No. 23-1324

In the Supreme Court of the United States

THOMAS PERTTU, PETITIONER

v.

KYLE BRANDON RICHARDS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

A judge's preliminary determination of intertwined facts regarding exhaustion under the Prison Litigation Reform Act (PLRA) leaves Seventh Amendment principles intact by preserving for the jury the ultimate determination of issues of fact where a case proceeds to trial. At the same time, it comports with the PLRA's strict, mandatory exhaustion regime.

Richards posits a bright-line rule that he says would resolve this case—that "predominantly factual issues relevant to liability in actions for money damages are for the jury." Br. 13. But that rule has no application here, where it is dependent on two incorrect suppositions. The first is that no prisoner will ever be able to return to federal court, making a dismissal without prejudice a label without substance. That is simply not true for many prisoners. Numerous prison grievance systems across the country afford prisoners an opportunity to return to court after a dismissal without prejudice. The second is that a judge's determination of intertwined facts concerning exhaustion will be binding on a jury that might later hear the merits, thus effectively deciding the merits where the prisoner has a right to a jury trial. But it would not be binding. Richards' proffered rule might be applicable in other contexts, but it is not so here—and it is wholly contrary to the goals of the PLRA.

Support for Richards' rule further unravels when he makes comparisons to defenses such as jurisdiction, venue, and statute of limitations, which are not appropriate comparators, and seeks support in the *Beacon Theatres* line of cases. The former tend to be

dependent on the degree of intertwinement and rest on the district court's exercise of discretion. The latter were driven by concerns about collateral estoppel, which, again, are not present in this context.

One comes away from Richards' merits brief with the idea that judges never decide intertwined facts. But they do. Class certification prerequisites and heightened pleading requirements are two such examples. And as *Markman* demonstrates, judicial fact-finding on legal issues—even where not, strictly speaking, intertwined with the merits—can greatly impact a jury's determination, yet do not infringe on the Seventh Amendment.

No one disputes that prisoners have a right to a jury trial on their 42 U.S.C. § 1983 claims once they meet the PLRA's threshold exhaustion requirement and otherwise state a viable claim for relief. And those prisoners, like Richards, who can go back and exhaust have the opportunity for a jury to decide the merits of their legal claims. This comports with the goals of the PLRA while preserving the right to a jury trial under the Seventh Amendment.

ARGUMENT

I. Judges can decide intertwined facts regarding PLRA exhaustion without impinging on the Seventh Amendment.

Richards' arguments appear to rule out allocation to a judge *any time* there are intertwined facts in an action at law for money damages. The Seventh Amendment does not mandate that broad rule, and

this Court has never adopted it. To the contrary, this Court has recognized circumstances where a judge may, in making a preliminary determination, decide facts that are intertwined with the merits. And the circumstances where intertwined facts counsel sending factfinding to a jury are distinguishable, being capable of resolution only by proceeding to the merits. Dismissal for failure to exhaust, by contrast, will not determine the ultimate merits question. Nor does the *Beacon Theatres* line of cases help Richards, as it is driven by concerns about collateral estoppel, which are not present in the PLRA exhaustion context. For these reasons, judges may engage in factfinding to resolve whether a prisoner has exhausted prison grievance procedures even where that issue is intertwined with the merits.

A. PLRA exhaustion is an affirmative defense, but affirmative defenses can be threshold issues that are properly decided by judges not juries.

"The Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court." *Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1371 (11th Cir. 2005) (emphasis omitted) (quoting *Am. Heritage Life Ins. Co.* v. *Orr*, 294 F.3d 702, 711 (5th Cir. 2002)). Exhaustion is one of those threshold issues that determine whether the litigation should proceed before a court. And in intertwined cases, "[t]he alternative of trying the merits before exhaustion . . . is unsatisfactory . . . because it would thwart Congress's effort to bar trials of prisoner cases in which the prisoner has failed to

exhaust his administrative remedies. A jury might decide 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." *Pavey* v. *Conley*, 544 F.3d 739, 742 (7th Cir. 2008) (citations omitted).

