No. _____

In The
Supreme Court of the United States

DALE DE STENO; JONATHAN PERSICO;
NATHAN PETERS,

Petitioners,

v.

KELLY SERVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred by denying the Petitioners' request for a jury trial pursuant to the Seventh Amendment as to the amount of attorneys' fees based upon the practical abilities and limitations of a jury.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Dale De Steno, Jonathan Persico, and Nathan Peters (collectively referred to herein as "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit").

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A1) is not reported but is available at 2019 WL 157654. The opinion of the District Court (Pet. App. A50) is also not reported.

JURISDICTION

The Court of Appeals filed its judgment on January 10, 2019. Pet. App. A1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. amend. VII:

> 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 OF THE CASE

A. Factual Background

Respondent Kelly Services, Inc. ("Respondent"), a Delaware corporation headquartered in Michigan, is a publicly traded staffing company with well over a hundred offices throughout the country. *See* Pet. App. A20. Petitioners were employed by Respondent to assist with recruiting and business development. *See id.* All three Petitioners worked for Respondent at its divisional office located in Minneapolis, Minnesota. *See id.* In approximately September 2015, Petitioners learned that Respondent intended to hire more staffing employees in the Minneapolis market. Petitioners believed that the addition of more employees would negatively impact their future compensation. In January 2016, Petitioners accepted employment offers from Pride Technologies, Inc. ("Pride") for the same or similar staffing positions in the same Minneapolis market area. *See Id.* at A21. On February 1, 2016, Petitioners voluntarily resigned their employment with Respondent. *See id.* Petitioners cooperatively participated in exit interviews with Respondent, and informed Respondent that they each had accepted positions with Pride. Before they left employment with Respondent, Respondent did not inform Petitioners that it was going to sue them or otherwise attempt to prevent them from working for Pride.

B. Respondent Sues Petitioners in Michigan

On or about February 11, 2016, ten days after Petitioners resigned their employment with Respondent, and without any prior notice, Respondent filed a three-count Verified Complaint for Injunctive and other Relief (the "Complaint") in Michigan state court against Petitioners. *See* Pet. App. A21. Petitioners timely removed the case to the United States District Court, Eastern District of Michigan ("District Court"), based on diversity of citizenship. *See id.*

C. The Court Enters a Preliminary Injunction

On May 2, 2016, the District Court entered an Order granting Respondent's motion for preliminary injunction, and then entered a Preliminary Injunction dated May 29, 2016. Pet. App. A19–A31 & A32–A36. The Preliminary Injunction, among other restrictions, prevented Petitioners from working in the capacity of recruiting or placing job positions in Minnesota, where they lived and worked. *See id.* at A32–A34. The Preliminary Injunction stated, "This Order shall remain in effect for 60 days, at the end of which [Respondent] may request entry of a further injunction. The Court strongly encourages the parties to reach a resolution as quickly as possible." *Id.* at A35–A36.

On June 28, 2016, Petitioners filed an interlocutory Notice of Appeal of the District Court's Preliminary Injunction. *See id.* at A5. One month later, on July 25, 2016, Respondent moved to extend the Preliminary Injunction. *See id.* On August 30,

2016, the District Court entered its Order Granting Respondent's Motion to Extend Preliminary Injunction, which stated, "The Court will therefore extend the preliminary injunction indefinitely until the Sixth Circuit rules on the [Petitioners'] interlocutory appeal." *Id.* at A38.

On September 21, 2016, before any briefing, Petitioners voluntarily dismissed their interlocutory appeal of the preliminary injunction to avoid further time and expense. *See id.* at A6. On May 30, 2017, the Court's preliminary injunction expired, well after the one year non-compete period contained in the alleged agreements had expired. *See id.*

D. The Parties Move for Summary Judgment

On July 28, 2017, Respondent filed its Motion for Summary Judgment and Entry of Order Awarding it Contractual Attorneys' Fees and Costs, pursuant to Fed. R. Civ. P. 56. On July 29, 2017, Petitioners filed their Motion for Summary Judgment of Plaintiff's state law claims for breach of contract and common law duty of loyalty, pursuant to Fed. R. Civ. P. 56. Petitioners argued that with no evidence ever presented to the Court that (a) Petitioners misappropriated, used or disclosed any purported protected business information and (b) any of the job applicant and/or hiring companies (*i.e.* goodwill) were exclusive to Respondent in the marketplace; summary judgment of Respondent's claims was warranted. *See Id*. at A42. On October 24, 2017, the District Court entered its Opinion and Order Granting in Part and Denying in Part Respondent's Motion for Summary Judgment and Order Awarding

