No. 09-

IN THE

Supreme Court of the United States

AMERICAN INSURANCE COMPANY AND
COLUMBIA CASUALTY COMPANY,
Petitioners,

v.

ASTENJOHNSON, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Seventh Amendment, may a plaintiff that fails to demonstrate damages essential to its only legal claim nevertheless obtain entitlement to a jury trial by adding a request for declaratory relief?

PARTIES TO THE PROCEEDING

Petitioners are American Insurance Company and Columbia Casualty Company, appellees below. Respondent is AstenJohnson, Inc., the appellant below.

CORPORATE DISCLOSURE STATEMENT

Allianz SE, a publicly owned company, is the indirect 100% owner of American Insurance Company by virtue of its ownership of 100% of the stock of Allianz America, Inc. (not publicly traded), which in turn owns 100% of the stock of Allianz Global Risks US Insurance Company (not publicly traded), which in turn owns 100% of the stock of Fireman's Fund Insurance Company (not publicly traded), which in turn owns 100% of the stock of American Insurance Company (not publicly traded).

Columbia Casualty Company is not publicly traded. All of Columbia Casualty Company's common stock is owned by Continental Casualty Company, which is not publicly traded. All of Continental Casualty Company's common stock is owned by The Continental Corporation, which is not publicly traded. All of The Continental Corporation's common stock is owned by CNA Financial Corporation, which has issued shares to the public. Loews Corporation owns the majority of the stock of CNA Financial Corporation and is publicly traded. CNA Surety Corporation is a publicly held affiliate of Continental Casualty Company.

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PETITION FOR A WRIT OF CERTIORARI

American Insurance Company ("American") and Columbia Casualty Company ("Columbia") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 562 F.3d 213 (3d Cir. 2009). App. 1a-32a. Its order denying rehearing is unpublished. App. 161a-162a. The district court's decision on the Seventh Amendment issue is unpublished. App. 33a-39a. Its decision on the merits of AstenJohnson's declaratory judgment claim is

reported at 483 F. Supp. 2d 425 (E.D. Pa. 2007). App. 41a-159a.

JURISDICTION

The court of appeals entered its judgment on April 2, 2009. App. 1a. On April 28, 2009, the court of appeals denied petitioners' petition for rehearing en banc. App. 161a-162a. On June 23, 2009, this Court extended the time for filing a petition for certiorari to and including August 26, 2009. No. 08A1147. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT

1. The Seventh Amendment preserves the right to a jury trial "in Suits at common law." U.S. Const. amend. VII. This Court has interpreted the Seventh Amendment to require jury trials in actions analogous to those that were once heard in courts of law. *See Tull* v. *United States*, 481 U.S. 412, 417 (1987). To determine whether an action is analogous to a former action at law, courts (1) "compare the ... action to 18th-century actions brought in the courts of England prior to the merger of law and equity" and (2) "examine the remedy sought and determine whether it is legal or equitable in nature." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 42 (1989) (internal quotation marks omit-

ted). "The second stage of this analysis is more important than the first." *Id.*

"Actions for declaratory judgments are neither legal nor equitable, and courts have therefore had to look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 284 (1988). This Court has thus recognized that jury trial rights apply where a potential defendant in a damages action does not wait to be sued, but instead brings a declaratory judgment action seeking an adjudication of the parties' rights. *See Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 504 (1959). In such a case, if the defendant in the declaratory judgment suit "would have been entitled to a jury trial in a ... damage[s] suit against [the plaintiff] it cannot be deprived of that right merely because [the plaintiff] took advantage of the availability of declaratory relief to sue [the defendant] first." *Id.* A declaratory judgment action of this kind is the equivalent, for purposes of determining whether there is a jury trial right, of an "inverted lawsuit." *James* v. *Pennsylvania General Ins. Co.*, 349 F.2d 228, 230 (D.C. Cir. 1965).

This case involves not an inverted lawsuit, but rather a declaratory judgment action brought by the party that is the natural *plaintiff* in a breach of contract action. The question presented here is whether the plaintiff in such an action is entitled to a jury trial even if it has no actual claim for damages or other legal relief.

2. Respondent AstenJohnson, Inc. ("Asten") is a manufacturer of various products for the paper industry, including, formerly, dryer fabrics containing asbestos. The company purchased several liability insurance policies from petitioners covering policy periods from

1981 to 1983. Petitioner Columbia issued primary comprehensive general liability policies to Asten for two policy periods—April 1, 1981 to April 1, 1982 and April 1, 1982 to October 1, 1983—as well as excess third-party liability policies for those periods. Petitioner American issued Asten umbrella liability policies for the April 1, 1981 to April 1, 1982 and April 1, 1982 to October 1, 1983 policy periods, excess to the Columbia primary policies for those periods, as well as an excess liability policy for the April 1, 1982 to October 1, 1983 policy period. In all, the policies provide $52 million of insurance coverage.

Each of the Columbia policies contains an exclusion stating that the policy "does not apply to any claim alleging an exposure to or the contracting of asbestosis or any liability resulting therefrom." App. 49a. Each of the American umbrella and excess policies provides that the policy applies only to the extent coverage is available to Asten under the primary policies issued by Columbia. All of the policies also contain provisions requiring Asten to provide timely notice of any occurrence that could give rise to a claim under the policies.

