No. 09-254

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a declaratory judgment claim seeking a declaration of legal rights – separate and independent from a breach of contract claim – is a "legal" claim for which the Seventh Amendment right to a jury trial is preserved.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

AstenJohnson Holdings Ltd. ("Holdings") is the parent of Respondent AstenJohnson, Inc. ("Asten"). Asten Holdings GP owns two thirds of Holdings' shares and JWI Ltd. owns one third of Holdings' shares. None of these entities is publicly traded.

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INTRODUCTION

The Seventh Amendment to the U.S. Constitution preserves the right to a jury trial for "Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII. Asten's request for a declaration of its legal rights is precisely such a claim. The Third Circuit did not err, therefore, in concluding that the district court improperly denied Asten a civil jury for that claim. Nor is there any "split" among the circuit courts of appeals on the question presented.

As this Court has recognized, "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935); *see also Simler* v. *Conner*, 372 U.S. 221, 222 (1963) (per curiam) ("The federal policy favoring jury trials is of historic and continuing strength."). The Third Circuit's careful scrutiny of the district court's decision was appropriate, and its conclusion correct. There is no basis for second-guessing that conclusion.

As the Third Circuit noted, Asten's request for a declaration of its legal rights arising from the insurance contracts at issue would have been recognized at common law as an action in assumpsit – a quintessentially legal claim. Moreover, as this Court has long recognized, "the phrase 'Suits at common law' refers to 'suits in which legal rights

[are] to be ascertained and determined . . . .'" *Chauffeurs, Teamsters & Helpers, Local No. 391* v. *Terry*, 494 U.S. 558, 564 (1990) (quoting *Parsons* v. *Bedford*, 28 U.S. 433, 447 (1830) (emphasis removed)). Accordingly, notwithstanding the district court's conclusion that Asten had offered insufficient evidence of damages to prove its breach of contract claim, the Third Circuit correctly concluded that Asten's declaratory judgment claim remained a legal one.[1]

Furthermore, the Third Circuit recognized that Asten's request for declaratory relief would helpfully determine its legal rights with respect to Columbia Casualty Company ("Columbia") and American Insurance Company ("American," and, collectively, "Petitioners," or "Insurers") "in anticipation of harm" arising from the Insurers' failure to assume their contractual obligations under the insurance agreements at issue. Pet. App. 21a. Considering the question "whether a declaratory judgment claim based on a contract, which would

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[1] It bears emphasizing that the district court never dismissed Asten's contract claim on the basis of Asten's purported inability to prove damages – either in the district court's pre-trial grant of Petitioners' motion to strike Asten's jury demand, *see* Pet. App. 33a-39a, or in its subsequent opinion and order following trial, *see id.* at 41a-159a. That claim remained in the case throughout the bench trial, and in its post-trial opinion and order the district court ruled against Asten on the breach of contract claim, but premised that ruling upon its interpretation of the policy language, without any reference to the purported lack of damages. *See id.* at 136a-138a.

otherwise clearly be a legal claim entitling the plaintiff to a jury, becomes an equitable claim when filed in anticipation of harm but before harm has been suffered," the Third Circuit answered straightforwardly: *No. Id.*

Nonetheless, Petitioners request this Court's certiorari review for three reasons. All are meritless. *First*, far from illustrating a circuit split, the views of the four circuits upon which Petitioners rely are entirely consistent with the Third Circuit's opinion. Indeed, two of the circuits that Petitioners reference have explicitly embraced the Third Circuit's jurisprudence. *Second*, this case is a poor vehicle for certiorari because: (a) the opinion below is plainly correct on the merits; (b) alternatively, even if the opinion below were incorrect (and it is not), this Court is traditionally reluctant to review the "misapplication of a properly stated rule of law"; and (c) even if the opinion below departed from the Third Circuit's own *Owens-Illinois* opinion (and it does not), this would actually provide a compelling reason for this Court *not* to exercise certiorari review. *Third*, there is no "confusion among the lower courts" and, consequently, no need for this Court's clarification. The petition should be denied.

STATEMENT OF THE CASE

1. **Factual background.** Asten is a Delaware corporation founded in the 1930s in Philadelphia, Pennsylvania. It manufactures fabrics used in the paper-making industry to dry the sheets that become paper. Decades ago, its predecessors manufactured certain dryer felts containing

chrysotile asbestos, and were members of the trade association Asbestos Textile Institute ("ATI").

The claims in this lawsuit arose from insurance policies provided by Columbia and American, in which Asten, as the successor to the named insured, received insurance coverage for the period from April 1981 to October 1983. Under those policies, the Insurers excluded from coverage certain claims relating to "asbestosis." Specifically, the exclusion says that

> [i]t is agreed that this policy does not apply to any claim alleging an exposure to or the contracting of asbestosis or any liability resulting therefrom. It is further agreed that this policy does not apply to any claim arising out of the Insured's membership in the Asbestos Textile Institute.

Id. at 49a-50a. Interpreting that clause to exclude from coverage *all* asbestos-related claims, rather than as a narrow exclusion for a particular condition – "fibrotic lung disease," *id.* at 2a – Columbia and American declined coverage for all of Asten's tendered asbestos claims.