Contractual Attorneys' Fees and Costs, and Denying Petitioners' Motion for Summary Judgment. *See id.* at A39–A45. The District Court's Opinion did not address, based on the evidence presented, whether a genuine issue of material fact existed as to each element of Respondent's claims for breach of contract and common law duty of loyalty. *See id.* Many of the arguments raised in Petitioners' Motion for Summary Judgment were not even discussed. *See id.*

Instead, the District Court held that Respondent "is contractually entitled to reasonable attorney's fees and costs it incurred by bringing the suit. [Petitioners] breached their obligation by refusing to pay fees and costs . . . which resulted in damages. [Respondent] is therefore entitled to judgment as a matter of law." *Id.* at A43. The District Court held:

> "Accordingly, a plain reading of the contracts suggests that the parties intended for [Petitioners] to pay attorney's fees if [Defendant] merely sought to enforce the contracts. And enforcement is precisely what the lawsuit involves: [Respondent], albeit not on the merits, persuaded the Court to enter an order enjoining [Petitioners] from competing for the duration of the non-compete clauses."

Id. The District Court then ordered supplemental briefing on the issues of "(1) whether a jury or the Court is the proper body to decide the amount of damages, and (2) if the Court can make the determination, what is the proper amount of damages." *Id.* at A44.

E. The District Court Decides the Amount of Contractual Attorneys' Fees as Damages and Enters Judgment against Defendants

Following supplemental briefing by the parties, the District Court on December 4, 2017 entered a Case Management Order, in which it held that "the Court will not conduct a jury trial to decide a reasonable amount of attorneys' fees to award [Respondent]." Pet. App. A48. On January 2, 2018, the District Court entered judgment "in favor of [Respondent]" and stated, "[Respondent] is awarded $72,182.90 in attorney's fees." *Id.* at A53. The Court's January 2, 2018 Order Awarding Attorney's Fees and Closing Case stated, "This is a final order that closes the case." *Id*.

F. The Sixth Circuit Affirms the District Court's Decision

In response, on January 31, 2018, the Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). On January 10, 2019, a panel of the Sixth Circuit issued an opinion affirming the District Court's judgment. *See id.* at A1–A18. The panel first addressed Petitioners' arguments "that the noncompete agreements were not enforceable under Michigan law; and that the district court, by making preliminary but not final rulings, did not properly or finally rule on the merits of those issues." *Id.* at A9. However, the Sixth Circuit adopted the reasoning of the District Court asserting that "these arguments are beside the point." *Id.* Next, the Sixth Circuit

addressed the Petitioners' argument that the District Court "erred in determining on its own the amount of fees owed, instead of giving the question to a jury." *Id.* at A11. The Sixth Circuit rejected the Petitioners' arguments with respect to this issue and held that "[t]he Seventh Amendment accordingly does not require a jury determination of the amount of attorneys' fees in this case." *Id.* at A15.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND THE DECISIONS OF SEVERAL OTHER CIRCUITS

This Court provided a framework for applying the Seventh Amendment's guarantee of a civil jury trial in *Ross v. Bernhard* as follows: (1) Whether the issue is legal rather than equitable under the custom of the courts of law; (2) Whether the remedy is legal; and (3) Whether the issue is triable to a jury given the jurors' practical abilities and limitations. *See Ross v. Bernhard*, 396 U.S. 531, 538 n. 10 (1970). Appellate Courts have long cited to *Ross* as one of the primary sources of this Court's guidance with respect to the Seventh Amendment. *See, e.g., Minnis v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.*, 531 F.2d 850, 852 (8th Cir. 1975); *Pons v. Lorillard*, 549 F.2d 950, 953 (4th Cir. 1977), *aff'd*, 434 U.S. 575 (1978); *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727, 736 (D.C. Cir. 1972).