Asten was first sued by plaintiffs claiming injury through exposure to asbestos-containing products manufactured by Asten in or about 1978. Nonetheless, Asten never notified Columbia or American of any asbestos-related suit that Asten claimed implicated the 1981 to 1983 Columbia and American policies, or tendered any asbestos-related claims to either insurer under those policies, until 2001.[1] In October 2001, Asten

[1] American also issued excess liability policies to Asten in 1979 and 1980, and beginning in 1979 Asten did notify American of asbestos-related claims that Asten asserted implicated the 1979

first notified Columbia of the asbestos-related lawsuits and tendered certain asbestos-related claims to Columbia. At around the same time, Asten contacted American to advise it that it believed the American umbrella and excess policies—which would be triggered only after the Columbia primary policies were exhausted—also covered losses arising from the asbestos-related lawsuits. In early 2002, Columbia informed Asten that based on the exclusion in its policies, Columbia would not defend or indemnify Asten for the asbestos-related claims.

3. On March 13, 2003, Asten filed suit against petitioners, claiming that Columbia had "fail[ed] and/or refus[ed] to honor its promises to defend, conduct settlement negotiations, and indemnify Asten for and in" the asbestos-related lawsuits and that American "continues to fail to acknowledge its coverage obligations" in those suits. App. 164a. The complaint, asserting diversity of citizenship as the basis for the court's jurisdiction, sought a declaratory judgment that the "asbestosis exclusions" in the policies were "invalid and unenforceable," and that American and Columbia were required to pay for Asten's defense of the asbestos-related suits and "to reimburse Asten for, or pay on behalf of Asten, any and all judgments or settlements reached" in those suits. App. 5a, 165a. Alternatively, Asten claimed that the policy exclusions applied only to claims for "asbestosis," and not to any other type of asbestos-related claim. Asten also sought monetary damages for breach of contract by Columbia for "refus[ing] to honor all of its obligations to provide Asten-

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and 1980 policies. Those policies are not at issue in this litigation, which involves only the scope of coverage provided by the 1981-1983 Columbia and American policies.

Johnson with a defense or indemnification in and for" the asbestos-related suits. App. 166a. Because no performance would be due from American until after Columbia first exhausted its underlying primary coverage, Asten asserted no breach of contract claim against American. Asten demanded a jury trial on its claims.

The district court granted petitioners' motion to strike Asten's jury trial demand, concluding that Asten had no legal claim for damages because it had "not alleged or shown any out-of-pocket expenses as a result of defendants' alleged breach of contract." App. 36a. The court noted that, at the final pre-trial conference, Asten's counsel "was unable to articulate what damages plaintiff had suffered" and, as of two weeks before trial, had "not offered any witnesses, expert or lay, to testify to specific damages suffered by the plaintiff." *Id.* Accordingly, the court held that Asten sought only equitable relief and was not entitled to a jury trial. The district court thereafter held a three-week bench trial, at which it heard testimony from numerous witnesses regarding Asten's insurance program, the negotiation of the Columbia and American policies at issue, custom and practice in the insurance industry at the time the policies were issued, and the course of dealings between the parties. In a lengthy decision containing detailed findings of fact and conclusions of law, the district court held that "the parties intended to exclude from coverage all claims arising from exposure to asbestos." App. 42a.[2]

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[2] The district court also ruled, among other things, that (1) Asten's suit against Columbia was barred by laches because Asten had waited twenty years to notify Columbia that it believed the asbestos-related claims were covered by Columbia's policies; (2) the aggregate coverage limits of the 1982-1983 policies applied

4. The Third Circuit reversed the district court's judgment in relevant part on the ground that the district court had erred in striking Asten's jury trial demand.[3] The court considered Asten's breach of contract claim and its declaratory judgment claim separately. First, with respect to the breach of contract claim, the court agreed with the district court that that "it was firmly established that Asten was not prepared to prove recoverable damages" and concluded that the district court "was entitled ... to rely upon that fact in resolving the Seventh Amendment issue before it." App. 13a. The court reasoned that, "[w]hen faced with a situation in which a party cannot tender evidence essential to its only legal claim, a federal trial court may strike a jury demand without offending the Seventh Amendment." App. 14a (citing cases). Because proof of damages was essential to Asten's claim of breach of contract, the court held that the district court had correctly struck Asten's jury trial demand as to that claim. App. 14a-15a.

The Third Circuit nonetheless went on to hold that Asten was entitled to a jury trial on its declaratory judgment claim. The court noted that Asten's action was not an "inverted lawsuit," in which a natural de-

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to the entire eighteen-month period of the policies (that is, the limits were not, as Asten argued, twelve-month limits such that an additional coverage limit was available for the six-month stub period); and (3) Columbia and American had no duty to defend or to indemnify defense costs under their excess policies.