Richards pushes back against Perttu's characterization of PLRA exhaustion as a threshold issue. But as a matter of logic, exhaustion is just that. It is clear from the PLRA's language that Congress intended it to be preliminary to the case proceeding, for the exhaustion provision reads: "*No action shall be brought* . . . *until* such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added).[1] This makes sense, as it allows claims to be resolved "more quickly and economically" within the prison system, settles some claims at the administrative level, and may "convince the losing party not to pursue the matter in federal court." *Woodford* v. *Ngo*, 548 U.S. 81, 89 (2006) (citations omitted).

Richards argues that because PLRA exhaustion is an affirmative defense and Congress decided not to include exhaustion in the § 1997e(c) prescreening provision, exhaustion is an "ordinary affirmative defense" rather than a threshold issue. Br. at 15–17. But

[1] This deliberate, mandatory timing component is a stark departure from the previous exhaustion provision under the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 St. 349, which provided that "[i]n any action brought . . . the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available."

neither prevents exhaustion from being considered as a preliminary matter, consistent with the language of § 1997e(a).

On the first point, Richards overreads *Woodford* and *Jones* v. *Bock*, 549 U.S. 199 (2007). Neither case suggests that exhaustion is not a threshold issue. *Woodford* explains that exhaustion is not jurisdictional, 548 U.S. at 101, and *Jones* holds that PLRA exhaustion is an affirmative defense, 549 U.S. at 212–13, meaning that prisoners need not raise exhaustion in their pleadings. As to the "usual practice," *id.* at 212, the Federal Rules provide only that affirmative defenses must be raised in a defendant's responsive pleading, Fed. R. Civ. P. 12(b), without otherwise mandating the timing or manner of their resolution.

The PLRA, however, does address the timing of exhaustion—by indicating that no prisoner action may be brought "until" available administrative remedies are exhausted. See § 1997e(a). The text of the PLRA is clear, and this Court's precedent is consistent with its language. See *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002) (explaining that "exhaustion is a prerequisite to suit") (citing *Booth* v. *Churner*, 532 U.S. 731, 741 (2001)); *Woodford*, 548 U.S. at 100 ("[S]aying that a party may not sue in federal court *until* the party first *pursues* all available avenues of administrative review necessarily means that, if the party never pursues all available avenues of administrative review, the person will never be able to sue in federal court.").

B. Judges sometimes decide intertwined facts regarding threshold issues, even in cases where there is a right to a jury trial on the merits.

Consistent with this Court's reminder that "the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases," *Atlas Roofing Co.* v. *Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 460 (1977), judges do decide intertwined facts on threshold issues.

Take the class-action context. Intertwinement arose in *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 342 (2011), a proposed class action alleging that the discretion exercised by supervisors as to pay and promotion matters violated Title VII by discriminating against women. The commonality prerequisite "overlap[ped] with the respondents' merits contention that Wal–Mart engage[d] in a *pattern or practice* of discrimination." *Id.* at 352. This Court explained that "[f]requently [Rule 23(a)'s] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 351. "That," the Court said, "cannot be helped," because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* (citation omitted). But the Court explained that there was not "anything unusual about that consequence," as "[t]he necessity of *touching aspects of the merits* in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation." *Id.* at 351–52 (emphasis added) (citation omitted).

Wal-Mart is instructive because Rule 23 does not set forth a mere pleading standard, but rather requires a party seeking class certification to "affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* at 350. And that can require a judge to "probe behind the pleadings before coming to rest on the certification question." *Id.* (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982)). See also *Amgen Inc.* v. *Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) (noting that "[m]erits questions may be considered to the extent…they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied") (citation omitted); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (cautioning that a judge's "obligation to make . . . [Rule 23] determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, *even a merits issue that is identical with a Rule 23 requirement*") (emphasis added).

