U.S. 133, 136 (1955) ("Fairness of course requires an absence of actual bias in the trial of cases. But our system

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[43] See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1087 (1996).

of law has always endeavored to prevent even the probability of unfairness."). For example, this Court held that due process required a state supreme court justice to step aside from reviewing a verdict for bad-faith refusal to pay an insurance claim because the justice was at that time pursuing his own bad-faith suit against an insurance company and the legal principles established by the state supreme court's decision had an impact on the outcome of the justice's own case. *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 825 (1986). This Court did not "decide whether in fact Justice Embry was influenced," but noted that the "possible temptation" that the circumstances offered "to the average * * * judge to * * * lead him not to hold the balance nice, clear and true" was enough to require recusal under the Due Process Clause. *Ibid.* (quoting *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey*, 273 U.S. at 532)).

Similarly, this Court held that due process required the recusal of a judge who had been subjected to repeated verbal abuse by a criminal defendant because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971). This "likel[ihood]" of bias was sufficient to require recusal under the Due Process Clause—despite the absence of any evidence that the judge harbored an actual bias against the defendant.

"The requirement of neutrality has been jealously guarded by this Court." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980). To give litigants the benefit of an unbiased and impartial judge, the Constitution forbids procedures that create a probability that prejudice will result. See *Connally* v. *Georgia*, 429 U.S. 245, 250-251 (1977) (due process is violated when justices of the peace are only paid when they issue search warrants, even if actual bias is not shown); *Morrissey* v. *Brewer*, 408 U.S.

471, 485-486 (1972) (due process is violated when a parole officer makes the determination of whether reasonable grounds exist for the revocation of parole because "[t]he officer directly involved in making recommendations cannot always have complete objectivity in evaluating them"); *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972) ("even if there is no showing of actual bias in the tribunal, * * * due process is denied by circumstances that create the likelihood or the appearance of bias"); *Turner* v. *Louisiana*, 379 U.S. 466 (1965) (due process is violated when key witnesses serve as bailiffs for jury; no showing of actual bias is required because the circumstances are inherently suspect); *Jackson* v. *Denno*, 378 U.S. 368 (1964) (jury simultaneously deciding admission of evidence and guilt of defendant violates due process regardless of whether defendant can show jury bias). This "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Murchison*, 349 U.S. at 136. The "inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance * * * .'" *Taylor* v. *Hayes*, 418 U.S. 488, 501 (1974) (quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 588 (1964)).

Applying this rule, this Court held that an administrative board composed of optometrists violated the litigants' due process rights by presiding over disciplinary hearings against competing optometrists. *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973). Moreover, this Court held that it was inconsistent with due process for a village mayor to preside over a hearing for violation of a village ordinance where the mayor was responsible for the village's finances, which depended to a significant extent

upon the fines levied in such proceedings. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

The appearance of likely bias is relevant not solely to public perception and confidence in the judicial system, but may be the only evidence of actual bias. Often there is simply no provable evidence of actual bias; even the judge might be unconscious of its presence. Indeed, appearances arising from specific facts may be the only indication that actual bias is present in fact.

While there is a presumption of integrity in the judiciary, the very fact that it is merely a presumption indicates that in some situations it can and will be overcome. Thus, in evaluating whether a judge's potential bias violates a litigant's due process rights, the question is not whether a judge of the highest integrity may be able to resist the temptation of partiality. Rather, the question is whether an average judge would be tempted under the circumstances.

Given the ubiquity of judicial elections and the ever-increasing amounts of campaign spending in those elections, circumstances can be imagined in which campaign support "'would offer a possible temptation to the average man as a judge to forget the burden of proof required * * * or which might lead him not to hold the balance nice, clear and true.'" *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). Therefore, one cannot say categorically that campaign support can never rise to such magnitude that a judge would be constitutionally prohibited from sitting in a case where the source of that support has a substantial stake in the proceedings.

Because the applicability of the Due Process Clause in the campaign spending context depends on the particular facts of each case, no bright-line rule can or should be attempted. See, *e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) ("Due process is flexible and calls for such

procedural protections as the particular situation demands."); *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. * * * '"Due process" * * * is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions * * * .'"). "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results." *Snyder* v. *Massachusetts*, 291 U.S. 97, 116 (1934) (Cardozo, J.).

Some may claim that allowing any due process challenge to an elective judge because of campaign support might open the floodgates for thousands of constitutional disqualification challenges against elective judges who preside over cases involving supporters and contributors. Such a fear, the Conference submits, is unfounded. A due process review of a challenged failure to recuse would be limited to cases of extraordinary support. Indeed, we know of only two other instances as extreme as this one in terms of size of the expenditure and percentage of the total support for a candidate. Even if one might raise more examples from the decades of thousands of campaigns and scores of millions in spending, there clearly are few outliers.