[3] The court first rejected Asten's arguments that the district court erred in considering extrinsic evidence of trade usage and the parties' course of dealings to construe the exclusion and that Asten was entitled to judgment as a matter of law based on the unambiguous wording of the exclusion. App. 9a-13a.

fendant preemptively sues to establish its rights and obligations before the natural plaintiff brings suit against it, but a typical lawsuit in which the plaintiff simply joined a claim for declaratory judgment to its breach of contract claim. App. 18a.[4] Despite its conclusion that Asten was not entitled to a jury trial on the breach of contract claim because it could not show damages, the court of appeals reasoned that, if the declaratory judgment remedy were not available, Asten's declaratory judgment claim—based on the same facts as its breach of contract claim—would have arisen as "an action in assumpsit for damages." *Id.* The court rejected petitioners' argument that Asten's declaratory judgment claim was akin to an equitable claim for specific performance or a bill *quia timet*, stating that there was "no possibility" that a suit would take either form because, once Asten suffered harm, an action in assumpsit would be an available and adequate remedy at law. App. 18a-20a. The court concluded that a declaratory judgment claim based on a contract is a legal claim, and is not rendered equitable "when filed in anticipation of harm but before harm has been suffered ... unless special circumstances exist which indicate that a suit on the contract is likely to be inadequate when it is available." App. 21a.

The Third Circuit accordingly reversed the district court in relevant part and remanded for further pro-

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[4] Although the starting point for the court's analysis was its decision in *Owens-Illinois, Inc.* v. *Lake Shore Land Co.*, 610 F.2d 1185 (3d Cir. 1979), as explained below, the court in fact departed substantially from the *Owens-Illinois* framework by failing to focus on Asten's actual and available claims and instead hypothesizing a different set of facts that could have supported a legal claim by Asten. *See infra* Part II.4.

ceedings. App. 31a-32a.[5] Petitioners' requests for rehearing and rehearing en banc were denied. App. 161a-162a.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision is in conflict with the decisions of other courts of appeals addressing the jury trial right in declaratory judgment actions. Those courts have held that a plaintiff like Asten with no claim to any legal relief cannot procure an entitlement to a jury trial simply by framing its suit as a claim for declaratory judgment. The Third Circuit's contrary holding both conflicts with decisions of other circuits and contravenes the established principle that the availability of declaratory judgment leaves Seventh Amendment jury trial rights unaffected. In addition, the Third Circuit's decision highlights a general confusion among the lower courts regarding the applicability of jury trial rights in declaratory judgment suits. This Court should grant certiorari to resolve the conflict and clarify the proper analysis of this constitutional question, which has significant practical importance both for litigants and for the administration of the district courts.

I. THE LOWER COURTS ARE DIVIDED ON THE QUESTION PRESENTED

The Third Circuit's decision in this case marks a significant departure from the analysis employed by other courts of appeals to determine when a plaintiff in

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[5] The court of appeals did affirm the district court's judgment that American had no duty to defend under the 1982-1983 American excess policy, concluding that American was entitled to judgment as a matter of law on that issue. App. 26a-31a.

a declaratory judgment action is entitled to a jury trial. At least four other courts of appeals have held—consistent with the Seventh Amendment principles enunciated by this Court—that a plaintiff cannot manufacture a right to a jury trial simply by adding a claim for declaratory judgment to a claim or claims that otherwise would not entitle the plaintiff to any legal relief. *See Marseilles Hydro Power, LLC* v. *Marseilles Land & Water Co.*, 299 F.3d 643, 647-649 (7th Cir. 2002); *Manning* v. *United States*, 146 F.3d 808, 811-812 (10th Cir. 1998); *Northgate Homes, Inc.* v. *City of Dayton*, 126 F.3d 1095, 1098-1099 (8th Cir. 1997); *Golden* v. *Kelsey-Hayes Co.*, 73 F.3d 648, 659-662 (6th Cir. 1996). But that is precisely what the Third Circuit held here. The reasoning employed by the Sixth, Seventh, Eighth, and Tenth Circuits leads to a different result in this case. This Court should grant review to address that division of authority.

1. The Seventh Circuit has flatly held that "casting one's suit in the form of a suit for a declaratory judgment, or adding a claim for a declaratory judgment to one's other claim or claims for relief, does not create a right to a jury trial." *Marseilles Hydro Power*, 299 F.3d at 649. *Marseilles* involved a contract action by a power company against a canal owner stemming from the latter's failure to maintain a canal wall, as required by a contract between the parties. The power company sought an injunction allowing it to enter the canal owner's property to repair the wall and a lien on the canal property to cover the repair cost. It also sought a declaratory judgment that no rent was owed to the canal owner until the wall was repaired. The canal company counterclaimed for rent due under the contract and demanded a jury trial. The district court ruled that the defendant's jury demand came too late under Fed-

eral Rule of Civil Procedure 38(b) because the declaratory judgment claim in the complaint itself gave rise to a jury trial right, and thus the defendant should have demanded a jury trial within 10 days of the complaint.[6]

