

No. _____

In the Supreme Court of the United States

MASSEY ENERGY COMPANY AND CENTRAL WEST VIR-
GINIA ENERGY COMPANY,

Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND
MOUNTAIN STATE CARBON, LLC,

Respondents.

**On Petition for a Writ of Certiorari to
The Supreme Court of Appeals of West Virginia**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires States to afford litigants at least one appeal as of right to review judgments awarding substantial compensatory and/or punitive damages.

2. Whether the Due Process Clause of the Fourteenth Amendment prohibits a court from deciding a case with the participation of a judge who has publicly and harshly attacked one of the parties over an extended period.

RULE 29.6 STATEMENT

Petitioner Massey Energy Company, a publicly traded company, has no parent corporation. Fidelity Management & Research owns 10% or more of its stock. Petitioner Central West Virginia Energy Company is a subsidiary of Massey Energy Company, which owns more than 10% of its stock. No other publicly traded corporation owns 10% or more of Central West Virginia Energy's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Massey Energy Company (“Massey”) and Central West Virginia Energy Company (“CWVEC”), respectfully petition for a writ of certiorari to review the orders of the Supreme Court of Appeals of West Virginia denying their petitions for appeal.¹

OPINIONS BELOW

The orders of the Supreme Court of Appeals denying petitioners’ petitions for appeal (App., *infra*, 1a-4a) are unreported. The orders of Justice Starcher denying petitioners’ motion and renewed motion for recusal (*id.* at 5a-18a) are unreported. The relevant orders of the circuit court (*id.* at 19a-34a) are unreported.

JURISDICTION

The orders of the Supreme Court of Appeals denying the petitions for appeal were entered on May 22, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a). Because the constitutionality of West Virginia’s failure to afford litigants at least one appeal as of right is drawn into question by this petition, 28 U.S.C. § 2403(b) may apply. Pursuant to this Court’s Rule 29.4(c), petitioners have therefore served this petition on the Attorney General of West Virginia.

¹ Petitioners are simultaneously filing a separate petition for a writ of certiorari (the “Circuit Court Petition”) seeking review of the underlying orders of the Circuit Court of Brooke County, the highest court in West Virginia to decide petitioners’ substantive claims on the merits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the Appendix. App., *infra*, 35a-37a.

STATEMENT

A West Virginia jury ordered petitioners to pay respondents \$119 in compensatory damages and \$100 million in punitive damages. The trial court upheld the award and added \$24 million in pre-judgment interest. Petitioners filed petitions for appeal in the West Virginia Supreme Court of Appeals—the State has no intermediate appellate court and the jurisdiction of the Supreme Court of Appeals is discretionary—but the court refused to review the case. As things now stand, therefore, petitioners must pay a damages award of nearly a quarter of a billion dollars—the Nation’s seventh largest verdict in 2007—that was reviewed by a grand total of one judge. That is an intolerable result. It is also unconstitutional.

This Court’s decisions establish a due-process right to appellate review of punitive-damages awards. The Court has held that appellate review of punitive awards must be *de novo*, and it has made clear that such review is a constitutional requirement. If the Constitution prohibits deferential review of punitive awards, it necessarily prohibits States from affording *no* appellate review of punitive awards. Yet that is precisely what occurred both here and in other cases in West Virginia, the only State in which there is no right to appellate review of a punitive award exceeding \$350,000.

The Supreme Court of Appeals’ denial of review violates due process for another reason: A judge who

participated in the consideration and disposition of the petitions was “actual[ly] bias[ed]” against petitioners. That judge—Justice Starcher—has, over the course of several years, attacked Massey and its chairman in terms so harsh as virtually to defy belief. He has said, for example, that Massey has attempted to “purchase” and “own” a seat on the Supreme Court of Appeals; that Massey’s chairman is “stupid” and a “clown”; that the conduct of Massey and its chairman are “obscene,” “disgusting,” “highly offen[sive],” “pernicious,” “evil,” and “cancer[ous]”; and that Massey and its chairman are comparable to violent criminals. If those statements do not amount to actual bias requiring recusal as a matter of due process, it is hard to conceive of any case in which antagonism towards a party would require a judge’s recusal. In fact, courts—including this one—have ordered recusal for far less. Indeed, in refusing to recuse himself, Justice Starcher all but dared this Court to grant review, stating that, if his decision to participate “can be argued to create due process problems of constitutional dimensions,” then “so be it.”

It is bad enough that petitioners received no appellate review of a nine-figure damages award and that one of the judges who participated in the decision to deny review has a demonstrated and acknowledged animus towards Massey. But the denial of review is all the more problematic because the damages of which petitioners seek review were awarded in a State—West Virginia—that has a well-deserved reputation as the most pro-plaintiff and anti-business jurisdiction in the Nation. If appellate review of a substantial punitive award, by an unbiased tribunal, is constitutionally necessary in every State, as this petition demonstrates, it is particularly

necessary in West Virginia, where staggeringly large jury verdicts are unfortunately all too common. This Court should grant certiorari to make clear that West Virginia—like every other State—must comply with these two basic requirements of due process.

A. Appellate Review in West Virginia

Unlike all other States but one, West Virginia does not afford litigants an appeal as of right. The State has no intermediate appellate court, and review by the Supreme Court of Appeals is entirely discretionary. The losing party in a West Virginia trial court must file a *petition* for appeal. W. VA. R. APP. P. 3, 5, 7; see W. VA. CONST. art. 8, § 4. If the petition is denied, the trial court's decision will go unreviewed, unless the party successfully petitions for a writ of certiorari in this Court (which, even in that event, would lack the power to correct any errors of state law).

The Supreme Court of Appeals exercises absolute discretion in deciding whether to grant or deny a petition for appeal, and it makes the decision without the full record. W. VA. R. APP. P. 7, 9; see *Billotti v. Dodrill*, 394 S.E.2d 32, 37 (W. Va. 1990). A petition for appeal thus resembles a petition for a writ of certiorari in this Court, except that a certiorari petition normally follows appellate review as of right in a federal or state appellate court. Unlike a grant of certiorari in this Court, moreover, a grant of leave to appeal to the Supreme Court of Appeals ordinarily requires the vote of a majority of the court's five justices. See ROBERT L. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* 14 (2d ed. 1989).