Cases involving heightened pleading requirements are also instructive. At the Rule 12(b)(6) stage, a judge can require a comparative weighing of factual assertions and prevent submission of claims to a jury without violating the Seventh Amendment. This can be seen in *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), an action under the Private Securities Litigation Reform Act of 1995 (PSLRA), which sets forth "[e]xacting" pleading requirements for both the facts constituting the alleged violation and the facts evidencing scienter. This Court allowed the judge to determine whether a reasonable person would deem the inference of scienter to be at least as

strong as the opposing inference. *Id.* at 322–24. In doing so, the judge had to "engage in a comparative evaluation," "consider[ing] not only inferences urged by the plaintiff . . . but also competing inferences rationally drawn from the facts alleged," *id.* at 314, in order to determine whether "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged," *id.* at 324. This Court described the heightened pleading rule as a congressionally "prescribe[d] means of making an issue," *id.* at 311 (cleaned up), and it noted that only when "[t]he issue [has been] made as prescribed," *id.* at 328, does the jury then have the authority to "assess the credibility of witnesses, resolve genuine issues of fact, and make the ultimate determination" as to scienter, *id.* at 311 (cleaned up)—much like PLRA exhaustion.

Although the Seventh Circuit in *Tellabs* was concerned that this screening violated the Seventh Amendment, this Court said the concern was undue, that a comparative assessment of plausible inferences—while constantly assuming the plaintiff's allegations to be true—"does not impinge upon the Seventh Amendment right to jury trial." *Id.* at 326–27. The goals of the PSLRA's pleading requirements are also much like the statutory requirements of the PLRA—to screen out frivolous suits, while allowing meritorious actions to move forward. *Id.* at 328.

There are situations, too, where, although a judge's factfinding on a legal issue does not involve specific facts that are intertwined with the merits, it affects the merits and can end up being dispositive of the underlying merits question. Yet the jury has not

had to "shoulder" that factfinding responsibility "*as necessary to preserve the substance of the common-law right of trial by jury*." *Markman* v. *Westview Instruments*, *Inc.*, 517 U.S. 370, 377 (1996) (cleaned up). *Markman* provides a vivid example. There, this Court said that the "mongrel practice" of deciding disputed claim terms over which testimony is offered fell to the judge and not the jury, *id.* at 378, even though doing so involved reviewing extrinsic evidence and making credibility determinations, and even though the district court's determination on the legal issue led to judgment as a matter of law for the alleged infringer, contrary to the jury's findings, *id.* at 375. See also *Teva Pharms. USA*, *Inc.* v. *Sandoz*, *Inc.*, 574 U.S. 318, 333 (2015) (explaining that while "[i]n some instances, a factual finding will play only a small role in a judge's ultimate legal conclusion about the meaning of the patent term," in others "a factual finding may be close to dispositive of the ultimate legal question of the proper meaning of the term in the context of the patent").

C. The contexts in which judges might send a threshold issue to the jury due to intertwined facts are distinguishable.

Judges do sometimes send intertwined facts to the jury, but the cases and contexts in which they tend to do so are distinguishable from PLRA exhaustion.

Take jurisdictional issues. They are generally decided by a judge, and that makes sense because "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (cleaned up). But there are cases in which the question of jurisdiction can be

resolved only by proceeding to a decision on the merits—in other words, where jurisdiction is "dependent on [a] decision on the merits." *Land* v. *Dollar*, 330 U.S. 731, 735 (1947). That was the circumstance in *Fireman's Fund Insurance Co*. v. *Railway Express Agency, Inc*., the decision on which the court below relied in ruling that intertwined exhaustion facts require a jury trial. 253 F.2d 780, 784 (6th Cir. 1958) (amount in controversy could not be decided without that jurisdictional ruling "constituting at the same time a ruling on the merits of the case"). In that situation, a district court holds jurisdiction to resolve both. *Land*, 330 U.S. at 739.

