No. 08-22

In the
Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,
Petitioners,
v.
A.T. MASSEY COAL COMPANY, INC., ET AL.
Respondents.

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

BRIEF OF THE STATES OF ALABAMA, COLORADO, DELAWARE, FLORIDA, LOUISIANA, MICHIGAN, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE STATES OF ALABAMA, COLORADO, DELAWARE, FLORIDA, LOUISIANA, MICHIGAN, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The *amici* States employ a variety of different judicial-selection methods. Three of the *amici* elect all of their judges—two in partisan elections, one in nonpartisan elections. Three of the *amici* select their judges through an appointment process—one by gubernatorial appointment from among nominating-commission recommendations, two by gubernatorial appointment with senate consent. And one of the *amici* elects trial-court judges but appoints appellate-court judges. In six of the *amici* States, a judge's retention in office is determined through election; in one, retention is subject to gubernatorial re-appointment. Despite these and other policy differences, the *amici* States share a common commitment to ensuring the fairness of their courts and the impartiality of their judges.

Amici do not appear here either to defend or to critique the wisdom of Justice Benjamin's refusal to recuse himself from the dispute between Caperton and Massey Coal. Reasonable minds can and will disagree about whether, on the particular facts presented, recusal would have been the better course. And in a way, that is precisely the point. As this Court has said time and again, there is a gulf between the arguably unwise and the unconstitutional. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 207-08 (2003); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728-29 (1988). From *amici*'s perspective, therefore, the

question is not whether, in some abstract sense, Justice Benjamin "should" have disqualified himself. The question, rather, is whether the Court should fashion an entirely new body of federal constitutional law to govern day-to-day recusal practice in state courts—and, in the process, birth an entirely new species of litigation pleading, the "*Caperton* motion." The answer on both counts is no.

If ever there were a case that proved the truth of Justice Holmes' dictum about "hard cases" threatening "bad law," this is it. Holmes' precise words were these:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (dissenting opinion).

Like the case about which Justice Holmes was concerned, this case has "excited [the] public attention." *Id.* at 401. *See, e.g.*, Editorial, *Too Generous*, New York Times, at WK8 (Sept. 7, 2008) ("The United States Supreme Court should add the Massey case to its docket for the upcoming term and throw out the court's tainted ruling."); Editorial, *West Virginia Supreme Court Justice Brent Benjamin Has Become a National Symbol of*

Questionable Justice, Charleston Gazette, at A4 (Jan. 8, 2009) ("In view of th[e] overwhelming barrage [of public criticism]—also voiced by major law journals and national newspapers—we can't imagine that the U.S. Supreme Court will allow Benjamin's participation to stand."). Clearly, what Justice Holmes called the "hydraulic pressure"—here to reverse, by any means necessary—has been building for some time. The *amici* States appear here to ensure that the Court does not make bad law based on what some may perceive to be the hard facts of this case.

SUMMARY OF THE ARGUMENT

1. States have an overriding interest in ensuring the fairness of their courts and the impartiality of their judges. Historically, States have been free to police judicial bias—both real and apparent—through statutes, rules, and bar codes. The Due Process Clause has not required recusal except in the most extreme cases—namely, where a judge either has a pecuniary "interest in the outcome of" a case or is "actually bias[ed]" against one of the parties. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Petitioners' position here—which would require recusal as a matter of federal constitutional law whenever a judge might feel a "debt of gratitude" to an interested party that suggests a "probability of bias"—would carry the Court well beyond existing due-process doctrine and make virtually every state-court recusal dispute a "federal case." Because petitioners' proposed extension is neither necessary nor wise, the Court should reject it.

2. There is no pressing need to constitutionalize state recusal practice. The States (1) are uniquely well-

situated to regulate recusal practice in their own courts and (2) have been both vigorous and innovative in doing so.

a. Review of the 50 States' court systems and judicial-selection methods—as well as the widely divergent public expectations that have grown up around them—reveals kaleidoscopic variety. Petitioners' attempt to shoehorn that variety into an overarching federal constitutional standard makes little practical sense. It would be far better to leave the particulars of state recusal practice to state policymakers, who are intimately familiar with the often state-specific "facts and circumstances" that will control disqualification determinations.

b. States "are free to impose judicial disqualification standards that are more rigorous than those mandated by the Due Process Clause," and, "with few exceptions, they have done just that." Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 34-35 (2d ed. 2007). Reflecting the diversity inherent in our federal system, the States have tackled the recusal issue using a variety of mechanisms. Even beyond the ABA's prophylactic model-code requirement that a judge recuse "in any proceeding in which [his] impartiality might reasonably be questioned"—which virtually every State has adopted—a number of States have experimented with additional, and often novel, regulations. Those include, among others, (1) "peremptory-recusal" rules; (2) campaign-contribution limits; (3) public-financing options; and (4) contribution-based disqualification requirements. Given their historical and ongoing activity, there simply is no evidence of any systemic

breakdown that would justify creation of new federal constitutional doctrine.

3. Petitioners' proposed constitutional recusal rule is not only unnecessary, but also unwise. It would be hopelessly inadministrable, both doctrinally and practically.

a. The lone "principle" that petitioners identify—that recusal is constitutionally required where the circumstances indicate a "debt of gratitude" that may create a "probability of bias"—is really no principle at all. There are two key problems. First, petitioners' position has no logical stopping point. For instance, although clearly aimed at elected judges, petitioners' "debt"-based theory would seemingly apply *a fortiori* to appointed judges, whose principal backers (starting with the executives who appointed them) are particularly conspicuous. Second, rarely if ever will it be self-evident when the requisite "debt" exists, let alone when that "debt" gives rise to an impermissible "probability of bias." Rather, the constitutional determination will inevitably devolve into a multifactor morass. Indeed, petitioners and their *amici* propose a series of different multifactor tests; altogether, they suggest nearly 20 pertinent (but nonexclusive) considerations. While that sort of hypercontextualism may well be appropriate to legislative policymaking on the state level, it is not the stuff of which constitutional doctrines should be made.

b. Petitioners' proposed due-process rule would unduly burden the courts, cause judges to "over-recuse" *en masse*, and encourage litigant mischief.