While a party may request an opportunity to present a petition for appeal orally, the Supreme

Court of Appeals may deny that request in the exercise of its discretion. W. VA. R. APP. P. 5(a). Such a request is not regularly granted, and it was not granted here. Only if a majority of the justices vote to allow an appeal will the case be docketed, the record assembled, the appeal fully briefed on the merits, and oral argument heard. W. VA. R. APP. P. 7-12.

West Virginia stands nearly alone among the 50 States. In 39 States, as well as the federal system, parties have the right to appeal an adverse judgment to an intermediate appellate court. See App., *infra*, 38a-45a. Nine other states and the District of Columbia do not have an intermediate appellate court, but afford parties an appeal as of right to the State's highest court. See *ibid*. Only West Virginia and its "mother state"—Virginia—deny litigants at least one appeal as of right.

B. Justice Starcher's Animus Towards Massey

One member of the Supreme Court of Appeals, Justice Larry Starcher, harbors a deep-seated animus towards Massey and the company's chairman, CEO, and president, Don L. Blankenship. The existence of the animus has been demonstrated beyond any doubt by Justice Starcher himself, through a remarkable series of increasingly vitriolic statements—both judicial and extrajudicial—over the course of several years.

The statements began no later than 2002, when Justice Starcher told a group of high-school students that Massey was harming West Virginia because it reaped benefits from the State while offering nothing in return. Juliet A. Terry, *Justice's criticism of Massey angers high school students*, THE STATE J.

(WV), Jan. 3, 2003, at 9. In 2004, in connection with Mr. Blankenship's activities in the judicial-election campaign, Justice Starcher repeatedly accused Massey of attempting to "own the West Virginia Supreme Court." *E.g.*, Christian Giggenbach, *Benjamin: Child rapist probation a mistake*, THE REGISTER-HERALD, Oct. 22, 2004, at 7B. Addressing a convention of plaintiffs' lawyers several months later, Justice Starcher expressed a similar view, telling the audience that he was "highly offended" by Massey's "obscene" attempt to "purchase a seat on our Supreme Court." Remarks at Va. Trial Lawyers Ass'n Annual Convention (Apr. 2, 2005). That same year, in denying a motion for recusal filed by a Massey affiliate in another case, Justice Starcher acknowledged that he had "said that, in my opinion, Massey has not been a good corporate citizen." Letter to Clerk, *Marfork Coal Co. v. Director*, No. 051011, at 1 (W. Va. June 16, 2005).

Later in 2005, Justice Starcher was quoted as saying that Massey's chairman, Mr. Blankenship, "has no real concern or interest in the betterment of West Virginia" but was "simply on an egomaniac trip." Vicki Smith, *Blankenship marks Starcher for defeat*, THE CHARLESTON GAZETTE, Oct. 27, 2005, at 7A. In an interview with a local news station around the same time, Justice Starcher said that Mr. Blankenship was "stupid" and "doesn't know what he's talking about," and added that "I am certainly not afraid of him." Sarah K. Winn, *Massey chief 'stupid,' justice asserts*, SATURDAY GAZETTE MAIL, Oct. 29, 2005, at A1. In the same interview, Justice Starcher described Mr. Blankenship as an "outsider" and a "clown" who was "trying to buy influence like buying candy for children," conduct that Justice

Starcher said he found “disgusting.” Tr. of WOWK News 13 Broadcast (Oct. 28, 2005, 11 p.m.).

C. Proceedings in the Trial Court

The underlying dispute in this case, which is described in more detail in the Circuit Court Petition (at 3-8), concerns a 1993 requirements contract between petitioner CWVEC, a supplier of coal and indirect subsidiary of petitioner Massey, and respondent Wheeling Pittsburgh Steel Company (“Wheeling Pitt”), a manufacturer of steel. In 2004, CWVEC encountered severe labor, transportation, and climatic complications that affected its ability to meet its contractual obligations. It consequently invoked a number of *force majeure* clauses, which excused performance under the contract. Trial Tr. 491, 913, 2327-2329, 2345, 2365, 2377, 4420, 4452-4454.

In April 2005, Wheeling Pitt sued CWVEC for breach of contract in the Circuit Court of Brooke County, home to the Wheeling Pitt steel factory, where many of the county’s residents work. Wheeling Pitt alleged that Massey had invoked the *force majeure* clauses in order to sell its coal to other buyers at a higher price. Compl. ¶ 2. Wheeling Pitt later amended its complaint, adding a claim for misrepresentation and a demand for punitive damages. Am. Compl. ¶¶ 134-39. The amended complaint added Massey as a defendant and respondent Mountain State Carbon, LLC, Wheeling Pitt’s successor in interest, as a plaintiff. *Id.* ¶¶ 7, 9.

In July 2007, a jury returned a verdict in favor of respondents. It awarded a total of \$219 million in damages—\$119 million in compensatory damages for which Massey and CWVEC were jointly and severally liable and \$100 million in punitive damages, of

which each petitioner was liable for half. Trial Tr. 5567-83.

The parties filed post-trial motions addressing, among other things, the award of punitive damages. After rejecting petitioners' challenges to the award, the court entered judgment for the full \$219 million. It also tacked on \$24 million in pre-judgment interest, calculated at the above-market statutory rate of 10 percent. In subsequent orders, the court summarily denied petitioners' motion for judgment as a matter of law or, in the alternative, a new trial with respect to the punitive award. App., *infra*, 19a-34a.