Those jurisdictional issues do not govern how courts should handle PLRA exhaustion for several reasons. First, a district judge has discretion in determining the mode of deciding jurisdiction in intertwined cases. See *Gulf Oil Corp*. v. *Copp Paving Co*., 419 U.S. 186, 203 n.19 (1974) (noting that jurisdictional decisions may be deferred until a hearing on the merits); *Wetmore* v. *Rymer*, 169 U.S. 115, 121 (1898) (same); 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (4th ed. 2024) ("The court *may* postpone a decision until evidence is submitted at trial if the jurisdictional issue is intertwined with the merits of the case.") (emphasis added). That defeats Richards' insistence that the Seventh Amendment mandates that intertwined threshold issues go to the jury. Second, dismissal for want of jurisdiction often closes the courthouse door forever, while dismissal for failure to exhaust under

the PLRA typically leaves the prisoner free to thereafter exhaust and seek an adjudication on the merits.[2]

Statute of limitations is another example of an affirmative defense that differs from PLRA exhaustion. In contrast to the discretion a judge might employ in equitably tolling the statute of limitations, the PLRA's exhaustion requirement is mandatory, see *Booth*, 532 U.S. at 739, and cannot be excused by a court, *Ross* v. *Blake*, 578 U.S. 632, 639 (2016).

For these reasons, how courts treat jurisdictional issues and statutes of limitations do not dictate how judges should handle PLRA exhaustion when the relevant facts are intertwined with the merits. As explained below, allocation of intertwined PLRA exhaustion facts to a judge does not impinge on the Seventh Amendment right to a jury trial.

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[2] Most circuits to have addressed the issue have held that a dismissal for failure to exhaust under the PLRA should be without prejudice. See *Savage* v. *United States Dep't of Just.*, 91 F.4th 480, 484 (D.C. Cir. 2024); *Moss* v. *Harwood*, 19 F.4th 614, 623 n.3 (4th Cir. 2021); *Bargher* v. *White*, 928 F.3d 439, 447 (5th Cir. 2019); *Garrett* v. *Wexford Health*, 938 F.3d 69, 81 n.16 (3d Cir. 2019); *Porter* v. *Sturm*, 781 F.3d 448, 452 (8th Cir. 2015) (citations omitted); *Gallagher* v. *Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009) (citation omitted); *Boyd* v. *Corr. Corp. of Am.*, 380 F.3d 989, 994 (6th Cir. 2004) (citations omitted); *Ford* v. *Johnson*, 362 F.3d 395, 401 (7th Cir. 2004) (citations omitted); *McKinney* v. *Carey*, 311 F.3d 1198, 1200–01 (9th Cir. 2002). But see *Varner* v. *Shepard*, 11 F.4th 1252, 1264 (11th Cir. 2021); *Berry* v. *Kerik*, 366 F.3d 85, 87–88 (2d Cir. 2004).

D. Under the PLRA, allocation of the exhaustion inquiry to a judge—even where some facts are intertwined—does not interfere with the jury's ability to decide the ultimate issues regarding liability and is therefore consistent with the Seventh Amendment.

What often drives the judge's decision to send intertwined facts to a jury is the concern that the plaintiff would be precluded by a preliminary judicial ruling from litigating disputed facts germane to the underlying statutory claim, allowing facts that would be decided by the jury to be summarily decided by the judge. That was true in *Lytle* v. *Household Manufacturing*, *Inc.*, 494 U.S. 545, 552–54 (1990) (holding that, out of concern for the effects of collateral estoppel, where a court wrongfully dismisses a plaintiff's legal claims, relitigation of the equitable issues decided by the court in a bench trial is permissible), and *Smithers* v. *Smith*, 204 U.S. 632, 645 (1907) (expressing concern that "the merits of the controversy" would "be summarily decided without the ordinary incidents of trial, such as the right to a jury").

Preclusion concerns also drove the rulings in *Beacon Theatres*, *Dairy Queen*, and *Ross*. As this Court has explained, "the Court in the *Beacon Theatres* case thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel"; its holding aimed "[t]o avoid this result" by limiting the trial judge's discretion in determining the sequence of trial. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 334 (1979).

Beacon Theatres itself expressed that same concern, noting that the district court's action in first deciding the equitable issue "might 'operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.' " *Beacon Theatres*, *Inc.* v. *Westover*, 359 U.S. 500, 504 (1959) (quotation omitted). Accord *Dairy Queen* v. *Wood*, 369 U.S. 469, 472 (1962).

