NO. 19-7612

IN THE SUPREME COURT OF THE UNITED STATES

SHA'RON A. SIMS,

APPILICANT

V.

WELLS FARGO BANK, N.A, WELLS FARGO AND COMPANY, INC.

AND THE UNNAMED PASS THROUGH TRUST

PETITION FOR REAHEARING

PETITION FOR CERT TO THE

ELEVENTH COURT OF APPEALS

SHA'RON A. SIMS

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QUESTIONS PESENTED

In Twombly, the Court justified its departure from the rule in Conley by its insistence that the language in Conley had been taken out of context for years and that the Court's present interpretation was the correct interpretation of Rule 12(b)(6), although the Conley rule had stood for fifty years.

In Tellabs the Court emphasized the power of Congress to formulate the standards for pleading causes of action that Congress creates. (the Court emphasized the power of Congress to formulate the standards for pleading causes of action that Congress creates. (See Tellabs, 127 S. Ct. at 2512.)

The Court did not consider the constitutionality issue at all in Twombly and gave a conclusory analysis of the issue in Tellabs. The many scholars who have examined one or both cases also have not focused on the constitutional implications. (*See, e.g., Richard A. Epstein, Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments, 25 WASH. U. J.L. & POL'Y 61 (2008); Brian Thomas Fitzsimmons, The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scale for Plaintiffs, Defendants, and Society, 39 RUTGERS L.J. (forthcoming 2008); Kendall W. Hannon, Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions, 83 NOTRE DAME L. REV. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm ?abstractid=1091246; Max Huffman, The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims, 10 U. PA. J. Bus. & EMP. L. 627 (2008); Allan Ides, Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice, 243 F.R.D. 604 (2007); David M. Levy & Sandra J. Peart, Adam Smith, Collusion and "Right" at the Supreme Court, 16 SUP. CT. ECON. REV. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstractid=1022829; Spencer, supra note 3; Joshua D. Wright, The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond, COMPETITION POLY INT'L, Autumn 2007, at 25; Amanda Sue Nichols, Note, Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Standard of Bell Atlantic v. Twombly?, 76 FORDHAM L. REV. 2177 (2008); Keith N. Hylton, When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards (Boston Univ. Sch. of Law Working Paper Series, Law & Econ. Working Paper No. 06-06, 2007), available at http://ssrn.com/abstractid=897486; Randal C. Picker, 'Twombly" 'Leegin' and the Reshaping of Antitrust (Univ. of Chi. Law & Econ., Olin Working Paper No. 389, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract id=1091498; Dodson, supra note 3; Audio recording: Richard A. Nagareda, Professor, Vanderbilt Univ. Law Sch., Commentary on Bell Atlantic v Twombly, broadcast on Federalist Society's SCOTUScast (May 25, 2007), http://www.fed-soc.org/publications/pubID.320/pub-detail.asp; cf. Allan Horwich & Sean Siekkinen, Pleading Reform or Unconstitutional Encroachment? An Analysis of the Seventh Amendment Implications of the Private Securities Litigation Reform Act, 35 SEC. REG. L.J. 4 (2007) (discussing the Private Securities Litigation Reform Act (PSLRA) issue before Tellabs was decided). For discussions of pleading standards prior to Twombly and Tellabs, see generally Richard L. Marcus, The Puzzling Persistence of Pleading Practice, 76 TEX. L. REV. 1749 (1998), and Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 COLUM. L. REV. 433 (1986)*)

the new motion to dismiss standards do not comport with the common law requirements and therefore

violate the Seventh Amendment. "*the Supreme Court was wrong to state that Congress and rulemakers could impose essentially limitless requirements upon plaintiffs at the pleading stage for causes of action that Congress created.*"

Upon a motion for summary judgment, a court examines the evidence presented by the litigants and decides whether "a reasonable jury could return a verdict for the nonmoving party."(*Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986) (discussing the standard for summary judgment); Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,475 U.S. 574, 585-88 (1986) (same); cf. Arthur R. Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichds Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 1073-74 (2003) (discussing the effect of this trilogy on the motion to dismiss*).

After the trilogy of Supreme Court cases in 1986 (***See Celotex, 477 U.S. at 322-25; Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-88***.), in which the Court established this standard, it has been said that the courts exponentially increased their use of summary judgment to dismiss cases.(*See, e.g., Redish, supra note 27, at 1330. But see Thomas, supra note 27, at 140 n.3 (citing Professor Burbank and Joe Cecil's views doubting the effect of the trilogy on Summary judgment).*