D. Proceedings in the West Virginia Supreme Court of Appeals

1. Petitioners filed petitions for appeal in the West Virginia Supreme Court of Appeals. The petitions raised multiple assignments of error, among them that the trial court erred in allowing respondents to recast their breach-of-contract claim as a tort claim; that respondents did not prove each element of the misrepresentation claim; and that the trial court erroneously admitted several types of evidence, including expert testimony, evidence that had not been disclosed before trial, and evidence of alleged misconduct that was time-barred. Massey Am. Pet. for Appeal 20, 22-48, 65-74; CWVEC Am. Pet. for Appeal 12-31, 45-65. The petitions also challenged the constitutionality of the punitive award. Massey Am. Pet. for Appeal 49-65; CWVEC Am. Pet. for Appeal 31-45. Massey argued that, "to guarantee the due process rights of the appellant," the court was obligated to undertake "a de novo determination" of whether a punitive award was justified and, if the court found that it was, "a de novo review" of

the size of the award. Massey Am. Pet. for Appeal 21.

Petitioners also filed a motion requesting that Justice Starcher recuse himself from participating in the case. The motion argued that recusal was necessary because Justice Starcher's "public, repeated, and derogatory statements," many of which were identified in the motion, "reveal a personal bias and deep-se[at]ed animosity against Massey." Joint Mot. to Recuse 1; see *id.* at 4-5. The motion pointed out that "[t]he underlying rationale for disqualification is based on principles of due process." *Id.* at 3.

In West Virginia, a motion to recuse is decided by the justice whose recusal is sought, W. VA. R. APP. P. 29(f), and Justice Starcher denied this motion in a short memorandum, App., *infra*, 6a-7a. Without disputing that he had made the statements Massey identified, Justice Starcher took the position that recusal was not required because he had no "financial interest in this case," did not "know any of the litigants," and did not have "personal knowledge of any disputed facts in the litigation." *Id.* at 7a.

2. At the time that Justice Starcher denied the motion for recusal, the West Virginia Supreme Court of Appeals had recently issued a decision in favor of a Massey affiliate in another case, *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2007 W. Va. LEXIS 119 (Nov. 21, 2007). In that case, Justice Starcher had also denied a motion by the Massey affiliate requesting that he recuse himself. He elaborated on his reasons for doing so in an opinion dissenting from the decision on the merits. The opinion expressed the view that Justice Starcher was no more required to disqualify himself from cases in which Massey is a party than from cases involving murderers and wife

beaters, because, in his words, “I do decry murder and domestic violence and I speak out on it, and I also sit as a judge and hear cases involving people who are charged with those offenses.” 2007 W. Va. LEXIS 119, at *106-*107 (Starcher, J., dissenting).

After the West Virginia Supreme Court of Appeals granted rehearing in *Caperton*, Justice Starcher changed his position and decided to recuse himself in that case. *A.T. Massey Coal Co. v. Caperton*, No. 33350 (Feb. 15, 2008), available at <http://www.state.us/wvsca/press/caperton.pdf>. Justice Starcher stated that he was recusing himself because there was “a reasonable appearance of impropriety.” *Id.* at 2. He nevertheless continued to insist that he could “fairly judge” a case in which Massey was a party, in the same way that he could fairly judge “drunk drivers, spousal abuse, criminal behavior of an individual, certain reprehensible behavior of tobacco companies or the conduct of predatory lenders—behavior which I personally abhor, yet professionally pass judgment on regularly.” *Id.* at 1-2. Justice Starcher also took the opportunity to state his belief that the conduct of Massey’s chairman, Mr. Blankenship, had become “a pernicious and evil influence” on “the administration of justice” and had “created a cancer in the affairs of this Court.” *Id.* at 3, 8-9.²

3. In light of Justice Starcher’s recusal in *Caperton*, Massey renewed its recusal motion in this case.

² On rehearing in *Caperton*, the court again ruled in favor of the Massey affiliate. *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 W. Va. LEXIS 22 (W. Va. Apr. 3, 2008). A petition for a writ of certiorari in that case is pending. *Caperton v. A.T. Massey Coal Co.*, No. 08-22, filed July 2, 2008.

In response, Justice Starcher took the unusual steps of scheduling a hearing (which was eventually cancelled) and propounding interrogatories to Massey (which were eventually rescinded). See App., *infra*, 8a. Despite his decision to recuse himself in *Caperton*, however, Justice Starcher again declined to recuse himself here. *Id.* at 8a-18a.

In denying the motion, Justice Starcher acknowledged that he had “publicly criticized” Massey and its chairman; that he had a “publicly-stated low opinion” of Mr. Blankenship; and that he had previously described Mr. Blankenship as “stupid and a clown.” App., *infra*, 16a. Justice Starcher also repeated his assertion that Mr. Blankenship had created a “cancer” in the court. *Id.* at 10a. And he again compared Massey and its chairman to violent criminals, arguing that, “while I strongly disapprove of rape, child molestation and murder, that doesn’t mean I have to step aside in those cases.” *Id.* at 16a.

Much of Justice Starcher’s opinion was devoted to an attack on two other members of the court. The opinion discussed the fact that Chief Justice Maynard—who, unlike Justice Starcher, recused himself both in *Caperton* and in this case—had spent time with Mr. Blankenship, an old friend, while they were vacationing separately in the same part of Europe. App., *infra*, 10a-15a. The opinion also discussed the fact that Mr. Blankenship had supported Justice Benjamin, and opposed his opponent, in the 2004 judicial election and that Mr. Blankenship had done so through substantial financial contributions. *Id.* at 9a-10a, 17a-18a.

The thrust of the opinion was that Justice Starcher was refusing to recuse himself in this case only because Justice Benjamin declined to recuse

himself in *Caperton* after Justice Starcher had done so. *Id.* at 9a-10a, 16a-18a. Indeed, Justice Starcher explicitly stated that he would “step aside following the very moment that [Justice Benjamin] in this case does so.” *Id.* at 17a-18a. Justice Starcher then concluded his opinion with the observation that, “[i]f my decision to participate in the instant case can be argued to create due process problems of constitutional dimensions, so be it.” *Id.* at 18a.