Those concerns about preclusion are not present here. Allocation of the exhaustion inquiry to the judge—even where disputed facts are intertwined with the merits—will not interfere with a prisoner's right to a jury trial of a § 1983 damages claim. This is true for two reasons. First, the prisoner will generally have the ability to return to federal court because dismissal for failure to exhaust will be without prejudice. Second, because a judge's factual determinations would not have preclusive effect, if the prisoner can show exhaustion on return, the subsequent jury could still decide the ultimate issues of fact in the prisoner's case. That distinguishes the concerns driving *Beacon Theatres* and supports allowing judges to decide PLRA exhaustion even when it is intertwined with the merits. Richards' effort to refute these propositions fails.

1. A dismissal without prejudice has meaning for many prisoners.

Richards repeatedly argues that "[t]he judicial factfinding here *has* precluded jury resolution of the critical issues, for all time" and that "[w]here (as here), a judge decides the intertwined exhaustion facts, *there will never be a jury*." Br. 26. The Sixth

Circuit made the same error, reasoning that "the rationale that a jury may reexamine the judge's factual findings rings hollow if the prisoner's case is dismissed for failure to exhaust his or her administrative remedies" because "[i]n such an instance, a jury would never be assembled to resolve the factual disputes." Pet. App. 15a. This, the court said, was the "fatal flaw" in the Seventh Circuit's decision in *Pavey*. *Id.* But these statements are inaccurate as to Richards, and in many other States and cases, inaccurate as to other prisoners.

Richards' claims are Prison Rape Elimination Act (PREA) claims, and as explained in Perttu's merits brief, the PREA prison directive in effect when Richards filed his claims did not impose a time frame for filing a PREA grievance. Br. 7 ("A prisoner may file a PREA grievance at any time.") (citing J.A. 75). This is consistent with applicable federal regulations, which generally prohibit correctional facilities from placing time limits on PREA grievances. 28 C.F.R. § 115.52(b)(1) ("The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse."). Thus, any attempt by Richards to exhaust his administrative remedies for the claims here would not be untimely. He would, however, have to exhaust both steps of the grievance process. Pet. Br. 7.[3]

Unlike MDOC's policy for PREA grievances, its standard grievance procedure does impose time

[3] MDOC's amended policy is even more lenient in terms of PREA grievances. Effective April 5, 2021, MDOC "has eliminated the administrative grievance procedure for addressing prisoner grievances regarding sexual abuse." PD 03.03.130(VV).

limits, but it allows for some discretion in excusing untimely filed grievances. And many other States' correctional systems, as well as the Federal Bureau of Prisons and the District of Columbia, do allow discretion to varying degrees.[4] See also *Woodford*, 548 U.S. at 101 ("Indeed, respondent asserts that most grievance systems give administrators the discretion to hear untimely grievances."). As the multistate amicus

