No. 20-____

In the
Supreme Court of the United States

DR. FAYSAL KHALAF,

Petitioner,

v.

FORD MOTOR COMPANY,
BENNIE FOWLER, and JAY ZHOU,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the sufficiency-of-the-evidence standard under the Sixth Amendment, as established by the Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), should apply in civil cases under the Seventh Amendment?

   The Petitioner contends that the answer to this question should be "Yes."

2. Whether a federal appellate court may overturn a federal civil jury's factual findings, when properly admitted evidence, taken in a light most favorable to the non-moving party, has been presented at trial supporting the jury's factual findings?

   The Petitioner contends that the answer to this question should be "No."

3. Whether a federal appellate court may overturn a federal civil jury's factual findings for insufficiency of evidence without ordering a new trial?

   The Petitioner contends that the answer to this question should be "No."

PARTIES TO THE PROCEEDING

Dr. Faysal Khalaf, an individual.

The Ford Motor Company, a Delaware corporation.

Bennie Fowler, an individual.

Jay Zhou, an individual.

RELATED PROCEEDINGS

1. United States District Court for the Eastern District of Michigan, *Khalaf v. Ford Motor Company, et al.*, No. 2:15-cv-12604, judgment entered August 10, 2018.

2. United States Court of Appeals for the Sixth Circuit, *Khalaf v. Ford Motor Company, et al.*, Nos. 19-1435/1468, opinion filed August 31, 2020.

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The unpublished opinion of the United States District Court for the Eastern District of Michigan, denying defendants' Fed. R. Civ. P. 50(b) motion except as to remittitur, *Khalaf v. Ford Motor Company, et al.*, No. 2:15-cv-12604 (E.D. Mich. March 28, 2019), is located in the Petitioner's Appendix at 1.

The published opinion of the United States Court of Appeals for the Sixth Circuit, *Khalaf v. Ford Motor Company, et al.*, 973 F.3d 469 (6th Cir. 2020), is located in the Petitioner's Appendix at 25.

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Michigan entered its final judgment on August 10, 2018. The defendants filed a timely Rule 50(b) motion on August 20, 2018, which was granted in part and denied in part on March 28, 2019. The plaintiff filed a timely Notice of Appeal on April 18, 2019, and the defendants cross-appealed on April 25, 2019.

The Sixth Circuit entered its judgment on August 31, 2020. The appellant/cross-appellee filed a timely petition for rehearing *en banc* on September 14, 2020, which was denied on September 30, 2020.

This petition for writ of certiorari is filed pursuant to Sup. Ct. R. 12.5, as amended by Order of the Court on March 19, 2020. The Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"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 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)

INTRODUCTION

This is a federal discrimination case, tried to a jury, which directly implicates the Re-Examination Clause of the Seventh Amendment. At trial, in the United States District Court for the Eastern District of Michigan, the jury specifically found that the plaintiff, Dr. Faysal Khalaf, was subjected to discriminatory workplace harassment and treatment at Ford Motor Company (R. 74; Jury Verdict at 2, 3; Pet's Appx. at 79, 80.), and that Ford Motor Company retaliated against plaintiff and terminated him when he objected to Ford's hostile work environment. (*Id*. at 3.)

The jury found that the plaintiff was entitled to $1.8 million in compensatory damages, and $15 million in punitive damages. (*Id*. at 4.)

The defendants filed a motion for a directed verdict during the trial, and they filed a Fed. R. Civ. P. 50(b) motion after the Court entered its judgment on the jury's verdict. The district court granted the defendants' motion as to remittitur of the punitive damages awarded by the jury (reducing the jury's award of punitive damages from $15 million to $300,000), but the district court held that the

remainder of the jury's verdict was supported by the evidence presented at trial. (R. 115; Decision of the District Court; Pet's Appx. at 1, 24.)

This case raises an important issue of first impression for the Court: in federal civil cases, what is the substantive standard for judicial review of the sufficiency of evidence for facts found by civil juries?