Prior to the 2006 Term, the Court's jurisprudence on the Seventh Amendment was well defined as governed by the English common law in 1791. The Seventh Amendment provides that "[i]n Suits at common law,... the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."(***U.S. CONST. amend. VII (emphasis added))*** The Seventh Amendment is the only provision in the Constitution to use the words "common law." The Court has interpreted the meaning of "common law" in the first and second clauses of the Amendment to be the English common law in 1791.(***The Amendment was adopted in 1791. See, e.g., Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 435-36 & n.20 (1996); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996); Galloway v. United States, 319 U.S. 372, 388-92 (1943); Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476-77 (1935); Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 497-98 (1931); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 377 (1913); Thompson v. Utah, 170 U.S. 343, 350 (1898) (stating that common law refers to English common law in 1791); United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (referring to the English common law as "the grand reservoir of all our jurisprudence"). See generally JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD (2004) (discussing the role of juries in various types of civil actions); 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY (1992) (noting the use and role of juries); JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 127-52 (2006) [hereinafter OLDHAM, TRIAL BY JURY] (describing the origin of special juries in England); Bernadette Meyler, Towards a Common Law Originalism, 59 STAN. L. REV. 551, 595-600 (2006) (discussing originalism in the Seventh Amendment); James Oldham, The Seventh Amendment Right to Jury Trial: Late-Eighteenth-Century Practice Reconsidered, in HUMAN RIGHTS AND LEGAL HISTORY 225 (Katherine O'Donovan & Gerry R. Rubin eds., 2000))***

In Curtis v. Loether 415 U.S. 189, 190 (1974), the Supreme Court explicitly considered the issue of whether a right to a jury trial existed for a Title VIII violation, a cause of action that did not exist under the English common law in 1791. The Court stated, "*Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.*" ***Id. at 194.*** The Court also has set forth a test to determine when a jury trial right exists in a case with both equitable and legal claims: "*The Seventh Amendment question depends on the nature of the issue to be tried ra- ther than the character of the overall action.*"***Ross v. Bernhard, 396 U.S. 531, 538 (1970)***". The Court continued, [T]he "*legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the re- medy sought; and, third, the practical abilities and limitations of ju ries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.*"

In Twombly and Tellabs, the Court ignored the well established case law under which the English common law in 1791 governs the constitutionality of procedures that affect the jury trial right. Likely because the After all, the parties, the lower courts, and the Supreme Court did not raise the Seventh Amendment issue. (***Cf. Gonzalez v. Carhart, 127 S. Ct. 1610, 1640 (2007)*** *(Thomas, J., concurring) (noting that questions not raised or briefed in lower courts are not properly before the Court on appellate review);* ***Cutter v. Wilkinson, 544 U.S. 709, 727 n.2 (2005)*** *(Thomas, J., concurring) (stating that the Court correctly declines to consider issues that were not addressed by lower courts)*)

This Court held, in Twombly, that "*[T]he line between possibility and plausibility of 'entitle[ment] to relief"' must be crossed.55 The Court held that the line had not been crossed, because independent parallel conduct by the companies alone, without more, did not make the conspiracy claim plausible.*" The plausibility Standard announced in the Court permits a court to examine inferences that favor both parties in the court's decision whether to dismiss a complaint. (Cf. id. at 1972-73; id. at 1986 n.11 (Stevens, J., dissenting) (discussing the Court's decision to draw factual inferences in favor of the defendant))

The Court explained that allegations must "plausibly suggest[]" the claim, "not merely [be] consistent with" the claim. Justice John Paul Stevens, joined by Justice Ruth Bader,Ginsburg, dissented: Justice Stevens asserted that a court should not dismiss a claim on the basis that the claim is not plausible.6 5 Plausibility should not be assessed at the motion to dismiss stage of a case.6 6 Instead, Justice Stevens asserted that the correct standard was the fifty-year-old Conley standard. (The above are excerpts from , used to form the questions sims will be sking)

As noted above, the Court didn't consider the impact of the Court's ruling on the 7th Amendment Right to a Jury trial. The 7th Amendment has a "*preservation clause*". How does the Court's articulated Motion to dismiss Standard aide, or hinder the "preserved right" to a Jury trial?

Under the Prevailing common law, in 1791, Courts did not require that a Plaintiff 'establish" or "prove" to the Judge that they have the only, or more likely to prevail case. In fact, "parrallel Consduct", as the Court termed it, was when the jury had its most impact. This Modern Court didn't require a choice

between parrallel conduct either. In fact, this Court seemed to have required that the alleged facts be have an ifference that is "atleast as strong as any opposing" inference from the Defense. ("When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?" [***Tellabs, 127 S. Ct. at 2511.])***

Parrallel definitions are (entry 2 of 3): "*a way in which things are similiar: shared quality or characteristic..: Something that equal to or similiar...*" Therefore, under a true definition and understanding of the word plausible, if two things are similar to one another each are possible and plausible. This is because plausible is "*an argument or statment seeming reasonable or probable*"

Here, the Court isn't asking for a plausible standard at all, it would seem. Because, if the claims and defenses are "parrallel" or "equal", then each is plausible and the Jury get to decide which, of the competing arguments is true. The Court's position is that the defense is correct, or more correct, if they can produce "competing" reasons why they took there action. More disturbing is that the Court's law on Rule 12(b)(6) motions allows the judge to "weigh" the factual allegations and "determine", in essences, if the defenses' merely alleged defenses, rather true or not, are enough to defeat the plaintiff's alledged facts.

Under the Court's standards, A plaintiff is forced, at the pleading stage , to "prove" their case to a judge. See Comcast, The Court held that the plaintiff's therein had an obligation, or requirment, to "establish" a "but for causation" in order to get to a Jury. At the same time, the Court held that Plaintiff must "prove" at the end of the trial "but for Causation".