4. The Supreme Court of Appeals subsequently denied petitioners’ petitions for appeal, by a vote of five to zero. App., *infra*, 1a-4a. The orders issued by the court provided no explanation for the denial; each stated only that the court was “refus[ing] said petition for appeal.” *Id.* at 1a, 3a. Justice Starcher participated in the consideration and disposition of both petitions.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Appeals’ refusal to review the \$243 million judgment against petitioners violated due process in two independent respects. First, a litigant has a right to appellate review of substantial awards, especially punitive exactions, and West Virginia did not afford any here. Second, a litigant has a right to unbiased decisionmakers, and Justice Starcher was manifestly biased against Massey. This Court should grant review on both of these exceptionally important issues.

I. REVIEW IS WARRANTED TO DECIDE WHETHER DUE PROCESS REQUIRES A STATE TO AFFORD DEFENDANTS A RIGHT TO APPEAL SUBSTANTIAL JUDGMENTS, ESPECIALLY THOSE IMPOSING LARGE PUNITIVE EXACTIONS.

A. The Supreme Court Of Appeals Violated Due Process By Refusing To Review The \$243 Million Judgment In This Case.

A money judgment constitutes a deprivation by the State of a defendant's property. For that reason, the requirements of due process apply to the procedures employed in arriving at such a judgment. See, e.g., *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062-1063 (2007). And the logic of this Court's cases, especially in addressing the review of punitive damages, indicates that West Virginia's practice of refusing any appeal as of right, so far out of step with the rest of the Nation, violates due process.

1. In its decisions recognizing the constitutional limitations on punitive damages, this Court has consistently emphasized the critical role of appellate review. Indeed, those decisions compel the conclusion that appellate review of punitive awards is required as a matter of procedural due process.

a. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the Court observed that, under "the traditional common-law approach," which the Court "more than once has approved," the amount of punitive damages "is initially determined by a jury" and the jury's determination "is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 15. In rejecting a due-process challenge to the punitive award in that case, the Court empha-

sized that, “[b]y its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury’s or trial court’s discretion” and that “[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose.” *Id.* at 20-21.

Two Terms later, in upholding a punitive award against a due-process challenge in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the plurality relied on the fact that the award was assessed by an impartial jury; that the award was reviewed and upheld by a trial judge who had heard the evidence; and that it “was affirmed by a unanimous decision of the State Supreme court of Appeals.” *Id.* at 457 (opinion of Stevens, J.). A judgment that is “a product of that process,” the plurality said, “is entitled to a strong presumption of validity.” *Ibid.*

The next Term, in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Court held that, as a matter of procedural due process, States must afford judicial review of awards of punitive damages challenged as excessive. In so holding, the Court observed that the decisions in *Haslip* and *TXO* had “strongly emphasized the importance of the procedural component of the Due Process Clause” and had specifically emphasized the importance of appellate review. *Id.* at 420. *Haslip*, the Court explained, “stressed the availability of both ‘meaningful and adequate review by the trial court’ and subsequent appellate review,” and *TXO* “found that the fact that the ‘award was reviewed and upheld by the trial judge’ and unanimously affirmed on appeal gave rise ‘to a strong presumption of validity.’” *Id.* at 420-21 (quoting *Haslip*, 499 U.S. at 20, and *TXO*, 509 U.S. at 457). *Honda*

has in fact been interpreted to stand for the proposition that “appellate review of punitive damage awards [is] required.” Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation*, 79 NOTRE DAME L. REV. 2025, 2027 (2004); accord Leonard E. Gross, *Time and Tide Wait for No Man: Should Lost Personal Time Be Compensable?*, 33 RUTGERS L.J. 683, 705 (2002).

b. If *Honda* did not already recognize a due-process right to appellate review of punitive awards, later decisions did. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court held that “courts of appeals should apply a *de novo* standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards” and that vacatur and remand were required there because “the Court of Appeals applied an ‘abuse of discretion’ standard.” *Id.* at 431, 436. The Court mandated *de novo* review because such review enables appellate courts “to maintain control of, and to clarify, the legal principles” governing the constitutionality of punitive awards and “tends to unify precedent and stabilize the law.” *Id.* at 436 (internal quotation marks omitted). The Court found support for the requirement in *Haslip*, which “emphasized the importance of appellate review to ensuring that a jury’s award of punitive damages comports with due process.” *Id.* at 436 n.9 (citing *Haslip*, 499 U.S. at 20-21).

Unlike this case, *Cooper Industries* involved review of a punitive award by a *federal* appellate court. But subsequent decisions of this Court confirm that the holding of the case is based on the Due Process Clause and therefore that, as Professor Chemerinsky has put it, “state appellate courts, too, must exercise

de novo review over whether punitive damages are excessive.” Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1069-1070 (2004).

Thus, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), a case arising in state court, the Court explained that, in policing the “constitutional limitations” on punitive awards, it had “instructed courts reviewing punitive damages to consider [certain] guideposts” and had “mandated appellate courts to conduct *de novo* review of a trial court’s application of them to the jury’s award,” because “[e]xacting appellate review ensures that an award of punitive damages is based upon an ‘application of law, rather than a decisionmaker’s caprice.’” *Id.* at 416, 418 (citing and quoting *Cooper Industries*, 543 U.S. at 424, 436). More recently, in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), another case arising in a state system, the Court explained that “the Constitution imposes certain limits[] in respect * * * to procedures for awarding punitive damages,” and then listed, as one example of those constitutional limits, the rule that, under *Cooper Industries*, “review must be *de novo*.” *Id.* at 1062. Consistent with those decisions, state courts have recognized that the holding of *Cooper Industries* applies to them as a matter of federal constitutional law. See, e.g., *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 n.2 (Cal. 2005); *Daka, Inc. v. McCrae*, 839 A.2d 682, 697 (D.C. 2003); *Stroud v. Lints*, 790 N.E.2d 440, 442 (Ind. 2003); *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 668 (N.M. 2002).

If the Due Process Clause of the Fourteenth Amendment requires that appellate review of puni-

tive-damages awards be *de novo*, as this Court's cases establish, the Due Process Clause must require that there be appellate review of such awards. It cannot be that, although a State is constitutionally prohibited from engaging in deferential review of a punitive award, it is not constitutionally prohibited from providing no review at all. If deferential review is unconstitutional, as it is, then *no* review is unconstitutional *a fortiori*. A State cannot avoid its obligation to provide more than deferential review by providing less.

