No. 05-

IN THE
Supreme Court of the United States

MICHAEL E. AVERY, ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Illinois selects the judges of its highest court through partisan elections. This case reached that court on October 2, 2002 after a $1.05 billion verdict against Respondent, State Farm Mutual Auto. Ins. Co., was unanimously upheld by the Illinois Appellate Court. The case was argued before and submitted to the Supreme Court of Illinois in May of 2003. Illinois then held a regularly scheduled judicial election in November 2004 for a vacant seat on the Supreme Court. The winner of this election, then-trial judge Lloyd Karmeier, directly received over $350,000 of donations from Respondent, Respondent's Lawyers, and Respondent's *Amicus* and their lawyers. Over $1 million in additional funds came indirectly from groups with which Respondent State Farm was affiliated and a member. After his election, Justice Karmeier declined to recuse himself from this matter, and then cast the decisive fourth vote overturning the verdict against State Farm.

May a judge who receives more than $1 million in direct and indirect campaign contributions from a party and its supporters, while that party's case is pending, cast the deciding vote in that party's favor, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioners Michael Avery, Mark Covington, Sam DeFrank, Carly Vickers and Todd Shadle, were appointed to represent a certified Class of State Farm auto policyholders in 48 states. They were Plaintiffs-Appellees in the courts below. Respondent State Farm Mutual Auto Insurance Company was Defendant-Appellant in the courts below.

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OPINIONS BELOW

The decision reversing the Appellate Court of Illinois, Fifth District's opinion upholding the verdicts and judgments below (App., *infra*, 1-149) is reported at 216 Ill.2d 100, 835 N.E.2d 801 (2005). The Appellate Court's decision upholding in part the verdicts and judgments below (App. 150-203) is reported in part at 321 Ill.App.3d 269, 746 N.E.2d 1242 (5th Dist. 2001). The October 8, 1999 Judgments of the Circuit Court (App. 204-221) are unreported. The September 26, 2005 Order of the Supreme Court of Illinois denying rehearing (App. 222) is unreported. The May 20, 2005 Order of the Supreme Court of Illinois vacating its March 16, 2005 Order denying the motion by Petitioners for conditional non-participation as moot (App. 223-4) is unreported. The March 16, 2005 Order denying the motion by Petitioners for conditional non-participation (App. 225) is unreported.

JURISDICTION

The Supreme Court of Illinois entered its Order denying Petitioners' petition for rehearing on September 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides in pertinent part "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

I. Proceedings in the Trial and Appellate Courts

The case below was brought as a class action in 1997 against respondent State Farm to challenge State Farm's nationwide policy of requiring the use of so called "imitation" or "non-original equipment manufacturer" ("non-OEM") crash parts to settle auto claims by its policyholders whenever those parts were available and cheaper than parts made by the vehicle's manufacturer.[1]

Petitioners filed in Marion, Illinois, the county seat of Williamson County, the county in which State Farm's regional offices were located. The assigned judge promptly disclosed to the parties under ABA Canon 3 that he had represented State Farm on numerous occasions within the preceding seven years. Both parties then waived the conflict under ABA Canon 3(D), adopted in Illinois as Ill. Sup. Ct. Rule 63(D).

After extensive briefing and a four-day evidentiary hearing, the trial court certified two claims — breach of contract and consumer fraud — on behalf of a Class of 4,762,000 State Farm policyholders in 48 states who had

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[1] This case involved only a specific list of 25 mass-produced "crash parts" such as outer body sheet metal parts (fenders and hoods) and outer body safety parts (taillight assemblies and bumper systems). These parts are commonly replaced after accidents and thus termed "crash parts." The case did not involve replacement of parts like batteries, oil filters and tires. As found below, "OEM parts" are made by or for the vehicle's original equipment manufacturer by approved suppliers according to the manufacturer's proprietary specifications. "Non-OEM parts" are made without these specifications by suppliers not approved by the OEM.

non-OEM crash parts used by State Farm to settle first-party comprehensive and collision claims. Petitioners contended that because these non-OEM crash parts were mass-produced without demonstrated compliance to the manufacturers' design, materials and measurement specifications, they were categorically not of "like kind and quality" to OEM crash parts, therefore could not restore vehicles to "pre-loss condition" as required by State Farm's policy language, and that State Farm's unauthorized use of them breached this uniform policy language. Petitioners further contended that State Farm had misrepresented and concealed the true quality of the non-OEM crash parts it used and therefore deceived its policyholders, whose policy premiums were paid pursuant to contracts requiring the use of "like kind and quality" parts.