In a Complaint filed March 13, 2003, Asten made three separate claims against the Insurers: a breach of contract claim seeking monetary damages, a declaratory judgment claim seeking a declaration of Asten's rights under the insurance agreements,

and a bad faith claim.[2] Along with its Complaint, Asten demanded a jury trial pursuant to Federal Rule of Civil Procedure 38(b), and consistent with the Seventh Amendment. Asten's Complaint clearly distinguished between its breach of contract and declaratory judgment claims, each of which appeared as separate counts under different headings.

The declaratory judgment claim, which appeared as "Count I," alleged that Columbia breached its promises in the relevant insurance policies "by failing and/or refusing to honor its promises to defend, conduct settlement negotiations, and indemnify" Asten, *id.* at 164a ¶ 140, and that American similarly had "continue[d] to fail to acknowledge its coverage obligations," *id.* ¶ 141. Asten therefore stated that it was "entitled to declaratory judgment . . . of its rights and of the obligations of Columbia Casualty and American under the . . . insurance policies." *Id.* ¶ 144. Furthermore, Asten said that "[d]eclaratory relief . . . will resolve all outstanding issues between [Asten] and Columbia Casualty and American regarding the obligations of Columbia Casualty and American under the . . . insurance policies." *Id.* at 164a-165a ¶ 145. Asten sought an order from the district court

> judicially declaring that the asbestosis exclusions in the . . . insurance policies

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[2] In its post-trial opinion and order, the district court dismissed Asten's declaratory judgment claim. Consequently, it likewise dismissed Asten's bad faith claim. *See* Pet. App. 155a.

> [are] invalid and unenforceable, and requiring Columbia Casualty and American to pay for [Asten's] defense of the Underlying Actions, outside of the . . . insurance policies' indemnity limits, and to reimburse [Asten] for, or pay on behalf of [Asten], any and all judgments or settlements reached in the Underlying Actions, until such time as the total aggregate limits of each of the . . . insurance policies have been exhausted . . . .

Id. at 165a ¶ (a).

Asten argued that a favorable declaratory judgment would have secured for the company a tangible legal interest. As Asten pointed out, the Petitioners' disclaimers of coverage required Asten to "burn" other insurance policies that were broader in their coverage – because they covered non-asbestosis claims, such as mesothelioma and lung cancer, as well as asbestosis claims that the Petitioners' policies excluded – and were therefore more valuable to Asten. Thus, Asten's use of the broader insurance coverage to cover non-asbestosis claims that should have been covered under the Petitioners' policies meant that the broader policies were prematurely exhausted. Consequently, the district court's declaration of Asten's legal rights under the Petitioners' policies would have allowed Asten to trigger Petitioners' coverage for non-asbestosis claims, effectively compensating Asten for its premature use of the more valuable policies.

Asten's breach of contract claim appeared as "Count II," and alleged that Asten "suffered damages" from Columbia's breaches. *Id.* at 166a ¶ 154. Accordingly, the relief Asten sought under its breach of contract claim included

> [t]he entry of an award requiring Columbia Casualty to pay [Asten] all monetary damages suffered by [Asten] caused by its breaches, including, without limitation, compensatory damages, consequential damages, prejudgment interest, postjudgment interest, and attorneys' fees and costs . . . .

Id. ¶ (a).

2. The district court's decisions. Nearly three years after Asten filed its Complaint, and shortly before the third listing for the start of trial, Columbia moved to strike Asten's jury trial demand. In its memorandum of law opposing the motion to strike, Asten clearly distinguished its declaratory judgment claim as an independently sufficient legal ground for a jury trial. Asten Mem. of Law in Opp. to Columbia Casualty's Mot. to Strike Jury Demand and to Bifurcate Trial at 7-9, 2006 WL 1791260 (E.D. Pa. June 26, 2006) (No. 03-1552). Furthermore, Asten argued that its "declaratory judgment count is in the nature of a legal action, not an equitable claim," because it "is akin to an anticipated or accelerated breach of contract claim . . . ." *Id.* at 2. Finally, Asten pointed out that Columbia had asserted its own breach of contract counterclaim

which was a further reason to accord Asten its jury trial demand. *Id.* at 9-10.

In a memorandum and order dated June 22, 2006, the district court denied Asten's request for a jury trial on the grounds that Asten did "not allege[] or show[] any out-of-pocket expenses as a result of defendants' alleged breach of contract," and had not produced "witnesses . . . to testify to specific damages suffered . . . ." Pet. App. 36a. Without what it deemed to be sufficient proof of damages, the district court concluded that Asten's contract claim did not warrant a jury trial, and stated "that the substance of plaintiff's claim is in equity." *Id.* Significantly, the district court did not *dismiss* Asten's breach of contract claim, and that claim remained in the case throughout the bench trial.[3]

Although the district court did not explicitly consider whether Asten's request for a declaratory judgment offered an independent legal basis for its asserted jury trial right, it appeared to accept, without elaboration, the Insurers' argument that, without sufficient proof of damages for Asten's contract claim, the "claim sounds in equity because the only relief requested is declaratory . . . ." *Id.* at 35a-36a. Thus, having concluded that Asten had "requested only equitable relief," *id.* at 36a, the district court granted Columbia's motion to strike and denied Asten's jury trial request. *Id.* A three-week bench trial before U.S. District Judge Lawrence F. Stengel ensued.