1. Were it to recognize petitioners' novel constitutional claim, this Court would birth a new species in litigation practice: the "*Caperton* motion." Given the

seeming breadth of the underlying right, *Caperton* motions would fly fast and furious. And given the right's unwieldiness, resolution of those motions would gum up the state litigation process by requiring judges (1) to allow discovery into the pertinent considerations, (2) to slog through laundry lists of case-dependent factors, and, in all likelihood, (3) to refer their recusal decisions to their colleagues for independent review. In addition, reversal here would both thrust this Court into the mix by making it the ultimate arbiter of state-court disqualification disputes and spawn additional collateral (*e.g.*, habeas) litigation in the lower federal courts. It is no answer to say that *Caperton* recusals will be required only in "exceptional" circumstances. Every litigant will contend that his case is exceptional.

2. Even as matters stand now, judges face extraordinary psychological pressure to recuse. *See Cheney v. United States Dist. Court for the Dist. of Columbia*, 541 U.S. 913, 929 (2004) (Scalia, J.). Introducing the Constitution into the equation would up the ante significantly. It seems scarcely debatable that if faced with accusations of oath-breaking for every supposed "debt," no matter how ill-defined, judges would defensively recuse even in cases in which recusal is not appropriate.

3. Increasingly, litigants manipulatively employ the recusal procedure as a judge-shopping device. Far from helping to remedy that abuse, petitioners' indeterminate "debt"-based due-process rule would actually facilitate it.

ARGUMENT

I. Petitioners' Proposal To Constitutionalize The Great Bulk Of State-Court Recusal Practice Contradicts Vital Principles Of Federalism.

Policing the fairness of the state judicial process is a core state function. In particular—and most importantly for present purposes—the States have a compelling interest in "ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party or person …." *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("Judicial integrity is … a state interest of the highest order.").

Because "most questions concerning a judge's qualifications to hear a case are not constitutional ones," States have traditionally been free to regulate judicial bias and its appearance through their own "common law, statute[s], or … professional standards of the bench and bar." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). To be sure, this Court has identified several discrete categories of cases in which a judge's participation would *ipso facto* violate the federal Constitution. To be clear, though, disqualification is "constitutionally required" only "in the most extreme of cases." *Aetna Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986). In particular, the Due Process Clause requires a judge to recuse—

- when he has "a direct, personal substantial pecuniary interest" in the case such that he becomes the judge in his own cause, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *accord Ward v. Village of*

Monroeville, 409 U.S. 57, 57-62 (1972); *Lavoie*, 475 U.S. at 821-25;

- when he is impermissibly serving in dual roles as both prosecutor and adjudicator, *see In re Murchison*, 349 U.S. 133, 136-39 (1955); or

- when, in unique circumstances arising out of contempt proceedings, he has become "embroiled in a running, bitter controversy" with a litigant, *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *accord Taylor v. Hayes*, 418 U.S. 488, 501 (1974).

As the Court succinctly summarized existing doctrine in *Bracy*, the constitutional "floor" established by the Due Process Clause "requires a 'fair trial in a fair tribunal' before a judge with no [1] actual bias against [either party] or [2] interest in the outcome of [the] particular case." 520 U.S. at 904 (internal citations omitted).

Petitioners and their *amici* now ask the Court to venture well beyond existing doctrine and to construct "a new paradigm for the application of due process." Former Chief Justices and Justices ("FCJJ") Br. 9. In particular, petitioners invite the Court to decree *as a matter of federal constitutional law* that, actual bias or financial interest aside, a judge must recuse whenever the circumstances suggest that he might feel a "debt of gratitude" to an interested party that gives rise to a "probability of bias." Pet. Br. *passim*. The Court should decline the invitation.

This Court has been reluctant to interpret the Constitution in novel ways so as to invade areas historically regarded as the "province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (rejecting due-process chal-

lenge); *see also, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989) (plurality opinion) (same). And with good reason. Pursuant to settled principles of federalism, the States have plenary authority to regulate conduct within their borders except to the extent that either the federal government has clearly preempted that authority or the federal Constitution clearly forbids them to exercise that authority. Accordingly, before displacing state regulation in an area of traditional state concern—particularly under a constitutional provision as open-textured as the Due Process Clause—it should at the very least be clear (1) that there is a compelling need for a constitutional fix and (2) that the fix is one that can be sensibly administered.

Here, neither essential prerequisite is satisfied. There is no warrant for removing recusal issues from the States and making every recusal dispute, as it were, a "federal case." And indeed, given the overwhelming line-drawing problems inherent in any "debt"-based due-process rule of recusal, there are compelling reasons not to constitutionalize the enterprise.

II. Constitutionalization Is Unnecessary: The States Are Well-Situated To Regulate Recusal Practice In Their Own Courts And Have Been Vigilant In Doing So.

Petitioners and their *amici* present the Court with a choice: Either adopt a sweeping new federal constitutional rule governing recusal or "relegate parties to trial before judges who harbor a strongly suspected (but unprovable) bias against them." Pet. Br. 23. Indeed, they say, "without this Court's intervention," recusal itself "is in danger of becoming a nullity …." Brennan Center Br.

25-26. But the all-or-nothing choice they present—between constitutionalization and chaos—is a false one. The *reason* that "judicial disqualification decisions are rarely made on due process grounds" is "because both Congress and state legislatures are free to impose judicial disqualification standards that are more rigorous than those mandated by the Due Process Clause—and because, with few exceptions, they have done just that." Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 34-35 (2d ed. 2007). Before extending the Due Process Clause's reach and attempting to impose an across-the-board federal constitutional standard on the several States (and their various judicial-selection systems), this Court should satisfy itself, at the very least, that there is a serious problem that demands redress and, further, that the States have failed—on a systemic basis—to engage it. Here, that threshold condition to federalization is not met.

