No. 08-205

IN THE
Supreme Court of the United States

CITIZENS UNITED,
Appellant,
v.
FEDERAL ELECTION COMMISSION,
Appellee.

On Reargument of Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* JUSTICE AT STAKE, AMERICAN JUDICATURE SOCIETY, THE CENTER FOR GOVERNMENTAL STUDIES, CITIZEN ADVOCACY CENTER, COMMON CAUSE, COLORADO JUDICIAL INSTITUTE, DEMOCRACY NORTH CAROLINA, THE ILLINOIS CAMPAIGN FOR POLITICAL REFORM, JUSTICE FOR ALL (ARIZONA), MICHIGAN CAMPAIGN FINANCE NETWORK, NORTH CAROLINA CENTER FOR VOTER EDUCATION, OHIO CITIZEN ACTION, PENNSYLVANIANS FOR MODERN COURTS, PUBLIC CAMPAIGN, TAKEACTION MINNESOTA, TEXANS FOR PUBLIC JUSTICE, TRANSPARENCY INTERNATIONAL USA, WISCONSIN DEMOCRACY CAMPAIGN, CHICAGO APPLESEED, CHICAGO COUNCIL OF LAWYERS, AND FORMER CHIEF JUSTICE NORMAN S. FLETCHER (GEORGIA, RETIRED) IN SUPPORT OF APPELLEE

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Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252 (2009).....*passim*
Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968) 12
Dimick v. Republican Party of Minnesota, 546 U.S. 1157 (2006)..... 17
FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)..... 12, 16
McConnell v. Federal Election Commission, 540 U.S. 93 (2003).....*passim*
Republican Party of Minnesota v. White, 536 U.S. 765 (2002).....11, 13, 16

STATUTES

Ga. Code Ann. § 21-5-41 (2006) 11

OTHER AUTHORITIES

American Bar Association Standing Committee on Judicial Independence, *Public Financing of Judicial Campaigns* (2002).....3, 9, 16

American Judicature Society, http://www.judicialselection.us/judicial_selection/ ..3, 10, 11

Annenberg Public Policy Center, *Public Understanding of and Support for the Courts* (2007), *available at* http://www.law.georgetown.edu/Judiciary/documents/finalversionJUDICIALFINDINGSoct1707.pdf..... 13

TABLE OF AUTHORITIES—Continued

Page

Larry C. Berkson, American Judicature Society, *Judicial Selection in the United States: A Special Report* (1980) (updated by Rachel Caufield in 2004), *available at* http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf. 3-4

Chris W. Bonneau, *The Effects of Campaign Spending in State Supreme Court Elections*, 60 Polit. Res. Q. 489 (2007) 6

Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 Just. Sys. J. 21 (2004) 6

Brennan Center for Justice, *Buying Time—2008: Wisconsin* (May 12, 2008), *available at* http://www.brennancenter.org/content/resource/buying_time_2008_wisconsin 8

Brennan Center for Justice, *Buying Time—Spending Rockets Before Elections* (Nov. 13, 2008), *available at* http://www.brennancenter.org/content/resource/buying_time_spending_rockets_before_elections/ 9

Brennan Center for Justice, *State Judicial Elections*, *available at* http://www.brennancenter.org/content/section/category/state_judicial_elections 9

TABLE OF AUTHORITIES—Continued

Page

Brennan Center for Justice *et al*., Press Release, *Special Interests Dominate Wisconsin Airwaves in High Court Race* (Mar. 20, 2008), *available at* http://brennan.3cdn.net/6dd3e14a629d0584f3_d3m6bhjqu.pdf 8

Committee for Economic Development, *Justice for Hire: Improving Judicial Selection* (2002), *available at* http://www.ced.org/images/library/reports/justice_for_hire/report_judicialselection.pdf ... 9

Committee for Economic Development, Brief of *Amicus Curiae* in Support of Petitioners, *Caperton v. A.T. Massey Coal Co. Inc*., 129 S.Ct. 2252 (2009) (No. 08-22), 2008 WL 3165832 17-18

Concerned Corporations, Brief of *Amicus Curiae* in Support of Petitioners, *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006) (No. 05-566), 2006 WL 42102. 17

Conference of Chief Justices, Brief As *Amicus Curiae* In Support Of Neither Party, *Caperton v. A.T. Massey Coal Co., Inc*., 129 S.Ct. 2252 (2009) (No. No. 08-22), 2009 WL 45973 5

Conference of Chief Justices, Resolution of February 7, 2007, *available at* http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html..... 5

TABLE OF AUTHORITIES—Continued

Page

Julian Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L. Rev. 733 (1994) 16

Stacy Forster, *Spending in Supreme Court Race Just Under $6 Million*, Milwaukee J. Sentinel, Jul. 22, 2008, *available at* http://blogs.jsonline.com/allpoliticswatch/archive/2008/07/22/spending-in-supreme-court-race-just-under-6-million.aspx 8

Stacy Forster, *WMC Ad Takes On "Loophole Louie," Campaign Watchdog Raps It*, Milwaukee J. Sentinel, Mar. 26, 2008, *available at* http://blogs.jsonline.com/allpoliticswatch/archive/2008/03/26/wmc-ad-takes-on-quot-loophole-louie-quot-campaign-watchdog-raps-it.aspx 8