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[3] *See supra* note 1.

Following trial, in an opinion dated March 30, 2007, Judge Stengel accepted the Insurers' interpretation of the asbestosis exclusion. *See id.* at 42a. Judge Stengel also ruled, *inter alia*, that the insurance policies did not create any duty to indemnify or defend Asten on the part of Columbia or American. *Id.* at 158a-159a.

3. The Third Circuit's decision. On appeal before the Third Circuit, Asten again distinguished the two independent legal grounds supporting its jury trial right. *First*, Asten argued that, in requesting a declaration of legal rights arising from the Insurers' contractual breaches, it had sought legal relief. *Second*, Asten asserted that its claim for monetary damages from the Petitioners' contractual breaches was also legal in nature.

With respect to the breach of contract claims, Asten argued, as it had before the district court, that its estimate of six million dollars in damage – the cost of defense and indemnification that Asten had to tender to other insurers due to Columbia's and American's disclaimers – sufficiently pled damages to entitle it to a jury trial on that claim. Asten C.A. Br. at 51. Asten also preserved the argument that the Petitioners' disclaimers of coverage had compelled Asten to prematurely exhaust more valuable insurance policies that covered all asbestos claims – *i.e.*, both asbestosis claims, and non-asbestosis claims such as mesothelioma and lung cancer. *Id.* Nonetheless, the Third Circuit held "that the District Court was entitled to find that Asten was unable to prove recoverable damages at

trial and to rely upon that fact in resolving the Seventh Amendment issue before it." Pet. App. 13a.

With regard to the declaratory judgment claim, however, the Third Circuit concluded that Asten was entitled to a jury trial. First, the court recognized that its prior opinion in *Owens-Illinois, Inc.* v. *Lake Shore Land Co., Inc.*, 610 F.2d 1185 (3d Cir. 1979) was controlling. *Id.* at 15a. Like *Owens-Illinois*, it stated, "this case . . . [is] not an inverted lawsuit situation," and noted that the *Owens-Illinois* "Court therefore looked to the nature of the claim set forth in the complaint" in order to determine whether the declaratory judgment claim was legal. *Id.* at 18a. Furthermore, the court noted that,

> [i]f we ask "in what kind of suit [Asten's] claim[s] would have come to court if there were no declaratory judgment remedy," *Owens-Illinois*, 610 F.2d at 1189, it seems clear that the answer is an action in assumpsit for damages consisting, *inter alia*, of reimbursement of litigation costs and amounts paid to victims.

Id.

The Third Circuit rejected the Insurers' arguments that Asten's declaratory judgment claim was the equivalent of an equitable claim for specific performance or *quia timet*. First, it pointed out that assumpsit would have provided Asten with an adequate remedy at law, and therefore no basis to seek the equitable relief of specific performance. *Id.*

at 19a. Second, the fact that the declaratory judgment action had its origins in bills for *quia timet* "would prove too much – it would result in all declaratory judgment actions being equitable, and we know that not to be the case." *Id.*

In short, the Third Circuit concluded, "the issue posed to us is whether a declaratory judgment claim based on a contract, which would otherwise clearly be a legal claim entitling the plaintiff to a jury, becomes an equitable claim when filed in anticipation of harm but before harm has been suffered." *Id.* at 21a.[4] "Our answer is 'no,'" the Third Circuit concluded, "unless special circumstances exist which indicate that a suit on the contract is likely to be inadequate when it is available." *Id.* Because there was no reason to think that Asten's suit for declaratory relief was "likely to be inadequate," the court "conclude[d] that Asten [was] entitled to a jury trial on its declaratory judgment claims." *Id.*

The Third Circuit also left no doubt that the district court's denial of Asten's jury trial right was not mere harmless error. "In the three weeks of trial," it stated, "the Court heard conflicting testimony about many material facts and resolved to credit one fact witness over another, as well as one expert over another." *Id.* at n.5 "After doing so, it drew a host of inferences concerning the motivation

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[4] In point of fact, as Asten argued, it had already suffered harm through its premature use of the broader and more valuable insurance policies.

of the parties at various stages. In short, it exercised the functions that Asten was entitled to have a jury exercise." *Id.*

Having concluded that the jury denial was erroneous, and was not harmless, the Third Circuit partially reversed the district court and remanded the case for further proceedings. *Id.* at 31a-32a. It subsequently denied the Insurers' petitions for rehearing and for rehearing en banc. *Id.* at 162a.

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Following the Third Circuit's partial reversal and remand, Petitioners sought an extension of time in which to file their petition for writ of certiorari. On June 23, 2009 Justice Souter granted an extension of time to file the petition, from July 27, 2009 to August 26, 2009. Petitioners timely filed their petition for certiorari on August 26, 2009.