As discussed more fully below, the Court has periodically addressed the procedural requirements of the federal judiciary's review of civil-jury fact-finding, without, importantly, establishing the constitutionally-required substantive standard of review. This case provides the Court with the perfect opportunity to decide and resolve this novel and important federal question.

Given the opportunity, the Petitioner will argue that the sufficiency-of-the-evidence standard under the Sixth Amendment, established by the Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), should be applied under the Seventh Amendment. Having comparable substantive standards of review for both amendments is logical and

consistent, and it will demonstrate fealty to the constraints of the Re-Examination Clause. The *Jackson v. Virginia* standard is also practical, in light of the ability of juries (whether in criminal cases or in civil cases) to observe the tone, demeanor, and body language (and, in this case, as will be discussed later, the accent) of the witnesses. The Courts of Appeals simply do not possess that advantage; in fact, they sit in a *disadvantaged* position when it comes to evaluating the testimony of witnesses, or evaluating the overall tenor of a trial.

In addition, because of the nature of the Seventh Amendment, violations of the Re-Examination Clause by the Courts of Appeals directly implicate the supervisory role of the Court. Without oversight and guidance by the Court, there is no other avenue for vindication of the rights protected by the Re-Examination Clause when it is violated by the Courts of Appeals.

Finally, it is vitally important for the Court to protect the entire federal judiciary from claims of partisanship and ideological bias. The Seventh Amendment insulates the federal judiciary from political attack. By visibly demonstrating to the American People, the

President, and the Congress that the Seventh Amendment will be respected by the federal judiciary, the Court will help to protect the People, the Constitution, and the federal judiciary itself.

STATEMENT OF THE CASE

Dr. Faysal[1] Khalaf filed suit in the United States District Court for the Eastern District of Michigan against Ford Motor Company, Bennie Fowler, and Jay Zhou on July 23, 2015. In his Complaint, subsequently amended on July 28, 2015, and May 3, 2017, Dr. Khalaf alleged claims of national origin discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and Michigan's Elliott-Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws 37.2101 *et seq.*, and racial discrimination and retaliation in violation of 42 U.S.C. § 1981. (R. 1, Complaint; R. 5, Amended Complaint; R. 45, Amended Complaint.)

[1] "Faysal" and "Faisal" are two different English spellings of the same Arabic name. Dr. Khalaf has been referred to by both spellings throughout this litigation. For purposes of this petition, for the sake of consistency, Dr. Khalaf's given name will be spelled "Faysal."

The district court possessed subject-matter jurisdiction pursuant to 28 U.S.C. § 1331.

Dr. Khalaf's case was tried to a jury from March 13, 2018 through March 28, 2018. As described by the district court,

> On March 28, 2018, following an eleven day trial, the jury entered a verdict in favor of Plaintiff, Faisal G. Khalaf, on his claims of (i) a hostile work environment based on his national origin or race, as to Fowler, and Plaintiff's subordinates; (ii) retaliation against his engagement in protected activity by Fowler, Zhou, and Ford. Specifically, the jury concluded that Plaintiff proved (a) retaliatory demotion by Fowler and Ford; (b) a retaliatory Performance Enhancement Plan ("PEP") by Zhou; and (c) retaliatory termination by Ford.

(R. 115, Decision of the District Court; Pet's Appx. at 2.)

After the district court entered judgment on the jury's verdict, the defendants filed a motion for judgment as a matter of law, or, in the alternative, for a new trial. (R. 82, Rule 58(b), 59(d), 50(b), 59(a) 50 Motion, and Motion for Remittitur (hereinafter, "Rule 50(b) Motion").) The district court granted the defendants' request for remittitur, reducing the jury's award of punitive damages from $15 million to $300,000, but denied the remainder of the defendants' motion, allowing

the jury's verdict as to liability, and as to compensatory damages, to stand. (R. 115, District Court Order; Pet's Appx. at 1, 24.)

In denying the defendants' Rule 50 motion, except as to remittitur, the district court held, "[I]t is apparent that Plaintiff's retaliatory termination claim does not fail for a complete absence of proof; controverted issues of fact upon which reasonable persons could disagree do exist." (*Id*. at 6.)