The Seventh Circuit reversed in a unanimous opinion by Judge Posner. The court rejected the contention that "if an issue *could* give rise to a claim for damages, either party can demand that it be tried by a jury." 299 F.3d at 648. It reasoned that a party is not entitled to a jury trial simply because a suit involves a breach of contract *issue*. "[R]egardless of the nature of the issues likely or even certain to arise in the case, most of which indeed might be legal," it is the nature of the *relief* sought that determines whether a jury trial right exists. *Id.* While a breach of contract claim might raise legal issues, if neither party seeks legal relief such as damages, there is no right to a jury trial. Because the power company's complaint sought no legal relief on its breach of contract claim, its addition of a declaratory judgment claim did not give rise to a jury trial right. Even where "the 'nature of the underlying dispute' ... is breach of contract," the court concluded, "a plaintiff who is seeking equitable relief and not damages cannot wrest an entitlement to a jury trial by the facile expedient of attaching a claim for declaratory judgment." *Id.*

Just as in this case, *Marseilles* involved a "non-inverted" declaratory judgment action, in which the natural plaintiff was suing to obtain redress for a breach of contract and a declaration of its rights under

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[6] Federal Rule of Civil Procedure 38(b) states that a party may demand a jury trial by making a written demand "no later than 10 days after the last pleading directed to the issue."

the contract. And, just as in this case, in *Marseilles* the plaintiff had no claim for any legal remedy stemming from the breach of contract. But the Third Circuit here and the Seventh Circuit in *Marseilles* drew strikingly different conclusions from those materially indistinguishable facts—and they did so because they employed irreconcilable modes of analysis.

The *Marseilles* court expressly rejected the notion that it is the nature of the "issue" presented by a case that determines the parties' jury rights. As *Marseilles* noted, a claim for breach of contract is "normally determined by the common law of contracts rather than by some principle of equity jurisprudence." 299 F.3d at 648. Yet that is not dispositive: rather, a court must ask whether the relief sought is legal or equitable. Because the plaintiff in *Marseilles* sought no legal relief, the addition of a declaratory judgment claim to its complaint did not give rise to a jury trial right. Here, by contrast, the Third Circuit acknowledged that Asten had no claim for damages—and thus had no right to a jury trial on its breach of contract claim—but apparently regarded a suit for a declaration of the plaintiff's rights under a contract as essentially "legal," requiring a jury trial regardless of the nature of the relief to which the plaintiff is entitled. App. 21a.

Indeed, the Seventh Circuit explicitly repudiated an essential premise of the Third Circuit's reasoning, noting that plaintiff "think[s] ... that if an issue *could* give rise to a claim for damages, either party can demand that it be tried to a jury. That is not correct." 299 F.3d at 648. The question is not whether, on some hypothetical set of facts, the plaintiff might have an entitlement to damages: the question is whether the plaintiff in fact has a claim for damages. *See id.* Yet the Third Circuit held that even though Asten has no

claim for damages and thus is not entitled to a jury trial on its breach of contract claim, because the putative breach of contract "*could* give rise to a claim for damages," *Marseilles*, 299 F.3d at 648, Asten was entitled to a jury trial on its declaratory judgment claim. That reasoning—and that result—cannot be reconciled with the Seventh Circuit's decision in *Marseilles*.

2. The Sixth Circuit has likewise concluded that a plaintiff in what is essentially a breach of contract action, but whose claims are essentially equitable, cannot obtain a jury trial simply by including a claim for declaratory judgment. *See Golden*, 73 F.3d at 659-662. In *Golden*, retired employees and surviving spouses of employees brought a class-action suit under Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185, claiming their former employers had breached collective bargaining agreements by modifying their health insurance benefits. The suit sought declaratory, injunctive, and monetary relief, as well as costs and attorneys' fees; the plaintiffs demanded a jury trial.

The Sixth Circuit affirmed the district court's denial of plaintiffs' jury trial demand. The court first noted that actions under Section 301 are "comparable to a breach of contract claim—a legal issue," *Golden*, 73 F.3d at 661 (quoting *Chauffeurs, Teamsters & Helpers, Local No. 391* v. *Terry*, 494 U.S. 558, 565 (1990) (plurality opinion), and that jury trial rights in such actions are "generally preserved," *id.* The court then analyzed the relief sought by the plaintiffs, and concluded that, although "generally" a monetary remedy is "a form of legal relief," the plaintiffs did not assert "legal rights" because their requested monetary relief was incidental

to the grant of injunctive relief. *Id.*[7] The court ruled that the fact plaintiffs sought declaratory relief made no difference: "Seeking declaratory relief does not entitle one to a jury trial where the right to a jury trial does not otherwise exist." *Id.* at 662; *see also Robinson* v. *Brown*, 320 F.2d 503, 505 (6th Cir. 1963) (declaratory judgment claim did not give rise to jury trial right in action seeking only injunctive relief; "[t]he inclusion of a claim for declaration of rights in the complaint did not, in our opinion, convert an equity case into an action at law").