REASONS FOR DENYING THE PETITION

Petitioners' three putative reasons for granting certiorari review are all equally meritless. *First*, there is no circuit split. Petitioners' authorities are clearly distinguishable and are entirely consistent with the Third Circuit's opinion below. *Second*, this case is a poor vehicle for certiorari because: (a) the opinion below was plainly correct on the merits; (b) alternatively, even if the opinion below were incorrect (and it is not), this Court is traditionally reluctant to review the "misapplication of a properly stated rule of law"; and (c) even if the opinion below departed from the Third Circuit's own *Owens-Illinois* opinion (and it does

not), this would actually provide a compelling reason for this Court *not* to exercise certiorari review. *Third*, there is no "confusion among the lower courts" and, consequently, no need for this Court's clarification. For all of these reasons, the petition should be denied.

I. THERE IS NO CIRCUIT SPLIT ON THE ISSUE DECIDED BELOW

Petitioners claim that the decision below "marks a significant departure from the analysis employed by other courts of appeals," Pet. 9, that such analysis "leads to a different result in this case," *id.* at 10, and that there is therefore a "square split of authority," *id.* at 18, on the issue decided by the Third Circuit. They are mistaken. The analysis of the other courts Petitioners cite does not differ from the Third Circuit's, and, to the extent the *results* in those cases differ from the outcome below, that is because those cases involved indisputably *equitable* – not *legal* – claims. Had the Third Circuit been confronted with the same facts as each of those cases, it would undoubtedly have reached a similar result. Accordingly, there is no circuit split on the question presented.

1. Petitioners' prime exemplar of an opinion purportedly diverging from the one below is *Marseilles Hydro Power, LLC* v. *Marseilles Land & Water Co.*, 299 F.3d 643 (7th Cir. 2002). That case involved a power company's suit against a canal owner under a contract. *Marseilles*, 299 F.3d at 645-646. The power company sued to compel the canal owner to maintain a canal wall in good condition

and, along with this request for specific performance, also sought a preliminary injunction. *Id.* at 646. When the canal wall crumbled, the canal owner counterclaimed for monetary damages – *i.e.*, rent that he claimed the power company owed. *Id.* The Seventh Circuit held that a jury trial was warranted for the canal owner's legal counterclaim, but not for the power company's equitable claims. *Id.* at 649-650.

Petitioners' reliance upon *Marseilles* is misplaced for several reasons. First, they misleadingly cite *Marseilles* in order to suggest that, in determining whether a suit is one that would be legal at common law, courts should not consider whether claims pose potentially legal *issues* (as is this Court's practice, and as the Third Circuit did below), but should rather focus solely on whether the *remedy* sought is legal or equitable. *See* Pet. 11 ("'[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." (quoting *Marseilles*, 299 F.3d at 648)).

The Seventh Circuit's concern with the word "issue" stemmed from its review of the lower court's efforts to discern its meaning in Rule 38(b) of the Federal Rules of Civil Procedure. *See Marseilles*, 299 F.3d at 647-648; Fed. R. Civ. P. 38(b). And in the context of its discussion of purely *equitable* claims, the Seventh Circuit stated that "[a] suit seeking only equitable relief," like the power company's "is not a suit at common law, regardless of the nature of the issues likely or even certain to

arise in the case, most of which indeed might be legal . . . ." *Marseilles*, 299 F.3d at 648 (citations omitted).[5]

Thus, when viewing Petitioners' quotation of *Marseilles* in its fuller context, it is clear that, unlike this case, the Seventh Circuit's language on which Petitioners rely applied to an indisputably equitable claim. It was therefore uncontroversial for the Seventh Circuit to say, in that context, that a superimposed declaratory judgment claim could not convert a claim for equitable relief into a legal one.

Furthermore, as if to underscore the point that consideration of issues raised remains a necessary consideration for determining whether a claim is legal, the Seventh Circuit quoted this Court's statement of the appropriate two-part analysis:

> [T]o determine whether a particular action will resolve legal rights, and therefore give rise to a jury trial right, *we examine both the nature of the* ***issues*** *involved and the* ***remedy*** *sought.* First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second,

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[5] As noted above, however, the Seventh Circuit ultimately *did* recognize a jury trial right in *Marseilles* – not on the basis of the plaintiffs' equitable claims, but because the defendant's counterclaim was legal. *See Marseilles*, 299 F.3d at 649.

> we examine the remedy sought and determine whether it is legal or equitable in nature. The second inquiry is the more important in our analysis.

Id. at 648 (quoting *Terry*, 494 U.S. at 565) (emphasis added). Thus, while the second element of this dual analysis may be the more important of the two, this Court has made clear that it is emphatically not the *only* consideration that should guide courts in determining whether a suit is legal or equitable.

Furthermore, this Court has previously been invited, but has thus far declined the invitation, to abandon the issues analysis prong of its two-part inquiry. In *Terry*, the majority explicitly stated, and applied, the traditional two-part analysis. Justice Brennan's concurrence, however, advocated abandonment of the issues analysis prong, and stated that he would have preferred to "decide Seventh Amendment questions on the basis of the relief sought." *Terry*, 494 U.S. at 574. This Court's rejection of that proposal demonstrates that issues analysis remains a relevant and important consideration. The Third Circuit therefore appropriately considered the legal issues raised in Asten's declaratory judgment claim.