The district court emphasized that its standard of review under Rule 50 is "to view the evidence in the light most favorable to the nonmoving party, Khalaf, to render no credibility determinations of the witnesses, and to decline to weigh the evidence." (*Id*. at 7 (citing *Denhof v. City of Grand Rapids*, 494 F.3d 534 (6th Cir. 2007)).)

The district court specifically held the following:

1. With regard to retaliation, "Plaintiff presented evidence to support the job he was offered upon his return from medical leave was an adverse action." (*Id*.at 7.)

2. With regard to "whether there was evidence presented to support Khalaf's claim that his termination was retaliatory" (*id*.at 8),

"Plaintiff did advance sufficient evidence from which the jury could and did find in his favor." (*Id*. at 10.)

3. With regard to the hostile work environment that Khalaf was subjected to, the district court held,

> The testimony at trial was that Fowler subjected Plaintiff to comments about his English on a weekly basis, asking Plaintiff whether he understood English, and telling Plaintiff to speak English. In addition, Fowler demeaned Plaintiff at weekly meetings, blamed Plaintiff for low Pulse scores, and subject Plaintiff to a performance review and PEP that were contrary to Ford policy.

(*Id*. at 11.)

4. With regard to whether Khalaf suffered discriminatory retaliation by being placed on a "Performance Enhancement Plan," the district court stated, "The jury had the opportunity to assess all of the evidence as a whole, and evidence was presented to support Plaintiff's claim as to Zhou [regarding retaliation]." (*Id*. at 15.)

5. With regard to whether Dr. Khalaf had been terminated by Ford, the district court noted, "Ford listed Plaintiff's employment status as terminated as of July 14, 2015, the date Khalaf attempted to return to work from his medical leave." (*Id*. at 10.)

On appeal, in the United States Court of Appeals for the Sixth Circuit, the appellate court overturned the jury's factual findings, and the district court's upholding of those same factual findings.[2] The appellate court stated, "[W]e hold that the evidence is insufficient to support a finding of defendant's liability on Dr. Khalaf's claims of hostile work environment." (Sixth Cir. Op., Pet's Appx. at 44.) To reach this conclusion, the Sixth Circuit directly rejected the evidence presented at trial about criticisms by Ford employees of Khalaf's "English skills" by asserting that these comments "did not reference Dr. Khalaf's accent". (*Id*. at 49.)

With regard to the pervasive and severity of Ford's employees' workplace conduct, which the district court had noted occurred "on a weekly basis," the Court of Appeals determined, "Dr. Khalaf failed to introduce sufficient proof for a reasonable jury to find the requisite 'severe and pervasive' element for the hostile-work-environment claim relating to his subordinates." (*Id*. at 53.) And, again, the Sixth Circuit

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[2] The appellate court possessed subject-matter jurisdiction pursuant to 28 U.S.C. § 1291.

found that the many comments about Dr. Khalaf's English had to have been performance related, and could not have been discriminatory. (*Id*. at 49.)

Finally, with regard to the jury's specific factual finding that Ford discharged Dr. Khalaf, and that his discharge was retaliatory, the Sixth Circuit specifically rejected the testimony of a Ford employee at trial that Ford did not offer severance payments to employees who voluntarily quit but that Ford was offering severance to Dr. Khalaf. (*Id*. at 74.) The Sixth Circuit did not mention that Ford's own records showed that Dr. Khalaf was "terminated" on July 14, 2015. (Cf. Opinion of the District Court; Pet's Appx. at 10.)

Tellingly, every time that the Sixth Circuit referred to a finding of fact made by the jury, or the testimony of witnesses that implicated the defendants, the court of appeals asserted that the finding, or the testimony, was "alleged." (Pet's Appx. at 31, 37, 44, 45, 46, 47, 48, 52, 53, 55, 58, 60, 63, 64, 68, 69, 73, 76.) Factual assertions on behalf of the losing parties at trial, the defendants, were never given the same treatment by the Court of Appeals. Not once.