After extensive pre-trial proceedings and full discovery, the trial court conducted a bifurcated seven week trial: the breach of contract claims were tried to a jury, and the statutory consumer fraud claim was determined by the court. At the conclusion of this trial, the jury found that State Farm breached its contracts by specifying the use of inferior non-OEM parts. After reviewing all of the evidence, the Trial Court agreed and issued a written Judgment on October 4, 1999, confirming a total award of $456,636,180 in breach of contract damages or less than $100 for each of the 4,762,000 class members. (App. 204-8) The Trial Court also found that State Farm had violated the Illinois Consumer Fraud Act ("ICFA"), and issued written findings supporting its conclusion. Specifically, it found that, in light of State Farm's knowledge of the inferiority of non-OEM crash parts, State Farm misrepresented, concealed, suppressed and omitted material facts concerning the non-OEM crash parts that it specified, and that as a direct and proximate result of these deceptions, Plaintiffs and the Class were injured and damaged. (App. 209-221)

The Trial Court awarded disgorgement damages of $130,000,000, which represented the amount State Farm had not paid on claims during the period within the statute of limitations for the ICFA claim (which was shorter than that for the breach of contract claim) as a result of its specification of cheaper non-OEM crash parts. The Trial Court recognized that the Class would receive only one award of this $130,000,000 as it overlapped with damages awarded by the jury on the breach of contract claim. Finding further that State Farm had willfully violated ICFA, the Trial Court applied controlling legal and equitable considerations, including State Farm's conduct, the "nature and enormity of the wrong," the resulting harm, the ability to pay, and potential liability in other cases and awarded punitive damages in the amount of $600,000,000 to the ICFA Class.

The record below contains more than 30,000 pages of pleadings and more than 13,000 pages of hearing and trial transcripts. The Appellate Court extended the page limitations for briefing to 150 so that State Farm would have an adequate opportunity to address the errors it claimed were prejudicial, and extended the time for oral argument. Although it found State Farm waived a number of the issues raised in its appeal, the Appellate Court, in a forty-page opinion issued on April 15, 2001, nevertheless addressed many of those issues on the merits. It did so "in the interest of thoroughly considering the issues raised in [the] appeal." (App. 160)

The Appellate Court's eventual opinion upheld the jury's verdict in all respects, disallowed the duplicative disgorgement of damages under ICFA awarded by the Trial Court, and upheld a $1.05 billion verdict for the Class.

II. Proceedings in the Supreme Court of Illinois

State Farm then petitioned for leave to appeal to the Supreme Court of Illinois. On October 2, 2002, the Court, with one judge (Rarick, J.) not participating, granted leave to appeal. *Avery v. State Farm Mut. Auto. Ins. Co.*, 201 Ill.2d 560, 786 N.E.2d 180 (2002). The issues raised by State Farm were extensively briefed, with oral argument occurring, and the case being submitted for decision, on May 14, 2003.

Under the Illinois Constitution, the Supreme Court of Illinois "shall consist of seven judges." Three are selected from the First Judicial District (comprising Cook County), the other four are selected from each of the other four judicial districts. *Ill. Const. Art. VI* §§ 2, 3. Absent the concurrence of four judges on the Supreme Court of Illinois, no Appellate Court opinions can be overturned. *Ill. Const. Art. VI*, § 3. Under the Illinois Constitution, judges on the Supreme Court of Illinois are nominated through partisan primary elections or by petition and then "shall be elected at general or judicial elections as the General Assembly shall provide by law." *Ill. Const. Art. VI*, § 12(a). Illinois places no limits on the amounts or sources of campaign contributions that a candidate, judicial or otherwise, may accept. Individuals, corporations, and groups, including political action committees, may all donate to judicial campaigns. The Illinois Election Code, 10 ILCS 5/9-1, et seq., imposes disclosure requirements on candidates and groups which accept contributions or make expenditures.[2]

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[2] Unfortunately, the rules are sometimes ignored. For example, in this case Citizens for Karmeier received a direct donation of $8,000; and indirect donations of up to $150,000 that were funneled through an organization called "JUSTPAC," from the "Illinois Coalition for Jobs Growth and Prosperity." The Coalition's failure to register under the Illinois Disclosure Act, or to reveal the

While this matter was pending and no decision had been issued, the seat of the Justice on the Supreme Court of Illinois representing the appellate district from which this case arose (the Fifth Appellate District) came open as a result of the retirement of Judge Rarick. The candidates for this open seat in the November 2004 election were Appellate Judge Gordon Magg, who had authored the underlying Appellate Court opinion (and who therefore would not have been able to sit in further judgment on this matter had he been elected) and then-circuit court Judge Lloyd Karmeier. In a race which was described by the press as one of the "most bitter" and "most expensive" judicial elections in history, Judge Karmeier raised and spent over $4.8 million and was elected on November 4, 2004.