Finally, it bears noting that the Seventh Circuit relied upon the Third Circuit's case law in reaching its conclusion – a remarkable fact if the *Marseilles* Court perceived its decision to be at odds with the approach of the Third Circuit. *See Marseilles*, 299 F.3d at 649 (quoting *Owens-Illinois* approvingly). Moreover, to the extent Petitioners

claim that *Owens-Illinois* is inconsistent with the Third Circuit's decision below, that fact (if true) would provide yet another reason for this Court to defer granting certiorari until the Third Circuit's own views have benefitted from greater percolation.[6]

2. Petitioners also claim that the opinion below diverges from the Sixth Circuit's decision in *Golden* v. *Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996). Again, they are mistaken. *Golden* involved a class-action suit by retired employees, and the spouses of retired employees, who sought continued health insurance benefits from their former employer under section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1988). *See Golden*, 73 F.3d at 651-652. Their only claim was for breach of contract, and the relief they sought was "declaratory, injunctive, and monetary relief, and costs and attorney fees." *Id.* at 652. Before the Sixth Circuit, the defendants appealed the district court's grant of plaintiffs' motion for a preliminary injunction, and the plaintiffs sought a writ of mandamus to secure a jury trial. *Id* at 651. The Sixth Circuit affirmed the lower court's grant of a preliminary injunction, *id.* at 658, and denied the petition for a writ of mandamus because it "conclude[d] that the plaintiffs' claims [were] entirely equitable," *id.* at 663.

The *Golden* holding is plainly consistent with the Third Circuit's decision below. Significantly, like the Third Circuit, the *Golden* Court reached its

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[6] *See infra*, Part II.C.

result, not through a myopic focus upon the plaintiffs' requested *relief* (which, in *Golden*, included monetary damages), but also by examining closely the nature of their *claims*. Moreover, unlike the decision below, the *Golden* Court concluded that plaintiffs' claims were "entirely equitable," not legal.

The *Golden* Court reached that conclusion by conducting a two-part *Terry* analysis. *See Terry*, 494 U.S. at 565 (quoting *Tull* v. *United States*, 481 U.S. 412 (1987)). Under the first prong, it concluded that the breach of a collective bargaining agreement was essentially a breach of contract claim. *Golden*, 73 F.3d at 660. Under the second prong, the Court concluded that, although the plaintiffs sought damages in addition to declaratory and injunctive relief, the monetary damages were merely "'incidental to and intertwined with' their request for specific performance," rendering their requested relief equitable. *Id.* at 661. Moreover, without the equitable injunctive relief that plaintiffs sought, the plaintiffs would have had "no adequate remedy at law." *Id.* at 662. It is hardly surprising, and in no way inconsistent with the opinion below, that the Sixth Circuit deemed the plaintiffs' claim equitable, not legal, under those facts.

The Third Circuit's opinion below was decided on an entirely different footing, for Asten did not seek equitable relief at all, and the Third Circuit appropriately recognized its request for a declaration of legal rights as a request for legal relief. Indeed, the Third Circuit correctly concluded, applying its *Owens-Illinois* precedent, that, in the absence of a request for declaratory judgment, Asten would have

had an adequate remedy at law (and therefore could not have sought equitable relief at common law) because it could have brought an action in assumpsit. *See* Pet. App. 18a.

3. The Tenth Circuit's decision in *Manning* v. *United States*, 146 F.3d 808 (10th Cir. 1998), is also entirely consistent with the Third Circuit's decision below. In *Manning*, the owner of a millsite initially sought both monetary damages and injunctive relief after U.S. Forest Service officials entered his property to conduct an inspection without his permission. However, the owner "subsequently *voluntarily dismissed the claim for monetary relief* . . . leaving only claims for declaratory and injunctive relief . . . ." *Manning*, 146 F.3d at 810.

The *Manning* Court concluded that the "action was equitable in nature" because the millsite owner "was not requesting monetary damages, but was seeking only equitable relief in the form of a declaratory judgment and injunction." *Id.* at 812. Consequently, "[t]he fact that he requested a declaratory judgment, in connection with the injunctive relief, did not alter the basic equitable nature of his action." *Id.* Thus, because the Tenth Circuit did not confront a jury trial demand in the context of a declaratory judgment claim seeking a declaration of legal rights, *Manning* has little to say on the question that confronted the Third Circuit below.

4. Finally, like the other opinions upon which Petitioners rely, the Eighth Circuit's decision in *Northgate Homes, Inc.* v. *City of Dayton*, 126 F.3d

1095 (8th Cir. 1997), does not differ from the Third Circuit's approach in this case. *Northgate Homes* involved a suit by the seller of mobile homes against a city arising from the sale of such homes in a mobile home park, allegedly in violation of local zoning ordinances. *Northgate Homes*, 126 F.3d at 1097-1098. Northgate initially sought declaratory and injunctive relief in a section 1983 claim, and later amended its complaint to add claims for various violations of the U.S. Constitution and Minnesota constitution, breach of contract, and equitable estoppel. *Id.* at 1098. Following dismissal of most of Northgate's claims at the summary judgment stage, the only claims "[r]emaining for trial were the parties' cross-claims for declaratory and injunctive relief on the nonconforming use issue." *Id.* After a bench trial, in which the city secured injunctive relief against Northgate, Northgate appealed. *Id.*