A. The States Are Uniquely Well-Situated To Regulate Recusal Practice In Their Own Courts.

Petitioners and their *amici* are asking the Court to step in to decree a new federal constitutional rule specifying when support for a particular judge's election or appointment creates a "debt of gratitude" that gives rise to a "probability of bias" that, in turn, requires the judge to recuse. Petitioners' position rests on one of two possible premises: Either support for a judge's candidacy *always* gives rise to a "debt" that triggers an obligation to recuse, or it *sometimes* does. Petitioners expressly (and sensibly) deny the former possibility (Pet. Br. 26), so it must be the latter. That seems to us self-evidently correct: *Sometimes* a litigant's or lawyer's support for a

judge will be of such a quality (or quantity) that it will give rise to doubts about the judge's ability to decide the issues fairly and, accordingly, will warrant the judge's disqualification. The question then becomes: Who decides at what point the supposed "debt" has become too great, and by reference to what?

Petitioners want to federalize the recusal issue. They believe that the Due Process Clause should provide the benchmark. The *amici* States respectfully disagree. Recusal has always been, and will always be, a highly contextualized issue. The recusal inquiry "is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) (Rehnquist, C.J.). Given the enormous variety (of which more below) among the 50 States' justice systems and judicial-selection methods—and the widely divergent expectations of the States' respective citizenries that have grown up around them—it makes no sense to require the "reasonable observer" to do his observing through a single, federal lens. Most of the "facts and circumstances" that will control recusal determinations in *state* courts exist (not surprisingly) at the *state* level. The Conference of Chief Justices has nicely captured the point:

> What is exorbitant in a small city like The Dalles, Oregon, may be unremarkable in a metropolitan jurisdiction like Dallas, Texas. … [A]n 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, like Alabama, where multi-million dollar races are frequent.

CCJ Br. 25-26.

If that is correct, which we think it is, it weighs heavily against a uniform federal constitutional rule. If the "reasonable observer" must take into account State-to-State differences in deciding on which side of the "sometimes" line a particular item of support falls—whether or not it gave rise to a "debt of gratitude" that, in turn, created a disqualifying "probability of bias"—surely it makes more sense to leave recusal specifics to state policymakers, who are intimately familiar with state history and practice, as well as citizens' collective expectations.

B. States Have Historically Regulated Recusal Practice In Their Own Courts And Continue To Experiment With Novel Regulatory Approaches.

Consistent with the principle of separated sovereignty, Congress and the States are free (within broad limits) to "overprotect" constitutional rights. And in fact, both have done so with some regularity. Among the more notable congressional efforts are Title VII of the Civil Rights Act of 1964, which effectively extends equal-protection principles to disparate-impact claims, *see Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971), and the Religious Freedom Restoration Act, which effectively extends First Amendment protections to cases involving generally applicable federal laws that incidentally burden religious exercise, *see* 42 U.S.C. §2000bb. For their part, a number of States, for instance, have passed mini-RFRAs to extend free-exercise rights to persons

challenging neutral, generally applicable state and local laws.[1] So too, in the wake of this Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), more than half the States enacted statutes to extend private property owners' rights against government takings beyond the Fifth Amendment baseline.[2]

In the same way—and as particularly relevant here—States are free to "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards." *Republican Party of Minn.*, 536 U.S. at 794 (Kennedy, J., concurring). Perhaps not surprisingly, the States have done exactly that. Indeed, "every State ha[s] devised [its] own set of laws, rules, practices, procedures and/or precedents to govern challenges to judges in particular matters." CCJ Br. 14. Of course, because the States' court systems, judicial-selection methods, and political histories vary, state recusal rules are not identical in every jot and tittle. But that is hardly a cause for embarrassment; "[d]iversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system." *Harmelin v. Michigan,* 501 U.S. 957, 990 (1991) (Scalia, J., concurring). *See also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic expe-

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[1] *See Congress Enacts Religious Land Use Law; Three More States Adopt RFRAs*, SG040 A.L.I.-A.B.A. 757, 764 (2001).

[2] *See* National Conference of State Legislatures, *Eminent Domain: 2006 State Legislation*, http://www.ncsl.org/programs/natres/ emindomainleg06.htm (visited Feb. 1, 2009).

riments without risk to the rest of the country."). The point is that in their own ways, based on their own experiences, and responding to the circumstances, needs, and expectations of their own constituencies, the States have set out to ensure judicial fairness through a variety of mechanisms—some conventional, others decidedly more experimental. A few examples follow.

1. *Recusal Codes and Statutes.* The American Bar Association's Model Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." ABA Model Code of Judicial Conduct Rule 2.11(A) (2007). That rule "has been adopted in some form in virtually every state." ABA Br. 14. "Reasonabl[eness]," of course, will depend on all manner of facts and circumstances particular to the adopting State. But this bedrock protection against even apparent judicial bias, which goes well beyond common-law requirements (Resp. Br. 15-19), is now firmly rooted in state law and practice.

2. *"Peremptory Recusal" Rules.* In addition to the baseline ABA-recommended recusal provision, nearly 20 States currently permit litigants "peremptory" challenges to judges. These peremptory-recusal rules typically enable each party to move to disqualify one judge per proceeding without cause. *See* Flamm, *supra*, at 789-822 (citing and discussing rules).

3. *Contribution Limits.* Nearly every State that elects judges has enacted campaign contribution limits of one form or another. *See* American Judicature Society, *Judicial Campaigns and Elections: Campaign Financing*, http://www.judicialselection.us/judicial_selection/

campaigns_and_elections/campaign_financing.cfm?state (visited Feb. 1, 2009). Notably, proving that the size of an eyebrow-raising contribution will necessarily vary from one community to the next, the States' caps on individual donations to high-court candidates range from $310 in Montana to $10,000 in Wisconsin. *Compare* Mont. Admin. R. 44.10.338 *with* Wis. Stat. Ann. §11.26.