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[4] The publicly available policies for at least 31 States, the District of Columbia and the Federal Bureau of Prisons, allow prison officials to exercise discretion in excusing untimely grievances, though under varying standards, including good cause, extenuating circumstances, a case-by-case basis, or where a district court orders that an inmate return to exhaust administrative remedies. See, *e.g.*, Ala. Admin. Reg. 406(V)(S); Ariz. Dep't of Corr. Rehab. Reentry Order No. 802 1.3.1.5; D.C. Dep't of Corr. Policy & Proc. No. 4030.1M(18)(a)–(b); Fla. Admin. Code Ann. r. 33-103.011(2); Ga. Dep't of Corr. Policy No. 227.02(IV)(C)(1)(e)(ii)(2); Haw. Dep't of Corr. & Rehab. Policy No. Cor.12.03(5.0.4(b)); Idaho Dep't of Corr. Standard Operating Proc. No. 316.04.01.001(4); Ill. Admin. Code tit. 20, § 504.810(a); Ind. Dep't of Corr. Policy No. 00-02-301(X)(B); Kan. Dep't of Corr. Proc. No. 44-15-101b; Ky. Corr. Policy No. 14.6(II)(J)(1)(a)(13); La. Admin. Code tit. 22, § I-325(G)(1) (2024); Me. Dep't of Corr. 29.1(VII)(B)(20); Md. Code Regs. 12.07.01(D), (F); Mass. Code Regs. 491.17(1) (2017); Mich. Dep't of Corr. Policy Directive No. 03.02.130(P)(5); Minn. Dep't of Corr. Policy No. 303.100(F)(2)(b); Mo. Dep't of Corr. DSOP5-3.2(III)(L)(5)(a); Mont. State Prison Policy No. 3.3.3(V)(D)(2); N.H. Dep't of Corr. Policy No. 313.05(f); N.C. Dep't of Adult Corr. Policy & Proc. G.0306(c)(2); N.D. Dep't of Corr. & Rehab Policy No. 3C-10(5)(C)(1); Ohio Admin. Code 5120-9-31(J)(2); Okla. Dep't of Corr. OP-090124(XIII)(C); Pa. Dep't of Corr. Policy No. DC-ADM-804, § 1(C)(2); R.I. Dep't of Corr. Policy No. 13.10-5 DOC(IV)(H)(1)(g); S.C. Dep't of Corr. Policy No. GA-01.12(13.10); S.D. Dep't of Corr. Policy & Proc. 500-04(IV)(1)(F); Utah Dep't of Corr. Proc. AG38 01.03(C); Wash. Dep't of Corr. Statewide Resolution Program Manual, p 9; Wis. Admin. Code DOC § 310.07(11); Wyo. Dep't of Corr. Policy & Proc. #3.100(IV)(E)(1)(3)(ii)(a); 28 C.F.R. § 542.14(b).

brief points out, Br. 20–21, the exercise of that discretion is potentially jeopardized by Richards' proposed rule. See *id*. ("After all, why would prison officials—having gone through a jury trial on exhaustion—willingly subject themselves to the chance of another jury trial?"). Additionally, all eight circuits to have considered the issue have held that the statute of limitations is tolled while a prisoner exhausts administrative remedies. See, *e.g.*, *Battle* v. *Ledford*, 912 F.3d 708, 715–17 (4th Cir. 2019) (collecting cases).

Contrary to Richards' argument that short prison deadlines will "virtually always" mean that dismissal without prejudice is an "abject legal fiction," Br. 27, dismissal without prejudice will afford many prisoners a path to return to federal court.

2. Factfinding on exhaustion will not adjudicate factual issues required to be resolved by a jury because collateral estoppel will not apply.

Perttu agrees with Richards that he is "entitled to have a jury decide questions of historical fact bearing on the merits of his claim," Br. 9, but only once the judge has determined that he has exhausted his administrative remedies. Contrary to Richards' argument, Br. 17, a judicial determination of intertwined facts on exhaustion would not resolve the ultimate merits of a prisoner's claims, for that decision would not preclude a jury from reexamining the judge's factual determinations.

Richards advances no reason why a judge's determination on exhaustion would necessarily have preclusive effect on a jury's decision. It is not an anomaly

that a jury would not be bound by earlier factfinding by a judge. This occurs routinely in the class-action context. See *Gariety* v. *Grant Thornton*, *LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (noting that inquiry as to Rule 23 prerequisites would not bind "the ultimate fact-finder's finding on the merits" of the underlying issues any more than does a finding that the plaintiff has shown a probability of success for purposes of a preliminary injunction). And as explained in Perttu's merits brief, collateral estoppel is a flexible, judge-made doctrine. Br. 44. It takes into account, among other things, the nature of the proceedings and whether unfairness would result from its application. *Parklane Hosiery*, 439 U.S. at 330–31; *Urfirer* v. *Cornfeld*, 408 F.3d 710, 718 (11th Cir. 2005). Here, the distinction between the threshold procedural matter of exhaustion and a trial on the merits, coupled with the prisoner's right to have the jury to be the factfinder on the ultimate determination of liability, counsels against its application.