Notably, the Eighth Circuit's analysis in *Northgate Homes* parallels the Third Circuit's consideration of the *issue* posed in Asten's claim. The Eighth Circuit recognized – contrary to Petitioners' suggestion that courts should instead undertake an isolated focus upon the *relief* requested – that "[t]o determine whether there is a right to a jury trial in a declaratory judgment action, it is necessary first to determine *the nature of the action in which the issue would have arisen* absent the declaratory judgment procedure." *Id.* at 1099 (emphasis added). As the Court elaborated, "if there would have been a right to a jury trial on *the issue* had it arisen in an action other than one for declaratory judgment, then there is a right to a jury trial in the declaratory judgment action," but "there

is no right to a trial by jury if, absent the declaratory judgment procedure, *the issue* would have arisen in an equitable proceeding." *Id.* (emphasis added). Significantly, for this proposition the *Northgate Homes* Court cited the Third Circuit's *Owens-Illinois* opinion with approval. *See id.* at 1099 (citing *Owens-Illinois*, 610 F.2d at 1189).

Ultimately, the Eighth Circuit upheld the denial of a jury trial because it recognized that Northgate's declaratory judgment claim, unlike Asten's, was "fundamentally equitable." *Id.* Indeed, the Court concluded "that Northgate's claim, in the absence of the declaratory judgment procedure, would have arisen in an action to enjoin the City from enforcing its zoning ordinances," and therefore "that Northgate [was] not entitled to a jury trial because its claim would have been an equitable claim." *Id.* Once again, this result is unsurprising, and does not speak to the issue that confronted the court below.

* * *

The opinions of the Sixth, Seventh, Eighth, and Tenth Circuits upon which Petitioners rely all arose from distinguishable facts. Each of those cases denied a jury trial on the basis of claims that were "only equitable," *Marseilles*, 299 F.3d at 648-649;[7]

[7] While *Marseilles*, as noted above, *see supra* note 5, ultimately did recognize a jury trial right on the basis of a legal counterclaim, it said that no such right could be premised upon a complaint's request for equitable relief in the form of an injunction and specific performance.

Manning, 146 F.3d at 812, "entirely equitable," *Golden*, 73 F.3d at 663, or "fundamentally equitable," *Northgate Homes*, 126 F.3d at 1099. As the Third Circuit correctly concluded, however, Asten's request for declaratory relief in this case was a legal one. *See* Pet. App. 15a-21a.

Furthermore, while it is unquestionably true, as Petitioners note, that a plea for declaratory relief cannot convert an otherwise equitable claim into a legal one, it is equally true that declaratory relief does not remove the legal basis for a claim that, like Asten's, entitles the claimant to a jury trial. *See Simler*, 372 U.S. at 223 ("The fact that the action is in form a declaratory judgment case should not obscure the essentially legal nature of the action."); *see also Northgate Homes*, 126 F.3d at 1099 ("The fact that a declaratory judgment is sought neither restricts nor enlarges any right to a jury trial that would exist if the issue were to arise in a more traditional kind of action for affirmative relief.").

Finally, it is telling that neither the Third Circuit, nor any of the circuit court decisions Petitioners cite in support of their circuit split argument, evidence any awareness of the existence of such a split. Indeed, two of those circuits actually cite the Third Circuit's jurisprudence approvingly. *See Marseilles*, 299 F.3d at 649; *Northgate Homes*,

126 F.3d at 1099.[8] Under these circumstances, Petitioners' circuit split argument rings hollow.

II. THIS CASE IS A POOR VEHICLE FOR CERTIORARI

This case is a poor vehicle for certiorari for at least three reasons. *First*, none of Petitioners' four separate criticisms of the decision below undermine the merits of the Third Circuit's holding. *Second*, even if the Third Circuit had erred in its application of legal rules (and it did not), this would still not be a "compelling reason" for certiorari review. *Third*, even if the decision below conflicted with the Third Circuit's *Owens-Illinois* decision (and it does not), that would actually be a compelling reason *not* to grant certiorari review in order to permit the Third Circuit to resolve any alleged internal split en banc.

A. The Decision Below Is Correct On The Merits

None of Petitioners' four criticisms undermine the merits of the holding below.

1. *First*, Petitioners fault the Third Circuit for a statement that is only ambiguous when removed from its context: "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

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[8] As discussed further below, *see infra* Part II.C, the Petitioners' argument that the opinion below is itself a departure from the *Owens-Illinois* opinion is, if anything, another compelling reason *not* to grant the petition.

jury demand without offending the Seventh Amendment." Pet. App. 14a. Detached from context, Petitioners read that statement as a reflection of the Third Circuit's view of the status of Asten's breach of contract claim, rather than as a more general aside or observation. Their reading clearly makes no sense in context, however, for the Third Circuit proceeded in the very next paragraph to evaluate Asten's declaratory judgment claim separately, and therefore understood that Asten was asserting, not one, but *two* distinct legal claims. *See id.* at 15a.