2. Even if this Court's decisions did not establish a due process right to appellate review, including review of punitive damages, the existence of such a right would follow from the application of the procedural due process methodology employed in *Honda*. Under that approach, the Court looks both to "[m]odern practice" and to "common-law practice." *Honda*, 512 U.S. at 426, 435; see also *TXO*, 509 U.S. at 457.

a. Under the modern practice, the nearly uniform rule is that litigants are entitled to at least one appeal as of right. West Virginia is one of only two States that does not afford such a right. In the remaining 48 States and the District of Columbia, as well as the federal system, a defendant has the right to appellate review, either by an intermediate appellate court or by a supreme court with mandatory jurisdiction. See App., *infra*, 38a-45a. Indeed, as far as appellate review of substantial punitive awards is concerned, West Virginia stands alone; the other State in which there is no appeal as of right—Virginia—protects against runaway awards by imposing a \$350,000 cap. VA. CODE § 8.01-38.1.

The availability of an appeal as of right in all but two jurisdictions shows that the right of appeal “is a fundamental element of procedural fairness as generally understood in this country,” Am. Bar Ass’n, Comm’n on Standards of Judicial Admin., Standards Relating to Appellate Courts § 3.10, at 18 (1994 ed.), and that a litigant’s entitlement to “at least one review of an adverse final decision” is “firmly rooted,” James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459, 463 (1975). Accordingly, just as there was a due-process violation in *Honda* because, “[i]n the federal courts and in every State[] except Oregon, judges review the size of damages awards,” *Honda*, 512 U.S. at 426, there is a due-process violation here because, in the federal courts and in every State except West Virginia and one other, appellate courts review the size of damages awards upon the defendant’s request.³

b. Under the common-law practice, too, courts acting in an appellate capacity reviewed damages awards. All of the eighteenth- and early nineteenth-century English cases cited in *Honda* for the proposition that “[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded” were decisions of common-law courts that served as courts of review. *Honda*, 512 U.S. at 421; see *id.* at 421-423.⁴ And there are numerous

³ The same consensus exists in Europe, where “[d]ecisions of the ordinary civil * * * courts of first instance may as a rule be appealed to an intermediate appellate court.” MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 219 (3d ed. 2007).

⁴ At that time in England, “the reviewing authorities for the writ of error operated under a horizontal system of ‘mutual re-

other cases from that period—and earlier—in which English courts exercising an appellate function reviewed damages awards. See, e.g., *Wilford v. Berkeley*, 97 Eng. Rep. 472, 472 (K.B. 1758) (“[t]he Court were, all three, clear and unanimous, that * * * there was no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessiveness of damages”); see also *Wood v. Gunston*, 82 Eng. Rep. 867 (K.B. 1655); *Bolton v. Thomson*, 84 Eng. Rep. 724 (K.B. 1674); *Clerk v. Udall*, 91 Eng. Rep. 552 (K.B. 1702); *Chambers v. Robinson*, 93 Eng. Rep. 787 (K.B. 1726).

State appellate courts in this country likewise reviewed damages awards—and overturned them when excessive—from the time of the Founding through the ratification of the Fourteenth Amendment and beyond. Most of the nineteenth-century cases cited in *Honda* for the proposition that “American courts reviewed * * * the amount of [damages] awards” were decisions of appellate courts. *Honda*, 512 U.S. at 425; see *ibid.* And there are many other such cases. See, e.g., *Harton v. Reavis*, 4 N.C. 256, 257 (1815) (recognizing the “duty of the court” to set aside a damages award when the jury “acted under the influence, either of undue motives, or some gross error or misconception”); see also *Roberts v. Swift*, 1 Yeates 209, 212 (Pa. 1793); *Franz v. Hilterbrand*, 45 Mo. 121, 124 (1869); *Pac. R.R. v. Hause*, 1 Wyo. 27, 34 (1871); *Rogers v. Henry*, 32 Wis. 327, 334 (1873);

view’” in which “the three central courts reviewed each other’s decisions.” Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 927 (1997). “Decisions in King’s Bench were reviewed by justices from Common Pleas and the Exchequer. Decisions in Common Pleas were reviewed by justices of King’s Bench. Decisions in the Exchequer were reviewed by justices of King’s Bench and Common Pleas.” *Ibid.*

McKinley v. Chicago & N.W. R.R., 44 Iowa 314, 322 (1876), *aff'd*, 99 U.S. 147 (1878).

Moreover, the right of appellate review was by no means limited at common law to excessiveness questions, and review was not discretionary. Rather, “[t]hroughout Anglo-American justice systems in the late eighteenth century litigants were free to invoke * * * appellate jurisdiction as a matter of right.” James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1570 (2001). At that time, in both England and the United States, “writs of error to secure review of judgments at common law[] were available to * * * petitioners in error as a matter of right.” *Ibid.*; accord ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 88, 116 (1941). Thus, West Virginia’s system of appellate review violates due process because it departs from the tradition under which “[c]ommon-law courts in the United States,” like “their English predecessors,” provided a right of appellate review of money judgments. *Honda*, 512 U.S. at 424.⁵

⁵ Another methodology that the Court has sometimes employed—the three-part balancing test of *Matthews v. Eldridge*, 424 U.S. 319 (1976)—yields the same result: Due process requires at least one appeal of right of a substantial damages award. First, it is beyond dispute that a large damages award threatens a cognizable property interest. *Id.* at 335. Second, because one-judge trial courts commit errors in a significant number of cases and West Virginia leaves correction of those errors to a purely discretionary system of appellate review, the risk of an erroneous deprivation of the property interest is high. *Ibid.* Third, although the cost of providing appellate review of right is not inconsequential, West Virginia need not create an intermediate appellate court to do so; it need only ensure that its Supreme Court of Appeals reviews substantial judgments.