The logic in Comcast is internally inconsistent and inconsistent with the 7th Amendment's Preserved right to a trial. First, in Comcast the Court held that the Plaintiff's burden shifts in degree within a case. The Court held that at the end of the case, the plaintiff must establish "but for Causation". Then, the court held that the plaintiff must "establish" but for causation at the pleading stage.

If the ultimate burden in comcast is to establish or prove the "but for Causation" to the jury, in order to prevail, and that is the "increased burden of the plaintiff at the trials end, How then is it not that the court has assumed the role of jury,, by declaring that what a plaintiff must prove to the factfinder, they must first prove to a single judge?

Reading This court's cases from Bell Atlantic to comcast, we find that the Court has taken the substance of the Jury right, and duties of the jury, for itself. Going back to the Magna Carta, this has never been the function of the Jury-to rubberstamp the judges' belief that the plaintiff have "proven" their case. The issues raised in this Court's ruling on Motions to dismiss makes clear that a judges role is now to be factfinder, in the first and ultimate sense.

This long setteled this issue : "*The principle that juries determine questions of fact is a fundamental underpinning of the American legal system. The Seventh Amendment was drafted in response to complaints raised during the ratification process that the Constitution failed to protect the institution of the civil jury. The Reexamination Clause, in particular, answered the chorus of objections in the ratifying conventions that the Supreme Court's appellate power "both as to Law and Fact" would effectively*

abolish the civil jury by allowing the Supreme Court to retry facts on appeal. It is for this reason that Justice Joseph Story characterized the Reexamination Clause as "more important" than the initial phrase of the amendment guaranteeing juries in civil trials. ***Parsons v. Bedford (1830).***

Question 1: Should this Court overrule *Bell Atlantic Corp. v. Twombly 550 US 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 - Supreme Court, 2007, Ashcroft v. Iqbal 556 US 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 - Supreme Court, 2009,* and later cases because they uncomstitutionally encroach upon the 7th Amendment's "preservation" clause.

Question 2: What is "preserved" within the 7th Amendment, in terms of Jury rights, duties and function?

Finally, The Federal Consitution places upon this Court, without Congressional Mandate, a minimum jurisdiction of cases arising under the Consitution. (Article III, Federal Consitution) This Court has policy of "*discreationary review*" of all cases. Question, Did either Congress or thisCourt have the a Consitutional Authority to reduce this Court's Jurisdiction to Discreationary, when the Consitutional Commanded that this court "*shall*" have that jurisdiction?

Implicit in the argument of ***Marbury v. Madison763*** is that this Court is obligated to take and decide cases meeting jurisdictional standards. Chief Justice Marshall spelled this out in ***Cohens v. Virginia***:764 *"It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."*

As the comment recognizes, because judicial review grows out of the fiction that courts only declare what the law is in specific cases (Justice Sutherland in ***Adkins v. Children's Hospital, 261 U.S. 525, 544 (1923),*** and Justice ***Roberts in United States v. Butler, 297 U.S. 1, 62 (1936).)*** and are without will or discretion, its exercise is surrounded by the inherent limitations of the judicial process, most basically, of course, by the necessity of a case or controversy and the strands of the doctrine comprising the concept of justiciability.

("28 U.S.C. §§ 1254–1257. See F. Frankfurter & J. Landis, supra at ch. 7. "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case . . . . If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." Chief Justice Vinson, Address on the Work of the Federal

Court, in 69 Sup. Ct. v, vi. It "is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari." Chief Justice Warren, quoted in Wiener, The Supreme Court's New Rules, 68 HARV. L. REV. 20, 51 (1954)."

Even if we were to assume that the qoute above is true, and for the sake of argument, lets ssume as musch is true. Therein resides a question as to what must this Court do to " *fulfill the Constitutional and statutory responsibilities placed upon the Court*" under Article III of the federal Consitution. The questions in Sims' case deal with consitutionally infirm decsions of the lower Court, decsisons wich are counter to th constitutional limits of the courts, judges, authority to act.

"when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."(***The Origin and Scope of the American Doctrine of Constitutional Law, in J. THAYER, LEGAL ESSAYS 1, 21 (1908)***) Thayer argues that the Courts, this Court, is required to correct mistakes of a constutional issue.

QUESTION 3: Does Article III, of the Federal Consitution, place a mandatory, non-discreationary, jurdisdiction upon this Court, wwhen the word "shall" appears ithin the text?

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ALABAMA LAW REVIEW

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING

WHAT IS MEANT BY "*PRESERVE*" WITHIN THE 7TH AMENDMENT AND WHAT IS SO "PRESERVED" BY THE 7TH AMENDMENT

"*The principle that juries determine questions of fact is a fundamental underpinning of the American legal system. The Seventh Amendment was drafted in response to complaints raised during the ratification process that the Constitution failed to protect the institution of the civil jury. The Reexamination Clause, in particular, answered the chorus of objections in the ratifying conventions that the Supreme Court's appellate power "both as to Law and Fact" would effectively abolish the civil jury by allowing the Supreme Court to retry facts on appeal. It is for this reason that Justice Joseph Story characterized the Reexamination Clause as "more important" than the initial phrase of the amendment guaranteeing juries in civil trials.* Parsons v. Bedford (1830).