Unfortunately, in the more than forty years since this Court's holding in *Ross*, courts have struggled to

interpret the three prong test consistently. As a result, the Sixth Circuit's decision in the instant matter directly conflicts with both rulings of its sister circuits and this Court. Moreover, the Sixth Circuit's decision cites a previous decision from the United States Court of Appeals for the Second Circuit ("Second Circuit"), *McGuire*, which also misapplies *Ross*. *See McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1315 (2d Cir. 1993). In *McGuire*, to determine whether the appellant had the right to jury determination of his demand for attorneys' fees, the Second Circuit characterized this Court's reference to the "'the practical abilities and limitations of juries'" as one of several factors to consider in determining whether an issue is legal or equitable under the Seventh Amendment. *Id*. (citation omitted). The Second Circuit thus blended the *Ross* factors together to focus its reasoning on its perception of the difficulty a jury would face in determining the reasonableness of an award of attorneys' fees. *See id*. This assisted the Second Circuit's attempt to minimize the effect of this Court's previous holdings that the calculation of a reasonable amount of attorneys' fees is a "traditionally 'legal' action." *See Simler v. Conner*, 372 U.S. 221, 223 (1963); *Stanton v. Embrey,* 3 Otto 548 (1876); *Trist v. Child,* 21 Wall. 441 (1874).[1]

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[1] The Second Circuit did concede that a right to a jury trial exists for the determination of whether attorneys' fees should be recovered and limited its restriction of litigants' Seventh Amendment rights solely to the calculation of reasonable attorneys' fees. *Compare McGuire*, 1 F.3d at 1315 *with Resolution Tr. Corp. v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991). The Sixth Circuit in the instant matter did not address this issue in depth as the District Court had granted the

Extensively relying on the Second Circuit's decision in *McGuire*, the Sixth Circuit in the instant matter took this misinterpretation one step further. In its opinion, the Sixth Circuit focused almost exclusively on the jurors' "practical abilities and limitations" and reasoned that the "impracticability concern is dispositive." Pet. App. A12–A15. In so ruling, the Sixth Circuit provided little to no analysis regarding whether the issue before it was legal rather than equitable or whether the remedy sought was legal. *Id.*[2] This truncated analysis differs dramatically from the detailed historical analysis that other appellate courts typically undertake when faced with an issue grounded in the Seventh Amendment.

In particular, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") rejected the type of functional analysis that the Sixth Circuit engaged in the instant case stating:

> While it is unclear as to what was meant by the inclusion of the third factor, we do not believe that it stated a rule of constitutional dimensions. After employing an historical test for almost two hundred years, it is

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Respondent's summary judgment motion with respect to its right to recover attorneys' fees. Pet. App. A15.

[2] The Sixth Circuit referred to two cases in passing regarding the issue of "pre-merger custom." *Id.* at A15 (citing *Schmidt v. Zazzara*, 544 F.2d 412, 414 (9th Cir. 1976) and *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F.Supp. 118, 122 (N.D. Ill. 1982)). However, those cases dealt with fee shifting in the context of a court's equitable powers or specific statutory scheme and therefore are irrelevant to this case which deals instead with a contractual fee shifting provision.

> doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote.

In re U. S. Fin. Sec. Litig., 609 F.2d 411, 425 (9th Cir. 1979).

In fact, in contrast to the Sixth Circuit, the Ninth Circuit explicitly ruled that the third *Ross* factor *was not binding on it. See id.* n. 43. Other appellate courts have shared the same skepticism as did the Ninth Circuit. *See Phillips v. Kaplus*, 764 F.2d 807, 814, n. 6 (11th Cir. 1985) ("Whether or not this factor retains any vitality is indeed open to question."); *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069, 1080 (3d Cir. 1980) ("We also find it unlikely that the Supreme Court would have announced an important new application of the seventh amendment in so cursory a fashion.").