Judge Boggs dissented on the jury trial question, arguing—in line with the Third Circuit's reasoning and result in this case—that plaintiffs' entitlement to a jury trial on their declaratory judgment claim turned on whether the underlying contractual *issue* could be characterized as "legal." *Golden*, 73 F.3d at 664. The dissent rejected the majority's premise that the nature of the relief plaintiffs sought was key to the jury-trial analysis, opining: "Up until now, the legal nature of an issue depended on the generic type of issue.... The idiosyncratic importance of the types of relief sought by the particular plaintiffs should have no place in Seventh Amendment analysis." *Id.* Because the issue whether the collective bargaining agreement had been breached was a "legal" issue that could give rise to a claim for damages, plaintiffs were entitled to a jury trial. *Id.*[8]

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[7] The monetary relief requested by the plaintiffs was intended to compensate them for the two-and-a-half month period between the company's modification of their benefits and the district court's grant of a preliminary injunction. *See Golden*, 73 F.3d at 661.

[8] The dissent also disagreed with the majority's conclusion that the monetary relief sought by plaintiffs was essentially equi-

Again, the analysis and outcome of *Golden* cannot be reconciled with the Third Circuit's decision here. The *Golden* majority specifically recognized that although "plaintiffs' LMRA claim is analogous to a breach of contract action," "[t]his determination is not dispositive," and that the controlling factor was that the relief plaintiffs sought was not legal in nature. 73 F.3d at 660. Moreover, because plaintiffs had no claim for legal relief as to their breach of contract claim, they were not entitled to a jury trial on their associated declaratory judgment claim. By contrast, in this case the Third Circuit—focusing on the nature of the *issue* underlying the declaratory judgment claim—found that Asten's claim for a declaration of its contractual rights mandated a jury trial even though Asten otherwise had no claim for legal relief based on its allegations of breach of contract. In short, the Third Circuit adopted the mode of analysis suggested by the *Golden* dissent, rather than that reflected in the majority opinion. The *Golden* majority's reasoning leads to a different result in this case.

3. The Tenth Circuit has relied on *Golden* to hold that a declaratory judgment claim does not entitle a plaintiff to a jury trial where the plaintiff's action seeks only equitable relief, and not damages. *See Manning* v.

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table because it was incidental to, and bound up with, plaintiffs' request for the equitable remedy of an injunction. *See* 73 F.3d at 664 (Boggs, J., dissenting) ("The inclusion of a request for an injunction has nothing to do with the issue of breach. The relevant facts do not change, nor does the legal remedy to which the plaintiffs are entitled."). No such question about how to characterize the plaintiff's non-declaratory-judgment claims is present in this case, where the Third Circuit expressly held that Asten has no right to any legal remedy—and hence no jury trial right—on its breach of contract claim.

United States, 146 F.3d 808, 811-812 (10th Cir. 1998). In *Manning*, the plaintiff brought suit against U.S. Forest Service employees for unlawfully inspecting his ore-processing plant. His initial complaint sought damages along with injunctive and declaratory relief, but he later voluntarily dismissed the damages claim. The district court denied his jury trial demand.

The Tenth Circuit affirmed. Citing *Golden* for the proposition that "[s]eeking declaratory relief does not entitle one to a jury trial where the right to a jury trial does not otherwise exist," the court held that the plaintiff's claims were "equitable in nature" because he sought "only equitable relief in the form of a declaratory judgment and injunction." *Manning*, 146 F.3d at 812 (internal quotation marks omitted). Moreover, "[t]he fact that [plaintiff] requested a declaratory judgment, in connection with the injunctive relief, did not alter the basic equitable nature of his action." *Id.* (citing *Robinson*, 320 F.2d at 505). In short, unlike the Third Circuit here, the Tenth Circuit concluded that where a plaintiff's only other claim is non-legal, the addition of a declaratory judgment claim does not create a jury trial right even if some hypothetical circumstances exist in which the plaintiff might have sought damages.

4. The Eighth Circuit has similarly held that a plaintiff is not entitled to a jury trial on a declaratory judgment claim where the plaintiff's sole claim for legal relief cannot survive summary judgment. *See Northgate Homes*, 126 F.3d at 1098-1099. In *Northgate Homes*, plaintiff asserted various constitutional, statutory, and common-law claims against the city of Dayton in relation to a zoning dispute and sought monetary, injunctive, and declaratory relief. After the district court granted the city summary judgment on all plaintiff's damages claims, it denied plaintiff's jury trial de-

mand. The Eighth Circuit affirmed, holding that the plaintiff had no right to a jury trial on its declaratory judgment claim, because "in the absence of the declaratory judgment procedure," the plaintiff's suit "would have arisen in an action to enjoin the City from enforcing its zoning ordinances." *Id.* at 1099.

Northgate Homes is consistent with *Marseilles Power*, *Golden*, and *Manning*—and in sharp contrast to the Third Circuit's decision here—in holding that where plaintiff's claims, as presented, are analogous to an action in equity, plaintiff is not entitled to a jury trial on a declaratory judgment claim. The *Northgate Homes* court did not inquire whether there was any set of facts on which the issue underlying the declaratory judgment claim *could have* arisen in a legal action. Though the court did inquire how the plaintiff's action would have arisen absent the declaratory judgment procedure, it did not, as the Third Circuit did here, hypothesize a different set of facts (*e.g.*, where the plaintiff has a *valid* damages claim) that would have supported a legal remedy.