The "*law and facts*" provision in Article III, combined with the lack of express protection for civil juries in the Constitution, caused Anti-Federalists to fear that the right to juries in civil matters would be abolished upon the Constitution's ratification. Both *George Mason* and Richard *Henry Lee* of Virginia argued that the Constitution abolished juries in all civil cases. As the Federal Farmer (thought to be Lee) noted, "*By Article 3, section 2,.. the Supreme Court shall have appellate jurisdiction, both as to law and fact... By court is understood a court consisting of judges; and the idea of a jury is excluded.*"

In the **Federalist No. 83,** *Alexander Hamilton* denied that the Constitution's silence regarding civil juries amounted to an abolition of civil juries. Reexaminations of facts, he said, would only result in a remand for another jury trial. He declared that under the Constitution, Congress had the power to protect the right to a jury trial in civil cases. Hamilton's disclaimer did not silence the Anti-

Federalist demands for constitutional guarantees, and the ratifying conventions of New York, Virginia, Massachusetts, and New Hampshire proposed adding a protection for civil juries in the Constitution. Thus, although the Anti-Federalists were unsuccessful in preventing the ratification of the Constitution, they made it clear that their demand for a right to a civil jury trial would have to be acceded to.

The Seventh Amendment's Reexamination Clause prohibits reviewing courts from reexamining any fact tried by a jury in any manner other than according to the common law. Under common law, appellate courts could review judgments only on writ of error, which limited review to questions of law. For example, in Parsons v. Bedford, Justice Story held that reviewing courts have no power to grant new trials based on a reexamination of the facts tried by a jury. The court can consider only those facts that "bear upon any question of law arising at the trial," and if there is error, the reviewing court's only option is to grant a new trial. Earlier, while on circuit in ***United States v. Wonson (1812)***, Story noted that a writ of error allows examination of "*general errors of law only*," and appellate courts "*never can retry the issues already settled by a jury, where the judgment of the inferior court is affirmed*." Trial courts could order a new trial for good cause, but reviewing courts could examine only alleged errors of law. Story's opinion encapsulates the traditional meaning of the Reexamination Clause.

The advent of the Federal Rules of Civil Procedure, along with other procedural devices allowing courts to weigh evidence, has cut into the traditional interpretation of the Reexamination Clause. Specifically, procedures such as summary judgment and directed verdicts, which greatly affect the substantive power enjoyed by juries, call into question the traditional view that appellate courts are allowed to review only questions of law, not fact. Dissenting in ***Parklane Hosiery Co. v. Shore (1979)***, ***Justice William H. Rehnquist*** declared, "*[T]o sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment.*"

The Supreme Court had, until recently, consistently held that the calculation of damages, including punitive damages, *"involves only a question of fact."* ***St. Louis, Iron Mountain & Southern Railway Co. v. Craft (1915); Barry v. Edmunds (1886)***. However, in ***Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001)***, the Court characterized punitive damages as a question of law and therefore not subject to the reexamination clause, permitting a de novo review by the appeals court of excessive jury awards under the Cruel and Unusual Punishment Clause of the Eighth Amendment.

A parallel trend is present in the handling of ordinary or compensable damages. The Court's decision in ***Gasperini v. Center for Humanities, Inc. (1996)*** specifically **rejected the common law standard of review in place in 1791** and validated review of the jury's fact-finding power by permitting appellate consideration of a jury award on the ground of excessiveness. The Court in Gasperini validated the practice, in which federal appellate courts had set aside jury verdicts only for *"gross error,"* or if the result *"shocked the conscience,"* or, later, if there was an "abuse of discretion" by the jury. None of these, the Court held, was contrary to the Reexamination Clause. It characterized such actions as *"questions of law."* In dissent, **Justice Antonin Scalia stated**, *"It is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness."*

The general rule, as articulated by the United States Court of Appeals for the Federal Circuit, remains that when an appellate court reduces a jury award on grounds on excessiveness, the *"'Seventh Amendment [ordinarily] requires that a plaintiff be given the option of a new trial in lieu of remitting a portion of the jury award[,]'" unless the award is reduced because of legal error. Minks v. Polaris Industries, Inc. (2008).* Thus, when a district court imposed a cap on an asbestos settlement that limited a jury award, the court declared the Reexamination Clause inapplicable, because it was merely effectuating what the legislature deemed reasonable. ***In re W. R. Grace & Co. (D. Del.).***

Similarly, in ***Weisgram v. Marly Co. (2000)***, the Supreme Court rejected the argument that a reviewing court's striking of evidence from the record required remand to the lower court to consider whether a new trial was warranted. Instead, the Court found that a federal appellate court can direct the entry of judgment as a matter of law when, after "*excis[ing] testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict.*" A federal district court subsequently extended ***Weisgram*** to hold that in granting a motion for a new trial, the court is entitled to reject jury findings when the court determines that certain testimony is "*not credible in light of the manifest weight of the evidence.*" ***Galvan v. Norberg (2011).***

"*The continuing erosion of the jury function exemplified in Gasperini and Weisgram seems therefore to confirm at least partially what the Anti-Federalists' suspicion, which the Framers of the Seventh Amendment sought to allay that jury findings would become vulnerable to judicial reexamination.*" (***The Heritage Foundation. The Heritage Guide to the Consitution:***
https://www.heritage.org/constitution/#!/amendments/7/essays/160/reexamination-clause

In reviewing the above text from The Heritage Foundation's review of This Court's Attack on the Jury Rights of the American People, one must ask what is the legal limits imposed by the "preservation" clause within the 7th Amendments to the Federal Constitution.