Georgia State Ethics Commission, Memorandum of February 24, 2009, *available at* http://ethics.georgia.gov/references/contributionlimits.aspx..... 11

James L. Gibson and Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?* (2009), *available at* http://polisci.wustl.edu/media/download.php?page=faculty&paper=157 14

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Page

Deborah Goldberg and Samantha Sanchez, *Justice at Stake, The New Politics of Judicial Elections 2002* (2002), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2002.pdf 6

Deborah Goldberg, Brennan Center for Justice, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* (2002), *available at* http://www.brennancenter.org/page/-/d/ji3.pdf 4, 9

Deborah Goldberg *et al*., *Justice at Stake, The New Politics of Judicial Elections 2004* (2004), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf 7

Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake Frequency Questionnaire* (2001), *available at* http://www.gavelgrab.org/wp-content/resources/polls/JASNationalSurveyResults.pdf 14

Dee J. Hall, *High Court Races as Barroom Brawls*, Wisconsin State J., Apr. 6, 2008, at A1, *available at* 2008 WLNR 6546125.. 8

Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary*, 1846-1860 44 Historian 337 (1983) 4

TABLE OF AUTHORITIES—Continued

Page

E. Haynes, *Selection and Tenure of Judges* (1944)..... 4

Justice At Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004), *available at* http://faircourts.org/files/ZogbyPollFactSheet.pdf..... 14

Stephen Kaufman, *Contributions to Judicial Races Worrisome, Justice O'Connor Says* (Oct. 6, 2008), *available at* http://www.america.gov/st/usg-english/2008/October/20081006101039esnamfuak0.1795618.html 13

Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, at A1, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html..... 15, 16

National Institute on Money in State Politics, *available at* http://www.followthemoney.org..... 5, 6, 10-11

Paul J. Nyden, *Mining Appeal Moving Along: Olson to Argue Harman Case Against Massey Before Supreme Court*, The Charleston Gazette, May 16, 2008, *available at* http://www.wvgazette.com/News/200805150741 ..... 11, 12

Thomas R. Phillips, *The Merits of Merit Selection*, 32 Harv. J.L. & Pub. Pol'y 67 (2009)..... 9

TABLE OF AUTHORITIES—Continued

Page

Jesse Rutledge, ed., Justice at Stake, *The New Politics Of Judicial Elections in the Great Lakes States, 2000–2008* (2008), *available at* http://www.followthemoney.org/press/Reports/NPJEGreatLakes2000-2008.FINAL.pdf. 7

James Sample *et al*., Justice at Stake, *The New Politics of Judicial Elections 2006* (2006), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf. 5, 7

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

Roy A. Schotland, *Republican Party of Minnesota v. White: Should Judges Be More Like Politicians?,* 41 No. 3 Judges' J. 7 (2002)..... 4

Ciara Torres-Spelliscy *et al*., Brennan Center for Justice at New York University School of Law, *Electoral Competition and Low Contribution Limits* (2009), *available at* http://www.brennancenter.org/page/-/publications/Electoral.Competition.pdf 10

Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* (2001), *available at* http://www.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf..... 15

TABLE OF AUTHORITIES—Continued

Page

Tort Reformers Score Victories in Midwest Judicial Races, Insurance J., Nov. 22, 2004, *available at* http://www.insurancejournal.com/magazines/midwest/2004/11/22/features/49934.htm 7

Alexander Wohl, *Justice for Rent*, The Am. Prospect, Nov. 30, 2002, *available at* http://www.prospect.org/cs/articles?article=justice_for_rent 14

INTEREST OF *AMICI CURIAE* [1]

Amici curiae represent 20 national, regional, and state organizations and a former chief justice of the Georgia Supreme Court. *Amici curiae* are all committed to preserving judicial independence and integrity. *Amici curiae* believe that further restricting government's ability to regulate organizational campaign spending, including from corporate and other outside entities, could have unintended consequences for the judiciary and respectfully submit this brief to highlight this important issue.

Justice at Stake, and its partners, believe that democracy depends on fair and impartial courts that can protect individual rights, guarantee equal justice, and make decisions based solely on the facts and the law-without fear of intimidation. Justice at Stake partners and allies have come together to help Americans keep special interests and political pressure out of the courtroom.

The majority of state judges are subject to some election process, and *amici curiae* believe that appropriate state regulation of money in judicial selection is vital to protecting the actual and perceived integrity of the judiciary.

A description of each *amicus* organization and individual may be found in the Appendix to this brief.

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* or their counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

As part of the broader list of threats articulated by other *amici curiae*, Justice at Stake and its allies write to emphasize that overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and consequently portions of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), would have a profound and negative effect on the selection of state court judges and could damage the integrity of the judiciary.

Special interest spending on judicial elections-by corporations, labor unions, and other groups-poses an unprecedented threat to public trust in the courts and to the rights of litigants. This has been recognized and discussed by journalists, academics, and leading jurists, including the Conference of Chief Justices. This Court itself held last term in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009), that some independent expenditures in judicial campaigns are so excessive that they in fact deny litigants due process under the law. If corporate treasury spending were unregulated in judicial elections, these concerns would only get worse.