In the wake of these decisions, this Court offered additional guidance as follows:

> This quite distinct inquiry into whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme, appears to be what the Court contemplated when, in *Ross v. Bernhard,* 396 U.S. 531, 538, n. 10, 90 S.Ct. 733, 738, n. 10, 24 L.Ed.2d 729 (1970), it identified 'the practical abilities and limitations of juries' as an additional factor to be consulted in

> determining whether the Seventh Amendment confers a jury trial right.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42, n. 4 (1989); *see also Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565, n. 4 (1990) ("We recently noted that this consideration is relevant only to the determination 'whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme.'") (citations omitted); *Tull v. United States*, 481 U.S. 412, 418, n. 4 (1987) ("The Court has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings.") (citations omitted).

Thus, the third factor enumerated by this Court in *Ross* primarily addresses the situation where a matter should be adjudicated by an administrative agency rather than offering guidance regarding whether a particular issue can be addressed by a judge instead of a jury. Unfortunately, despite the fact that this Court has addressed this issue on multiple occasions, appellate courts have continued to offer differing interpretations of this Court's jurisprudence. *Compare Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312, n. 27 (5th Cir. 1998), *with Cass Cty. Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 644 (8th Cir. 1996).[3]

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[3] *See also United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 60 (Minn. 2012) ("Some federal courts have inexplicably continued to rely on the

Thus, while the Sixth Circuit in this matter adopted practicality as the touchstone by which to analyze whether a litigant has a Constitutional right to a trial by jury for any given issue, it is clear that this is a dramatic departure from the past holdings of both this Court and other circuit courts. Enacting such a standard would enable courts to deny a request for a jury trial whenever they perceive an efficiency can be gained by handling a matter themselves. Clearly more is required to curtail a Constitutional right as important as the right to trial by jury.

II. THIS COURT SHOULD REVERSE THE SIXTH CIRCUIT'S DECISION

A. The Sixth Circuit Misapplied this Court's Previous Decisions Regarding the Seventh Amendment and Focused Almost Exclusively on Practicability

As noted above, the Sixth Circuit's decision held dispositive the assumption that having a jury assess the amount of attorneys' fees would be "highly impractical." Pet. App. A13. First, that consideration is not dispositive in the Seventh Amendment analysis presented by this case. *See Chauffeurs*, 494 U.S. at 565 n. 4. This Court has repeatedly clarified

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practical considerations mentioned in *Ross* in addressing the right to a jury trial under the Seventh Amendment to the United States Constitution.").

that it intended this particular analysis to be applied in the context of determining whether an issue was more appropriately adjudicated by an Article I administrative agency instead of an Article III court. *See id*. It was never intended to distinguish between issues that should be addressed by a judge instead of a jury.

Moreover, this Court has already provided guidance with respect to the issue of whether there is a constitutional right to a jury's evaluation of the reasonableness of an award of attorneys' fees. While analyzing the amounts owed under a contingency fee arrangement, this Court held in *Simler* that "on the question whether, as a matter of federal law, the instant action is legal or equitable, we conclude that it is 'legal' in character. . . .The case was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract, a traditionally 'legal' action." 372 U.S. at 222. So true here. The Sixth Circuit should have treated this Court's ruling in *Simler* as dispositive in the instant matter. However, the Sixth Circuit only referred to *Simler* briefly in a citation from a previous case. Pet. App. A13.

Instead, as noted above, its analysis focused almost exclusively on the practicality of a jury determining the reasonableness of an award of attorneys' fees. However, as juries are already required to determine the reasonableness of an award of attorneys' fees under several states' constitutions, it is quite clear that they are more than capable of doing so. *See e.g. United Prairie Bank-Mountain Lake*, 813 N.W.2d at 60; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351,

367 (Tex. 2000). In fact, the court system asks jurors to determine complex issues all the time such as the decisions made by lawyers in the context of legal malpractice suits (*see, e.g., Seed Company Ltd. v. Westerman*, 832 F. 3d 325, 329 (D.C. Cir. 2016) ("With regard to the remaining defendants . . . we find that the statute of limitations poses no bar to the malpractice action. On the merits of the claims against those defendants, we reverse the grant of summary judgment in their favor and remand the case for trial")), and sit on "[g]reen-eyeshade account[ing]" (*Fox v. Vice*, 563 U.S. 826, 838 (2011)) trials, such as royalty, valuation and partner disputes. So, even under the improper standard adopted by the Sixth Circuit, it is clear that the Petitioners are entitled to a trial by jury to determine the reasonableness of the fees assessed against them.