We should start, I suppose, with *"what"* a Jury's function was, and why that Function was preserved within our Federal Constitution.

What is being preserved? The Magna Carta, which guarantees the jury trial in pre-revolutionary England was a check on the King, who was the entire government: The legislature, the Judicial and, of course, the executi***ve. (Lysander Spooner. "EASSAY ON THE TRIALS BY JURY; John P. Jewett & Co. [1852], page 20)***
Therefor, the King was, constitutionally, the government. The only limit the King

had, if he wishes to observe any limits, was the common law (also known as the "*law of the Land*")

A part of this law of the land, secured through the Magna Carta, was that "*the King could not punish any freeman without consent of his peers*": The Jury? This was substantially, the only real reform, which could protect the people, their liberty and property from the laws, and whims, of the King.

When the Magana Carta was sealed, the People held the right to be the judge of, and try, the whole case on its merits, independent of all "arbitrary legislation, or judicial authority, on part of the King." In so doing, they took the liberties of each other out of the hands of the King. (See generally APP "C")

Therefore, at common law, it would appear that the Jury, not the judges, made determinations of the "*whole*" case: No verdict was entered, with respect to the merits of the case, if not be the jury.

Under the *Magna Carta*, it was the right of the Jury to be the judge of the justice of the laws themselves. It made no sense that they would merely sit to rubber stamp the government, or the laws passed, if the purpose of the Jury was to secure the liberties of the people from the oppression of the government.

These Words Appear in the Charter: *"Nullus liber homo capiatur, vel imprisonetur, aut disseisetur de libero tenemento, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemusm nisi per legale judicium suorum, vel per legem terrae"* (**translation**: "*No freeman shall be arrested, or imprisoned, or deprived of his freehold, or his liberties, or free customs or outlawed, or exiled, or in any manner destroyed, nor will we [the King] pass upon him, nor condemn him, unless by judgement of his peers, or law of the land*"

Coke rendered the words " *Nec super eum ibimus, nec super eum mittemus*" as " *No man shall be condemned at the King's suit, either before the King in his bench, nor before any other commissioner or judge whatsoever*". Others hold that truer

translation is " *Nor shall we proceed against him, executively*". This would render the meaning that Juries were to stop the singular actions of a judge, in determining the cases of free men. Such as, let's say, determining that Parallel conduct A is true or Parallel conduct B is true: a jury decides.

The Magna Carta has another phrase within in it " *Per legale judicium parium suorum*", which means "*according to the sentence of his peers*". "*judicium*" has a literal meaning, technical, depending the type of preceding. In criminal cases it mean "*sentence*", in chancery cases it means "*decree*" and in civil cases it means "*judgements*". Therefore, when speaking of either criminal or civil cases, the word "judicium" means what the court does at the ending of the trial. And again, it's the jury that is the center of the court's action, in a jury trial, not the judge.

Here we see that the Jury, at common law, or law of the land, was a shield between the judges and the people before them. This makes sense, because judges are little more than instruments of the government, be that government a King, or a constitutional democracy.

Three hundred before the Magna Carta, Emperor Conrad guaranteed jury trial to his people. Blackstone cited him in ***3 Blackstone, 350***: "*Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum, et judicium parium suorum*". This phrase means: *No on shall lose his estate, unless according to* (secundum) *the custom* (or law) *of our ancestors, and* (according to) *the sentence* (judgement) *of his peers.*"

We see here that no judgement, be it civil, criminal, or chancery, was to be handed down by any but the jury. In all ways, this was the citizens check on the laws, and the execution of the laws, which impacted each other.

Now, what duties did a Jury have, in accordance with the Law of the Land (common law)? Reminding, or explaining, that the "*law of the Land*" means ***Common law.*** It has been called other things, but it's all the same. ("*per legem terrae*"[Magna

Carta], "*Nolumus legws Angliae*" [statute of Merton, cap. 9] or "*lex et consuetudo regni*" [the law and customs of the king])

The king was sworn to maintain the law of the land. Much like the 7th Amendment's "*preservation*" clause. (see *St. 20 Eward III[Statute of 1346, by Edward III])* This oath to maintain the law of the land, was not an oath to uphold any and all laws passed by the King, who legislated from the throne, but to maintain a unyielding fundamental law. Say, like our Constitution?

