No. _____

In the Supreme Court of the United States

THOMAS PERTTU, PETITIONER

v.

KYLE BRANDON RICHARDS

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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QUESTION PRESENTED

In cases subject to the Prison Litigation Reform Act, do prisoners have a right to a jury trial concerning their exhaustion of administrative remedies where disputed facts regarding exhaustion are intertwined with the underlying merits of their claim?

PARTIES TO THE PROCEEDING

The petitioner is Thomas Perttu, a Resident Unit Manager (RUM) for the Michigan Department of Corrections (MDOC). The respondent is Kyle Brandon Richards, a parolee who was returned to MDOC custody for an alleged parole violation.

RELATED CASES

- United States Court of Appeals for the Sixth Circuit, *Richards*, *et al.* v. *Perttu*, No. 22-1298, Order issued March 19, 2024 (reversing the district court decision).

- United States District Court for the Western District of Michigan, *Richards*, *et al.* v. *Perttu*, 2:20-cv-00076, Order issued March 22, 2022 (overruling objections, adopting the magistrate judge's December 3, 2021 report and recommendation, and granting Defendant's motion for summary judgment).

- United States District Court for the Western District of Michigan, *Richards*, *et al.* v. *Perttu*, 2:20-cv-00076, Report and Recommendation on Defendant's motion for summary judgment issued December 3, 2021 (recommending granting Defendant's motion for summary judgment).

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JURISDICTION

The district court had jurisdiction over Richards' claims under 42 U.S.C. § 1983. The district court entered judgment for Perttu on March 22, 2022. Richards filed a timely notice of appeal by right on April 11, 2022. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution, U.S. Const. amend. VII, 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.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), states in applicable part:

> (a) No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

INTRODUCTION

The Sixth Circuit held that prisoners have a right to a jury trial on the question whether they have exhausted their administrative remedies under the Prisoner Litigation Reform Act (PLRA) where disputed facts regarding exhaustion are intertwined with the underlying merits of their claim. This decision created a firm split with the Seventh Circuit, which held that courts, not juries, must determine whether a prisoner has exhausted his or her administrative remedies, regardless of whether exhaustion is intertwined with the merits of the case.

This split, when combined with the importance of the issue, warrants this Court's review. The Sixth Circuit's decision conflicts with Congress's intent that the PLRA's robust exhaustion requirement limit the burden on federal courts by dismissing frivolous claims at the earliest possible juncture. Indeed, requiring prisoners to properly exhaust all administrative remedies as a precondition to filing suit in federal court has dramatically reduced the burden on federal courts and prison officials.

The Sixth Circuit's decision counteracts this streamlined process by creating a right to a jury trial to determine whether prisoners have the right to bring their case to a jury. Ironically, under the Sixth Circuit's analysis, the very method used by Congress in the PLRA to *decrease* the burden on federal courts and prison officials will end up *increasing* it by requiring a jury trial to determine a threshold issue necessary for prisoners to present their case to a jury. To put this in perspective, over the past five years, Michigan alone has averaged 600 PLRA cases each year, all of which are filed in federal court.

This result not only contravenes the intent of Congress but also finds no support in the Seventh Amendment. This Court has held that summary judgment and directed verdicts, both of which require a court to determine issues of fact, do not offend Seventh Amendment guarantees. Similarly, courts—not juries—determine subject-matter jurisdiction, personal jurisdiction, abstention, and supplemental jurisdiction over state-law claims, even where there are disputed issues of fact. Judges can similarly determine whether a prisoner has exhausted his or her administrative remedies, regardless of whether exhaustion is intertwined with the merits of the case. The Court should grant this petition to resolve the circuit split and to give full effect to Congress's purpose in enacting the PLRA.