4. *Public Financing.* Several States have already begun to experiment with forms of public financing for judicial elections. *See* N.M. Stat. §1-19A-1 *et seq.*; N.C. Gen. Stat. §163-278.61 *et seq.*; Wis. Stat. Ann. §11.50. And as one of petitioners' *amici* has reported, "Other states are considering following suit. Legislative leaders in Georgia, Illinois, Michigan, Montana and Washington [recently] put forward their own proposals for public financing of their state's high court elections." Justice At Stake, *The New Politics of Judicial Elections 2006* at 39, http://www2.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf (visited Feb. 1, 2009).

5. *Contribution-Based Recusal Rules.* A number of States have adopted ethical rules that expressly link recusal to campaign contributions. Not surprisingly—indeed, appropriately—they have done so in slightly different ways. Alabama's legislature, for instance, has adopted a firm disqualification rule that (1) requires a trial judge to recuse from any case involving a litigant or lawyer who contributed more than $2000 to his election campaign and (2) requires an appellate judge to recuse when a litigant's or lawyer's contribution exceeded $4000. *See* Ala. Code §§12-24-1, -2. Like Alabama, Mississippi has adopted specific monetary benchmarks—$1000 for trial judges and $2000 for appellate judges. *See* Miss. Code of Jud. Conduct, Canon 3E(2), commen-

tary. Unlike Alabama, Mississippi has made such "major don[ations]" relevant to, but not decisive of, the recusal question. *Id.* Notably, Mississippi opted for a more flexible rule because it concluded that "political donations may but do not necessarily raise concerns about a judge's impartiality." *Id.*

A number of other States, including West Virginia, have promulgated rules that, in more general fashion, make campaign contributions "relevant to disqualification." W. Va. Code of Jud. Conduct, Canon 5(C)(2), comment; *accord, e.g.*, Ind. Code of Jud. Conduct, Canon 4.4, comment 3; N.D. Code of Jud. Conduct, Canon 5(C)(2), comment; Tenn. S. Ct. R. 10 (Code of Jud. Conduct), Canon 5(C)(2)(b), comment; Wash. Code of Jud. Conduct, Canon 7(B)(2), comment.[3] And as one of petitioners' own *amici* reports, still other States are now "actively considering new canons to provide much-needed guidance to judicial candidates and their supporters [regarding] when financial support by a party becomes sufficiently high to require a judge or justice to recuse." FCJJ Br. 13-14; *see also* ABA, *Comparison of ABA Model Judicial Code and State Variations: 1/5/09*, http://www.abanet.org/cpr/code/2_11.pdf (visited Feb. 1, 2009).

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[3] The fact that more States have not followed Alabama's lead in adopting fixed numerical recusal triggers should come as no surprise. As even critics of state-court recusal practice acknowledge, "in states with reasonable contribution limits, the potential for real or apparent corruption is largely addressed by the limits, which no individual may legally exceed. Under those circumstances, [a numerical recusal trigger] adds little or nothing to the campaign finance regime to protect a judge's impartiality." Deborah Goldberg, *et al.*, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 Washburn L.J. 503, 529 (2007).

* * *

Clearly, the States are not asleep at the wheel. To the contrary, the States are presently experimenting with different—and often novel—ways of ensuring the impartiality of their own judges. Indeed, West Virginia's actions in the wake of the 2004 election perfectly illustrate the States' nimbleness in dealing with perceived judicial failings. In direct response to the controversy surrounding Justice Benjamin's non-recusal in this case, West Virginia amended its campaign finance laws related to judicial elections. *See* 2005 W. Va. Acts, Ch. 9. The new law requires § 527 groups to register and disclose their financing and, further, establishes a $1000-per-election cap on individual contributions to § 527 groups operating in West Virginia. *See* W. Va. Code §3-8-12. More recently still, the West Virginia legislature proposed a state constitutional amendment creating a three-member "Judicial Recusal Commission" that would issue "binding decision[s] on whether a family court judge, a circuit court judge or a supreme court justice should be recused from hearing, deciding or participating in deciding" a particular case. H.R. J. Res. No. 104, 78th Leg., 2d Sess. (W. Va. 2008).

Given the States' historical and ongoing activity, there simply is no evidence of any systemic breakdown that would justify the creation of new constitutional doctrine. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 353-54 (2001) (noting the "dearth of horribles demanding redress" in refusing a "request for the development of a new and distinct body of constitutional law"). By contrast, the States have proven their willingness and ability to carefully regulate recusal-related issues in ways that are responsive to the conditions prevailing in

their own specific communities. Particularly where, as here, "the States are currently engaged in serious, thoughtful examinations" of an important public-policy issue, this Court should be reluctant to silence the democratic dialogue through an act of constitutionalization. *Washington v. Glucksburg*, 521 U.S. 702, 719 (1997); *accord, e.g.*, *Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("[I]t is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down."); *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) ("[J]udicial imposition of a categorical remedy … might pretermit other responsible solutions being considered in Congress and state legislatures.").

III. Constitutionalization Would Be Unwise: Petitioners' "Debt"-Based Constitutional Recusal Rule Is Incapable Of Principled Application.

Not only is petitioners' proposed new constitutional recusal rule unnecessary, it is also unwise. It would be hopelessly inadministrable, both doctrinally and practically. Worse, it would create the opportunity for mischief in state-court systems.

A. Petitioners' Proposed Due-Process Rule Would Be Doctrinally Unworkable.

The due-process rule that petitioners suggest—that a judge's "debt of gratitude" can give rise to a federal constitutional obligation to recuse—is not susceptible of sensible administration as a doctrinal matter. This Court is not in the business of issuing "good-for-this-ride-only" decisions. It "must lay down rules that can be followed in the innumerable cases [it is] unable to re-

view." *Mickens v. Taylor*, 535 U.S. 162, 167 n.1 (2002). Before minting a new federal constitutional rule that will supersede existing state practice, the Court should be sure that the rule is capable of principled application. Petitioners' is not.