* * *

In sum: The Third Circuit here acknowledged that Asten was not entitled to a jury trial on its breach of contract claim because it had suffered no damages. Under the reasoning of the Sixth, Seventh, Eighth, or Tenth Circuits, that fact would have ended the analysis: as those courts have uniformly held, "[s]eeking declaratory relief does not entitle one to a jury trial where the right to a jury trial does not otherwise exist." *Golden*, 73 F.3d at 662; *Manning*, 146 F.3d at 812; *see also Marseilles*, 299 F.3d at 649. In contrast, the Third Circuit ignored its own conclusion that absent the claim for declaratory judgment Asten would have had no right to a jury trial and held that, notwithstanding Asten's actual

lack of entitlement to any legal remedy, Asten's tacked-on declaratory judgment claim entitled it to a jury. This Court should grant review to resolve the square split of authority on this important constitutional question.

II. THE THIRD CIRCUIT'S DECISION IS ERRONEOUS

In addition to departing from the reasoning and results reached by other courts of appeals, the Third Circuit's decision is wrong on its merits. Having squarely held that Asten was not entitled to a jury trial because it failed to show the entitlement to damages that was essential to its "only legal claim" (App. 14a)—its claim for breach of contract—the court went on to conclude that Asten's request for declaratory relief nevertheless entitled it to a jury trial. In the Seventh Circuit's words, that reasoning enables a plaintiff with no claim to any legal remedy to "wrest an entitlement to a jury trial by the facile expedient of attaching a claim for declaratory judgment." *Marseilles*, 299 F.3d at 649. This Court should grant review to make clear that this is not the law.

1. As an initial matter, the Third Circuit's decision is internally inconsistent. The court found that Asten had no right to a jury trial on its "only legal claim"—its claim for breach of contract—because it could not "tender evidence essential to" that claim. App 14a. Yet at the same time it held that Asten was entitled to a jury trial on its claim for a declaration of its rights under those same contracts—despite Asten's lack of any monetary loss—because "if there were no declaratory judgment remedy," Asten's claims would have come to court in a breach of contract action seeking monetary damages. App. 18a. The incongruity of this reasoning is highlighted by the cases on which the

Third Circuit relied to affirm the district court's decision denying Asten a jury trial on its breach of contract claim. *See* App. 14a ("When faced with a situation in which a party cannot tender evidence essential to its only legal claim, a federal trial court may strike a jury demand without offending the Seventh Amendment." (citing *Design Strategy, Inc.* v. *Davis*, 469 F.3d 284 (2d Cir. 2006) and *AstraZeneca LP* v. *Tap Pharm. Prods., Inc.*, 444 F. Supp. 2d 278 (D. Del. 2006))). As in this case, the plaintiff in *Design Strategy* asserted a variety of claims based in part on an alleged breach of contract, including damages in the form of lost profits. Finding that the plaintiff had not made an adequate showing that it would be able to prove lost profits at trial, the district court precluded it from raising that claim and, finding the plaintiff's remaining claims equitable, denied it a jury trial; the Second Circuit affirmed. 469 F.3d at 299-300. Under the Third Circuit's reasoning, however, if the plaintiff in *Design Strategy* had merely tacked on a declaratory judgment claim, it would have been able to obtain a jury trial after all. The illogic of that result is reason enough to reject it.

2. The Third Circuit also erred when it ignored Asten's actual lack of entitlement to any legal relief and instead hypothesized an entirely different set of facts that, if present, could have supported a legal claim by Asten. *See Marseilles*, 299 F.3d at 648 (rejecting argument that "if an issue *could* give rise to a claim for damages, either party can demand that it be tried to a jury"). In analyzing how Asten's suit "would have come to court if there were no declaratory judgment action" (App. 18a), the Third Circuit's task was to determine the closest non-declaratory analogue to Asten's actual claims. But instead the court conjured an entirely different set of circumstances—one in which a

plaintiff does have a basis to claim damages—to conclude that the closest analogue is "an action in assumpsit for damages consisting, *inter alia*, of reimbursement of litigation costs and amounts paid to victims." *Id.* Further, the court reasoned that "[t]here is *no possibility*" that Asten's action would arise in a suit for specific performance or a bill *quia timet* because, assuming Asten suffered actual harm, "assumpsit would be an available and adequate remedy at law." *Id.* (emphasis added). The court thus held that Asten could not have brought an equitable action—the only kind of action it had a basis to bring—because the court could conceive of a hypothetical set of facts under which it could bring a legal claim—which the court had already decided Asten could not do in this case.