The plaintiff, Dr. Khalaf, now files this petition for writ of certiorari to contest the Court of Appeals' re-examination of the facts found by the trial jury. Respectfully, Dr. Khalaf asks that the Court require the Courts of Appeals to apply the substantive sufficiency-of-the-evidence standard under the Sixth Amendment, established by the Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), for civil jury trials under the Seventh Amendment

ARGUMENT

This case raises an important and novel question of law under the Seventh Amendment. Cf. Sup. Ct. R. 10(c). The writ should issue for three primary reasons:

1. This case is an excellent case for the Court to clearly establish, for the first time, the substantive standard of judicial review of the sufficiency of evidence for facts found by civil juries.

2. Only the Court can vindicate the Re-Examination Clause, as applied to the Courts of Appeals.

3. Vindication of the Re-Examination Clause by the Court will help insulate the federal judiciary from claims of partisanship and ideological bias.

I. THE FUNDAMENTAL QUESTION PRESENTED BY THIS CASE IS A NOVEL AND IMPORTANT QUESTION OF FEDERAL LAW

The Seventh Amendment provides, "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 re-examined in any Court of the United States, than according to the rules of the common law*." U.S. Const. Amdt. VII (emphasis added).

In *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-81 (1913), the Court outlined the purpose and the early judicial history of the Seventh Amendment:

> The Constitution of the United States, as originally adopted, conferred upon this court, by art. 3, § 2, 'appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make;' but this and the absence of any provision respecting the mode of trial in civil actions were so generally regarded as endangering the right of trial by jury as existing at common law, and evoked so much criticism on that ground, that the first Congress proposed to the legislatures of the several states the 7th Amendment, which was promptly ratified. 1 Stat. at L. 21, 97; Story, Const. §§ 1763, 1768.
>
> The adjudged cases dealing with the origin, scope, and effect of the Amendment are numerous and so comprehensive that little room for original discussion

remains. A reference to some of them will show its true and settled meaning, and point the way to its right application here.

In *United States v. Wonson*, 1 Gall. 5, 20, Fed. Cas. No. 16,750, a case decided in 1812, and often cited with approval by this court, it was said by Mr. Justice Story, after quoting the words of the Amendment: 'Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. . . . Now, according to the rules of the common law, the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded. This is the invariable usage settled by the decisions of ages.'

In *Parsons v. Bedford*, 3 Pet. 433, 7 L. ed. 732, decided in 1830, the same learned justice, speaking for this court, said (p. 446): 'The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the 7th Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guaranty of the rights and liberties of the people.' And then coming to the clause, 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,' he continued (pp. 447, 448): 'This is a

prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings.'

In *Walker v. New Mexico & S. P. R. Co.[,]* 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, decided in 1897, where the Amendment was again under consideration, it was said by this court, speaking through Mr. Justice Brewer: 'Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in commonlaw actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. . . . Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be, and express their conclusions in the verdict. The power of the court to grant a new trial if, in its judgment, the jury have misinterpreted the instructions as to the rules of law, or misapplied them, is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact.'

In *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 43 L. ed. 873, 877, 19 Sup. Ct. Rep. 580, decided in 1899, the subject was much considered, and, following a careful review of the prior decisions, it was said by Mr. Justice Gray, who spoke for the court: 'It must therefore be taken as established, by virtue of the 7th Amendment of the Constitution, that either party to an action at law (as

distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds $20, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a state, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.'

These decisions make it plain, first, that the action of the circuit court of appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to direct a judgment accordingly, must be tested by the rules of the common law; second, that while under those rules that court could set aside the verdict for error of law in the proceedings in the circuit court, and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the 7th Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the circuit court of appeals itself determined the facts, without a new trial. Thus, it assumed a power it

> did not possess, and cut off the plaintiff's right to have the facts settled by the verdict of a jury.
>
> While it is true, as before said, that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff, and that the circuit court erred in refusing so to instruct the jury, this does not militate against the conclusion just stated. According to the rules of the common law, such an error, like other errors of law affecting a verdict, could be corrected on writ of error only by ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practised. And this procedure was regarded as of real value, because, in addition to fully recognizing that right, it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anything that appears in the record it may enable her to supply omissions in her own evidence, or to show inaccuracies in that of the defendant, which will rightly entitle her to a verdict and judgment in her favor.