The lone "principle" that petitioners identify—that recusal is constitutionally required where the circumstances indicate a "probability of bias"—is really no principle at all. It will hardly be self-evident in any particular case when a litigant's or lawyer's support for a judge has created a "debt of gratitude" that, in turn, gives rise to a disqualifying "probability of bias." And the variables that would necessarily inform any "probability" calculus are seemingly innumerable.

Consider, as just one example, how petitioners' "debt"-based theory should apply to each of the various judicial-selection methods currently in force around the country. Trying to get a handle on those methods is itself a dizzying exercise; "[i]f distinctions are parsed finely enough, one can identify almost as many different methods of judicial selection as there are States in the Union." CCJ Br. 5. Looking only at the ways in which States select the judges of their *highest* courts, one finds the following:

- Eight States utilize partisan elections.
- Thirteen States utilize nonpartisan elections.
- One State holds partisan primaries but nonpartisan general elections.

- In thirteen States, the Governor appoints from among nominees selected through a judicial nominating commission ("JNC") or its equivalent.

- In two States, the Governor appoints, but subject to confirmation by the JNC or similar board.

- In one State, the Governor nominates from among JNC recommendations, and the Legislature then formally makes the appointment.

- In two States, the Governor appoints subject to senate confirmation.

- In seven States, the Governor appoints from among JNC nominees, subject to confirmation by the senate (or, in one State, the house and senate).

- In one State, the Governor nominates from JNC recommendations, and an "executive council"—a body separately elected every two years through partisan elections—then formally makes the appointment.

- In two States, the legislature itself makes the selections.[4]

The diversity gets downright kaleidoscopic when one factors in the various methods for selecting lower appellate and trial-court judges, the methods by which state judges and justices are retained, and the methods for filling interim vacancies—many of which differ (1) not

[4] *See* American Judicature Society, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm. (visited Feb. 1, 2009).

only from one State to another but also *within each State* and (2) not only from the methods used to select state high-court justices but also from one another.[5]

This variety matters because, although clearly aimed at elected judges, the logic of petitioners' "debt"-based due-process recusal standard is not so easily cabined; it applies equally to judges chosen through other methods. In this case, petitioners sought Justice Benjamin's disqualification because, they said, he owes his seat on the West Virginia Supreme Court to the election-related activities of Massey's CEO, Don Blankenship. But if Blankenship's expenditures and political advocacy created a "debt of gratitude" sufficient to infer a "probability of bias," then it follows *a fortiori* that an appointed judge would have to recuse himself from cases involving his key supporters. An appointed judge's backers (and opponents, for that matter) are likely to be far more easily identifiable than an elected judge's. For starters, think about the President or Governor who actually taps an appointed judge. If Justice Benjamin was unconstitutionally "indebted" to Massey by virtue of Blankenship's indirect support,[6] how much greater is the "debt" owed by an appointed judge to the chief executive who chose him, specifically, from among dozens (if not hundreds) of qualified eligibles?

Benjamin's election was contingent on a host of factors, most of which were beyond Blankenship's control. Blankenship's advocacy certainly didn't hurt, but it

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[5] *See id.*

[6] Blankenship's participation in the 2004 election was driven more by a desire to defeat then-Justice McGraw than to elect Justice Benjamin. Resp. Br. 3-4, 55.

couldn't cinch the deal, either. *See* Resp. Br. 54 (noting, for instance, that most West Virginia newspapers endorsed Benjamin and that Benjamin's opponent declined all media interviews, refused to debate, and gave one particularly "bizarre speech"). In an ordinary appointment system, by contrast, the chief executive's personal choice is a necessary condition to the judge's elevation. If any judge can be said to owe his office to anyone, then surely it is the appointed judge who owes the executive who selected him. But can it possibly be that an appointed judge must—*as a matter of federal constitutional law*—recuse himself every time his appointer (or, more likely, his appointer's designee) appears before him as a litigant? Common sense and historical practice both confirm that the answer is no.

Of course, the problems for the appointed judge under petitioners' "debt"-based standard wouldn't end with cases involving his appointer. What about, for instance, the legislators who supported his nomination? The administration lawyers who vetted his selection? The private-sector attorneys who wrote letters or testified on his behalf to a legislative or bar committee? Those who actively advocated his appointment or confirmation in the press? "[H]uman nature" being what it is (Pet. Br. 30), surely the appointed judge may feel some "debt of gratitude" to those individuals, too. But just as surely, the Due Process Clause could not possibly require the judge to recuse in every case in which any of them shows up before him as lawyer or litigant. If it did, the business of the courts—including this one—would grind to a halt.

The complications attending the election-appointment vector, alone, should give the Court pause

about embracing petitioners' "debt of gratitude" criterion. But they are just the tip of the iceberg. The variations go on and on. A brief sampling—

- Exactly what kinds of "debts" count, and for how much? What about political and personal debts, as opposed to financial?

- Should it matter whether the support comes from a litigant, a lawyer, or some other interested person?

- Is the support threshold different for judges who represent statewide constituencies than for those whose jurisdiction is more limited?

- How would the calculus apply where a litigant or lawyer has actively opposed (rather than supported) a particular judge's candidacy?

- If an individual is initially appointed or elected to a policymaking position (say, Attorney General) and then later springboards to judicial office, does any "debt" to his early supporters follow him from the statehouse to the courthouse?

- How should courts discount the indebtedness that attaches to independent expenditures as opposed to direct contributions? What about solicitations?

- Of what relevance is the closeness of the election or the competitiveness of the appointment?

- Should a due-process rule treat support offered during the pendency of a case differently from support offered before the case is filed?

There is no need to go on. The point is clear: Petitioners' "debt"-based theory has no principled, logical stopping point.