STATEMENT OF THE CASE

A. District Court Proceedings and Bench Trial

Richards and co-Plaintiffs Kenneth Damon Pruitt and Robert Kissee filed suit under 42 U.S.C. § 1983, alleging that Thomas Perttu, a RUM for MDOC, sexually harassed them and other prisoners, retaliated against them, and destroyed their property, in violation of the First, Fifth, and Eighth Amendments. (Compl., R. 1, Page ID # 1–51.) Perttu moved for summary judgment, arguing that Richards and his co-Plaintiffs failed to exhaust administrative remedies before filing their complaint. (Mot. for Summ. J., R. 34, Page ID # 108–110.) The district court denied Perttu's motion, finding a question of fact as to whether the grievance process was available to Richards due to his allegation that Perttu interfered with his grievance filings. App. 78a–83a.

Following this ruling, the magistrate judge conducted a bench trial on the issue of exhaustion on November 4, 2021. (Minutes, R. 156, Page ID # 748–749.) Evaluating the testimony, evidence, and arguments presented, the magistrate judge recommended that the district court conclude that Perttu carried his burden by establishing "that Plaintiffs failed to exhaust any of their claims before filing suit." App. 64a, 76a. Richards alleged that Perttu had destroyed his and his co-Plaintiffs' grievances or otherwise prevented them from being processed, making the grievance process unavailable. App. 30a, 37a, 59a–60a. Reviewing the evidence, however, the magistrate judge recommended that the Court conclude that "administrative remedies were generally available" to Richards and his co-Plaintiffs. App. 68a.

The magistrate judge discussed how the circumstances surrounding the alleged observations of Perttu destroying grievances undermined their own credibility. App. 71a–73a. Notably, the evidence "demonstrate[d] that RUM Perttu could not, and in fact did not, intercept and destroy all grievances filed by Plaintiffs in the relevant time," in part because "Perttu did not work seven days a week every week from June 2019 to March 2020." App. 73a. Moreover, the evidence showed that Richards had access to the grievance process because he had filed six grievances in the relevant period—three of them specifically grieving Perttu—directly contradicting his claim that his administrative remedies were effectively unavailable. App. 73a–75a.

Based on these findings, the magistrate judge recommended that the district court conclude that Richards and his co-Plaintiffs failed to exhaust their administrative remedies for the claims against Perttu. App. 76a. Richards and his co-Plaintiffs filed nine objections, (Obj., R. 159, Page ID # 790–814), which the district court overruled, App. 22a–28a. The district court adopted the report and recommendation and entered judgment for Perttu. App. 22a–28a. Richards alone appealed the district court's ruling. (Notice, R. 172, Page ID # 878.)

B. The Appeal to the Sixth Circuit

On appeal, Richards argued that the district court erred by not granting him a jury trial to resolve the exhaustion issue, which he claimed was intertwined with the merits of his case. The Sixth Circuit began its analysis by discussing whether the exhaustion

issue was intertwined with Richards' underlying retaliation claim, noting that Richards alleged that Perttu destroyed his grievances, preventing him from exhausting the grievance requirements. Richards' complaint, the Sixth Circuit said, "lays out several specific instances when Perttu allegedly destroyed grievances that Richards had intended to file." App. 2a–3a. This allegedly "interfered with Richards's speech." App. 10a. Under these circumstances, the Court concluded that "the factual disputes regarding exhaustion . . . are intertwined with the merits of Richards's retaliation claim." App. 12a.

The Sixth Circuit turned its attention to whether this intertwining implicated the Seventh Amendment right to a jury trial. The court recognized that, in *Lee* v. *Willey*, 789 F.3d 673 (6th Cir. 2015), it held that prisoners had no right to a jury trial for an exhaustion defense under the PLRA. App. 13a. But the court noted that *Lee* did not apply to the present case because the disputed facts of the exhaustion issue were not " 'bound up with the merits of the underlying dispute.' " App. 13a (quoting *Lee*, 789 F.3d at 678).

The Sixth Circuit then looked to the other circuits, finding that only the Seventh Circuit had squarely addressed the issue, in *Pavey* v. *Conley*, 544 F.3d 739 (7th Cir. 2008). There, the Seventh Circuit held that prisoners had no right to a jury trial to determine whether they had exhausted their administrative remedies under the PLRA, regardless of whether the exhaustion issue is intertwined with the merits of the case. App. 14a (citing *Pavey*, 544 F.3d at 741–42). "Juries decide cases, not issues of judicial traffic control," the Seventh Circuit stated. *Pavey*, 544 F.3d at 741.