The first instance was in the 1982 Texas Democratic Primary, where an active litigant, a controversial "South Texas rancher and oil man," contributed $200,000 to one unsuccessful Supreme Court candidate, accounting for over 90% of that candidate's contributions, as well as about 33% of the funds raised by a successful Supreme

Court candidate.[44] The second instance came in a supreme court race in Illinois in 2006, where justices are elected from districts, not statewide. The employees and other persons affiliated with a party to a case directly contributed over $350,000 to the successful candidate; in addition, some of them founded a PAC that directly contributed another $1.2 million.[45]

III. Criteria For Evaluating Whether Due Process Requires Recusal For Campaign Spending In A Particular Case

This case is an opportunity, acutely needed, to clarify the analysis to be considered in deciding whether a recusal is constitutionally required because of campaign support. After all, if there are judicial elections, there will be campaigns and campaign spending. Even though judicial campaign spending has risen more sharply in recent years than other campaign spending,[46] and even though high-dollar campaigns have undoubtedly affected public perceptions about judicial impartiality,[47] not every

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[44] Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 84 (1986); Asker, *'82 Supreme Court Races Signal End of Era, Assert Winners, Losers*, Houston Post, May 3, 1982.

[45] See Pet. in *Avery* v. *State Farm Mut. Auto. Ins. Co.*, No. 05-842, at 6-8 & n.2 (Dec. 27, 2005); see also Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 Washburn L.J. 503, 509-511 (2007). The relevant district's total population was 1,290,401. See *2005 Annual Report of the Illinois Courts: Administrative Summary* 29.

[46] See Bert Brandenburg & Leo A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 Geo. J. Legal Ethics 1229, 1230 n.5 (2008).

[47] For two national polls and eight single-state polls conducted between 1995 and 2004 reflecting public skepticism about the effect of contributions on judicial outcomes, see Thomas A. Gottschalk, *Judicial Recusal as a Campaign Finance Reform* app. A (Sandra Day O'Connor Project on the State of the Judiciary, 2008 Conference:

judge who has been involved in a high-dollar, vigorous campaign can be presumed to have a probability or likelihood of bias whenever a matter in which some supporter is vitally interested later comes before the judge's court.

The Conference of Chief Justices submits that several criteria must be evaluated in deciding whether campaign support has been so egregious as to create a "probability" or "likelihood" of bias that would jeopardize a litigant's due process right to a fair hearing. The following seven criteria are neither exclusive nor exhaustive, but they do reflect issues that we have encountered in the judicial campaign finance context and that we believe are relevant to a constitutional inquiry.

A. Size Of The Expenditure

The amount of support given by the interested party must be considered. No set amount can be labeled as "beyond the pale" for all cases; circumstances *always* matter. For example, the size of the jurisdiction and the electorate to be persuaded is crucial: What is exorbitant in a small city like The Dalles, Oregon, may be unre-

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Our Courts and Corporate Citizenship) (publication forthcoming). Some media attention about contributions to judicial campaigns unduly amplifies concerns about impropriety. For example, the *New York Times* reported a forthcoming law review article that attacked Louisiana Supreme Court Justices about their campaign contributions. But the *Times* never reported (except on NYTimes.com as an "Editor's Note Appended," Sept. 20, 2008) that, after publication, the author's dean (at Tulane Law School) sent a formal apology to that court because of the article's errors. See Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. Times, Jan. 29, 2008; Vernon Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul. L. Rev. 1291 (2008); Susan Finch, *Tulane Law School Issues Apology to Louisiana Supreme Court*, Times-Picayune, Sept. 16, 2008.

markable in a metropolitan jurisdiction like Dallas, Texas. Standard practice in a jurisdiction is also a vital component; an amount of support that is outrageous in a State like Minnesota, which has for many decades had only low-key judicial contests, might be routine in a smaller State, such as Alabama, where multi-million dollar court races are frequent. See *Randall* v. *Sorrell*, 548 U.S. 230, 252-256 (2006) (considering local practice in determining the constitutionally of Vermont's campaign regulation). Even within a single State, from year to year, from court to court, or from county to county, an amount that might possibly offend due process in one instance will simply not in another.[48]

B. Nature Of The Support

Second, the nature of the support, and its benefit to the candidate and his or her candidacy, must be considered.[49] In some jurisdictions, a judge must sign the public reports detailing all contributions to his or her campaign; but the judge has no similar knowledge about any independent support. In some jurisdictions, judicial candidates control their campaign treasuries and have wide discretion over how to spend or dispose of campaign

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[48] Presumably, a contribution that complied with a contribution limit set by statute or rule would not violate due process. However, situations may arise that would test that proposition. For example, if every member of one law firm contributes the maximum amount allowed and if the aggregate of those contributions constitutes (say) 80% of a candidate's campaign funds, such support would comply with the law but might be such an out-of-line concentration of support as to raise obvious concerns.