Seemingly recognizing as much, petitioners and their *amici* retreat to a series of multifactor balancing tests. Tellingly, though, petitioners and their *amici* can't seem to agree on a single set of pertinent considerations. For their part, petitioners emphasize five criteria—the sheer size of Blankenship's expenditures, those expenditures' proportion of Justice Benjamin's total financial support, Blankenship's additional election-related advocacy, the timing of the expenditures, and the non-reviewability of Benjamin's recusal decision. Pet. Br. 27-30. Petitioners' *amici* likewise suggest factors for the Court's consideration—but not necessarily the *same* factors. The ABA presses a *four*-factor inquiry. ABA Br. 19-20. The Center for Political Accountability urges the Court to focus on *six* factors. CPA Br. 18-19. The Conference of Chief Justices has a *seven*-factor test in mind. CCJ Br. 25-29. Public Citizen lists *ten* factors. PC Br. 15. And as a capper, the *amici* hasten to emphasize that their proposed factors should be deemed non-exclusive. *See* ABA Br. 19, CCJ Br. 25.

All of which results, of course, in an adjective-laden smorgasbord of relevant-but-not-decisive factors that as a matter of federal constitutional law may—or may not—require recusal in any given case. Those factors, as best we can summarize them, are as follows:

- Whether the "sheer volume" of support is "truly staggering" (Pet. Br. 28), "unusually large" (ABA Br. 19), "lopsidedly large" (American Academy Br. 3), "disproportionately large" (Committee for

Economic Development Br. 5), "outsized" (American Association for Justice ("AAJ") Br. 11), or even "extremely extraordinary" (CCJ Br. 5)—factoring in, of course, "the costs of judicial campaigns in a jurisdiction, recognizing that they vary with the size of the electorate and ... whether the election is contested, has a large or small field, or is long in duration, and ... whether public or alternative funding sources are available" (ABA Br. 19), as well as the "standard practice" in the area (CCJ Br. 26).

- Whether the support in question represented a "large" percentage of the candidate's total or only a "small fraction." Pet. Br. 26, 28-29.

- Whether the support was "within the scope of legislated limits" or, instead, "greatly exceed[ed]" those limits (AAJ Br. 2, 14)—keeping in mind that, although ordinarily "a contribution that complied with a contribution limit set by statute or rule would not violate due process," it may require recusal if the circumstances are such as would raise "obvious concerns" (CCJ Br. 26 n.48).

- Whether the support was provided by "the parties, the lawyers [or] amici" (PC Br. 15) or by some other "interested observer" (ABA Br. 20) with a "substantial stake" in the proceedings (CCJ Br. 4).

- Whether, when support is offered by a non-party, the "relationship between the supporter and the party to the case" is sufficiently "close[.]" CCJ Br. 29.

- Whether the support was directed "to the candidate or a political committee, and if the latter, whether the committee supported many candidates or, as here, was devoted solely to defeating one candidate (and hence electing the other)." PC Br. 15.

- Whether the support was "effective[]" (CCJ Br. 28) or played a "meaningful role" in the judge's selection (Pet. Br. 35).

- Whether the support was strictly independent and, if not, the extent to which the candidate exercised control over the support. CCJ Br. 26-27.

- Whether an expenditure was coupled with other forms of support, such as "campaign[ing], "solicit[ing] donations," and writing letters. Pet. Br. 29.

- Whether any advertising support "expressly refer[red] to the judge or the judge's opponent." CPA Br. 19.

- Whether similar support was offered "by people with interests on both sides of the litigation (or by the same person to all candidates) or just one." PC Br. 15.

- Whether the "supporter's record of campaign activity" shows that he "has habitually made large contributions to or made independent expenditures on behalf of many candidates in the past." CCJ Br. 28.

- Whether the timing of the support "strongly suggests" that it was "intended to influence the outcome" of the litigation. Pet. Br. 29.

- Whether the judge's recusal decision was reviewable by his colleagues and, if so, whether they expressed "discomfort." Pet. Br. 29-30.

- Whether the election or appointment was contested (CPA Br. 19) and, if so, whether the contest was "competitive" (PC Br. 15) and, if so, whether the judge was selected by a "narrow … margin" (Pet. Br. 30).

- Whether the "history between the supporter and the judge" raises "pertinent concerns about the probability or likelihood of judicial bias." CCJ Br. 28.

The "test" alone, such as it is, should alert the Court that something is amiss. Such scatter-shot *ad hocery* is not the stuff of which federal constitutional doctrine should be constructed. The point is not, of course, that there is no place in the law for fact-specific, contextual decisionmaking. Of course there is. The point is simply that in instances like this—involving all manner of case-dependent factors—it is simpler to police conduct through state statutes or rules rather than "through the Constitution" because a statute or rule can allow resolution of the issue to "turn on any sort of practical consideration without having to subsume it under a broader principle." *Atwater*, 532 U.S. at 352. And not just simpler, but more respectful of the State-to-State variations that underlie Our Federalism and the democratic process, as well.

B. Petitioners' Proposed Due-Process Rule Would Be Counterproductive In Practice.

Doctrinal purity aside, petitioners' "debt"-based due-process rule would create very real practical problems. There are three key points. First, petitioners' rule would spawn countless additional motions to disqualify judges—both state and federal, both elected and appointed—and thereby greatly increase the burden on the already-overburdened American court system. Second, simply by introducing the Constitution into the mix, and thus upping the ante significantly, petitioners' theory would likely cause judges to "over-recuse" on a grand scale. And finally, there is reason to suspect that petitioners' due-process test would lead to all sorts of mischief in the form of tactical maneuvers to force judges' disqualification.