Under Common law, the *"judgement"* was fixed by the jury. This would make sense, if the jury, as it was, were to judge the whole of the case. This is why, likely, that the 7th Amendment have a prohibition against "re-examination" of the jury verdict. Why would the Jury have the power to judge, and render judgement, if a court, or other authority, had the right to go behind the jury and change the verdict? What type of security to liberty would that be? Once a Jury spoke, the case was over-every one goes home! (or to jail :))

What **John Jay**, the first **S.Ct. Chief Justice**, said about Jury nullification of laws was within the proper duties and rights of a Jury. In the "*Mirror Justice*", written during the Time of ***Edward I (1272-1307)***, it was said *"tum demum beges vin et vigorem habuerunt, cum fuerunt non modo institoe sed firmatae approbatione communitatis*" or "*the law had force and vigor only when they were not only enacted, but when confirmed by the approval of the community*". The jury, in all cases, had the right to determine if the laws, though properly enacted, had any force within the country-within each case so tried. This is the conscience of the Community, wise and just, in protecting the life, liberty and property of the people.

The Jury right was an import into Britain, from nations abroad. Their customs, helped to fix the minds of the British subjects, as to the role of the Jury. Hallan writes: "*The Franks, Lombards and Saxons seem alike to have been jealous of judicial authority; and averse to surrendering what concerned every man's private right, out of the hands of his neighbors and equals*" (***1-Middle Ages, 271***)

"If ...in adminstration of justice, or of law, that the freedom or subjection is tested. If this administration be in accordance with arbitrary will...as it appears in statutes, be the highest rule of decision known to judicial tribunals, -the government is a despotism, and the people are slaves." (cite pge 63)

The Courts, before the *Magna Carta,* which was founded on the law of the land, whether they sat as **court-baron**, ***the hundred court***, the ***court-leet*** or the ***county court***, they *"were mere courts of conscience, and that the juries were the judges, deciding causes according to their own notions of equity, and not according any laws of the king, unless they thought them just...The sheriffs and bailiffs caused the free tenants of their baliwics to meet at their counties and hundreds [courts]; at which justice was so done, that everyone so judged his neighbor by such judgement as man could not elsewhere receive in like cases ... And, although freeman commonly was not to serve (as a juror or judge) without his assent, nevertheless it was assented unto that free tenants should meet together in counties and hundreds, and lords courts, if they were not specially exempted to do such suits, and there judged their neighbors"* ****(Mirror of Justice, p 7,8),***

"In county Courts if the debt was above forty shillings, there issued a justicies (a commission) to the sheriff, to enable him to hold such a plea, where the suitors (jurors) are judges of law and fact" ***(Gilbert's Cases in Law and Equity, , 456)***

"Summon twelve free and legal men (or sometimes twelve knights) to be in court, prepared upon oaths to declare whether A or B have the greater right to the land (or other thing) in question" ***(Writs in Beams' Glanville, p. 54-70, and 233-306-332)***

"By one law, every one was to be tried by his peers....By another law, the judges, for so the jury was called, were to be chosen by the party impleaded, after the manner of the Dannish nembas; by which, probably, is to be understood that the defendant had the liberty of taking exceptions to, or challenging the jury, as it would afterwards be called" (***Crabbe's History of the English Law, p55***) (In this quote, we see that the "plaintiff" decided if the case would be heard by a jury - such we have here in this nation today.)

REEVES stated: "*The great court for civil business was the county court; held once every four weeks. Here the sheriff presided; but the suitors of the court, as they were called, that is, freemen or landholders of the county, were the judges; and the sheriff was to execute the judgement..... The hundred court was held before some baliff; the leet before the lord of the manor's steward....Out of the county court was derived an inferior court of civil jurisdiction, called the baron-court. This was held from three weeks, and was in every respect like the county court; (that is, the jurors were judges in it;); only the lord to whom the franchise was granted, or his steward, presided instead of the sheriff*"(***1-Reeve's History of the English Law, pg 7)***

As we have read above, the jurors, under the common law, were the judges of the whole case. When we say, within the Federal Constitution that we Preserve the right to a jury trial, did we not Preserve the duty of the Jurors to decide if we actually win, or lose, our case-and thusly our property?

From the quotes above, we see that no official held the right to determine if we "*established*" or "*proved*" an element of our case, before a Jury was impaneled. However, in today's pre-trial rules, and rulings, Courts, and this Court is leading the way, has insisted that plaintiffs prove their cases, before a judge-even when we have demanded our preserved jury rights.

How then are our neighbors the protector of our liberties, life and property? If a judge, who has no authority to decide if the case is, or isn't, a prevailing case, on any facts, can require that we allow him to determine the merits of our case, what has been preserved within the 7th Amendment? Is it the right to simply ask for a jury trial? What type of guarantee is that? Judges are "*human after all*" (***Justice Kagen's Concurrence, RAMOS v. LOUISIANA, No. 18–5924, Decided April 20, 2020***), they come to the bench with biases and prejudices, no one can claim the opposite is true. However, this Court insists that we entrust the rights, liberties and quality of life to a single person, not a jury of our peers-or neighbors.

If there is a choice to make, between Parallel "A" and "B" (***Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)***, and such parallel are similar, why can we not a jury determine which of the two similar things it is in fact true? Or, if we have to establish but for causation, which means we have to convince a judge, through factual evaluations by the judge, that only race played a part (***RAMOS v. LOUISIANA, No. 18–5924, Decided April 20, 2020***)), then what is a jury for? That standard isn't a pleading standard, it a proof standard. We plead to the court: We prove to a Jury. Nothing has been preserved of the substance of the jury since this Court's Ruling 2007.