III. Petitioners' Motion for Conditional Non-Participation is Denied

Perhaps not surprisingly, of the more than $4.8 million which disclosure statements later showed to have been raised and spent by and on behalf of Justice Karmeier, much came directly from State Farm and its agents or from groups of which State Farm was an active member and supporter. Petitioners therefore fully expected that Justice Karmeier would recuse himself under ABA Canon 3(c)(1), which had been codified as Ill. Sup. Ct. Rule 63(C)(1), and controlling Due Process principles. When this did not occur, Petitioners filed a *Conditional Motion for Non-Participation* with the Supreme Court of Illinois on January 26, 2005. (App. 288-311). This motion noted that, perhaps through oversight, Justice Karmeier had not recused himself, and it contended that the close connections between State

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source of its funds, is currently the subject of a complaint filed with the Illinois State Board of Elections. *See* http://www.ilcampaign.org/ (providing link to the complaint).

Farm and Justice Karmeier's campaign required recusal. The motion was accompanied by a voluminous authenticated record, including the following evidence to support the recusal motion:

First, the race in question happened after the Supreme Court of Illinois had accepted review of this case in 2002, briefing was completed, and oral argument was heard and the matter submitted on May 14, 2003. This case was therefore *pending* before the Supreme Court of Illinois, and had been pending for well over a year, at the time of the race in question.

Second, at the time of this election, the outcome of this case had become a major issue that was widely anticipated to affect other parties facing similar litigation (including Allstate and other insurers that had also been sued over their use of non-OEM crash parts in similar suits). Enormous sums of money would be won or lost based upon the outcome of this case. As Petitioners showed, and as State Farm never denied, now-Justice Karmeier, his supporters Ed Murnane and Bill Shepherd (both of whom were connected to State Farm) and a group of organizations Mr. Murnane founded, including the Illinois Civil Justice League, and JUSTPAC, were well aware of the pendency of this lawsuit. The evidence showed, and it was not disputed by State Farm, that State Farm lawyer and lobbyist Bill Shepherd was instrumental in the founding of these groups, and that State Farm *directly* provided funding to them. The evidence further showed that Mr. Murnane in particular was aware of this case, felt it was unfair and should be overturned, and personally recruited Justice Karmeier to run for the Supreme Court of Illinois.

Third, once Mr. Murnane and his State Farm-funded and supported groups had recruited Justice Karmeier to run, they financed his race with massive contributions. For example, JUSTPAC gave Justice Karmeier a total of $1,191,453 in donations. From the

perspective of the donors to JUSTPAC, Justice Karmeier, and the public, these donations were the equivalent of direct contributions to Justice Karmeier's campaign because all but $500 of the funds raised by JUSTPAC (0.04%) were given to Justice Karmeier's campaign. Also notable was $269,338 from the Illinois Chamber of Commerce, and total donations by the U.S. Chamber of Commerce of over $1.3 million to the Republican Party of Illinois, which were in turn passed directly on to Judge Karmeier's campaign. As Petitioners showed, State Farm employees were Directors of both organizations and both donating organizations were also members of, and major supporters of JUSTPAC, and through it Justice Karmeier.[3]

Although, as Petitioners admitted, most of the funds given to Justice Karmeier's campaign cannot be traced beyond their source in organizations of which State Farm is a member and contributor, it was also shown that over $350,000 of the direct donations to Justice Karmeier's campaign could *be directly traced* to State Farm's employees, lawyers, or amicus and lawyers representing amicus in this case. In addition, as Petitioners showed, many hundreds of thousands of dollars were given to Judge Karmeier's campaign by State Farm employees, agents, and amicus through JUSTPAC, including $1000 given directly by Edward B. Rust, State Farm's Chairman and CEO and a witness at this trial below.

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[3] As Petitioners also showed, huge sums of money were directed to Justice Karmeier's campaign by three other groups — the Illinois Coalition for Jobs, Growth and Prosperity ($150,000), the American Tort Reform Association ($415,000), and the Illinois Insurance Political Committee ($6000). State Farm was a member of and contributor to all of these groups . *See Non-Participation Mot.* at 19-22 (App. 308-310).

Fourth, and finally, the motion showed that there is no doubt that the results of the race were correctly perceived by the public as an election bought by big money. For example, on November 5, 2004, the *St. Louis Post Dispatch* (which endorsed Justice Karmeier) ran an editorial stating that "Big business won a nice return on a $4.3 million investment in Tuesday's election. It now has a friendly justice on the Illinois Supreme Court. * * * And anyone who believes in evenhanded justice should be appalled at the spectacle of a big-money effort to buy a Supreme Court seat." The editorial described the election as an "ugly, dispiriting, destructive, misleading, money-drenched race." The article suggested that Justice Karmeier might be tempted to "do favors for the interests that lavished millions on his campaign" and that the average citizen must be "wondering if it's payback time." *Buying Justice*, St. Louis Post-Dispatch, November 5, 2004, at B06.