3. On a number of occasions, this Court has stated that there is no constitutional right to an appeal in a criminal case. See, e.g., *Smith v. Robbins*, 528 U.S. 259, 270 n.5 (2000); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Ross v. Moffitt*, 417 U.S. 600, 606 (1974). Those statements, however, are dicta. In all of the cases in which they appear, the State *did* provide the right to an appeal; the issue was whether the State discriminated in doing so. No decision of this Court has held that a defendant may be denied any appeal in a criminal case.

There is also good reason to believe that the statements are incorrect. The original source of the dictum—*McKane v. Durston*, 153 U.S. 684 (1894)—cited no support for the proposition that the Due Process Clause does not afford a right to appeal a criminal conviction. And some Justices have expressed “little doubt” that, if the question were ever presented, the Court “would decide that a State must afford at least some opportunity for review of convictions,” because “[t]here are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a

In any event, “[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard.” *Id.* at 348. Indeed, because the issue here concerns disputes between private parties, the third element requires “principal attention to the interest of the [opposing] party,” *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991), and appellate review poses no threat to any legitimate interest of plaintiffs who have won a substantial money judgment. To the extent such a judgment is predicated on legal error, the system has no interest in leaving it uncorrected. As for awards of punitive damages, it is well accepted that they are in the nature of a windfall; plaintiffs have no “right” to receive any award of punitive damages, much less one that might be determined to be excessive after appellate review.

person's liberty or property" and "depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction." *Jones*, 463 U.S. at 756 n.1 (Brennan, J., joined by Marshall, J., dissenting).

Even if there is no constitutional right to appellate review of a criminal conviction, moreover, it does not follow that there is no constitutional right to appellate review of substantial damages awards. It has been suggested that there is no due-process right to a criminal appeal because "no appeals from convictions in the federal courts were afforded * * * for nearly a hundred years," and "there was no appeal from convictions" in England "until 1907." *Griffin v. Illinois*, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring in the judgment). With respect to appeals from judgments imposing substantial damages awards, however, there is no such "historic policy." *Ibid.* In fact, the contrary is true. "[A]t the same time that a federal defendant had no right to review of his criminal conviction, * * * a federal civil litigant had a right to appeal to the Supreme Court in causes involving more than \$5,000." Gary Stein, Note, *Expanding the Due Process Rights of Indigent Litigants: Will Texaco Trickle Down?*, 61 N.Y.U. L. REV. 463, 467 n.31 (1986). And at the same time that an English defendant had no right to review of his criminal conviction, an English civil litigant had a right to review of a damages award. See *supra*, pp. 18-20. Even after criminal defendants were granted a right of appeal, the sentencing component of the judgment, unlike a punitive award, was—as it is today—generally reviewed with great deference. *Gall v. United States*, 128 S. Ct. 586, 591 (2008); *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

There would be no anomaly in holding that there is a right to appeal a substantial award of punitive damages or other civil liability but no right to appeal a criminal conviction. First, a defendant in a civil case in which punitive damages are sought does not have the benefit of the procedural protections afforded a defendant in a criminal case—the requirement of proof beyond a reasonable doubt being perhaps the most important (though hardly the only one). Second, unlike a sentence in a criminal case, which is limited by a statutory maximum (and sometimes a guidelines maximum), an award of punitive damages has no upper limit (unless the jurisdiction has imposed a cap). Third, a civil defendant against which a punitive award is entered has no entitlement to the other (non-appellate) forms of review available to a criminal defendant—state post-conviction review and federal habeas corpus.

Because a defendant facing a substantial punitive award lacks these protections, there is a greater risk that punishment will be erroneously imposed than in a criminal case. It is therefore perfectly sensible for the Constitution to afford a right to appeal a substantial punitive award, whether or not there is a right to appeal a criminal conviction. Indeed, in the same discussion in *State Farm* in which this Court made clear that parties have a constitutional right to *de novo* appellate review of a punitive-damages award, the Court pointed out that “defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding,” even though “these awards serve the same purposes as criminal penalties.” 538 U.S. at 417.

B. The Issue Is Exceptionally Important.

1. The fundamental unfairness of a statewide system in which a single-judge trial court can have the final say on whether a defendant must pay a substantial damages award, by itself, makes the issue in this case one of exceptional importance. Another factor makes it even more important: West Virginia's status as the most plaintiff-friendly and anti-business jurisdiction in the Nation, one in which staggeringly large verdicts against companies are routine.

According to a survey of in-house counsel, West Virginia has had the worst legal climate of the 50 States each of the past three years, "in part because of the state legislature's repeated failure to enact meaningful and comprehensive legal reform legislation, and in part because West Virginia courts are among the most anti-business in the country." U.S. Chamber Institute for Legal Reform, *Lawsuit Climate 2008: Ranking the States 5*, available at <http://www.instituteforlegalreform.com/issues/tools/ppt/LawsuitAbuseFactFacts2008.ppt>. Another tort-reform organization has labeled the entirety of West Virginia a "judicial hellhole," making it the only entire State to earn that distinction. Am. Tort Reform Found., *Judicial Hellholes 2007* at iii-iv, available at <http://www.atra.org/reports/hellholes/report.pdf>. The designation is based on the number of "massive lawsuits" that are filed and the number of "anti-business rulings" that are issued in the State—problems exacerbated by civil defendants' lack of "assurance that they will receive appellate review." *Id.* at iii.

In this case, the West Virginia Supreme Court of Appeals denied review of a judgment exceeding \$200 million, approximately half of which was punitive.

On the same day, in *Estate of Tawney v. Columbia Natural Resources, LLC*, No. 32966, the court denied review of a judgment of approximately \$400 million, more than half of which was punitive.⁶ Those were two of the seven largest verdicts in the Nation in 2007; a third verdict in the top seven was also returned by a jury in West Virginia. VerdictSearch, *Top 100 Verdicts of 2007*, available at <http://www.verdictsearch.com/index.jsp?do=top100>.