A judicial ruling cannot upend a constitutional protection. Not even the Supreme Court has that right, Constitutional authority or privilege granted them. It's a Usurpation of political power, from the people.

"With the exception of voting...the honor and privileged of jury duty is their most significant opportunity to participate in the democratic process" (***Powers v. Ohio, 499 US 400, 407 (1991)*** This is because, as noted above, the jury is a direct check on both the judges and the legislature and injects a community based voice in the execution of the laws. (see ***APP "E", PG 830-835***) This participation provides confidence in the verdicts reached. (See APP "E", pg 831[with citations]) This confidence is because jury service is the citizens' check on the government. ,(see ***4 William Blackstone, Commentary on law at 342***; ***The Federalist Papers No. 83***; ***THOMAS JEFFERSON, THE ADMINSTRATION OF JUSTICE AND DISCRIPTION OF LAW, in Notes on the State of Virginia 140, 140 [Richmond, J. W. Randolph 1853]***; ***Jenny E. Carrol, The jury's Second Coming, 100 GEO. L.J., 657 (2012);*** and ***Sparf and Hanson v. United States reconsidered, 46 Am. J. Legal History. 353, 388 (2004)*** *"Revolutionary colonials refused to define law as an instrument of state which could not be judged by the common man. Rather, they viewed it as the reflection of their community which ordinary men were equally capable of judging for themselves."*)

Are we to assume that there is an absurdity within the restrictions placed on the Government; That the preserved rights is but an illusionary promise? Or, has the courts improperly denied Sims, and other home owners their constitutional rights in this nations' courts? Upon what constitutional grant of power can that decision rest?

As Noted above, this Court has held that a Judge may ignore the Jury's Verdict because he/she, or other judges, may differ with the verdict. This Practice renders the prohibition against re-examination null and void. By Court Order, and not by A Constitutional Amendment, this Government, through this Court-the Third Branch of Government, has denied a constitutional right. Upon what Constitutional Authorized Power did this Court find it's ability to deny the substance of these Clauses within the 7th Amendment? (preservation and re-examination clauses)

As Noted Above, ***Common Law, in 1791,*** was expressly against the actions this Court has decided to embark on since 1996. Again, under what constitutional Grant of Authority did this rest upon in determining that the Common Law of, as understood by the Founders of this Nation, wasn't what they "*preserved*" for all time?

As Noted Above, the Jury, not the Judge, decided if Litigant "A" or "B" had a "higher right to the land" (property) under common law, Under What Grant of Constitutional Authority did this Court have the right to change that protection.

As noted above, the Jury at common Law decided if the accusations of the plaintiff or the defenses of the defendant was correct and true. Under what grant of Constitutional Authority did this Court rest in removing the Jury's substantial Power to decide between the accusations of the Plaintiff and the defenses of the defendant?

Question 1: In ***Romas*** this Court held that the text of the 6th Amendment comes with some meaning: Considering the attacks this government, through the Federal Courts, has leveled at the 7th Amendment, what is meant by the "preservation" clause of the 7th Amendment?

Question 2: Was Sims' Right to a jury trial, as preserved in form and function at the time of our founding, violated by the lower courts' action within this instant case?

Question 3: Because Bell Atlantic, Iqbal and ESN require a Judge to make choices between the legitimate arguments between the Plaintiff and the Defendant, including "*parallel conduct*", which are accusations and defenses running in the same direction, with shared factual support (i.e. both the plaintiff and the defendant agree with actions and the results of those actions, but differ to causation), should those cases be overruled on the basis that they substantially take for the judge what is purely a Jury consideration under the 7th Amendment's Jury Guarantee)

In ESN, Twombly and Iqbal, the issue turned on "parallel conduct". This is an issue of Motivation, not an issue of if these defendants actually engage in the acts alleged. Did Bell Atlantic act with an ilegal motive? Was Comcast's action because of racial animus? Did Aschcorft act based on Racial bias? Motives are factual in nature, not legal standards. (cite)

This Court has held in each case that, because the defendant articulate a *"reasonable*" reason that they acted as they did, the Plaintiff did not "*established*" and "prove" that their cases, pe-jury trial, and their cases were dismissed: Based on the motives alleged by the defendant. Alleged, not proven to a jury, but merely alleged.

The glaring problem with this Court's reasoning is that the reasons these defendants acted is a factual matter to be decided by a jury. This goes to Motive and motives are a factual determination. Even if we take Coke's writing as gospel, this Court's rulings since 2007 isn't in keeping with that understanding of a jury's role. Coke wrote that juries determine fact, judges' law. Motivating factors are facts, not law. Parallel conduct is a factual determination, not a legal standard.

Therefore, in a Jury Demanded Trial, the Plaintiffs must *"establish*" and "*prove'* that factual basis to the Jury, not a judge pre-trial. To require otherwise is to

elevate the Courts to position outside of the constitution; It is to say that judges are not limited by the constitution: Judges are Supreme to the Constitution.

This is a debate within the legal community: Constitutional Supremacy v. Judicial Supremacy. This debate is dead, before it starts. Article VI of the Federal Constitution Clearly commands that "*every judge in every state shall be Bound*". This command do not omit the US Supreme Court Judges, though they are titled "*Justices*". US Supreme Court Judges, whatever title they are under, are bound to the Constitution. This Command, "*shall be bound thereby*" answers the question as to which is Supreme. Only that which can constrain the other is supreme between the two. Therefore, no judge, not even those upon the US Supreme Court, shall be superior to, but rather controlled by, the Constitution.