Tellingly, State Farm filed an opposition to Petitioners' Non-Participation Motion. Yet, this opposition did not deny, let alone refute, the factual showing made by Petitioners of the clear appearance of impropriety if Justice Karmeier were to sit on this case. Instead, it asserted (1) that the facts shown did not require recusal as the standard was not the appearance of impropriety; and (2) the motion "appears to be part of an attempt to prevail in this case by securing Justice Karmeier's disqualification." *Opposition of Defendant-Appellant State Farm Mutual Auto. Ins. Co. to Plaintiffs-Appellees' Conditional Mot. for Non Participation*, at 15 (App. 281).

Petitioners then filed a *Memorandum in Response to Appellants' Opposition* which further supplemented the record with additional materials supporting recusal, refuted State Farm's claim that the appearance of impropriety was not the standard, and noted how State Farm's own opposition—which, in effect, conceded that

State Farm itself believed Justice Karmeier's vote was a vote in its camp—supported recusal.

On March 16, 2005, the Court below denied Petitioners' motion, ruling that the subject of Justice Karmeier's recusal was up to Justice Karmeier and was not subject to further review by the Illinois Supreme Court. (App. 225). On May 20, 2005, the Court below issued a second order stating that, because Justice Karmeier had declined to recuse himself, Petitioners' recusal motion was now "moot." (App. 223-4).

IV. Petitioners Seek Rehearing After The Issuance Of The Opinion Below On Which Justice Karmeier's Vote Was Decisive On A Major Portion Of The Case

On August 18, 2005, the Supreme Court of Illinois issued its Opinion in this case, well over two years after the case was argued. One justice, Justice Thomas, recused himself and took no part in the consideration or decision of the case. (App. 112, 216 Ill.2d at 511, 835 N.E.2d at 864).

A majority opinion by then Chief Justice McMorrow joined by three other Justices reversed the award of $600 million in punitive damages under the ICFA, finding that the ICFA did not apply to the claims of Class members residing outside of Illinois. (App. 92, 216 Ill.2d at 502, 835 N.E.2d at 855). This portion of the Court's opinion was joined by a separate concurrence in part by Justices Freeman and Kilbride, thus making the decision as to this portion of the opinion unanimous.

As to the breach of contract claims, these same four justices overturned the award of $456,636,180 to the Class in its entirety on the grounds that the damages awarded were the result of "improper speculation," because, according to these four justices, the term "like kind and quality" was unambiguous and did not require

that any replacement parts be of OEM quality, and because, according to the majority, State Farm's contractual obligation varied such that the nationwide Class should not have been certified.

`Two Justices dissented as to these breach of contract holdings. However, these two justices believed that their interpretation of State Farm's contractual obligation (which was based on rules of construction and the evidence as to how State Farm itself interpreted the obligation) might conflict with the rule in certain other states; they therefore would have "remand[ed] the cause to the circuit court to determine whether there exists any subclass of the nationwide class with respect to which the verdict may be upheld" under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (App. 142, 216 Ill.2d at 526, 835 N.E.2d at 879). Therefore, the portion of the Opinion addressing the Class's breach of contract claims had the four votes required by the Illinois Constitution only because it was joined by Justice Karmeier. Absent Justice Karmeier's participation, only those parts of the court's opinion joined by the two dissenting Justices would have had the four votes required by law and hence the force of law.

Thus, as reflected in the dissenting opinion, the Class members' contract claims (valued at up to $465 million) would have been remanded to the Williamson County Circuit Court for further proceedings under this court's seminal *Phillips Petroleum* decision (recently reaffirmed unanimously by this court as the Constitutional choice-of-law touchstone in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003)).[4]

[4] As this Court indicated in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003), the determination and award of damages to a class of State Farm policyholders would be appropriate consistent with their "inclusion" in this case and the conduct of an appropriate choice of law determination under *Phillips*

Accordingly, there is no doubt that Justice Karmeier "cast [] the deciding vote" on a very substantial portion of this case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

Because Justice Karmeier's participation in this case had turned out to be decisive, on September 8, 2005, Petitioners moved for rehearing and again challenged Justice Karmeier's participation. As this motion argued, because of the massive support given to Justice Karmeier during the pendency of this case by State Farm,

> [T]he decisive participation of Judge Karmeier in this case violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Illinois law in that: (1) [the Supreme Court of Illinois] allowed Justice Karmeier to himself determine the recusal motion challenging his impartiality in violation of the due process requirement that "no man can be a judge in his own case," *In re the Matter of Murchison*, 349 U.S. 133, 136 (1955) , and (2) that the huge support provided to his election by State Farm and its supporters *during the pendency of this case* [in the Supreme Court of Illinois] violates Due Process in that it "would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear, and true." *Lavoie*, 475 U.S. at 825 (*quoting Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *quoting Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

Petroleum Co. v. Shutts, 472 U.S. 797, 821-822 (1985).