Alarmed about the damage of unbridled politicizing of judicial elections, many states are in the process of responding with significant reform efforts aimed at shoring up the public's confidence in the fairness and integrity of the nation's elected judges. Revisiting how campaigns are funded is one important part of this effort. Eliminating states' longstanding ability to regulate corporate influence on judicial elections will cripple these essential reform efforts and exacerbate the recent explosion of special interest pressure on the courts.

Unleashing corporate treasury funds on judicial elections also will distract judges from their most important job: guaranteeing impartial justice to the litigants who come before them. And because escalating corporate campaign expenditures will inevitably breed more recusal and due process motions under the *Caperton* decision, overruling *Austin* and *McConnell* will make the job of sitting judges even more difficult.

ARGUMENT

I. THIS COURT'S DECISION WILL AFFECT JUDICIAL SELECTION IN THE MAJORITY OF STATES.

Although various states have elected judges for many years, the volume and corrosive potential effect of campaign contributions and third-party expenditures on judicial candidates is now more significant than ever before. Total campaign expenditures for state supreme court races have more than doubled in the last ten years, and corporations—along with labor unions, trade associations, attorneys, and others seeking victory in the courtroom—are increasingly seeking to dominate these campaigns.

Unlike the federal system of judicial appointment by the president followed by Senate confirmation for lifetime tenure, 39 states use some form of judicial election for their appellate or trial courts.[2] The

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[2] *See generally* American Judicature Society, *Methods of Judicial Selection*, *available at* http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm; *see also* American Bar Association Standing Committee on Judicial Independence, *Public Financing of Judicial Campaigns* 5 (2002); Larry C. Berkson, American Judicature Society, *Judicial Selection in the United States: A Special Report* 2-3 (1980) (updated

majority of the country's approximately 10,000 state judges are selected or retained through some variety of election.[3] There is no uniformity in election processes or rules among the states. Elections vary from traditional partisan contests to nonpartisan races to retention elections, in which incumbent judges remain in office unless a majority of the electorate votes for removal.

The use of judicial elections as a selection method has not always been so common. When the Federal Constitution was adopted in 1789, all state constitutions provided for the appointment of judicial officers. Starting with Georgia in 1812, states began adopting varying systems for electing judges to make courts more democratic and accountable and to secure a judiciary that was "free from the corrosive effects of politics and able to restrain legislative power."[4] By the time the Fourteenth Amendment was ratified, 24 of 34 states elected some or all judges.[5]

In 2007 the Conference of Chief Justices adopted a resolution urging action to address growing problems

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by Rachel Caufield in 2004), *available at* http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf; Deborah Goldberg, Brennan Center for Justice, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* 4-5 (2002), *available at* http://www.brennancenter.org/page/-/d/ji3.pdf.

[3] Roy Schotland, *Republican Party of Minnesota v. White: Should Judges Be More Like Politicians?*, 41 No. 3 Judges' J. 7, 9 (2002).

[4] Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 44 Historian 337, 338-39 (1983).

[5] *See* Berkson, *supra* note 2, at 1; E. Haynes, *Selection and Tenure of Judges* 99-135 (1944).

in judicial elections.[6] As the Conference stated in a recent amicus brief to this Court, "if judicial elections create problems with fairness—real and perceived—of judicial outcomes, the Conference of Chief Justices and other groups dedicated to enhancing the effective administration of justice in America must address those problems in ways that go beyond mere advocacy for judicial selection reform."[7] Regulation of campaign finance and selection system change are both viable approaches to the challenges of increasing money in judicial elections.

Funding of judicial elections thus has emerged as a central concern for groups seeking to enhance the effective administration of justice. As in most competitive campaigns for elected office, the cost of running for judicial office has reached unprecedented levels. Nationally, state supreme court candidates raised and spent over $200.4 million in judicial elections from 1999 to 2008.[8] This figure is more than double the $85.4 million raised for the same purpose from 1989 to 1998.[9] Between 1993 and 2002, winning can-

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

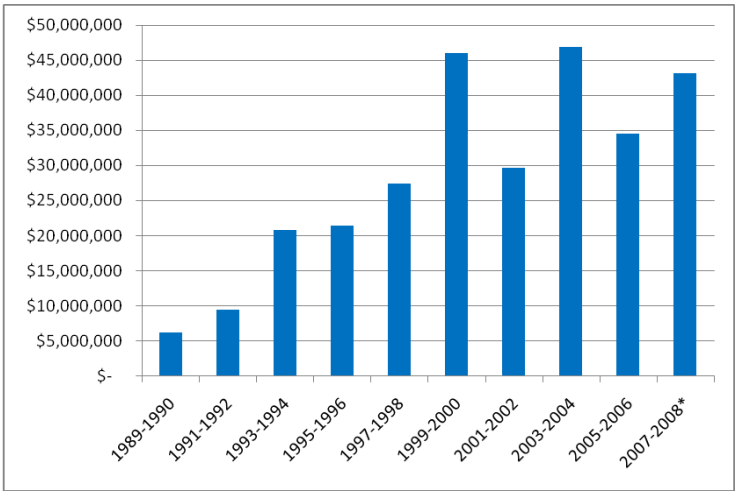
[7] Brief of The Conference of Chief Justices as *Amicus Curiae* In Support of Neither Party at 6-7, *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009).