That analysis runs counter to this Court's decision in *Beacon Theatres, Inc.* v. *Westover*, which makes clear that the availability of the declaratory judgment procedure leaves jury trial rights unaffected. *See* 359 U.S. 500, 504 (1959) (Declaratory Judgment Act "preserves the right to jury trial for both parties"); *see also Gulfstream Aerospace Corp.* v. *Mayacamas*, 485 U.S. 271, 284 (1988) ("Actions for declaratory judgments are neither legal nor equitable"); 9 Wright & Miller, *Federal Practice and Procedure* § 2313 (3d. ed. 2008) ("[T]he fact that a declaratory judgment is sought neither restricts nor enlarges any right to jury trial that would exist if the issue were to arise in a more traditional kind of action for affirmative relief."). Whereas *Beacon Theatres* was concerned to ensure that declaratory judgment actions do not deprive defendants of jury trial rights, the Third Circuit's decision in effect allows a plaintiff to use the declaratory judgment procedure to obtain a jury trial to which it is not otherwise entitled. The only requirement is that the plaintiff

frame its suit in such a way that the court can conceive of a set of facts under which the plaintiff would have an adequate remedy at law.

3. In addition, the Third Circuit's decision appears to presume, wrongly, that contract issues are by nature legal claims to which jury trial rights apply. The court concluded that a "claim based on a contract" is a legal claim even when brought "before harm has been suffered." App. 21a. As other courts have correctly observed, however, contract actions are not inherently legal or equitable; rather, their character depends on the nature of the relief sought. *See Marseilles*, 299 F.3d at 648-649 ("The 'nature of the underlying dispute' here is breach of contract, but a plaintiff who is seeking equitable relief and not damages cannot wrest an entitlement to a jury trial by the facile expedient of attaching a claim for declaratory judgment."); *Fischer Imaging Corp.* v. *General Elec. Co.*, 187 F.3d 1165, 1169 (10th Cir. 1999) ("Determining whether a contract action would have historically been tried to a jury is 'difficult and even at times impossible.'" (quoting 5 Corbin, *Corbin on Contracts* § 1103 (1964))). In this respect, the Third Circuit failed to heed this Court's admonition that, in determining whether a particular cause of action entitles a party to a jury trial, the most significant part of the analysis is determining whether the *remedy* the party seeks sounds in law or equity. *See Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 42 (1989). The court's focus on the contractual (and hence, in the court's view, legal) nature of the dispute led it to miss the dispositive fact that Asten had no basis to seek a damages remedy.

4. Finally, while the Third Circuit purported to rely on its own precedent in *Owens-Illinois, Inc.* v. *Lake Shore Land Co.*, 610 F.2d 1185 (3d Cir. 1979), the

court in fact extended that decision, in a wholly unjustified fashion, to find a jury trial right in circumstances in which the plaintiff in a non-inverted declaratory judgment action has no present claim for damages or other legal relief. *Owens-Illinois* involved an action for breach of a real estate contract. The plaintiff sought a declaratory judgment that the defendant was required to convey certain land; the defendant asserted that its answer presented legal issues and demanded a jury trial. The *Owens-Illinois* court sought "to determine in what kind of suit the claim would have come to court if there were no declaratory judgment remedy." 610 F.2d at 1189. It explained: "If the declaratory judgment action does not fit into one of the existing equitable patterns but is essentially an inverted law suit—an action brought by one who would have been a defendant at common law—then the parties have a right to a jury. But if the action is the counterpart of a suit in equity, there is no such right." *Id.*

Applying this standard, *Owens-Illinois* analyzed the plaintiff's actual and available claims, observing that the plaintiff asserted a right to conveyance of title, but "no claim for damages or any other legal remedy." 610 F.2d at 1189. The court thus concluded that "[t]he plaintiff's suit ... is not an inverted law suit, but rather is a claim cast in declaratory judgment form because the right to specific performance had not ripened at the time the action was filed." *Id.* The court rejected the defendant's contention that its "legal defenses"—which, among other things, asserted that the plaintiff had breached the lease contract—entitled it to a jury trial because those issues were not "appended to a legal claim," and "[i]f there are no legal claims in a suit, there are no legal issues for purposes of determining the right to a jury trial." *Id.* at 1190.

The Third Circuit here substantially altered the *Owens-Illinois* framework when, despite recognizing that Asten had no legal claim, it inquired whether the plaintiff would have had an adequate remedy at law under a *different* set of facts—*i.e.*, if it had suffered cognizable damages. Once the court concluded that Asten's action was not an inverted law suit and that Asten had no valid legal claim, it should have found that Asten was not entitled to a jury trial. Instead, the court reasoned that Asten's declaratory judgment claim was legal in nature because, if and when it suffered harm, Asten would have a valid legal claim. That analysis misses *Owens-Illinois'* focus on the nature of the plaintiff's actual and available claims, and in so doing, incorrectly extends *Owens-Illinois* to circumstances in which the plaintiff in a non-inverted action has no present claim for damages or other legal relief.

Notably, the Seventh Circuit in *Marseilles* also relied on the basic rule laid out in *Owens-Illinois*, but interpreted that rule very differently—reaching a result precisely the opposite of the Third Circuit's here. *See Marseilles*, 299 F.3d at 649. Quoting *Owens-Illinois*, the Seventh Circuit concluded that the plaintiff's declaratory judgment claim was not an "inverted law suit," but "the counterpart of a suit in equity": "The 'nature of the underlying dispute' here is breach of contract, but a plaintiff who is seeking equitable relief and not damages cannot wrest an entitlement to a jury trial by the facile expedient of attaching a claim for declaratory judgment." *Id.* Just so here: because Asten's suit was not an inverted lawsuit and Asten had no right to damages, the Third Circuit erred in holding that Asten could manufacture a jury trial right through the assertion of a declaratory judgment claim.