Notably, in *Albino* v. *Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc), the Ninth Circuit agreed with the reasoning of *Pavey*. App. 14a.

Instead of following the reasoning of the Seventh and Ninth Circuits, the Sixth Circuit found "several district-court decisions in the Second Circuit" more convincing and ultimately concluded that "Richards was stripped of his right to a jury's resolution of the ultimate dispute" because he was denied a jury trial on the exhaustion issue. App. 15a–17a (internal citation omitted). The Sixth Circuit also relied on *Fireman's Fund Insurance Co*. v. *Railway Express Agency, Inc*., 253 F.2d 780, 784 (6th Cir. 1958), a case outside of the PLRA context. App. 17–19a. In *Fireman's Fund*, the Sixth Circuit held that where jurisdiction is intertwined with the merits of the case, the issue cannot be summarily decided where factual claims would not be subject to cross-examination. 253 F.2d at 784 ("the merits of a controversy could be summarily decided, partly on affidavits without the right of cross-examination").

The Sixth Circuit concluded that the district court erred by ordering an evidentiary hearing rather than a jury trial on the issue of exhaustion, "emphasiz[ing] that a jury trial is appropriate in these circumstances only if the district court finds that genuine disputes of material fact concerning PLRA exhaustion are 'decisive of the merits of the plaintiff's claim.' " App. 19a (quoting *Fireman's Fund*, 253 F.2d at 784).

C. The PLRA Framework

The Sixth Circuit's decision did not discuss the framework of, or Congress's intent behind, the PLRA. In 1970, just over 2,000 prisoner civil rights suits were filed in federal courts. Margo Schlanger, *Trends in prisoner litigation, as the PLRA approaches 20*, 28 Correctional Law Reporter, Vol. 69, 71 (2017). Shortly after that, filings exploded. *Id*. By the mid-1990s, correctional systems and federal courts were overburdened by a mammoth caseload of prison litigation. In 1995 alone, 39,053 prisoner lawsuits were filed in federal court, a rate of 24.6 per 1,000 prisoners. *Id*. Not surprisingly, this strained the resources of the federal court system, not to mention correctional systems. In this context, Congress enacted the PLRA "largely in response to concerns about the heavy volume of frivolous prison litigation in the federal courts." *Alexander* v. *Hawk*, 159 F.3d 1321, 1326 n.11 (11th Cir. 1998).

A significant component of the PLRA was a robust, mandatory exhaustion requirement. Previously, § 1997e contained a limited and largely discretionary exhaustion requirement. *Porter* v. *Nussle*, 534 U.S. 516, 523–24 (2002). In enacting the PLRA in 1996, however, Congress "invigorated the exhaustion prescription," requiring prisoners to fully exhaust all of their available administrative remedies through the grievance process as a prerequisite to filing suit in federal court. *Id*. at 524. As this Court stated, "[b]eyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits." *Id*. at 524. To further this end, "Congress afforded corrections officials time and opportunity to address complaints internally" prior to prisoners seeking relief in federal court. *Id*. at 525. Part of the rationale was

that, by giving correctional officials the opportunity to address grievances, "corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation." *Id.* In addition, a prison's "internal review might 'filter out some frivolous claims.' " *Id.* (quoting *Booth* v. *Churner*, 532 U.S. 731, 737 (2001)). And the record created by prisons' internal grievance processes would facilitate consideration of those "cases ultimately brought to court." *Id.*

Lower courts have also recognized Congress's intent in enacting the PLRA. As courts have acknowledged, Congress passed the PLRA for three interrelated purposes. First, Congress intended "to return control of the inmate grievance process to prison administrators." *Spruill* v. *Gillis*, 372 F.3d 218, 230 (3d Cir. 2004). Second, the PLRA "encourage[d] development of an administrative record, and perhaps settlements, within the inmate grievance process." *Id.* Third, Congress sought "to reduce the burden on the federal courts by erecting barriers to frivolous prisoner lawsuits." *Id.* Comporting with this analysis, the D.C. Circuit found that "the very purpose of the PLRA exhaustion requirement[ ] [is] relieving courts of the burden of lawsuits filed before prison officials have had an opportunity to resolve prisoner grievances on their own." *Jackson* v. *District of Columbia*, 254 F.3d 262, 269 (D.C. Cir. 2001).