[8] *See generally* National Institute on Money in State Politics, *available at* http://www.followthemoney.org/index.phtml; James Sample *et al*., Justice at Stake, *The New Politics of Judicial Elections 2006* 30 (2006), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicial Elections2006.pdf.

[9] *Id.*

didates in supreme court elections spent $91 million, while losing candidates spent $53 million.[10]

Increasing Fundraising in
State Supreme Court Elections [11]



[10] Deborah Goldberg and Samantha Sanchez, Justice at Stake, *The New Politics of Judicial Elections 2002* 16 (2002), *available at* http://www.gavelgrab.org/wp-content/resources/New PoliticsReport2002.pdf. Increased campaign spending affects electoral support: For example, for every 1 percent increase in challenger spending, incumbent electoral support declines by approximately 1.8 percent. Chris W. Bonneau, *The Effects of Campaign Spending in State Supreme Court Elections*, 60 Polit. Res. Q. 489, 497 (2007).

[11] This table is based on Justice at Stake analysis of contribution data maintained by the National Institute on Money in State Politics. *See* National Institute on Money in State Politics, *Industry Influence Search Tool*, *available at* http://www.follow themoney.org/database/IndustryTotals.phtml; *see also* Roy A. Schotland, *New Challenges To States' Judicial Selection*, 95 Geo. L. J. 1077, 1080 (2007); Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 Just. Sys. J. 21, 24-27 (2004). The 2007 to 2008 data is preliminary.

Judicial election spending records have been smashed in many states during the past decade. For example, in 2004, $9.3 million was expended in the Illinois Supreme Court election, exceeding the spending in eighteen U.S. Senate contests that year.[12] This Illinois race was the most expensive contested judicial election in American history.[13] On election night, the victor, Judge Lloyd Karmeier, called the spending "obscene for a judicial race" and asked, "What does it gain people? How can people have faith in the system?"[14]

In the 2005 to 2006 election cycle, candidates for all open Alabama Supreme Court seats raised a combined $13.4 million, surpassing the previous state record by more than a million dollars.[15] The three candidates for chief justice raised a combined $8.2 million, making it the most expensive judicial race in state history, and the second most expensive contested judicial campaign in American history.[16]

These official campaign contributions only reveal a small portion of the recent escalation in judicial election spending. In many cases, independent ex-

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[12] Deborah Goldberg *et al*., Justice at Stake, *The New Politics of Judicial Elections 2004* vi (2004), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004. pdf.

[13] Jesse Rutledge, ed., Justice at Stake, *The New Politics Of Judicial Elections in the Great Lakes States, 2000–2008* 1 (2008), *available at* http://www.followthemoney.org/press/Reports/NPJEGreatLakes2000-2008.FINAL.pdf.

[14] *Tort Reformers Score Victories in Midwest Judicial Races*, Insurance J., Nov. 22, 2004, *available at* http://www.insurancejournal.com/magazines/midwest/2004/11/22/features/49934.htm.

[15] Sample *et al*., *supra* note 8, at 5.

[16] *Id.* at 15, 26.

penditures by special interest groups have exceeded spending by judicial candidates themselves. These numbers are more difficult to track because often states that do choose to permit corporate independent expenditures often do not require reporting of those expenditures. For example, in the 2008 Wisconsin Supreme Court election, third-party interest groups outspent official candidates four-to-one.[17] Focusing only on television advertising, special interest groups were responsible for almost nine out of every ten dollars spent during the campaign.[18] One corporate group in particular attacked incumbent Justice Louis Butler in advertisements by referring to him as "Loophole Louie" and accusing him of preferring criminals over the police.[19]

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[17] *See* Stacy Forster, *Spending in Supreme Court Race Just Under $6 Million*, Milwaukee J. Sentinel (Jul. 22, 2008), *available at* http://blogs.jsonline.com/allpoliticswatch/archive/2008/07/22/spending-in-supreme-court-race-just-under-6-million. aspx. In the same election, another report showed that 95 percent of television advertising was paid for by outside interest groups while the candidates themselves paid for only 5 percent of the advertising in the month preceding the last two weeks of the campaign. Press Release, Brennan Center for Justice *et al*., *Special Interests Dominate Wisconsin Airwaves in High Court Race* (Mar. 20, 2008), *available at* http://brennan.3cdn.net/6dd3e14a629d0584f3_d3m6bhjqu.pdf.

[18] Brennan Center for Justice, *Buying Time—2008: Wisconsin* (May 12, 2008), *available at* http://www.brennancenter.org/content/resource/buying_time_2008_wisconsin.