Since the Court decided *Slocum*, it has addressed a number of procedural questions around the application of the Seventh Amendment, particularly the Re-Examination Clause.

In *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935), the Court held that a Court of Appeals may dismiss the case, rather than order a new trial, when the Court of Appeals determines that the evidence presented to the jury was insufficient. But, importantly, the

Court in *Redman* did not establish the substantive standard that the Courts of Appeals must use to overturn a civil jury's factual findings. It reviewed the procedure employed by the Court of Appeals, rather than the substance of the Court of Appeals' decision.

In *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940), the Court held that, under Fed. R. Civ. P. 50(b), which then had only recently been enacted, a party need not move for a directed verdict prior to submission of the case to the jury in order to prevail on a 50(b) motion after the verdict is rendered.

In *Cone v. West Virginia Pulp & Paper Co.*, 331 U.S. 794 (1947), the Court held that a party moving for a directed verdict before the case is presented to the jury must move under Rule 50(b) after the jury verdict in order to receive judicial review of the motion for a directed verdict.

In *Neely, et al. v. Morton K. Eby Constr. Co.*, 386 U.S. 317, 327 (1967), the Court held that, following the 1963 amendments to Rule 50, a Court of Appeals could dismiss a case without retrial, where "the defendant's grounds for setting aside the jury's verdict raise questions

of subject matter jurisdiction or dispositive issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation." However, "where the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated." *Id.* In such a case, on appeal, the plaintiff-appellee "should have the same opportunity [as in the trial court] to ask [the appellate court] to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof." *Id.* (citing *Cone*, 330 U.S. at 217).

In *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), the Court held that failure to file a Fed. R. Civ. P. 50(b) motion after the jury has returned its verdict forecloses appellate review of the sufficiency of the evidence presented to the jury, even though the party has filed a Fed. R. Civ. P. 50(a) motion before the case was submitted to the jury.

Importantly, the Court has never established the constitutionally-required substantive standard for judicial review, particularly appellate review, of facts found by a civil jury. The closest that the

Court has ever come to establishing such a substantive standard was in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In that case, the Court held that Fed. R. Civ. P. 50 requires that the reviewing court "review all of the evidence in the record" and that it "must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence." *Id*. at 150. The Court added that the reviewing court "must disregard all evidence favorable to the moving party and the jury is not required to believe." *Id*. at 150.

That is the standard that the district court applied in this case, and, respectfully, that is the standard that Court of Appeals should have applied in this case but did not. The Court of Appeals' failure to examine the evidence in a light favorable to the prevailing party (Dr. Khalaf) is evidenced by the "alleged" facts supporting the jury's verdict (in the Court of Appeals' description), and the "not alleged" facts supporting the Court of Appeals' rationalization for its decision -- all of which, according to the Court in *Reeves*, should have been disregarded by the Court of Appeals.

Importantly, the Court in *Reeves* did not discuss the requirements of the Seventh Amendment, or the Re-Examination Clause itself. In contrast, under the Sixth Amendment and under the Due Process Clause, in *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court has established, and clearly determined, the constitutionally-required substantive standard for judicial review of criminal-jury factfinding. In that case, the Court held that a criminal jury's verdict must be upheld when, "after viewing the evidence in the light most favorable to the prosecution," "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. at 315.