The PLRA has been tremendously successful in reducing the burden on both prison officials and federal courts. From the peak of filings in 1995, within five years of the passage of the PLRA, prisoner lawsuits had fallen by 43%, even though the total prisoner

population grew by 23%. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1694 (2003). This decline continued for several more years. By 2006, the decline reached 60%. Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. Pa. J. Const. L. 139, 141–42 (2008). Although the decline gradually plateaued, by 2014, prisoners filed 25,324 lawsuits, a rate of 11.6 per 1,000 prisoners. Schlanger, *Trends in prisoner litigation, as the PLRA approaches 20*, at 71. Compared to 1995, this represents a 34% decrease in the number of prisoner lawsuits and a 53% decline in the rate of lawsuits filed per 1,000 prisoners. The exhaustion requirement has been a critical component of the PLRA's success.

REASONS FOR GRANTING THE PETITION

I. This Court's review is warranted to resolve a circuit split and give effect to Congress's intent in enacting the PLRA.

In the wake of the decision below, circuits are split regarding whether a prisoner has a right to a jury trial where the exhaustion requirement of the PLRA is intertwined with the merits of the case. The Seventh and Sixth Circuits are squarely in opposition on this important question.

Congress enacted the PLRA to streamline prisoner lawsuits. But the Sixth Circuit's decision undermines this goal by holding, unnecessarily, that prisoners have the right to a jury trial to determine whether they have the right to take their case to a jury.

Resolution by this Court is necessary to ensure the PLRA is faithfully followed.

Of course, the Seventh Amendment will not yield to a statute. But it need not here, as the Constitution does not entitle a prisoner to a jury trial to determine whether the prisoner has exhausted administrative remedies any more than a jury is necessary to determine whether there is a genuine issue of fact for trial. Threshold issues such as exhaustion do not implicate the Seventh Amendment.

A. The Sixth Circuit's decision created a circuit split that this Court must resolve.

Although the Sixth Circuit's decision created a circuit split on whether the Seventh Amendment requires a jury trial when exhaustion is intertwined with the merits of the case, there is no dispute that the PLRA requires prisoners to exhaust their administrative remedies as a prerequisite to filing suit in federal court. Under the PLRA, "[n]o action shall be brought with respect to prison conditions under section [1983 of this title], or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The exhaustion requirement is mandatory, *Porter*, 534 U.S. at 524, but not jurisdictional, *Woodford* v. *Ngo*, 548 U.S. 81, 101 (2006). The failure to exhaust is an affirmative defense that defendants have the burden to plead and prove. *Jones* v. *Bock*, 549 U.S. 199, 218 (2007).

Prisoners have contended that, because exhaustion constitutes a disputed issue of fact, whether a prisoner has exhausted his or her administrative

remedies is an issue that should be decided by a jury. But in various contexts giving rise to the question of whether a jury should determine factual disputes relating to exhaustion, the circuits that have examined the issue agree that "judges may resolve factual disputes relevant to the exhaustion issue without the participation of a jury." *Small* v. *Camden Cnty.*, 728 F.3d 265, 271 (3d Cir. 2013); see also *Messa* v. *Goord*, 652 F.3d 305, 308–09 (2d Cir. 2011) (per curiam); *Dillon* v. *Rogers*, 596 F.3d 260, 272 (5th Cir. 2010); *Lee*, 789 F.3d at 678; *Pavey*, 544 F.3d at 741–42; *Bryant* v. *Rich*, 530 F.3d 1368, 1373–74 (11th Cir. 2008); *Wyatt* v. *Terhune*, 315 F.3d 1108, 1119–20 (9th Cir. 2003), *overruled on other grounds by Albino*, 747 F.3d at 1166.