Plaintiffs-Appellees' Motion for Rehearing at 1-2. (App. 228). As Petitioners argued, most importantly, "under the due process clause of the Fourteenth Amendment 'justice must satisfy the appearance of justice,'" *Aetna*, 475 U.S. at 825 (citations omitted) and Justice Karmeier's decisive participation in this case could not satisfy that test, which requires rehearing after Justice Karmeier's recusal. (App. 228).

On September 26, 2005, the Supreme Court of Illinois, with now Chief Justice Thomas having again recused himself, but Justice Karmeier sitting, denied rehearing without comment. (App. 222).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with the Rationales of this Court's Due Process Holdings on the Right to a Fair and Impartial Judicial Decisionmaker

Parties to civil cases have a constitutional right to a fair trial. *Latiolais v. Whitley*, 93 F.3d 205, 207 (5th Cir. 1996); *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988). "Trial before an 'unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (citation omitted); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."). As this Court has observed:

> This requirement of neutrality in adjudicative proceedings safeguards the

> two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

What constitutes a disqualifying interest "cannot be defined with precision. Circumstances and relationships must be considered," *In re Murchison*, 349 U.S. at 136. Nonetheless, this Court has repeatedly held that "[e]very procedure which would offer a possible temptation to the average . . . judge . . . not to hold the balance nice, clear, and true" denies due process of law. *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)); *accord Aetna*, 475 U.S. at 825 (*quoting Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Nor does the Due Process Clause of the Fourteenth Amendment require a showing of actual bias before a judge must be recused. As this Court has noted:

> Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'

In re Murchison, 349 U.S. at 136 (*quoting Offutt v. United States*, 348 U.S. 11, 14 (1954)); *accord, Concrete Pipe & Prods.*, 508 U.S. at 618 ("[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.") (quoting *Marshall v. Jerrico*, 446 U.S. at 243 (brackets in original)).

Whether or not campaign contributions from litigants and their attorneys actually affect a judge's conduct in a case, the Due Process Clause forbids even the "possible temptation to the average man as a judge" not to be neutral and detached. *Concrete Pipe & Prods.*, 508 U.S. at 617-618 (quoting *Ward*, 409 U.S. at 60) . Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927) , this Court reversed a conviction adjudicated by a town mayor who was paid for his service as a judge from fines he assessed when acting in a judicial capacity, although no showing of actual bias was made. Similarly, as this Court observed in requiring the recusal of a State Supreme Court Justice whose decision was argued, as here, to have been influenced improperly:

> We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true.'"

Aetna, 475 U.S. at 825 (*quoting Ward*, 409 U.S. at 60 (*quoting Tumey*, 273 U.S. at 532)) . The Due Process test is therefore not actual bias, but rather the "appearance of justice."

Because the Illinois Supreme Court (like the Alabama Supreme Court in *Aetna*) never explained why due process was not violated under the circumstances in this case, the Court can look to State Farm's Opposition wherein State Farm argued that the appearance of impropriety standard was not applicable to this case. (App. 270-275). If this is the reason that the Illinois Court relied on, it is plainly invalid under this Court's Due Process decisions unless one of two distinctions applies. *First*, it might be argued that recusal is not required because the massive contributions at issue were permitted by Illinois law. However, in all of the other Due Process cases, especially *Ward* and *Tumey*, the conduct that gave rise to the Due Process claim was mandated by law, and yet this Court found a Due Process violation. *Second*, in the other cases, the benefit to the judge would arise in the future, whereas here all of the campaign contributions had already been given. However, if timing were significant on the issue of an appearance of partiality, none of the laws placing limits on campaign contributions for any elected office could be upheld. Moreover, no case has ever drawn such a distinction, and the appearance problem may actually be greater where the arguable quid pro quo has already been given than when it might occur in the future.

This Court has never directly addressed the requirements of recusal under the Fourteenth Amendment's Due Process Clause as a result of the appearance of impropriety and the effect on public perceptions of the integrity of the courts caused by large campaign donations to judicial candidates. However, as Justice O'Connor has suggested, the potential for an appearance of bias is clear:

> relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. * * * Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.

Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., *concurring*).