In cases dealing with the Jury Right, in Civil cases, This Court seems to have elevated every judge in the nation above and beyond constitutional restraints. Sims has argued the limitation placed on Judges, the Judiciary, within her Petition for Cert. The Court sidestepped that limitation through use of discretionary review, which appears itself to be without Constitutional Authority.

THE IRREDUCIBLE JURISDICTION OF THIS COURT

MANDATORY: NOT DISCREATIONARY

The Federal Constitution places upon this Court, without Congressional Mandate, a minimum jurisdiction of cases arising under the Constitution. (***Article III, Federal Constitution***) Congress has the Power to create inferior Courts. (Article III, sect 1, Federal Constitution). As a natural, but not stated consequence of the power of creation, we will all agree that Congress has the authority to grant those inferior Courts with either Broad or Limited Jurisdiction (District Court's v. District Courts, District Courts v. Tax Courts..etc.)

However, nothing in the text of Article III or Article I grant the Congress Authority to reduce the Constitutional jurisdictional Grant to this Court. (Article III, section 1

and 2, Federal Constitution) Likewise, Nothing in Article III grant this Court the Authority to reduce its Jurisdiction, granted by the Constitution.

The Structure of the Federal Constitution is important to the inquiry. The right to make law (Congress), the right to execute law (the Executive) and the right to judge law , the right to enforce the Constitution(Article III, and VI) (the Judiciary), the Right place Restrictions upon government's Authority (The Bill of Rights and Articles I, II, III, IV, VI, VII, Federal Constitution)

What is Meant by the Command, within the Constitution, that this Court "shall" have jurisdiction of all cases "*arising under the Constitution*"? Do this imply a "choice", a discretion, that this Court can, if it thinks the question worthy, to answer?

Our Constitutional structure prevents the Government from growing, unchecked, including this Branch, by strong limitations. The Constitution is a negative rights document, from the people to the government-including this Court.

By requiring that this Court be "*bound*" by the constitution and by placing the Jurisdiction of all cases "*arising under*" the Constitution, We The People created a constitutional frame work which required governmental self-correction-without the need for another revolution. This Court cannot decline that mandate.

A declination of that mandate will leave all citizens to the whim of government and increasing injury to our freedoms. All revolution is caused by the slow encroachment of a ruling class upon the rights of the people. In the Judicial departments, this encroachment is done by "*Judicial Aristocracy*".***(Kendall Few, American Jury Trial Foundation: Trial by Jury, Vol 2***.

"*Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.*"'***(Ullmann v. United States, 350 U.S. 422, 428 (1956)***) The American People did not, as a point of fact, remove the jury guaranty, nor the jury function under the 1791 common law,

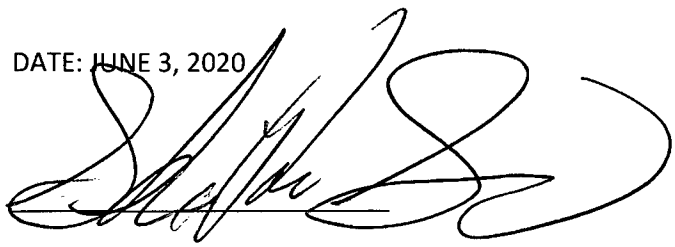
from the constitution. Nor did the American People remove this Court's mandatory jurisdiction for cases arising under the constitution from this Court's obligation.

The Courts, this Court, by constitutional Design, " *through judicial review, would uphold the Constitution against attempts by Congress or the President to enlarge their powers. As such, the judiciary was a protector of the people, not a danger to their liberties.*" (***CENTER FOR THE STUDY OF THE AMERICAN CONSTITUTION , UNIVERSITY of WISCONSIN–MADISON:*** https://csac.history.wisc.edu/document-collections/constitutional-debates/judiciary/) This Court has the same obligation, it would seem, to uphold the Constitution against attempts by this Court to enlarge its powers, or the power of the lower courts, as well.

Because the Constitution limited the actions of the Judiciary to that which "*shall*" be bound by the Constitution itself, by design, this Courts' action was to safeguard the constitutional rights of the people before the courts. Hence, This Court's Mandatory jurisdiction within ***Article III.***

Therefore, Sims asks this court to grant rehearing to 1) Consider if ***Bell Atlantic Corp. v. Twombly, 550 U.S. 544***, ***Ashcroft v. Iqbal, 556 U.S. 662, Tellabs Inc. v. Makor Issues & Rights, 551 U.S. 308,*** AND ***Comcast v. National Association of African-American-Owned Media, 589 U.S. ___ ,(2020)*** should be overturned, because those holdings cannot withstand the constitutional requirements of 7th Amendment and what is preserved by 7th Amendment's "Preservation Clause"; and, 2) consider if Article III's Jurisdictional Grant of case "arising under" the constitution allow for discretionary review of such cases.

DATE: JUNE 3, 2020



SHA'RON A. SIMS

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