In the more specific context of exhaustion intertwined with the merits of the case, prior to the Sixth Circuit's decision in the present case, the circuits that considered the issue were in agreement: prisoners had no right to a jury trial to determine whether they had exhausted their administrative remedies, even where exhaustion was intertwined with the merits of the case. *Pavey*, 544 F.3d at 742 (Seventh Circuit); see also *Albino*, 747 F.3d at 1171–72 (Ninth Circuit). The Sixth Circuit acknowledged that its decision created a circuit split. App. 15a–16a (citing *Pavey*, 544 F.3d at 742 & *Albino*, 747 F.3d at 1171–72).

In *Pavey*, the plaintiff filed suit claiming that a correctional officer had used excessive force against him, breaking his arm. 544 F.3d at 740. When the defendants moved to dismiss based on the plaintiff's failure to exhaust his administrative remedies, he countered that, due to his broken arm, he was unable to

complete a grievance. *Id*. Thus, like *Richards*, the exhaustion inquiry was intertwined with the merits of the case. And, also like *Richards*, the plaintiff contended that he had the right to a jury trial on the exhaustion issue. *Pavey* v. *Conley*, No. 3:03-CV-662 RM, 2006 WL 3392946, at *1 (N.D. Ind. Nov. 21, 2006), *amended*, No. 303-CV-662 RM, 2006 WL 3715019 (N.D. Ind. Dec. 14, 2006), and *rev'd*, 544 F.3d 739 (7th Cir. 2008), *as amended on denial of reh'g and reh'g en banc* (Sept. 12, 2008).

The Seventh Circuit began its analysis by noting that "not every factual issue that arises in the course of a litigation is triable by a jury as a matter of right." 544 F.3d at 741. Subject-matter jurisdiction, personal jurisdiction, abstention, and supplemental jurisdiction over state-law claims are all decided by courts, not juries, "even if there are contestable factual questions bearing on the decision." *Id*. From this, the Seventh Circuit gleaned the principle that "juries do not decide what forum a dispute is to be resolved in" because "[j]uries decide cases, not issues of judicial traffic control." *Id*. In most cases, "the only consequence of a failure to exhaust" is that a prisoner must withdraw his or her case and refile once the grievance process has been completed. *Id*.

That the merits of the case are intertwined with the exhaustion issue makes no difference to whether a court or a jury should determine whether a prisoner exhausted administrative remedies. First, "any finding that the judge makes, relating to exhaustion, that might affect the merits may be reexamined by the jury if—and only after—the prisoner overcomes the exhaustion defense and the case proceeds to the merits."

Id. at 742. Second, "[t]he alternative of trying the merits before exhaustion . . . is unsatisfactory in the present setting because it would thwart Congress's effort to bar trials of prisoner cases in which the prisoner has failed to exhaust his administrative remedies." *Id*. And the Seventh Circuit cautioned that having a jury determine exhaustion may lead to the "jury . . . decid[ing] the merits of a case that should never have gotten to the merits stage because the judge should have found that the prisoner had failed to exhaust his administrative remedies." *Id*.

Several years later, in *Albino*, the Ninth Circuit endorsed the result and reasoning of *Pavey*, noting that, to the extent summary judgment is not appropriate, "the district judge may decide disputed questions of fact in a preliminary proceeding." *Albino*, 747 F.3d at 1168. The Ninth Circuit concluded, as did the Seventh Circuit, that "exhaustion is analogous to subject-matter jurisdiction, personal jurisdiction, venue, and abstention," which are all decided at the outset of litigation. *Id*. at 1170. Like those issues, exhaustion should be decided prior to reaching the merits of a prisoner's claims. *Id*. Factual questions should be decided by the court, not a jury, including in those instances where exhaustion is intertwined with the merits of the claim. *Id*. at 1170–71.

B. The Sixth Circuit's decision weakens the PLRA by undermining the exhaustion requirement.

The Sixth Circuit's holding ignores the carefully crafted framework of the PLRA and its stringent exhaustion requirement. This Court has held that

exhaustion requires *proper* exhaustion, which means that the prisoner must fully complete the prison grievance process. *Ngo*, 548 U.S. at 93–94. "[P]roper exhaustion of administrative remedies . . . means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)." *Id*. at 90 (quotation omitted). Exhaustion of administrative remedies is a prerequisite to filing a prisoner lawsuit challenging prison conditions. 42 U.S.C. § 1997e(a); *Porter*, 534 U.S. at 524. As such, exhaustion is a threshold issue that must be determined before a court can review the merits of a plaintiff's claims or the other defenses raised by a defendant.