Indeed, these very concerns are what animate and justify this Court's decisions upholding legislative limits on campaign contributions generally: "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 27 (1976). Other courts have also recognized the improper appearance created by judges accepting and soliciting contributions from lawyers and parties appearing before them. *See, e.g., Stretton v. Disciplinary Bd. of the Supreme Court of Penn.*, 944 F.2d 137, 145 (3d Cir. 1991) ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court"); *In re Mason*, 916 F.2d 384, 387 (7th Cir. 1990) ("difficult case" would be presented if attorney gave significant financial support to judge's campaign committee while judge presided over case in which attorney was involved).

Under *White,* the First Amendment requires substantial leeway in enacting rules governing what States may forbid candidates for judicial office from saying, and under *Buckley* and its progeny, the

government may not set contribution limits so low that they prevent candidates (including candidates for judicial office) from raising the money needed to get their message out to the voters. As a result, in the context of judicial elections where campaign contributions from interested persons play a substantial role, the only way to provide appropriate Due Process protection is to disqualify judges whose impartiality may reasonably be questioned as a result of having been financially supported in substantial ways by a party to a lawsuit or counsel for that party.

Because what is sufficient to disqualify a judge "cannot be defined with precision," *Aetna*, 475 U.S. at 822 (*quoting Murchison*, 349 U.S. at 136), this Court has looked at all the factors that might give rise to an appearance of bias. *See, e.g., Aetna*, 475 U.S. at 822-25; 475 U.S. at 829-30 (Brennan, J., concurring). Petitioners do not take the position that a judge must step aside in any case in which a party or its attorney makes a contribution however small to that judge's campaign. Rather, whether Due Process requires recusal must be based on a consideration of a number of factors, such as the size of the contribution made by the party and those aligned with it; the total amount of money raised and spent on the judge's election; the timing of the contribution in relation to the judicial decision; and any other connections between the party and the judge's campaign.

In invoking the Fourteenth Amendment Due Process requirements in this case, Petitioners did not seek recusal of Justice Karmeier solely on the basis that campaign contributions were made to Judge Karmeier by State Farm and its allies. Rather, as they argued, the "appearance of justice" (and perhaps the eventual result in this case) was distorted by the (1) timing of these donations (which occurred during the pendency of this case before the Supreme Court of Illinois when there was a real or reasonably assumed belief that Justice

Karmeier's vote might be decisive); (2) the massive size of these donations (a total of more than $350,000 in direct donations, with more than a million dollars more in indirect donations, out of a total of about $4.8 million, or almost one-third of the amount raised); and (3) the specific and substantial relationship between Judge Karmeier, his election proponents, and State Farm. Nonetheless, the Supreme Court of Illinois evidently not only did not see the appearance of impropriety that was so obvious to the media and the public, but it did not even think that Petitioners' Due Process claim was worthy of a response. The only conclusion, given the facts of this case, is that, in Illinois, no amount of contributions, no matter when given or under what circumstances, can ever be the basis for a judicial recusal. Because such a position is completely at odds with what this Court has held in other Due Process cases challenging judicial partiality, the Court should grant review and set aside the decision below.

II. The Decision Below Conflicts With Decisions Of Other Highest State Courts Applying This Court's Due Process Jurisprudence

At least two Highest State Courts – Florida and Oklahoma -- have reached sharply different standards from those which evidently guided the court below in applying this Court's Fourteenth Amendment jurisprudence. One other state – Texas – follows what appears to be the Illinois approach under which lawful campaign contributions are never a basis for recusal. *See Apex Towing Co. v. Tolin,* 997 S.W. 2d 903, 907 (Tex. 1999) (no recusal required where judge received "substantial political donations from opposing counsel and from one of the parties"), *rev'd on other grounds*, 44 Tex. Sup. Ct. J. 470, 41 S.W. 3d 118 (2001); *Texaco, Inc. v. Penzoil Co.,* 729 S.W. 2d 768, 842 (Tex. App. 1987) (no recusal although plaintiff's counsel contributed $10,000 to trial judge soon after filing lawsuit), *cert dismissed*, 485 U.S. 994 (1988), and superseded by Tex.

R. App. P. 47(b)(2) and Tex. Civ. Prac. & Rem. Code § 52.002, as stated in *Isern v. Ninth Court of Appeals*, 39 Tex. Sup. Ct. J. 785, 925 S.W. 2d 604 (1996). The precise facts of each case are, not surprisingly, different (and not surprisingly no reported case has ever involved contributions of the size at issue here and made while the case was awaiting decision). But, as we now show, there can be no doubt that the approach taken by the Florida and Oklahoma Supreme Courts on the issue of the Due Process implications of contributions to a judicial candidate are in direct conflict with that followed in Illinois.