[19] Stacy Forster, *WMC Ad Takes On "Loophole Louie," Campaign Watchdog Raps It*, Milwaukee J. Sentinel (Mar. 26, 2008), Mar. 26, 2008, *available at* http://blogs.jsonline.com/allpoliticswatch/archive/2008/03/26/wmc-ad-takes-on-quot-loophole-louie-quot-campaign-watchdog-raps-it.aspx; *see also* Dee J. Hall, *High Court Races as Barroom Brawls*, Wisconsin State J., Apr. 6, 2008, at A1, *available at* 2008 WLNR 6546125.

This recent Wisconsin election is just one example, of many, in which outside interests have increasingly sought to influence judicial elections through independent expenditures.[20]

In response to this escalating arms race, the American Bar Association and other organizations have endorsed adopting a system of public financing for judicial elections in states that elect judges, which would restrain financial influences in elections. However, because of budget constraints and other political obstacles, few jurisdictions have yet moved to a fully functioning public financing system.[21] In all states with judicial elections except New Mexico, Wisconsin and North Carolina, judicial candidates are entirely dependent on private funds to finance their campaigns.[22]

Instead of providing public funds for judicial campaigns, most states primarily regulate how private financing of judicial elections can occur,

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[20] *See generally* Thomas R. Phillips, *The Merits of Merit Selection*, 32 Harv. J.L. & Pub. Pol'y 67, 81-82 (2009); Brennan Center for Justice, *Buying Time—Spending Rockets Before Elections* (Nov. 13, 2008), *available at* http://www.brennancenter.org/content/resource/buying_time_spending_rockets_before_elections/.

[21] *See generally Public Financing of Judicial Campaigns*, *supra* note 2, at 30; Brennan Center for Justice, *State Judicial Elections*, *available at* http://www.brennancenter.org/content/section/category/state_judicial_elections; Committee for Economic Development, *Justice for Hire: Improving Judicial Selection* 1-4 (2002), *available at* http://www.ced.org/images/library/reports/justice_for_hire/report_judicialselection.pdf.

[22] Deborah Goldberg, Brennan Center for Justice, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* 4 (2002), *available at* http://brennan.3cdn.net/41535ba38d3d460fc6_kwm6b1ecu.pdf.

including the extent to which corporate and labor union funds can be used. And, as judicial elections are becoming increasingly costly and politicized, some reform efforts—relying on this Court's precedents in *Austin* and *McConnell*—are focusing on how corporate and other financing is regulated.

Data show that looser limits on corporate and other campaign financing translate to a greater potential for runaway spending on state supreme court elections.[23] For example, in Alabama and Illinois, which are among the states with the loosest regulations,[24] contributions to judicial campaigns between 2000 and 2008 totaled over $41 million and $20 million, respectively.[25] In contrast, in Georgia and

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[23] *See generally* Ciara Torres-Spelliscy *et al.*, Brennan Center for Justice at New York University School of Law, *Electoral Competition and Low Contribution Limits* 3 (2009), *available at* http://www.brennancenter.org/page/-/publications/Electoral.Competition.pdf (explaining that lower contribution limits increase the chance that incumbents will face viable election challenges and increase the overall competitiveness of campaigns).

[24] Alabama does not limit judicial campaign contributions from individuals or PACs, but limits corporate contributions to $500; Illinois does not impose any limits on judicial campaign contributions. *See* American Judicature Society, *Judicial Campaigns and Elections: Campaign Financing*, *available at* http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm.

[25] *See* National Institute on Money in State Politics, *Advanced Search Tool*, *available at* http://www.followthemoney.org/database/advancedsearch.phtml. Notably, in Illinois, where the winner himself called the $9.3 million spent in one election "obscene," there currently are no limits on corporate spending. *See* American Judicature Society, *Judicial Campaigns and Elections: Illinois, available at* http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state=IL; National Institute on Money in State Politics,

Arkansas, which have tighter regulations,[26] contributions to judicial campaigns between 2000 and 2008 totaled only approximately $3.7 million and $1.9 million, respectively.[27]

Overruling Austin would pave the way to more "obscene" scenarios like the one experienced in Illinois and could produce factual situations that are even more extreme than the one presented in *Caperton*, where a single executive spent millions of dollars to elect a judge who would help decide his anticipated appeal.

II. UNREGULATED CORPORATE TREASURY SPENDING IN JUDICIAL ELECTIONS WOULD ERODE JUDICIAL INTEGRITY.

There is no question that "[j]udicial integrity is . . . a state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (J. Kennedy, concurring). Preserving the integrity of the judiciary requires both that litigants actually receive their constitutional due process before a neutral

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available at http://www.followthemoney.org/database/state_overview.phtml?s=IL&y=2004.

[26] Georgia limits individual, PAC, and corporate contributions to $6,100. *See* Ga. Code Ann. § 21-5-41 (2006); State Ethics Commission, Memorandum of February 24, 2009, *available at* http://ethics.georgia.gov/references/contributionlimits.aspx. Arkansas limits contributions from individuals to $1,000 and from political parties and PACs to $2,500. *See* American Judicature Society, *supra* note 24.