The question whether defendants in West Virginia have a right to appellate review of large damages awards is exceptionally important, not only to the defendants in these three cases, but to any business that can be sued in the State. The importance of the question is confirmed by the fact that the Governor of West Virginia has taken the position, consistent with petitioners', that the Supreme Court of Appeals is obligated to review punitive-damages awards as a matter of federal constitutional law. See Br. of Joe Manchin, III, as *Amicus Curiae* in *E.I. du Point de Nemours & Co. v. Perrine*, No. 080721.

It is true that there is no conflict among the lower courts on the issue, but, as in *Honda*, that is not a reason to deny review. Among the 50 States, only West Virginia and Virginia do not provide an appeal as of right, and Virginia has adopted a \$350,000 cap on punitive awards. Accordingly, the question whether there is a right to appellate review of punitive awards exceeding \$350,000 can arise only in West Virginia.

⁶ The defendants in *Tawney* will be filing petitions for a writ of certiorari contemporaneously with the petitions in this case.

2. The circumstances of this case demonstrate why a failure to provide appellate review of a large punitive award is intolerable. They also make the case an ideal vehicle for deciding whether appellate review is constitutionally required.

As explained in the Circuit Court Petition (at 9, 26), (a) the jury imposed a punitive award of \$100 million even though petitioners had no notice that their conduct could be subject to tort remedies and (b) the trial court then approved the award without considering whether a lower amount would be sufficient to serve the purposes of punishment and deterrence. The lack of notice and limited review at the trial-court level make appellate review of the punitive award in this case especially critical. Yet the Supreme Court of Appeals refused to provide any. This Court should grant certiorari to decide whether that result is permitted by the Constitution.

II. REVIEW IS WARRANTED TO DECIDE WHETHER DUE PROCESS PROHIBITS A JUDGE WITH A HISTORY OF PERSONAL ATTACKS AGAINST A PARTY FROM PARTICIPATING IN THE CASE.

A. As a consequence of his deep-seated hostility towards Massey, Justice Starcher was constitutionally obligated to recuse himself from the consideration and disposition of the petitions for appeal.

1. “[A] fair tribunal is a basic requirement of due process,” and a fair tribunal “of course requires an absence of actual bias” on the part of the decisionmaker. *In re Murchinson*, 349 U.S. 133, 136 (1955). A biased decisionmaker is “constitutionally unacceptable.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); accord *Bracy v. Gramley*, 520 U.S. 899, 904-905

(1997). That means that no one may judge a case in which he or she has “an interest in the outcome.” *Murchison*, 349 U.S. at 136. An “interest,” in this context, is that which would lead a judge “not to hold the balance” between the parties “nice, clear, and true.” *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (internal quotation marks omitted).

Such an interest may be financial. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), for example, this Court applied the principle that due process prohibits a judge from adjudicating a case if the judge has a direct and substantial pecuniary interest in the outcome. *Id.* at 821-822 (internal quotation marks omitted).

But a direct pecuniary interest is not the only type of interest that precludes a judge from acting as a decisionmaker. Actual bias requiring recusal under the Due Process Clause exists when the judge has “personal feeling against” a party, *Offutt v. United States*, 348 U.S. 11, 14 (1954), or an “unfavorable personal attitude toward” it, *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); when the judge has become “embroiled in a running, bitter controversy” with the party, *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); or when the judge otherwise harbors “hostility,” *Offutt*, 348 U.S. at 16, toward the party.⁷ The undisputed facts demonstrate beyond any doubt that Justice Starcher had an actual bias of this second

⁷ *Offutt* involved the exercise of this Court’s supervisory powers, but the standard for actual bias applied in that case is little different from the standard applied in this Court’s due process cases. See, e.g., *United States v. Meyer*, 462 F.2d 827, 838 n.18 (D.C. Cir. 1972).

type: a deep-seated antagonism towards Massey and its chairman.

2. Over the course of the last several years, Justice Starcher has leveled a series of vituperative accusations against Massey and its chairman, Don Blankenship, so outlandish that it almost defies belief that the words could have been uttered by a justice of the State's highest court. Those statements, which are set forth in detail above, see *supra*, pp. 5-7, 9-11, include the assertions that Massey has no "concern or interest in the betterment of West Virginia" and is not "a good corporate citizen"; that Massey was attempting to "purchase" and "own" a seat on the State's Supreme Court of Appeals; that Massey's chairman, Mr. Blankenship, is "stupid" and a "clown"; that the conduct of Massey and its chairman is "obscene," "disgusting," "highly offen[sive]," "pernicious," "evil," and "cancer[ous]"; and that Massey and its chairman are comparable to violent criminals. Justice Starcher has not denied saying any of these things. On the contrary, he has candidly and unapologetically acknowledged making a number of the statements, at times repeating them with seeming relish.

If this record does not demonstrate a sufficient degree of personal antagonism to require a judge's recusal, it is difficult to imagine what would. In fact, this Court has required recusal for much less. See *Taylor*, 418 U.S. at 501-503; *Offutt*, 348 U.S. at 13-16. Indeed, it has done so in a case in which the attack was levied *by the party against the judge* (rather than the other way around). See *Mayberry*, 400 U.S. at 465-466.

Justice Starcher himself recognized that the facts recited above obligated him to recuse himself in

Caperton, where a Massey affiliate was a party, and he did ultimately recuse himself in that case. If recusal was necessary there, as it clearly was, it was equally necessary here. Cf. *United States v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) (finding bias under the Judicial Code based on the judge’s “crude characterizations of Microsoft” and his “frequent denigrations of Bill Gates” in statements to the media).

The reason Justice Starcher did *not* recuse himself in this case was that (i) he believed that Justice Benjamin, a supposedly “pro-Massey” Justice, should have recused himself as well; (ii) Justice Benjamin gave no indication that he intended to recuse himself; and (iii) even though Justice Starcher recognized the basis for his own recusal, he believed that it was more necessary for him to remain in the case as a counterweight to Justice Benjamin. See App., *infra*, 17a-18a. Even assuming, contrary to what we believe the law to be, that Justice Benjamin was required to recuse himself, his decision not to do so is of course an impermissible basis for Justice Starcher’s decision not to recuse *himself*.