Congress enacted the PLRA "to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter*, 534 U.S. at 516–17. The exhaustion requirement constitutes a critical component of those goals, requiring prisoners to exhaust their administrative remedies as a prerequisite to bring a lawsuit under § 1997e(a). *Ngo*, 548 U.S. at 85; *Porter*, 534 U.S. at 524–25. That is, prisoners do not have the right to bring their case before a jury unless and until they have exhausted all available administrative remedies. *Ngo*, 548 U.S. at 85; *Porter*, 534 U.S. at 524.

Requiring proper exhaustion serves Congress's goals in enacting the PLRA. It gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors. *Ngo*, 548

U.S. at 94. This is important in relation to prison systems because it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser* v. *Rodriguez*, 411 U.S. 475, 491–92 (1973). It makes sense, therefore, why Congress required prisoners to properly exhaust their administrative remedies before filing suit by filing a grievance that complies with the prison's grievance system regarding the allegations made in the complaint. The Sixth Circuit's decision, however, upends this practical wisdom by granting prisoners the right to a jury trial to determine the threshold question of whether they have the right to bring their case before a jury.

The decision below not only thwarts congressional intent but also misconstrues the Seventh Amendment, effectively neutering the PLRA's exhaustion requirement. As a practical matter, for entitlement to a jury trial in the Sixth Circuit, prisoners need only allege that prison officials prevented them from filing grievances. Regardless of how implausible or even outlandish the allegations—as here, where the bench trial established that Richards' allegations are both implausible and outlandish, App. 68a–76a—prisoners can all but guarantee that their case will go to a jury where exhaustion is an issue.

The result will be entirely predictable: prison officials and federal courts will again be inundated with meritless lawsuits that they must allow to go to a jury. This approach will erase nearly 30 years of progress in reducing frivolous lawsuits.

To put this in perspective, in 1995, before the passage of the PLRA with its exacting exhaustion requirement, there were 24.6 lawsuits per 1,000 prisoners. At that time there were about 1.6 million prisoners in the United States, including state, local, and federal prisoners. Schlanger, *Trends in prisoner litigation, as the PLRA approaches 20*, at 71. As of 2021, there were approximately 1.9 million prisoners[1] and 24,372 prisoner lawsuits.[2] At the 1995 rate of 24.6 lawsuits per 1,000 prisoners, this would result in 46,740 prisoner lawsuits—nearly doubling the number of prisoner lawsuits filed in federal courts.

The PLRA was enacted to avoid such a result, and having judges determine whether administrative remedies have been exhausted comports with the intent of Congress. A critical component is the exhaustion requirement, which Congress enacted to prevent premature lawsuits from going to trial at all. *Jones*, 549 U.S. at 202 ("Among other reforms, the PLRA mandates early judicial screening of prisoner complaints and requires prisoners to exhaust prison grievance procedures before filing suit."). Accordingly, under the PLRA, exhaustion is a "threshold issue[ ] of judicial administration that 'courts must address to determine whether litigation is being conducted in the right forum at the right time.' " *Lee*, 789 F.3d at 678 (quoting *Dillon*, 596 F.3d at 272). Threshold issues,

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[1] See Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, Prison Policy Initiative (March 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html.

[2] See *Data Update*, Incarceration and the Law, https://incarcerationlaw.com/resources/data-update/ (last visited June 12, 2024).

contrary to the Sixth Circuit's decision, do not require a jury.