[27] *See* National Institute on Money in State Politics, *supra* note 25. Paul J. Nyden, *Mining Appeal Moving Along: Olson to Argue Harman Case Against Massey Before Supreme Court*, The Charleston Gazette, May 16, 2008, *available at* http://www.wvgazette.com/News/200805150741.

decision—maker-which the *Caperton* decision acknowledged is not always possible when a litigant spends extraordinary amounts on a judicial election—and that the public continues to place its confidence in the decisions of the judiciary. As this Court has explained, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968).

As Citizens United's counsel, Theodore Olson, has acknowledged: "The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today."[28] Overruling *Austin* and *McConnell* would prevent states from regulating how non-voting corporations influence judicial elections and would risk dangerously eroding judicial integrity, both real and perceived. This Court has repeatedly recognized that corporations have unique state-conferred abilities to accumulate wealth and exert a distorted political advantage. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986). Overruling *Austin* would not only disregard this long-held observation but would undermine this Court's recognition just last term in *Caperton* that extreme independent expenditures can cause due process concerns. It might also trigger a domino effect, encouraging states to dismantle restrictions on union and other group spending.

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[28] Paul J. Nyden, *Mining Appeal Moving Along: Olson to Argue Harman Case Against Massey Before Supreme Court*, The Charleston Gazette, May 16, 2008, *available at* http://www.wvgazette.com/News/200805150741.

In the words of Justice O'Connor: "Justice is a special commodity. The more you pay for it, maybe the less it's worth."[29]

A. The Public Believes That Money Spent In Campaigns Influences Judges' Decisions In Particular Cases.

The appearance of bias is as dangerous as actual bias. Perceptions of a biased judiciary lead to distrust, which undermines the effective administration of justice. *See, e.g., White*, 536 U.S. at 789 (J. O'Connor, concurring) ("[E]ven if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so."). Data repeatedly show that the public firmly believes that judicial outcomes are in fact influenced by campaign contributions.

- One recent survey conducted in 2007 for the Annenberg Public Policy Center showed that 69 percent of the public believe that raising money for elections affects a judge's rulings to a moderate or great extent.[30]
- A 2002 study by the Texas State Bar and the Texas Supreme Court found that 79 percent

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[29] Stephen Kaufman, "Contributions to Judicial Races Worrisome, Justice O'Connor Says," (Oct. 2, 2008), *available at* http://www.america.gov/st/usg-english/2008/October/20081006101039esnamfuak0.1795618.html.

[30] Annenberg Public Policy Center, *Public Understanding of and Support for the Courts* 3 (2007), *available at* http://www.law.georgetown.edu/Judiciary/documents/finalversionJUDICIALFINDINGSoct1707.pdf.

of attorneys surveyed believed that campaign contributions have a significant influence on a judge's decision.[31]

- In 2004, 70 percent of Americans surveyed by Justice at Stake believed that judicial campaign contributions have at least some influence on judges' decisions in the courtroom.[32] Likewise, in 2001, 76 percent of those surveyed believed campaign contributions influence judges' decisions.[33]

These surveys of the American public are consistent with recent academic research showing that "the receipt of campaign contributions can indeed threaten legitimacy. For many citizens, contributions to candidates for judicial office imply a conflict of interest, even a quid pro quo relationship between the donor and the judge, which undermines perceived impartiality and legitimacy."[34]

These data indicate that elected courts are already facing a public perception of bias. Increasing

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[31] Alexander Wohl, *Justice for Rent,* The Am. Prospect, Nov. 30, 2002, *available at* http://www.prospect.org/cs/articles?article=justice_for_rent.

[32] Justice At Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004), *available at* http://faircourts.org/files/ZogbyPollFactSheet.pdf.

[33] Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake Frequency Questionnaire* 4 (2001), *available at* http://www.gavelgrab.org/wp-content/resources/polls/JASNationalSurveyResults.pdf.

[34] James L. Gibson and Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?* 6 (2009), *available at* http://polisci.wustl.edu/media/download.php?page=faculty&paper=157.

expenditures and influence from corporations with cases before the courts would only exacerbate these concerns and stymie important reform efforts.

B. There Is A Substantial Risk That Money Spent In Campaigns Affects Judicial Decisions.

The effects of judicial campaign contributions and independent expenditures extend beyond public perception. Reports show that some campaign contributions are in fact correlated with positive procedural and substantive outcomes for donors, which certainly raises judicial integrity issues.

For example, a 2006 New York Times report reviewed twelve years of Ohio Supreme Court decisions and found that Ohio justices routinely sat on cases after having received campaign contributions from the parties involved; those justices then voted in favor of their contributors 70 percent of the time.[35]

Likewise, a 2001 report concluded that "across the board, the more a petitioner [donated to candidates running for the Texas Supreme Court], the greater the likelihood that the court would accept a given petition."[36]

Some judges have candidly acknowledged the practical implications of the cost of judicial campaigns for court decisions. In the same New York Times article, one Ohio justice candidly acknowledged:

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[35] Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, at A1, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html.

[36] Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* 10 (2001), *available at* http://www.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf.