2. *Second*, while apparently recognizing that the Third Circuit applied a proper rule of law when it considered "how Asten's suit 'would have come to court if there were no declaratory judgment action,'" Pet. 19 (quoting Pet. App. 18a), Petitioners maintain that the Third Circuit improperly *applied* that rule of law, purportedly by "ignor[ing] Asten's actual lack of entitlement to any legal relief," and by "hypothesiz[ing] an entirely different set of facts that, if present, could have supported a legal claim by Asten," *id.*[9]

Petitioners mistakenly believe that, because the district court found Asten's proof of damages inadequate (although the district court stopped short

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[9] As discussed further below, *see infra* Part II.B, this Court has a well-founded reluctance to grant certiorari review on the basis of an alleged "misapplication of a properly stated rule of law." Sup. Ct. R. 10.

of dismissing Asten's contract claim on that basis[10]), Asten's declaratory judgment claim either became insupportable or was somehow transmuted into a claim for equitable relief. Neither is the case.

First, the district court's conclusion with respect to Asten's damages proof – even though mistaken – was relevant to Asten's breach of contract claim, but did not remove the separate basis for the declaration of legal rights that Asten sought under the insurance agreements. Indeed, as Asten argued, it had suffered damages, in part, due to the necessity of drawing upon broader and more valuable lines of insurance coverage as a result of Petitioners' refusal to cover Asten's non-asbestosis claims. This independent proof of the damages Asten suffered from the Petitioners' breach, at a minimum, supported Asten's independent declaratory judgment claim for legal relief. *Second,* there is no alchemy by which to convert a request for declaratory relief from a fundamentally legal claim into an equitable one. *See Simler*, 372 U.S. at 223. Accordingly, the Third Circuit properly applied its rule of law to determine that Asten's request for declaratory relief would, at common law, have been a legal cause of action in assumpsit.

3. *Third,* Petitioners charge that the decision below "appears to presume, wrongly, that contract issues are by nature legal claims to which jury trial rights apply." Pet. 21. This argument is a straw man, for the Third Circuit presumed no such thing.

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[10] *See supra* note 1.

On the contrary, its lengthy quotation from *Owens-Illinois* illustrates that it was well aware that some claims arising from contracts are equitable, not legal. *See* Pet. App. 16a (quoting *Owens-Illinois*' description of "a declaratory judgment [claim asserting] . . . [plaintiff's] right under an option agreement to compel the defendant's conveyance of certain realty"). It merely concluded, in this instance, that Asten's request for declaratory relief was legal, and therefore entitled it to a jury trial. *Id.* at 21a. Finally, while one might argue that the Third Circuit could have done a better job – if only for clarity's sake – of articulating the legal remedy Asten sought (*i.e.*, the declaration of rights stemming from the insurance agreements), this omission was, at worst, only harmless error.

4. *Fourth*, Petitioners criticize the court below for what they claim was a misapplication of the Third Circuit's own *Owens-Illinois* precedent. In fact, the opinion below is just as consistent with *Owens-Illinois* as it is with the opinions of the Seventh and Eighth Circuits that cited *Owens-Illinois* approvingly. *See Marseilles*, 299 F.3d at 649; *Northgate Homes*, 126 F.3d at 1099. And for much the same reason: like each of the cases upon which Petitioners rely for their circuit split argument, *Owens-Illinois* involved an equitable claim. *See Owens-Illinois*, 610 F.2d at 1189. For this reason, it is unsurprising that the court below and the *Owens-Illinois* Court applied the same legal rule to different facts and therefore reached different results.

B. Alternatively, Certiorari Review Is Not Warranted For The "Misapplication Of A Properly Stated Rule Of Law"

Even if there were any validity to Petitioners' quibbles with the merits of the Third Circuit's holding (and there is not), Petitioners would still face a significant hurdle in this Court's traditional reluctance to grant certiorari review of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. *See also Youngblood* v. *West Virginia*, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting) (stating that "[e]ven when we suspect error, we may have many reasons not to grant certiorari outright," including "an overcrowded docket, a reluctance to correct 'the misapplication of a properly stated rule of law,'" and "this Court's Rule 10"); *Gonzalez* v. *Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting) ("[E]rror correction is a disfavored basis for granting [certiorari] review . . . .").

As noted above, the Third Circuit's "properly stated rule of law" for determining whether a declaratory judgment claim is legal or equitable derived from its *Owens-Illinois* opinion.[11] There, the Third Circuit stated that, to determine whether a declaratory judgment claim is legal or equitable, "[a] workable formula that has been developed is to

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[11] As noted above, Petitioners do not dispute that the rule of law the Third Circuit applied was a proper one. Rather, they challenge the *application* of the Third Circuit's properly stated rule of law. *See supra* Part II.A.2 (quoting Pet. 19).

determine in what kind of suit the claim would have come to court if there were no declaratory judgment remedy." *Owens-Illinois*, 610 F.2d at 1189 (citing 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2313 (1971)). *See also* Pet. App. 18a ("The teachings of *Owens-Illinois* reflect the law generally."). Applying that formula, the Third Circuit concluded that, in the absence of a declaratory judgment claim, Asten's claim would have been "an action in assumpsit." *Id.* Petitioners may dislike that particular application of the properly stated *Owens-Illinois* rule, and even believe it to be an incorrect application of that rule, but neither objection (even if valid) furnishes a "compelling reason[]" for certiorari review. Sup. Ct. R. 10.