C. The Sixth Circuit misconstrued the Seventh Amendment.

Having judges determine the exhaustion issue also comports with the Seventh Amendment, which does not require a threshold issue to be decided by a jury. As this Court held in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 336 (1979), "[t]he Seventh Amendment has never been interpreted in the rigid manner advocated by the petitioners," because "many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment." Such "procedural devices" are broad and varied, including directed verdicts, retrials on the issue of damages, and summary judgment. *Id.* (citing *Galloway* v. *United States*, 319 U.S. 372, 388–93 (1943) (holding that granting a directed verdict does not violate the Seventh Amendment); *Gasoline Prods. Co.* v. *Champlin Refin. Co.*, 283 U.S. 494, 497–98 (1931) (holding that a retrial on the issue of damages only does not violate the Seventh Amendment); & *Fidelity & Deposit Co. of Md.* v. *United States*, 187 U.S. 315, 319–21 (1902) (holding that granting summary judgment does not violate the Seventh Amendment)).

Other questions require courts to decide disputed issues of fact without sending the issue to a jury. For instance, sometimes-fact-intensive questions of subject-matter and personal jurisdiction are resolved by courts, not juries. E.g. *McNutt* v. *Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 188–90 (1936)

(holding that subject-matter jurisdiction should be decided by the court); *Dillon*, 596 F.3d at 271 (holding that personal jurisdiction should be decided by the court). Similarly, whether a court has supplemental jurisdiction over a state-law claim is decided by a court rather than a jury. See *Pavey*, 544 F.3d at 741. The same is true for abstention and venue. See *Ambrosia Coal & Constr. Co.* v. *Pages Morales*, 368 F.3d 1320, 1330–32 (11th Cir. 2004) (holding that abstention is a threshold issue to be decided by the trial judge); *Small*, 728 F.3d at 269–70 (holding that exhaustion, like venue, is a threshold issue to be decided by the court rather than the jury). See also *Lee*, 789 F.3d at 678 ("[J]udges may resolve disputed facts in deciding threshold issues of judicial administration such as subject-matter jurisdiction, personal jurisdiction, venue, and abstention in favor of another court or agency.").

The collective lesson of these cases is that threshold issues, which determine whether a case should get to a jury, are procedural matters that do not require a jury. And exhaustion is exactly that—a threshold issue to determine whether a prisoner has met a procedural requirement to take his or her case to a jury. The Sixth Circuit failed to heed the parallels between these kinds of procedural determinations and the PLRA's exhaustion requirement. Indeed, the Sixth Circuit's only attempt to distinguish those circumstances was to say that "none permit a judge to decide genuine disputes of material fact at a preliminary stage of the case that would normally be reserved for a jury." App. 17a.

The Sixth Circuit also failed to give deference to Congress's intent behind the PLRA's exhaustion requirement. In discussing the pre-PLRA version of § 1997e, this Court noted that "even in this field of judicial discretion, appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992), superseded by the PLRA, *Booth*, 532 U.S. at 739–41, 737.

Moreover, instead of discussing the text, history, and purpose of the Seventh Amendment, the Sixth Circuit relied heavily on its decision in *Fireman's Fund*, 253 F.2d at 780. But that case did not hold that a jury is required to determine the merits of an issue.

In *Fireman's Fund*, the defendant contended that the amount in question did not meet the jurisdictional requirements of the district court. *Id.* at 782. The district court agreed and dismissed the case. *Id.* The Sixth Circuit reversed, ruling that the amount in question went to the merits of the case. *Id.* at 784. In such circumstances, the court said, "the case should be heard and determined on its merits through regular trial procedure." *Id.* Otherwise, "the merits of a controversy could be summarily decided, partly on affidavits without the right of cross-examination." *Id.*

There are several problems with reliance on *Fireman's Fund*. For one, the case did not discuss or rely on the Seventh Amendment. For another, it did not discuss the prospect of a bench trial that included "the right of cross-examination" and the other incidents of

trial, including the right to present and examine witnesses, the opportunity to present evidence, application of the Federal Rules of Evidence, and the availability of opening and closing statements. A bench trial includes all of these elements, and it is undisputed that the district court provided Richards all of the incidents of a typical trial, other than a jury. Accordingly, the concerns articulated in *Fireman's Fund* simply do not apply.

CONCLUSION

For these reasons, this Court should grant this petition.

Respectfully submitted,

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