> "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race," said Justice Paul E. Pfeifer, a Republican member of the Ohio Supreme Court. "Everyone interested in contributing has very specific interests."
>
> "They mean to be buying a vote," Justice Pfeifer added. "Whether they succeed or not, it's hard to say."[37]

As former California Supreme Court Justice Otto Kaus observed, trying to set aside the political consequences of high-profile judicial decisions as an elected judge is "like ignoring a crocodile in your bathtub."[38] There is no reason to doubt that the jaws of that crocodile would loom as large—or larger—if judges knew their decisions affected well-known corporate interests that had contributed to or expended large amounts on their judicial campaigns.[39]

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[37] Liptak & Roberts, *supra* note 35, at A1.

[38] *White*, 536 U.S. at 789. (J. O'Connor, concurring) (citing Julian Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L. Rev. 733, 739 (1994)).

[39] As the Court has observed, corporations also have the power to exert a corrosive and distorting influence. *Massachusetts Citizens for Life,* 479 U.S. at 257. Well-funded single-issue groups have an easier time influencing a "comparatively small, highly motivated block of voters to affect" a judicial election. *Public Financing of Judicial Campaigns*, *supra* note 2, at 18 (further stating that "these groups politicize judicial elections because they seek to link an incumbent's tenure in office to her position on a single, politically incendiary issue").

C. Litigants, Including Corporations, Feel Undue Pressure To Spend Money In Campaigns When Finance Regulations Are Removed.

The pressures created by corporate giving to judicial campaigns extend to businesses, as well. For example, in an *amicus* brief filed in *Dimick v. Republican Party of Minnesota*, 546 U.S. 1157 (2006), 39 national corporations explained that they "often have reasons for concern about—and many of them have had at least one experience of—receiving what appears to be less than fair and impartial justice in jurisdictions where they are not located and have not contributed to or been solicited by judicial candidates."[40] The corrosive effect of corporate giving thus works in both directions. Overruling *Austin* increases the likelihood of an inverse scenario from that presented in *Caperton*, where a corporate litigant fears a lack of due process under law by virtue of not having contributed to or spent large amounts on a judicial election.

A legal environment that assures impartial and predictable outcomes serves the best interests of corporations. As the Committee for Economic Development has noted, the business community's belief "that justice is even-handed affects economic decision-making, reduces the perception of risk, and encourages consistent adherence to transparent rules of law."[41]

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[40] Brief of *Amicus Curiae* Concerned Corporations in Support of Petitioners at 3, *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006) (No. 05-566), 2006 WL 42102.

[41] Brief of *Amicus Curiae* the Committee for Economic Development in Support of Petitioners at 5, *Caperton v. A.T. Massey*

Moreover, even where corporations have no intention of skewing the results of litigation, a high volume of corporate expenditures on judicial campaigns creates an appearance of seeking favor that adversely affects the public perception of both the courts and the corporations.

III. EXPANDING CORPORATE TREASURY SPENDING IN JUDICIAL ELECTIONS WOULD INCREASE *CAPERTON* DUE PROCESS CLAIMS.

Just last term in *Caperton*, this Court acknowledged that self-interested campaign spending can in fact create a Fourteenth Amendment due process threat to the guarantee of an impartial tribunal. The Court explained that "[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias can arise when-without the consent of the other parties-a man chooses the judge in his own cause." *Caperton*, 129 S.Ct. at 2265. In *Caperton*, the Court held that campaign contributions and expenditures are unconstitutionally dangerous where "under a realistic appraisal of psychological tendencies and human weakness" the spending "poses such a risk of actual bias or prejudgment" that the elected judge cannot implement the guarantee of due process and there would be a "possible temptation to the average judge to lead him not to hold the balance nice, clear and true." *Id*. at 2263-64.

Both the majority and the dissent in *Caperton* worried that the decision may be used to bring "*Caperton* motions" in multiple other cases where a judge sits on a case involving a campaign supporter.

Coal Co. Inc., 129 S.Ct. 2252 (2009) (No. 08-22), 2008 WL 3165832.

See id. at 2265 (J. Kennedy), 2272 (C.J. Roberts, dissenting). However, the majority argued that the *Caperton* fact pattern was an exceptional and extreme one, not likely to be seen again because in that case just one individual had spent more than $3 million on a single campaign. *Id*. at 2265.

If corporate treasury spending were unleashed on judicial campaigns, it would inevitably escalate the cost and controversy of judicial elections. There is no reason to doubt that, in a regime lacking the regulations permitted by *Austin* and *McConnell,* corporations with their "immense aggregations of wealth" would make expenditures of *Caperton* magnitude more commonplace in judicial elections-causing a spike in legitimate *Caperton* recusal and due process motions. And, as other groups felt pressure to match this corporate treasury spending, these issues would only snowball. Relying so much on the due process limitations articulated in *Caperton* would be highly risky, since that decision was not intended to supplant an overarching framework of state regulation designed to preserve the integrity of the judiciary amid a rising tide of campaign expenditures.

CONCLUSION

Overruling this Court's well-reasoned and long-standing precedents in *Austin* and *McConnell* could dramatically skew the future course of the judiciary in America. Courts can only be impartial if they are independent. To ensure due process, judges must be able to make decisions without looking over their shoulders at wealthy donors whose cases they must decide. *Austin* and *McConnell* should not be overruled.