Indeed, it cannot be said that, after a judge's exhaustion inquiry, "nothing remains for trial, either with or without a jury." *Parklane Hosiery*, 439 U.S. at 325 (cleaned up). A judge's decision on exhaustion does not usurp the role of the jury or deny a prisoner the right to a jury trial. As to Richards or any other prisoner who has claims dismissed without prejudice and later exhausts and refiles, thereby meeting the PLRA threshold, "if there is a jury trial, the jury will make all the necessary findings of fact without being bound by (or even informed of) any findings of fact made by the district judge" in determining the exhaustion issue. *Pavey*, 544 F.3d at 742. The Seventh Amendment therefore permits judges to find facts

related to PLRA exhaustion even where those facts are intertwined with the merits.

II. Judges may find facts related to exhaustion under the Seventh Amendment.

Richards asserts that this Court does not need to determine whether judges may decide non-intertwined factual disputes concerning PLRA exhaustion. Br. 11. That is correct, as an implicit premise of the Question Presented was that judges may do so. But that issue is a steppingstone to the question whether judges can decide factual disputes on PLRA exhaustion inquiries that *are* intertwined with the merits. For this predicate question, Richards offers an overly simplistic fact/law distinction under which judges decide questions of law, and juries decide questions of fact. Br. 31–34. This Court has already rejected such a simplified approach in favor of a historical and functional analysis and should do so again here. So, too, should it reject Richards' proposed historical analog—"ordinary" affirmative defenses, such as the statute of limitations—because they differ in operation and purpose from PLRA exhaustion. And he altogether overlooks the functional considerations this Court said should be assessed if history is inconclusive.

A. Judges can decide facts related to exhaustion under this Court's historical approach to Seventh Amendment cases.

This Court has consistently reaffirmed that the Seventh Amendment inquiry hinges on historical standards. See, *e.g.*, *City of Monterey* v. *Del Monte Dunes at Monterey*, *Ltd.*, 526 U.S. 687, 708 (1999)

("[O]ur interpretation of the Amendment has been guided by [a] historical analysis . . . ."); *Markman*, 517 U.S. at 376 (explaining the steps of the Court's "longstanding adherence to th[e] 'historical test' ") (citations omitted). This historical inquiry is appropriate even when dealing with an action at law, such as a § 1983 action. *Del Monte Dunes*, 526 U.S. at 718 ("Having decided Del Monte Dunes' § 1983 suit was an action at law, we must determine whether the particular issues of liability were proper for determination by the jury.") (citation omitted).

Richards attempts to sidestep any historical analysis, however, by concluding that the fact/law distinction does the work. Br. 31–33. This Court has already rejected this oversimplified conclusion. *Markman*, which itself involved a mixed question of law and fact, looked elsewhere in answering the Seventh Amendment question at issue. 517 U.S. at 384 n.10 (citations omitted). In *Del Monte Dunes*, too, the Court rejected a broad fact/law disposition, instead holding that the question "whether a land-use decision substantially advances legitimate public interests"—which "involve[d] an essential factual component"—should go to the jury given the "narrow question" presented. 526 U.S. at 721. It did so, however, after finding "no precise [historical] analogue" for the particular issue, *id.* at 718, and the case therefore turned on "considerations of process and function," *id.* at 720. And, of course, in neither *Markman* nor *Del Monte Dunes* did the Court deal with the context presented here—the

determination of a mixed question of law and fact on a threshold issue.[5]

In short, Richards' proposed fact/law solution overlooks the import of the historical inquiry for Seventh Amendment questions. Under this historical inquiry, the relevant question is whether, in this action at law, the exhaustion decision "must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Markman*, 517 U.S. at 376 (citation omitted). In 1791, that right did not include jury factfinding on exhaustion or its historical analogs.

B. Richards casts aside the historic origins of exhaustion and offers analogs that do not take into account the characteristics of PLRA exhaustion.

Although the parties agree that exhaustion was not contemplated in 1791, Richards contends that its appropriate analogy lies not in equitable defenses but in the broader category of affirmative defenses. Br. 15–17. This argument, however, overlooks both the historical underpinnings of exhaustion generally and the unique characteristics of PLRA exhaustion.