The need for an explicit, constitutional substantive standard of review under the Seventh Amendment has been stressed by the legal academy. E.g., Dorsaneo, "Reexaming the Right to Trial by Jury," 54 SMU L. Rev. 1695, 1719 (2001)("[T]he constitutional ability of federal courts of appeals to conduct weight of the evidence review of jury findings has been unsettled for at least the last fifty years."). See also, Bassett, "'The Expanding Power of the Federal Appellate Courts to Reexamine Facts," 38 Hous. L. Rev. 1129 (2001); Lerner, "The Failure

of Originalism in Preserving Constitutional Rights to Civil Jury Trial," 22 Wm. & Mary Bill Rts. J. 811 (2104); Meyler, "Towards a Common Law Originalism," 59 Stan. L. Rev. 551 (2006); Molot, "An Old Judicial Role for a New Litigation Era," 113 Yale L.J. 27 (2003); Thomas, "Judicial Modesty and the Jury," 76 U. Colo. L. Rev. 767 (2005).

Given the opportunity, Dr. Khalaf will argue that the Court should establish a similar standard under the Seventh Amendment that it has already created under the Sixth Amendment. From Dr. Khalaf's viewpoint, the substantive standard for review of civil-jury factfinding should be, "after viewing the evidence in the light most favorable to the prevailing party, whether any rational trier of fact could have found in favor of the non-moving party by a preponderance of the evidence."

II. FURTHER CONSIDERATIONS FOR GRANTING THE WRIT IN THIS CASE

A. This case is well-suited for the Court to resolve the Questions Presented.

The district court's decision on the defendants' Rule 50(b) motion could not stand in starker contrast to the approach taken by the Court of Appeals. For that reason alone, this case is a good case for the Court to establish the constitutionally-required standard for re-examination of facts found by civil juries.

Most importantly, the impact of the voluminous testimony about Dr. Khalaf's "English skills" perfectly illustrates the practical benefits of deference to the jury's, and the trial judge's, ability to see and hear the witnesses at trial. The Court of Appeals evaluated the witnesses' testimony about Dr. Khalaf's "English skills" without ever being able to hear how Dr. Khalaf actually speaks and sounds. Both the jury and the district court had that benefit, but the Court of Appeals did not. From a purely practical standpoint, this case highlights one of the key issues regarding re-examination of facts found by juries that the Court should consider in establishing the appropriate constitutional standard

of review: the ability of appellate courts to adequately review a jury trial based upon a cold record.

B. Enforcing the Nation's anti-discrimination laws is of paramount importance.

While the fundamental Seventh Amendment issue presented in this case could arise in any area of federal law tried to a civil jury, including in diversity cases, it is of note that this issue arises in the context of our Nation's (and the State of Michigan's) anti-discrimination laws. When victims of discrimination resort to the federal courts to vindicate the Equal Protection Clause, or Section 1981, or Titles VI, VII, or IX, it is imperative that litigants receive the benefit of a fair jury hearing, and respect by the federal appellate courts for the outcome of those trials. Such respect for our civil jury system is at the heart of the Seventh Amendment.

Enforcement of our non-discrimination laws is simply not possible without fair jury adjudication of the subjective motives of witnesses, based on all the circumstances of a case, and the considered, practical judgment of the jurors hearing and observing the witnesses in civil-rights cases.

The Court has worked hard, in *Batson v. Kentucky*, 476 U.S. 79 (1986), and similar cases, to vindicate the importance of non-discrimination within our judicial system.

But it also is of note that this case arises in Michigan, where the People of Michigan have insisted on non-discrimination as the primary touchstone of their laws. In the wake of the Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003)(regarding admissions at the University of Michigan), which has permitted racial discrimination by institutions of higher education under the Equal Protection Clause and Title VI, the People of Michigan nonetheless insisted upon non-discrimination as the operating principle of their State law. Cf. Michigan Civil Rights Initiative, Michigan Proposal 06-2 (2006). The Court subsequently permitted the People of Michigan to prioritize non-discrimination within their laws. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014).