B. The Sixth Circuit Erred in Finding that the Attorneys' Fees Issue was Collateral to the Merits of the Case

In addition to misinterpreting the *Ross* test, the Sixth Circuit departed from *Budinich v. Becton Dickinson and Company,* 486 U.S. 196 (1988), because no merits determination had been issued. The amount of attorneys' fees was not "a question remaining to be decided after an order ending litigation on the merits…." *Id*. at 199–200.

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and

sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, 752–53 (1942).

Parties have imposed counsel fees under growing exceptions to the "American rule":

> Limited exceptions to the American rule have, of course, developed. They have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result. In appropriate circumstances, we have held, an admiralty plaintiff may be awarded counsel fees as an item of compensatory damages (not as a separate cost to be taxed). And in a civil contempt action occasioned by willful disobedience of a court order an award of attorney's fees may be authorized as part of the fine to be levied on the defendant. The case upon which petitioners here place their principal reliance—involved yet another exception. That exception had previously been applied in cases where a plaintiff traced or created a common fund for the benefit of others as well as himself. In that situation to have allowed the others to obtain full benefit from the plaintiff's efforts without requiring contribution or charging the common fund for attorney's fees would have been to enrich the others unjustly at the expense of the plaintiff. Sprague itself involved a variation of the common-fund situation where, although the plaintiff had not in a technical sense sued for the benefit of others or to

> create a common fund, the stare decisis effect of the judgment obtained by the plaintiff established as a matter of law the right of a discernible class of persons to collect upon similar claims. The Court held that the general equity power 'to do equity in a particular situation' supported an award of attorney's fees under such circumstances for the same reasons that underlay the common-fund decisions.

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (internal citations omitted); *see also Burlington v. Daugue*, 505 U.S. 557, 561–62 (1992).

Yet, parties, themselves accustomed to being judged by juries would be surprised to learn that part of the rationale for not imposing attorneys' fees in the first place—"[t]he time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration" (*Fleischmann Distilling Corp.*, 386 U.S. at 718, citing *Oelrichs v. Spain*, 15 Wall. 211, 231 (1872))—has been misused to escape juror scrutiny as to the amount of fees imposed on parties. Stated otherwise, when an exception to the American rule exists, the rationale for the American rule should not bar a Seventh Amendment right to jury.

Viewed in the *Ross* framework, this diversity non-compete employment lawsuit rendered a result antithetical to the Petitioners' Constitutional rights—reliance on a string of non-merits determinations to deny Petitioners' a Seventh

Amendment right, under the rationale that the issue of the amount of attorneys' fees involved only a collateral matter.[4] This Court's past case law has always envisioned a merits determination as a predicate to finding other matters collateral and that certainly did not occur here. *See, e.g., Budinich,* 486 U.S. at 199–200

First, the preliminary injunction obtained by Respondent (and later lifted by the Sixth Circuit) was a non-merits decision. As this Court explained in *Camenisch*:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing…In short, where a federal district court has granted a preliminary injunction, the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the

[4] To be sure, this Court has held that the award of attorneys' fees is generally a collateral issue with respect to timing of an appeal pursuant to 28 U.S.C.A. § 1291. *See Budinich,* 486 U.S. at 199–200; *see also Ray Haluch Gravel Co. v. Central Pension Fund of Intern. Union of Operating Engineers and Participating Employers,* 571 U.S. 177, 179 (2014).

> controversy. Thus when the injunctive aspects of a case become moot on appeal of a preliminary injunction, any issue preserved by an injunction bond can generally not be resolved on appeal, but must be resolved in a trial on the merits.

University of Texas v. Camenisch, 451 U.S. 390, 395–96 (1981); s*ee also Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546, n. 12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.").