Richards asserts at length that PLRA exhaustion is not an equitable defense. Br. 41–48. Perttu agrees, but it is beside the point. As explained in Perttu's brief, Br. 27–33, because of its origins and functions it

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[5] Richards' reliance (Br. 34) on *Google LLC* v. *Oracle Am., Inc.*, 593 U.S. 1 (2021) is misplaced. That case, unlike this one, concerned the standard of review for mixed questions of law and fact, making it inapposite. *Id.* at 24–25.

is closely *analogous* to various equitable defenses, such as the adequate remedy at law doctrine, *forum non conveniens*, abstention, and habeas corpus bars. Richards has little, if anything, to say about these equitable defenses, which stand as the most appropriate analogs for the historical inquiry.

Richards instead focuses on PLRA exhaustion's mandatory nature, which forecloses judicial discretion. Br. 41–43. But this mandatory nature distinguishes PLRA exhaustion from the "ordinary" affirmative defenses upon which Richards relies.

Take, for example, the statute of limitations. Although a plaintiff must generally comply with the statute of limitations, courts have the discretion to equitably toll the defense. *Young* v. *United States*, 535 U.S. 43, 49 (2002) (explaining that "unless tolling would be 'inconsistent with the text of the relevant statute,' " "limitations periods are 'customarily subject to equitable tolling' ") (citations omitted). As Richards points out, under the PLRA, exhaustion may only be excused on the terms provided by Congress. Br. 41. A statute of limitations differs from PLRA exhaustion in other material respects as well. The statute of limitations is focused on timely claims, and therefore a successful statute of limitations defense closes the door to the courthouse, barring any future litigation on the merits. PLRA exhaustion, however, is concerned with judicial efficiency and deference to administrative agency authority. While a prisoner's lawsuit will be dismissed for failure to exhaust, in many instances the prisoner may file a new lawsuit on the same claims following proper exhaustion of administrative remedies. In this regard, the jury's ultimate

determination of issues of fact is preserved whereas a jury will *never* hear a case following a dismissal under the statute of limitations.

Matters in abatement also fail to offer an appropriate historical analog, though for different reasons. To begin, courts cannot agree on what qualifies as a matter in abatement. See Aaron R. Petty, *Matters in Abatement*, 11 J. App. Prac. & Process 137, 142 (2010) ("The biggest problem seems to be that no one knows what . . . [matters in abatement] means, and a number of courts have suggested that this has been the case for some time.") (citations omitted). As a result, even if matters in abatement were an appropriate analogy, historical practice would provide little guidance on the inquiry here. In any event, the Seventh "Amendment did not bind the federal courts . . . to the common-law system of pleading[.]" *Galloway* v. *United States*, 319 U.S. 372, 390 (1943).

C. Functional considerations also favor judicial determination of PLRA exhaustion.

A final point bears emphasis. Both *Markman* and *Del Monte Dunes* show that when historical analysis proves inconclusive, this Court weighs functional considerations. *Markman*, 517 U.S. at 388 ("Where history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury . . . ."); *Del Monte Dunes*, 526 U.S. at 718 (same) (citation omitted). While Richards fails to grapple with this functional inquiry, the PLRA's exhaustion provision favors judicial determination of this threshold issue.

This Court has already confirmed that statutory exhaustion regimes, like the PLRA, "stand[ ] on a different footing." *Ross*, 578 U.S. at 639 (explaining the differences between statutory exhaustion and judge-made exhaustion). "Time and again, this Court has taken such statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements." *Id.* (citations omitted). Consequently, this Court has "reject[ed] every attempt to deviate . . . from [the PLRA's] textual mandate," *id.* at 639–40, which prohibits prisoner lawsuits from being brought *until* available administrative remedies are exhausted, § 1997e(a); see also *Porter*, 534 U.S. at 524 ("[E]xhaustion is a prerequisite to suit.") (citation omitted). To allow disputed questions of fact on PLRA exhaustion—intertwined or not—to be decided by juries would be to allow such a deviation, undoing the purposes and benefits of the statute. This concern, coupled with the consideration that many prisoners may refile their claims after a dismissal without prejudice, compels the conclusion that judges, not juries, are the best positioned to determine the threshold issue of PLRA exhaustion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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