[49] A further problem is caused by direct contributions or independent expenditures *against* a judge. On the one hand, efforts to defeat a judge are every bit as likely to affect that judge's attitudes toward a party as are efforts to support that judge. On the other hand, a wealthy lawyer or litigant could always consider spending enough to defeat or at least disqualify a disfavored judge.

funds; independent expenditures risk being illegal if the candidate exercises any control over them or even coordinates with them. A problematic direct contribution could be returned, but a candidate has no power over independent expenditures, whether effective or not.[50]

C. Timing Of The Support

Third, the timing of contributions or independent support is a critical factor. If the supporter's case is pending or about to be pending before the court on which the candidate sits or to which he or she seeks election, obviously a large contribution or expenditure is more likely to create a probability or likelihood of bias than if the case had not yet arisen or its assignment was subject to a random process so that it might never come before the successful candidate.[51] Obviously, the more remote in time the sup-

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[50] Although some people are skeptical about the "independence" of independent spending, not only is there a constitutional right to such participation in campaigns, but at least in judicial campaigns, independent spending has backfired against the candidate it was intended to advance. One instance was in 2000, when the Chief Justice of Mississippi's defeat was apparently due to reaction against an independent effort. See Associated Press, *Chief Justice Asks U.S. Chamber of Commerce to Stop Running TV Ads*, Comm. Appeal, Oct. 22, 2000; Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. M.S.U.-D.C.L. 849, 877. Similarly in North Carolina in 1986, the Chief Justice's defeat was caused at least in part by independent spending aimed at supporting her. The Chief Justice described the independent group's effort: "Some of their tactics * * * were offensive, and I asked them to discontinue them, but * * * I had no means of controlling them. * * * I know that they offended a large number of people." Anthony Champagne, *Interest Groups and Judicial Elections*, 34 Loy. L.A. L. Rev. 1391, 1404 (2001) (quoting letter to author from former Chief Justice Rhoda Billings).

[51] One example of problematic timing: A challenge was made to two justices of the Ohio Supreme Court who had received large contributions from a law firm only three weeks before voting on whether or not to review a particular case. The firm had a multi-million dollar

port was given, the less likely it is to create problems of a constitutional magnitude.

D. Effectiveness Of The Support

Fourth, the effectiveness of the support, both actual and perceived, must be considered. This is particularly true of independent expenditures—the more the message is pointed to the particular campaign, the more likely that it might constitute a due process violation.

E. Nature Of Supporter's Prior Political Activities

Fifth, the supporter's record of campaign activity must be considered. If the supporter has habitually made large contributions to or made independent expenditures on behalf of many candidates in the past, the support for one jurist who may later happen to preside over a case in which the supporter was involved would raise less suspicion than if the support was novel or extraordinary.

F. Nature Of Supporter's Pre-Existing Relationship With The Judge

Sixth, the history between the supporter and the judge must be explored. A prior friendship or professional relationship may help explain the size of the support, but may raise other, perhaps still more pertinent concerns about the probability or likelihood of judicial bias. If the contributor had roles beyond writing a check, such as chairing a campaign committee or raising money from others, that may exacerbate the situation. On the other hand, if the judge in question has decided other matters involving the supporter with no indication of

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contingent fee at stake in the matter and contributions from the lawyers and their spouses amounted to almost five percent of each justice's total campaign funds. See Pet. in *Consol. Rail Corp.* v. *Wightman*, No. 99-950, at 7-8 (Mar. 6, 2000).

bias, then concerns about a lack of fairness may be reduced.

G. Relationship Between The Supporter And The Litigant

Finally, the relationship between the supporter and the party to the case must be considered. Of course, when the outlying support is provided by an individual litigant, the relationship is obvious and no further questions arise. But should the same rules apply to support by a party's lawyer? And if the party is a corporation, partnership or other entity, and the donor is an officer, director, partner, shareholder or employee of the party, then the exact nature of the relationship must be explored. Obviously, the closer the identity between the supporter and the party, the more likely that due process concerns will be implicated.

CONCLUSION

Amicus curiae, the Conference of Chief Justices, respectfully requests that this Court clarify the applicability of the Due Process Clause to motions to disqualify and articulate the considerations that should be weighed in deciding whether the Constitution requires recusal.

Respectfully submitted.

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