While the federal courts may continue to grapple with the extent that racial discrimination will be permitted in the United States, cf., *Students for Fair Admission v. President & Fellows of Harvard College*,

980 F.3d 157 (1st Cir. 2020), and while the People may similarly grapple with the extent to which the government, or government grantees, may lawfully engage in racial or ethnic discrimination, cf. California Proposition 16 (2020) (rejecting proposed repeal of California Proposition 209), it remains undeniably true that invidious racial and ethnic discrimination are unlawful under Section 1981 and similar State statutes. Only by being able to vindicate these civil rights, by bringing damages claims before civil juries and having juries' verdicts respected by the federal judiciary, will the promise of non-discrimination under our laws become a real, tangible, practical reality for victims of racial or ethnic discrimination.

III. THE QUESTIONS PRESENTED BY THIS CASE IMPLICATE THE COURT'S SUPERVISORY RESPONSIBILITIES

As the Court is well-aware, error correction is not a primary purpose of certiorari. While the Court of Appeals in this case violated the Court's admonition in *Neely* that the courts of appeals should permit the option for a retrial when the court determines that the plaintiff has failed to present sufficient evidence at trial, and the Court of Appeals violated the Court's Rule 50 standard in *Reeves* for reviewing the sufficiency of evidence presented at trial, Dr. Khalaf believes that the Court should nonetheless focus on the fundamental constitutional question regarding the Seventh Amendment's substantive requirements for judicial review of civil-jury factfinding.

There is one important aspect of the Re-Examination Clause that deserves the Court's particular consideration, however: only the Court can vindicate the Re-Examination Clause when it has been violated by one of the several Courts of Appeals. So, while error correction is not, and should not, generally be the responsibility of the Court, supervisory oversight is a primary reason for the Court to take this

case. Cf., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.").

It is entirely appropriate, under the Court's supervisory authority, to periodically remind the Courts of Appeals of the limitations to their power imposed by the Seventh Amendment.

IV. VINDICATING THE SEVENTH AMENDMENT IN THIS CASE WILL INSULATE THE FEDERAL JUDICIARY FROM POLITICAL ATTACK

As the Court is well-aware, the entire federal judiciary, and the Court itself, have recently been under intense political attack. Not since the Court-packing threats of the 1930s ("We have . . . reached the point as a nation where we must take action to save the Constitution from the court and the court from itself." -- President Roosevelt, March 9, 1937 (National Archives)) has the Court been under such political criticism. For decades, it would have been unthinkable for a President to chastise the members of the Court during a State of the Union address, but it has recently happened. Then, the next President,

among many other attacks on the Court, derided "Obama judges." ("President Trump Escalates Attacks on 'Obama Judges' After Rare Rebuke from Chief Justice," *Time*, November 21, 2018).

Even now, the new Administration, under political pressure, has begun the creation of a commission to study reforms to the Court and the federal judiciary. (Pager, T., "Biden starts staffing a commission on Supreme Court reform," *Politico*, January 27, 2021.)

In the midst of these political attacks, the federal judiciary, and the Court itself, can be shielded by our jury system. Cases like this case, which could otherwise be dismissed as an "ordinary" discrimination case, can, at times, be of great importance. Cf. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)(upholding State minimum wage law & ending President Roosevelt's Court-packing threats).

By vindicating the Seventh Amendment, the Court can reinforce — to the President, the Congress, and the American People — that the federal judiciary will accede to the People, sitting as civil jurors, when evidence properly presented at trial exists to support the jurors' considered judgment.

CONCLUSION

The Seventh Amendment is an explicit restraint on the power of the federal judiciary. To recognize the sovereignty that the People possessed when establishing the Seventh Amendment, and that the People still possess when sitting as jurors, the federal judiciary should visibly demonstrate the humility and deference required by the Seventh Amendment. Particularly because of the final power that the Courts of Appeals normally possess, it is incumbent on the Court to police the boundaries imposed by the Seventh Amendment on the Courts of Appeals.

By accepting this petition, the Court will, most importantly, be able to unify the substantive standards of review under the Sixth and Seventh Amendments. In doing so, the Court will also be able to insulate the federal judiciary from claims of partisanship or ideological bias.

The writ should issue, and the questions presented in this petition should be decided by the Court.

Respectfully Submitted.

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