In *MacKenzie v. Super Kids Bargain Store, Inc.*, 15 Fla. L. Weekly 5397, 565 So.2d 1332 (1990), the Florida Supreme Court reviewed a decision holding that a $500 contribution made to a campaign for judicial election required recusal. Noting that Florida law both limited such donations to $1,000 (Illinois has no limits) and required full disclosure of the sources of any donations, the Florida Court held that a $500 donation was "legally insufficient when presented as the sole ground for disqualification." *Id.* at 1336. The Florida Court, however, went on to indicate that larger donations, made to a "judge's judicial election campaign which was *ongoing* at the time of the underlying lawsuit" or where there was "a *specific and substantial political relationship*" were "additional factors," beyond the fact of a small donation, which might indicate a substantial enough connection to require recusal. *Id.* at 1338 n.5 (emphasis in original). Such "additional" factors are clearly in evidence here. The Due Process standard set by the Florida Supreme Court was therefore far different than the standard applied in this case.[5]

[5] In addition to those factors discussed above, an additional reason for recusal in this case is the harsh and very personal nature of the race between now Justice Karmeier and his opponent, then Judge Gordon Magg,

The Oklahoma Supreme Court in *Pierce v. Pierce*, 2001 OK 97, 39 P.3d 791 (2002), also explored the interplay of campaign contributions and Constitutional Due Process. The *Pierce* Court found, as the *MacKenzie* Court implied it would find on similar facts, that "due process must include the right to a trial without the *appearance* of judge partiality arising from counsel's campaign contributions and solicitation of campaign contributions on behalf of a judge during a case pending before that judge." *Pierce*, 39 P.3d at 799 (emphasis in original). Addressing contributions totaling $10,000 from counsel and counsel's father "during the litigation and prior to trial," *id.* at 798, the Oklahoma Court found that the Due Process Clause required recusal. In Petitioners' view, the appearance of partiality is far stronger in this case given State Farm's much closer connection to, and larger support of, Justice Karmeier. At the very least,

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who authored the Appellate Court opinion under review below. See *Non-Participation Mot.* at 3-6, App. 291-294. The likelihood of actual bias is highlighted because, as State Farm pointed out below, certain lawyers for Petitioners made campaign donations to the Democratic Party, which State Farm implied were then sent on to Judge Magg's campaign. See *S. Ct. Rule 328 Affidavit of Theresa M. Donell* at Exh. J-K (filed below). Petitioners agree that donations that are passed through other organizations must be considered in the Due Process analysis. However, Petitioners' donations would have been of no significance had Judge Magg been elected because he would have had to recuse himself in any event as the author of the opinion under review. Nevertheless, Petitioners' contributions are relevant to the Due Process analysis now before this Court as they provided further reason for the public to believe that Justice Karmeier was biased against Petitioners, whose lawyers had contributed to his opponent, and that it affected his eventual vote in this matter. *See e.g. MacKenzie, supra,* 565 So.2d at 1338-1339.

the unwillingness of the Supreme Court of Illinois to deal with the Due Process implications of these massive contributions, made while this case was pending there, is wholly at odds with what the Oklahoma and Florida Supreme Courts have done in analogous situations, and therefore constitutes an additional basis for review by this Court.

III. This Case Presents An Ideal Vehicle For Deciding An Important And Pervasive Issue That Rarely Will Reach This Court

This petition comes to this Court with the Due Process issue starkly and squarely presented. There is no doubt that the Due Process claim was directly and clearly raised in the Illinois Supreme Court by the original motion for recusal and then again on rehearing and that the court below rejected the claim, apparently because there is a per se rule permitting any and all campaign contributions to be made to judges in Illinois without triggering a recusal. There is also no doubt that the contributions here were very substantial, by any measure, and that Justice Karmeier cast the deciding vote on a part of this case in which as much as $456,000,000 was at stake. Unlike in Florida and Oklahoma, where the precise contours of the Due Process right to recuse a judge who arguably has been unduly influenced by campaign contributions could be determined in the future, the decision in this case appears to close the door to any further similar challenges in Illinois, unless this Court intervenes and corrects the error of the court below.