1. Petitioners' rule would unduly burden the courts.

Reversal here will give birth to a new breed of litigation pleading: the "*Caperton* motion." *Caperton* practice can be expected to increase the burdens of litigation in a number of concrete ways.

a. First, and most obviously, by creating an entirely new—and vague—basis for recusal, petitioners' due-process rule will encourage the filing of additional disqualification motions. Once litigants are told that a judge's "debt of gratitude" may give rise to a "probability of bias," and thus to a federal constitutional duty to recuse, the *Caperton* motions will fly. As a snapshot indication of the scope of possible recusal litigation, consider that one study found that between 1995 and 1999, 63% of the Alabama Supreme Court's cases involved par-

ties or attorneys who had contributed to a winning supreme court candidate before their cases were decided.[7] In Michigan, the number was 89%.[8] Under petitioners' view, the opponents of every one of those litigants would be entitled to file a *Caperton* motion. (And, again, for reasons already explained, the filings would likely be at least as frequent, if not more so, in appointment systems, whether state or federal. *See supra* at 21-23.) Whether the motion would succeed, of course, would depend on the outcome of one of the several proposed multifactor balancing tests. But the Court should make no mistake, the motion would be filed.

b. Second, the burden would be exacerbated because, in deciding *Caperton* motions, reviewing judges would have to slog through a laundry list of contextual factors before determining whether, in fact, recusal was constitutionally required. *See supra* at 24-27. Whereas a State legislature, having considered the State's own specific history and circumstances, can peg the obligation to disqualify to a particular, easily-discernible fact—*e.g.*, a trial judge's receipt of a $2000 contribution, *see* Ala. Code §12-24-1, -2—the due-process inquiry, as petitioners and their *amici* concede, is not susceptible of bright-line resolution. *See, e.g.*, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (lamenting tests that "jettison … predictability for the

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[7] *See* Laura Stafford & Samantha Sanchez, *Campaign Contributions and the Alabama Supreme Court,* The Institute for Money in State Politics (May 5, 2003) *at* http://www.followthemoney.org/press/AL/20030505.pdf (visited Feb. 1, 2009)

[8] *See* Ronald D. Rotunda, *A Preliminary Empirical Inquiry Into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates*, 14 No. 2 Prof. Law. 16, 18 (2003).

open-ended rough-and-tumble of factors, inviting complex argument in a [lower] court and a virtually inevitable appeal").

c. Third, *Caperton* practice would often require substantial discovery, thus bogging down the litigation process even further. Consider, again, the sorts of factors that petitioners and their *amici* have said should ultimately control the disposition of a *Caperton* motion: "the history between the supporter and the judge," the "relationship between the supporter and the party," and the "supporter's record of campaign activity," among others. In current practice, there is typically little, if any, discovery conducted in connection with disqualification motions made under state and federal recusal statutes and rules. *See* Flamm, *supra*, at 490, 911. But because, on petitioners' view, a *Caperton* motion would be the vehicle for exercising a fundamental *constitutional* right, the *Caperton* movant would presumably be entitled to discover at least some facts necessary to make out his claim.

d. Fourth, petitioners' sweeping due-process theory would require courts—including this Court—to radically curtail the practice of permitting single judges to make their own recusal determinations. Petitioners have emphasized, as an indication that Justice Benjamin's nonrecusal here violated the Due Process Clause, the fact that his "decision to participate in Massey's appeal was not subject to review by the other members of his court." Pet. Br. 30. But at least under current practice, that is typically the case. Recusal motions directed to a judge under 28 U.S.C. §455 are ordinarily decided by that judge in chambers, not by his court sitting en banc. *See Hanrahan v. Hampton*, 446 U.S. 1301, 1301 (1980)

(Rehnquist, J.) ("[G]enerally the Court as an institution leaves such motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer."); Flamm, *supra*, at 501-02, 910-12 (summarizing state-court practice). But because the point of a *Caperton* motion would be to show (by way of a mushy balancing analysis rather than, say, a simple pecuniary-interest determination) that a judge is *constitutionally* untrustworthy to decide the merits of the movant's case, the solo in-chambers procedure likely would not suffice. Rather, as with other rights "established and ordained by the Constitution," there would presumably need to be some sort of "independent review" of the recusal determination. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505, 511 (1984) (First Amendment); *accord, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (Fourth Amendment); *Thompson v. Keohane*, 516 U.S. 99, 115-16 (1995) (Fifth Amendment).

e. Fifth, this Court, in particular, should note that if it were to adopt petitioners' position, it would have to wrangle with the unwieldy "debt of gratitude" test itself. Because this Court would be the only venue for review of motions (like the ones filed here) to recuse justices of a State's highest court, any *ad hoc* balancing rule would unleash a flood of "repeated petitions asking this Court to assess the due process implications of contributions in case after case" (PC Br. 1), and therefore commit this Court to correcting "misapplication[s] of a properly stated rule of law"—a task to which it is not well-suited. *See* S. Ct. Rule 10. Worse, every state-court disqualification motion that would (in the pre-*Caperton* days) have been based on state statutes, ethics codes, or court rules would, post-*Caperton*, simply be recast in due-process terms—thus raising a federal question and, under 28

U.S.C. §1257, making this Court the ultimate arbiter of efforts to disqualify state judges at any level.

f. Finally, reversal here would likely spawn additional collateral recusal-based litigation, as well. Most troublingly from the States' perspective, should petitioners prevail here, it would presumably be only a matter of time before constitutional "*Caperton* claims" arrived on the habeas-corpus scene. *See* 28 U.S.C. §2254(a) (habeas-corpus remedy available to individuals "in custody in violation of the Constitution … of the United States"). Already, States have had to defend against habeas petitioners' assertions that a state judge's participation gave rise to an impermissible "appearance of bias" that required recusal. *See, e.g.*, *Davis v. Jones*, 506 F.3d 1325, 1331-36 (11th Cir. 2007); *Crater v. Galaza*, 491 F.3d 1119, 1130-33 (9th Cir. 2007); *Johnson v. Carroll*, 369 F.3d 253, 260-63 (3d Cir. 2004). Having prevailed in the majority of those cases on the ground that the Due Process Clause does not require (let alone clearly require) recusal for an alleged "appearance of bias," the States would now—following a reversal—be subjected to a second round of challenges predicated on petitioners' "probability-of-bias" criterion.[9]

g. Efforts to shrug off these systemic concerns are unpersuasive. Petitioners, for instance, assert that it is only in "exceptional cases where recusal is constitutionally required" and, therefore, where the burdens we have described would arise. Pet. Br. 36. The Council of Chief

[9] Collateral attacks via 42 U.S.C. § 1983 are likewise not out of the question. *See Shepherdson v. Nigro*, 5 F.Supp.2d 305 (E.D. Pa. 1998) (suit against state-court judge alleging that his failure to recuse from a campaign supporter's case gave rise to a federal constitutional claim).