III. THE COURT SHOULD GRANT REVIEW TO CLARIFY AN IMPORTANT CONSTITUTIONAL ISSUE THAT HAS CAUSED CONFUSION IN THE LOWER COURTS

In addition to the conflict among the courts of appeals on the question presented in this case, there is, more generally, significant confusion among the lower courts regarding the appropriate analysis for determining jury trial rights in declaratory judgment actions. This Court's review is warranted to remedy that confusion in this important area of constitutional law.

1. The question presented in this case concerns the proper application of the Seventh Amendment jury trial right in civil cases—a question that only this Court can resolve. This Court has recognized that the problem of classifying actions as legal or equitable is a source of considerable confusion in the lower courts—particularly in the declaratory judgment context. As the Court has put it, resolving the applicability of the jury trial right in declaratory judgment actions "has placed courts 'in the unenviable position not only of solving modern procedural problems by the application of labels which have no currency, but also of considering the nature of law suits which were never brought.'" *Gulfstream Aerospace*, 485 U.S. at 284 (quoting *Diematic Mfg. Corp.* v. *Packaging Indus., Inc.*, 516 F.2d 975, 978 (2d Cir. 1975)). Scholars have likewise recognized that "[d]etermining which actions belong to law and which to equity for the purpose of delimiting the jury trial right continues to be one of the most perplexing questions of trial administration." *Federal Practice and Procedure* § 2302.

Lower courts have indeed demonstrated confusion as to the proper inquiry for determining jury trial rights in declaratory judgment actions. In particular, courts have struggled over whether, and to what ex-

tent, the inquiry requires courts to analyze hypothetical factual circumstances under which the claim at issue could arise. *See Medimmune, Inc.* v. *Genentech, Inc.*, 535 F. Supp. 2d 1020, 1024-1025 (C.D. Cal. 2008) (stating that how to "properly determine the 'ordinary circumstances' in which the case should have been brought" poses "an intractable problem"). The problem is especially acute where the analysis whether an action is legal or equitable yields no clear answer. *See Fischer Imaging Corp.*, 187 F.3d at 1168-1172 (concluding that "this case does not fit neatly in either category [*i.e.*, law or equity]," and playing out the issue of the jury trial right in five hypothetical suits "[i]n the hopes of resolving the dilemma").

Lower courts' uncertainty in this area is exacerbated by the Court's plurality opinion in *Terry*, which appears to focus the Seventh Amendment inquiry on the "nature of the issues involved," *Terry*, 494 U.S. at 565, rather than (as the Court has often stated) on the nature of the claim and the relief sought. *See, e.g., Granfinanciera*, 492 U.S. at 42; *Tull*, 481 U.S. at 417-418. Undue focus on whether underlying *issues* are generically legal or equitable can lead courts to miss the nature of the plaintiff's actual claims for relief. As the D.C. Circuit has explained, if "the focus of the inquiry is on whether the '*issue* to be tried' was analogous to one characteristically dealt with in equity or at common law, ... as most traditional issues could be tried in both contexts (albeit leading to different remedies), inconclusive results seem foreordained." *Crocker* v. *Piedmont Aviation, Inc.*, 49 F.3d 735, 745 (D.C. Cir. 1995) (quoting *Terry*, 494 U.S. at 569). Indeed, the notion that the proper focus should be on the nature of the issue to be addressed, rather than the nature of the claim for relief, appears to lie in substantial part behind

the Third Circuit's erroneous reasoning in this case. *See* App. 21a. That confusion also, in part, divided the Sixth Circuit panel in *Golden*. *See* 73 F.3d at 665 (Boggs, J., dissenting). The Court should grant review, among other things, to clarify the principle that in determining whether a declaratory judgment claim is legal or equitable, courts should look, above all, to the nature of the relief sought.

2. Not only is the question presented here an important one, but it also has substantial practical significance for trial courts' management of their limited resources. The decision below leaves trial courts uncertain whether a jury trial is necessary in actions involving a request for a declaratory judgment where the plaintiff has no valid claim for legal relief. In light of that uncertainty, district courts facing such actions will have to choose between risking wasteful bench trials—such as the three-week trial held in this case—or holding time-consuming jury trials as a matter of course, contrary to the principle that the declaratory judgment procedure does not affect jury trial rights. *See supra* p. 21.

3. Finally, this case is an excellent vehicle to resolve the question presented. The Third Circuit unequivocally held that Asten has no claim for damages and that it is entitled to a jury trial only on the basis of its declaratory judgment claim. There is nothing more for the lower courts to do with respect to the Seventh Amendment issue in this case. Moreover, the resolution of the jury trial issue by this Court will conclusively determine whether final judgment is to be entered for the petitioners or whether the case is to return to the district court for retrial before a jury. There is thus no reason to wait until a better case pre-

sents itself: this Court should grant review to clarify this important question now.

CONCLUSION

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

Respectfully submitted.

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