In the end, Justice Starcher seemed utterly unconcerned about whether his actions violated the Constitution. He concluded his opinion denying petitioners’ request for recusal with the defiant pronouncement that, if his decision to participate in the case “can be argued to create due process problems,” then “so be it.” App., *infra*, 18a. About that, at least, Justice Starcher was correct. Indeed, as we explain above, there is more than a mere “argu[ment]” that Justice Starcher’s recusal was constitutionally required; it self-evidently was.

B. The fact that the petitions for appeal were denied unanimously does not render the due-process violation harmless. Reversal is required regardless of whether the biased judge cast the deciding vote.

1. In *Lavoie*, the biased member of the appellate court *had* cast the deciding vote against the petitioner, and this Court found reversible constitutional error on that basis. The Court did not address the question whether, regardless of the vote, “a decision of a multimember tribunal must be vacated” whenever “one member who had an interest in the outcome of the case” participated in the decision. *Lavoie*, 475 U.S. at 827; see *id.* at 827 n.4. In concurring opinions, however, three members of the Court took the view that a decision must be vacated whenever a biased judge participates. *Id.* at 830-831 (Brennan, J., concurring); *id.* at 831-833 (Blackmun, J., joined by Marshall, J., concurring in the judgment).

That view is correct. As the concurrences explained, decisionmaking by a multi-member appellate court is a “shared enterprise” in which there is an “exchange of ideas,” *Lavoie*, 475 U.S. at 831, 833 (Blackmun, J.), and the participation of an interested judge “*necessarily* imports a bias into [that] deliberative process,” *id.* at 831 (Brennan, J.). That was the rule in English courts in the nineteenth century—a highly relevant consideration when seeking to determine the guarantees of the Due Process Clause of the Fourteenth Amendment. See, e.g., *Queen v. Justices of Hertfordshire*, 115 Eng. Rep. 284, 285 (Q.B. 1845) (“The magistrates discuss the question among themselves; and it is impossible to say what effect that discussion may have on the decision.”); see also

Queen v. Justices of Suffolk, 118 Eng. Rep. 156 (Q.B. 1852); *Queen v. Meyer*, 1 Q.B.D. 173, 176 (1875).

2. As the Court indicated in *Lavoie*, see 475 U.S. at 827, lower courts in the United States have divided over the question. Five circuits and at least five state courts of last resort have concluded that reversal is required whenever a biased member of a multi-member tribunal participates in the consideration and disposition of the case. See *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Berkshire Employees Ass'n v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-768 (6th Cir. 1966); *Stivers v. Pierce*, 71 F.3d 732, 746-748 (9th Cir. 1995); *Hicks v. City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991); *Nationwide Mut. Ins. Co. v. Clay*, 525 So.2d 1339, 1341 (Ala. 1987) (per curiam); *Johnson v. Sturdivant*, 758 S.W.2d 415, 416 (Ark. 1988); *Rollins v. Connor*, 69 A. 777, 778-779 (N.H. 1908); *Powell v. Anderson*, 660 N.W.2d 107, 122-123 (Minn. 2003); *State ex rel. Getchel v. Bradish*, 70 N.W. 172, 173 (Wis. 1897). Like the concurring Justices in *Lavoie*, those courts correctly recognize that each member of a tribunal “contributes not only his vote but also his voice to the deliberative process,” *Stivers*, 71 F.3d at 747, and that reversal is required because the influence the biased member “might have upon the decision * * * cannot be estimated,” *Rollins*, 69 A. at 779.

In contrast, one circuit and a number of state courts of last resort have concluded that reversal is not required when the biased member did not cast the deciding vote. See *Bradshaw v. McCotter*, 796 F.2d 100, 101 (5th Cir. 1986); *Caples v. Taliaferro*, 200 So. 378, 381-382 (Fla. 1941) (per curiam); *Big-*

gins v. Lambert, 73 N.E.371, 373 (Ill. 1905); *State ex rel. Langer v. Kositzky*, 166 N.W. 534, 535 (N.D. 1918); *Goodheart v. Casey*, 565 A.2d 757, 761-762 (Pa. 1989); *State v. Lund*, 718 A.2d 413, 418-419 (Vt. 1998). Those decisions are mistaken. None of them engages, much less refutes, the argument against their position—that the bias of any judge infects the deliberative process. And some of the decisions rest on the mistaken premise that *Lavoie* held reversal to be required only when the biased judge’s vote was decisive (rather than having simply reserved the question). See *Bradshaw*, 796 F.2d at 101; *Goodheart*, 565 A.2d at 761.

C. The question whether due process was violated by Justice Starcher’s participation in the consideration and disposition of the petitions for appeal is exceptionally important, and therefore warrants review. First, Justice Starcher’s refusal to recuse himself despite his deep-seated animosity towards Massey brazenly disregards the due-process principles established in a long line of this Court’s decisions on judicial bias. Second, this case provides the Court with an opportunity to resolve the question that was left open in *Lavoie* and has divided the lower courts: whether a biased appellate judge must cast the deciding vote in order for reversal to be required. Third, Justice Starcher’s hostility towards Massey is such a shockingly egregious instance of judicial bias that the denial, with his participation, of Massey’s request for review of a \$243 million judgment against it simply should not be permitted to stand.⁸

⁸ It does not follow from this that the Court should grant the petition in *Caperton v. A.T. Massey Coal Co.*, No. 08-22, filed

CONCLUSION

The petition for a writ of certiorari should be granted.

July 2, 2008. That petition presents the question whether Justice Benjamin’s refusal to recuse himself in a case in which a Massey affiliate was a party violated due process because Massey’s chairman made substantial financial contributions that supported the election of Justice Benjamin, and the defeat of his opponent, in 2004. As will be explained in more detail in the brief in opposition in that case, the petition in *Caperton* should be denied because this Court’s due process decisions do not require recusal of a judge with a mere “appearance” of bias, and such a standard in any event has no place in the context of campaign contributions, which are an inherent feature of elected judiciaries. In this case, in contrast, Justice Starcher’s bias was self-evidently an *actual* one.

Respectfully submitted.

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