The absence of an alternative forum for challenging this no-recusal rule is demonstrated by other cases in which such alternatives have been tried. Thus, in the face of the Texas rule, which is similar to that adopted in Illinois, two consumer groups and five lawyers, who themselves did not and/or would not make substantial contributions in judicial elections and who

represented clients who were in the same position, sued in federal court in an attempt to have the constitutionality of the Texas approach determined, but the Fifth Circuit found that the federal courts could not entertain such a claim. *Public Citizen, Inc. v. Bowen*, 274 F.3d 212 (5th Cir. 2001). A similar attempt to avoid raising this issue in state court was rejected in *Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 309 (E.D. Pa. 1998), with the court holding that any Due Process violation based on a failure of a state trial court judge to recuse was addressable only by appeal to a neutral decision-maker in the state court system. Thus, from a procedural perspective, review on certiorari by this Court is the only way in which any federal court can pass on this issue. Even if a litigant were willing to challenge a state court judge who is sitting on his or her case on account of the judge's receipt of campaign contributions, it would be impossible for a state-court litigant to bring the issue to this Court until after entry of a final judgment. *See Jefferson v. City of Tarrant*, 522 U.S. 75 (1997). That assumes that a litigant (and his or her counsel) would be willing to make such a challenge in the face of state law clearly to the contrary, for fear of increasing the bias that they believe already exists.[6]

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[6] Evidence of the widespread perception resulting from the circumstances of the *Avery* decision that (1) justice was for sale, and (2) that litigants should not embark on a futile effort to challenge justices for fear of what reaction the challenge might provoke, are both found in *Price v. Philip Morris, Inc.*, ___ N.E.2d ___, 2005 WL 3434368 (Ill. Dec. 15, 2005), in which the same Supreme Court of Illinois overturned a $10.1 billion fraud verdict against Philip Morris, Inc., and in which Justice Karmeier again cast the fourth vote for reversal. As the *Chicago Tribune* noted in its December 16, 2005 story, despite the fact that "Lawyers for Philip Morris U.S.A. contributed $16,800 to help elect a judge who cast the deciding vote" and "the

The need for guidance by this Court as to the interplay between the First Amendment rights of judicial candidates, *see Republican Party of Minn. v. White, supra*, and the Due Process rights of litigants to an impartial decision-maker, is a further reason for this Court to grant review. Although the issue in *White* was limited to the validity of the state law prohibitions on speech, none of the five opinions suggested that recusal would not be available to protect the right to a fair trial of those who claim that remarks by a judicial candidate during an election race evidenced the kind of closed mind that would be the basis for recusal. Indeed, Justice Scalia's majority opinion observed that the Due Process rights protected by the Fourteenth Amendment have "coexisted with the election of judges ever since it was adopted," *White*, *supra*, 536 U.S. at 783, which can be true only if recusal is available when the First Amendment permits campaign speech or, as here, campaign spending. Thus, because Illinois has set no contribution limits in judicial races, and because the First Amendment would require that any limits it set not be unreasonably low, the inevitable clash between Due Process and the First Amendment in this area can only be resolved by this Court granting review and holding

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judge also received $1.2 million in campaign money from a group that filed an amicus brief supporting the cigarette maker," no motion for recusal was filed. *Philip Morris law firms, supporters backed Judge*, Chicago Tribune, December 16, 2005 at 1. As the article further noted, quoting Cindi Canary, director of the Illinois Campaign for Political Reform, "[t]he system creates the perception that money is influencing justice." *Id.* The article also quoted Edward Murnane, president of the Illinois Civil Justice League, which contributed $1.2 million to the Karmeier campaign and filed an amicus brief supporting Philip Morris, as stating: "Karmeier's election changed the vote." The same observation could fittingly describe the *Avery* vote.

that recusals are guaranteed by the Due Process Clause when campaign contributions of this magnitude are made by a party to a pending lawsuit to a judge sitting on the case.

The problem of recusals and campaign contributions in judicial elections is not limited to financial support from defendants. For better or worse, the arms race here is waged by both sides, as evidenced by the fact that certain of Petitioners' own counsel made substantial contributions to support Justice Karmeier's opponent.[7] The same is also true in other big money judicial election states, such as Ohio, Texas, Alabama and Mississippi (*see, e.g., Rachel Weiss, Fringe Tactics, Special Interest Groups Target Judicial Races,* The Institute on Money in State Politics (August 25, 2005), www.followthemoney.org/press/reports/200508251.pdf). *See also White*, *supra*, 536 U.S. at 789-90 (O'Connor, concurring) (further examples of massive spending on judicial elections). This Court cannot halt that race, but it can assure that those who cannot or chose not to make contributions to judicial candidates will not be denied neutral decision-makers because their opponents or their lawyers made a different choice. Given the importance of the interests at stake, and the conflicts in opinions as to the proper balance between the First Amendment rights of judicial candidates to raise and spend money on their elections and the countervailing Due Process right of

[7] While here, election of Karmeier's opponent could not have resulted in an additional vote for Petitioners (because, as a member of the Appellate Court that decided *Avery* he could not have sat in decision on the case under Illinois law), the larger point is the recurring danger to due process when politics, the provenance of legislatures, intrudes into the courts, whom we entrust with the fair and impartial administration of justice—an equal entitlement of those whose candidates lose, as well as win, elections.

litigants, this Court should grant review of the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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