Second, and perhaps more importantly, the preliminary injunction had been lifted *prior* to Respondent filing its summary judgment motion. Beyond the attorneys' fees provided by the parties' agreement, there was no merits issue left to decide. Respondent's motion thus conceded this point by stating: *"[t]he only issue remaining is the amount of attorneys' fees and costs*…." Pet. App. A6 (emphasis added). As noted above, the Sixth Circuit based much of its reasoning in the instant matter on the Second Circuit's *McGuire* case. *See* Pet. App. A12–A13 (citing *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1315 (2d Cir. 1993)). However the concurrence in that case specifically stated that its holding did not extend to cases where there are no other merits issues left to decide. *See McGuire*, 1 F.3d at 1317 ("*This appeal does not require us to decide the availability of a jury trial for fees where all of the other aspects of the same case are disposed of by motion or by another jury*, or where a claimant seeks contractual indemnification for fees incurred in a

separate litigation against a third party.") (emphasis added). This distinction was seized upon by the United States Court of Appeals for the Tenth Circuit which later held the exact opposite of the Second Circuit and found that there was a right to a trial with respect to the calculation of fees in an action regarding attorneys' fees incurred in a separate, underlying action against a third party. *See J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1117 (10th Cir. 2009) (stating that "The *McGuire* concurrence carefully limited the court's holding by noting the nature of the parties' action.").

Third, the employment agreement's fee-shifting provision was interpreted as lacking a prevailing party requirement. The fee triggering mechanism was not a success, but mere filing of suit. Other Circuits have rightly held that damages sought pursuant to such a clause—one that does not require a finding of fault at trial as a condition precedent to recovery—should be considered substantive damages rather than collateral costs. *See, e.g.*, *Carolina Power & Light Co. v. Dynegy Mktg. & Trade*, 415 F.3d 354, 358–60 (4th Cir. 2005), *abrogated on other grounds by Ray Haluch Gravel Co.*, 571 U.S. 177.

It is certainly true that "the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions," (*Simler*, 372 U.S. at 222), but with the injunction dispute moot, the entire dispute was about the amount of attorneys' fees—which Michigan law considers damages, not costs (*Central Transport, Inc. v. Fruehauf Corp.*, 362 N.W.2d 823, 829 (Mich.App. 1984) ("[A]ttorney fees awarded under contractual

provisions are considered damages, not costs.")).[5] Putting aside state substantive law not being dispositive in Seventh Amendment analysis (*Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537–539 (1958); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 465 (1996) (Scalia, J., dissenting)), the attorneys' fees dispute was the only remaining issue in the case and with fees being the only dispute, as noted above, this case fell squarely into this Court's holding in *Simler*.

III. THIS CASE REPRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE WARRANTING THE COURT'S IMMEDIATE RESOLUTION

Trial by jury is the bedrock of the American legal system. As this Court has said in the past,

> Maintenance 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 jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935). The Sixth Circuit's misinterpretation of this Court's

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[5] The District Court specifically noted this and expressly stated that it was not considering the Respondent's request for attorneys' fees as a collateral matter under FRCP 54 (Pet. App. A42) but was instead considering them substantial damages as the "substantive law requires those fees to be proved at trial as an element of damages." FRCP 54(d); *see also Dryvit Sys., Inc. v. Great Lakes Exteriors, Inc.*, 96 F. App'x 310, 311 (6th Cir. 2004).

jurisprudence regarding the right to a jury trial should not be allowed to stand. As noted above, the Sixth Circuit focused almost exclusively on the issue of efficiency and failed to conduct any meaningful inquiry with respect to any other factor. Thus, the Sixth Circuit's holding represents a radical departure from the traditional historical analysis established by this Court many years ago to determine the availability of a right to a jury.

Moreover, the standard employed by the Sixth Circuit simply represents too low a bar for the curtailment of a constitutionally-guaranteed right. The availability of a constitutionally-guaranteed right does not and should not turn on the practical difficulties of its implementation. *Cf. United States v. Booker,* 543 U.S. 220, 243–44 (2005) ("We recognize, as we did in *Jones, Apprendi*, and *Blakely*, that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.").

As noted above, this Court has been forced to clarify the factors identified in the *Ross* case on several occasions but has not done so in some time. The Sixth Circuit's decision below demonstrates that this Court's previous clarifications have not been fully heeded and additional guidance is needed with respect to the proper evaluation of when a right to trial by jury is available to a civil litigant. This case represents the perfect opportunity for the Court to provide that guidance.

CONCLUSION

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

Respectfully submitted,

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