Justices likewise asserts that *Caperton* motions would be "limited to cases of extraordinary support." CCJ Br. 23. But adjectives like "exceptional" and "extraordinary" (even "extremely extraordinary," *id.* at 5) provide little concrete protection. Every litigant believes—and will argue, citing to a host of contextual considerations—that his case *is* "exceptional" or "extraordinary." The problem is that so many of the considerations that petitioners and their *amici* have proposed as relevant to the due-process inquiry ("exceptionalism" and "extraordinariness" among them) are vague, case-dependent, and relative. There simply is no way to decree, as an *a priori* matter, that a particular case is *not* "exceptional" or "extraordinary." The matter will always be open to debate. It would be far less burdensome to allow individual States—where appropriate in the light of their own histories and circumstances—to open the door legislatively by articulating clear standards to govern the necessity of recusal in particular instances.

Nor is it any answer to say that a "debt"-and-"probability"-based constitutional standard would entail no additional burdens because the same sorts of considerations that petitioners would locate in the Due Process Clause currently inform recusal decisions made under state statutes and court rules. First, it is a simple fact of litigation life that the advent of additional claims (or here, bases for disqualification) will yield additional court filings. Put simply, petitioners would give litigants seeking to disqualify judges an additional arrow for their quiver. Particularly given that the arrow is a constitutional claim—and an amorphous one at that—there is every reason to believe that litigants would use it. Second, the due-process claim that petitioners envision is different in an important respect—namely, its perma-

nence—from the state-law arguments that now control most recusal decisions. If a State's recusal standard turns out to be too stringent or too lenient, it can easily be tweaked (or repealed, if need be) through a statutory amendment or the promulgation of a new rule. If, by contrast, experience shows petitioners' proposed *constitutional* standard to be improvident, a fix will be far more difficult to implement. Finally, anyone defending against the burdens inherent in a new constitutional recusal standard on the ground that the due-process rule merely duplicates the analysis that prevails under existing state statutes needs to answer another—and more fundamental—question: What, then, is the point of minting a new constitutional rule?

2. Petitioners' rule would cause judges to over-recuse.

Systemic burdens and inefficiencies aside, there is reason to believe that petitioners' ill-defined due-process standard would cause judges to over-recuse. Even as matters stand now, judges facing disqualification motions confront a certain psychological pressure to recuse; no judge takes lightly the accusation that he or she may appear to be partial or corruptible. *See Cheney v. United States Dist. Court for the Dist. of Columbia*, 541 U.S. 913, 929 (2004) (Scalia, J.) ("If I could have done so in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the case."). Introducing the Constitution into the mix would raise the stakes considerably. The very point of petitioners' position, of course, is that a judge, by virtue of some purported "debt of gratitude," violates the Constitution—the nation's founding charter—simply by virtue of his or her presence on the

bench. It is difficult to imagine a more serious charge. *Cf.* U.S. Const. art. VI, § 3 (oath).

It seems scarcely debatable that if faced with likely accusations of oath-breaking for every supposed "debt," no matter how ill-defined, judges would defensively recuse even in instances where recusal is not necessary. The chilling effect could be very real. It would also be particularly pernicious in view of the fact that judges are not permitted the luxury of peace-of-mind recusals. Rather, they "ha[ve] a duty to sit where not disqualified which is equally as strong as the duty not to sit where disqualified." *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Rehnquist, J.); *accord, e.g.*, W. Va. Code of Jud. Conduct, Canon 3B(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.").

3. Petitioners' rule would encourage mischief and manipulation.

If the Court is concerned about the public perception of the judiciary, petitioners' "debt"-based recusal standard is a particularly bad solution. Unfortunately, litigants increasingly abuse the recusal procedure; they use disqualification motions—including those based on campaign support—as tools to shape the court that will decide their disputes. *See, e.g., Storms v. Action Wisconsin Inc.*, 754 N.W.2d 480, 487 (Wis. 2008) (motion to disqualify judge based on campaign support filed after decision rendered); *Ainsworth v. Combined Ins. Co. of Am.*, 774 P.2d 1003, 1014 (Nev. 1989) (same); *cf. Cheney*, 541 U.S. at 916 (Scalia, J.) ("The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it

has been cast for the other side, or because it has not been cast at all.").

Acknowledging this problem, Justice Breyer has observed that the recusal standard must be drawn so as to "prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989). Far from helping to remedy the abuse, petitioners' infinitely malleable due-process rule—based on vaguely defined "debt[s] of gratitude"—would only facilitate it. Machiavellian litigants would (should the stakes get high enough) have every incentive to exploit the test's vagueness by cobbling together a story about a judge's "indebtedness" to some interested party. More creatively still, litigants might go so far as to attempt to jigger court assignments by giving support to judges they perceive to be *unfavorable*. *See Adair v. Michigan Dep't of Ed.*, 709 N.W.2d 567, 580 (Mich. 2006) (Taylor, C.J., and Markman, J.) ("[I]t would be a simple expedient for a party or a lawyer to 'mold' the court that will hear his or her cases by tailoring contributions and opposition contributions.").

Individual cases aside, these manipulations would adversely affect the judicial system as a whole. As we have explained, the merits (or demerits) of the abusive disqualification motion would not always control the targeted judge's recusal decision; oftentimes, the *in terrorem* effect of being labeled an oath-breaker would cause the judge to step aside unnecessarily. *See supra* at 34-35. By contrast, should the judge stay on the case, the charges of unconstitutional conduct would only diminish public confidence in the judiciary.

CONCLUSION

The Court should affirm the judgment below.

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