C. Alternatively, If The Decision Below Conflicts With The Third Circuit's *Owens-Illinois* Opinion, Certiorari Review Would Be Premature

Even if the opinion below conflicted with the Third Circuit's *Owens-Illinois* opinion (and it does not), the resulting internal circuit split would actually provide a compelling reason *not* to grant certiorari review. "Ordinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 253 (9th ed. 2007). This is because internal circuit splits are most appropriately resolved by the circuit in question through en banc review. *See Davis* v. *United States*,

417 U.S. 333, 340 (1974) (noting denial of certiorari following Solicitor General's argument that internal circuit split should be resolved by the circuit); *see also Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("[D]oubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

The Court's practice of not intervening in intra-circuit splits is well founded. In the event a clear difference between the approach of the Third Circuit and other courts emerges in the future – a difference, it bears repeating, that is not evident on the present record – other circuits may by then have had a chance to "weigh in." Such percolation would greatly benefit this Court's consideration of the issues. On the other hand, it appears more likely that further percolation will obviate the need for granting certiorari at all. An en banc panel of the Third Circuit would likely remove any doubt as to the consistency of the Third Circuit's approach with those of other circuits.[12] In either case, however, granting certiorari now – on the basis of a claimed difference of opinion within the Third Circuit that could be resolved in en banc review – would consume

[12] The fact that the Third Circuit denied a petition for en banc review in this case, *see* Pet. App. 162a, suggests, as argued above, that there is in fact no conflict between the decision below and *Owens-Illinois*.

limited judicial resources prematurely by inviting this Court's untimely intervention.

III. THERE IS NO "CONFUSION" AMONG THE LOWER COURTS, NOR ANY BASIS FOR SUCH CONFUSION, AND THEREFORE NO NEED FOR THIS COURT'S CLARIFICATION

Petitioners' final effort to secure this Court's review is a Hail Mary pass – a weakly supported assertion that there is a need to clarify "significant confusion among the lower courts" on an important question of constitutional law. Pet. 24. Because there is no such confusion, nor any basis for it, there is no need for this Court's clarification.

Significantly, the "confusion" that Petitioners allege is not confusion about *the issue in this case.* Rather, it is "more generally," about "the appropriate analysis for determining jury trial rights in declaratory judgment actions." *Id.* For the reasons discussed above, however, this case is a poor vehicle to embark upon a general effort at clarification or restatement of this area of the law. To the extent confusion among the lower courts in fact exists (a dubious proposition, given the dearth of support), this Court should await a better vehicle for clarification.

Petitioners' argument founders on their proffered evidence of just two examples of purported lower court confusion – the opinions of a district court and a circuit court, both within the Tenth Circuit – neither of which exhibit particular

"confusion" regarding the appropriate analysis to undertake in cases like this one. *Id.* at 24-25. *See MedImmune, Inc.* v. *Genentech, Inc.*, 535 F. Supp. 2d 1020, 1022 (C.D. Cal. 2008) (recognizing this Court's two-part Seventh Amendment analysis with little difficulty); *Fischer Imaging Corp.* v. *General Elec. Co.*, 187 F.3d 1165, 1168 (10th Cir. 1999) (same).[13] Furthermore, there is no reason to believe that "[t]he 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.*" Pet. 26 (emphasis added). As discussed at length above, this is not such a case. The Third Circuit correctly concluded that Asten *does* have a valid claim for legal relief.

Petitioners also claim that this Court's own jurisprudence "exacerbate[s]" the confusion of lower courts. Pet. 25. This is allegedly because, in their view, *Terry* – contrary to this Court's previous opinions in *Tull* and *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989) – improperly emphasizes the analysis of *issues* rather than requested *relief*. *Id.* This claim holds no water, because it relies upon a bald-faced misstatement of the *Terry* Court's approach. Indeed, rather than quote the *Terry* Court's complete statement of the

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[13] *Fischer* provides further evidence that, contrary to Petitioners' assertion, the Tenth Circuit has not "split" from the Third Circuit. Indeed, the opinion below cites *Fischer* as illustrative of the fact that "[t]he teachings of *Owens-Illinois* reflect the law generally." Pet. App. 18a (citing *Fischer*).

two-part analysis it *actually* employed, Petitioners quote a fragment, leaving the impression that *Terry* relied upon only the first of the two prongs. *Compare* Pet. 25 ("[T]he Court's plurality opinion in *Terry* . . . appears to focus the Seventh Amendment inquiry on the 'nature of the issues involved,' *Terry*, 494 U.S. at 565, rather than . . . on the nature of the claim and the relief sought.") *with Terry*, 494 U.S. at 565 ("To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought.").[14] In this way, Petitioners sow confusion where none in fact exists. Plainly, because there is no "confusion," nor any basis for it, there is no need for clarification.

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[14] As it happens, the second prong of *Terry*'s analysis – the remedy analysis – was outcome determinative in that case. *See Terry*, 494 U.S. at 570. *See also id.* at 573 ("Considering both parts of the Seventh Amendment inquiry, we find that respondents are entitled to a jury trial on all issues presented in their suit."). Accordingly, there is no basis for Petitioners' claim that *Terry* "focus[ed]" on the issues analysis "rather than . . . on the nature of the claim and the relief sought." Pet. 25.

CONCLUSION

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

Respectfully submitted,

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