Respectfully submitted,

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APPENDIX

LIST OF *AMICI CURIAE*

Justice at Stake is a non-partisan campaign of more than 50 organizations working to keep courts fair and impartial. Justice at Stake Campaign partners educate the public and work for reforms to keep special interest pressure out of the courtroom.[1]

The American Judicature Society works to maintain the independence and integrity of the courts and increase public understanding of the justice system. Founded in 1913, the society is a non-partisan organization with a national membership of judges, lawyers and other citizens interested in the administration of justice. Its mission is to secure and promote an independent and qualified judiciary and fair system of justice.

The Center for Governmental Studies (CGS), a non-profit, non-partisan organization, helps civic organizations, decision-makers and the media to strengthen democracy and improve government processes by providing rigorous research, nonpartisan analysis, strategic consulting and innovative media models of public information and civic engagement. CGS has issued two reports on judicial campaign financing, one concerning Los Angeles County's judicial elections and one regarding North Carolina's judicial public campaign financing program.

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[1] The arguments expressed in this brief do not necessarily express the opinion of every Justice at Stake partner or board member. Members of Justice at Stake's board of directors who are sitting judges did not participate in the formulation or approval of this brief.

The Citizen Advocacy Center is a non-profit community legal organization dedicated to building democracy by strengthening the citizenry's capacities, resources, and institutions for self-governance. Since 1994, Citizen Advocacy Center community lawyers have empowered the citizenry to be active participants in the democratic process as well as protected the rights of the citizenry to ensure such participation is meaningful.

Common Cause is one of the nation's oldest and largest citizen advocacy organizations, with organizations in 35 states, and nearly 400,000 members and activists around the country. Common Cause is a strong proponent of fair and impartial judiciary, and supports reform initiatives for judicial election, selection and retention that eliminate the undue influence of special interest money on the judiciary. Common Cause seeks such reforms through state chapters in many states, including Georgia, Ohio, Pennsylvania, and Wisconsin.

The Colorado Judicial Institute is a 29-year old non-partisan, non-profit organization that seeks to preserve and enhance the independence and excellence of Colorado courts, further public understanding of the Colorado judicial system, and ensure that the courts meet the needs of the people.

Democracy North Carolina is a non-partisan organization that uses research, organizing, coalition-building, and public education to enhance the vitality of democracy in North Carolina and help fulfill the promise of "one person, one vote." It was a major leader in the successful effort to make North Carolina the first state in the nation with a robust public financing program for candidates in statewide judicial elections.

The Illinois Campaign for Political Reform is a non-profit, non-partisan public interest group that conducts research and advocates reforms to promote public participation, address the role of money in politics and encourage integrity, accountability and transparency in government.

Justice for All is the Arizona counterpart to Justice at Stake. Justice for All is dedicated to the preservation of an independent, impartial judiciary and the merit selection/retention system of appointing and retaining judges.

The Michigan Campaign Finance Network conducts research and provides public education on money in Michigan politics. It has published analysis of the last five Michigan Supreme Court election campaigns.

The North Carolina Center for Voter Education is dedicated to improving the quality and responsiveness of elections through public education and research. The Center is a non-partisan, non-profit organization based in Raleigh, North Carolina.

Ohio Citizen Action was founded in 1975 and has 80,0000 members. Ohio Citizen Action's Money in Politics Project has identified sources of campaign contributions and the economic and policy interests of donors.

Pennsylvanians for Modern Courts is a statewide non-profit, non-partisan organization founded to improve and strengthen the justice system in Pennsylvania by reforming the judicial selection process; improving court administration, court financing and the jury system; eliminating bias; and assisting citizens in navigating the courts and the justice system, whether as litigants, jurors, or witnesses. The organ-

ization's mission is to ensure that Pennsylvania has fair and impartial courts that serve all Pennsylvanians.

Public Campaign is a non-profit, non-partisan organization dedicated to campaign reform that dramatically reduces the role of special interest money in American politics. Public Campaign works for reform with a broad range of organizations, including local community groups and national organizations whose members are not fairly represented under the current campaign finance system.

TakeAction Minnesota's mission is to unite the power of diverse individuals, communities, and organizations in active grassroots democracy that builds social, racial, and economic justice.

Texans for Public Justice is a Texas-based nonprofit research and advocacy organization established in 1997. One of the organization's missions is to research the role of campaign contributions in the Texas judicial system and to promote a range of judicial reforms.

Transparency International-USA works in the U.S. and abroad to combat corruption and promote transparency and integrity in government, business and development assistance.

The Wisconsin Democracy Campaign is a nonpartisan watchdog group that tracks the money in state politics and advocates for campaign finance reform and other reforms promoting clean, open and honest government.

The Chicago Council of Lawyers is a public interest bar association which strives for the fair and effective administration of justice.

Chicago Appleseed is a research and advocacy organization which promotes social justice and government effectiveness by identifying injustice in the community, investigating its causes, and finding effective solutions.

The Honorable Norman S. Fletcher was appointed to the Supreme Court of Georgia in 1989 and served as Chief Justice from 2001-2005.