

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS PERTTU,)
 Petitioner,)
 v.) No. 23-1324
KYLE BRANDON RICHARDS,)
 Respondent.)
- - - - -

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Tuesday, February 25, 2025

APPEARANCES:

LORI ALVINO MCGILL, ESQUIRE, Charlottesville,
Virginia; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:34 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 23-1324, Perttu versus
5 Richards.

6 Ms. Sherman.

7 ORAL ARGUMENT OF ANN M. SHERMAN

8 ON BEHALF OF THE PETITIONER

9 MS. SHERMAN: Mr. Chief Justice, and
10 may it please the Court:

11 Exhaustion is the centerpiece of
12 Congress's reforms under the Prison Litigation
13 Reform Act. Yet, even with this invigorated
14 exhaustion requirement, prisoner lawsuits still
15 account for an outsize share of filings in
16 federal district courts. A rule that requires a
17 jury trial on intertwined exhaustion issues
18 would increase this burden while incentivizing
19 non-exhaustion and undermining the goals and
20 structure of the PLRA.

21 Respondent would have this Court cast
22 aside the PLRA's goals and structure merely
23 because exhaustion is an affirmative defense.
24 Focusing on this Court's holding in Jones versus
25 Bock, he contends that there's no principled

1 reason for treating PLRA exhaustion differently
2 than other affirmative defenses that are
3 routinely sent to juries when there are facts
4 intertwined with the merits.

5 Jones does not stand for this broad
6 proposition. It held only that prisoners need
7 not plead exhaustion. And there is a principled
8 reason for treating PLRA exhaustion differently
9 than other affirmative defenses. It is a
10 mandatory prerequisite to suit. So its intended
11 benefits would be entirely undercut by merits
12 discovery and a trial before its resolution.

13 PLRXA -- PLRA exhaustion must be
14 resolved by a judge at the early stages of
15 litigation. Contrary to the Sixth Circuit, this
16 does not run afoul of the Seventh Amendment even
17 when there are intertwined facts. The judge's
18 determination on exhaustion does not interfere
19 with the jury's ultimate fact-finding role
20 because dismissal is typically without prejudice
21 and the judge's determination on exhaustion
22 would not have preclusive effect.

23 Richards, like many other prisoners,
24 can exhaust, come back, and have a jury decide
25 the merits of any viable claims. For this

1 reason, this Court should reverse the Sixth
2 Circuit's decision.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Are exhaustion
5 determinations normally made by the judge?

6 MS. SHERMAN: They are. And, in -- in
7 fact, lower courts are pretty much in agreement
8 that at least when there are no intertwined
9 facts, that judges will make those
10 determinations.

11 JUSTICE THOMAS: So what is it about
12 the intertwining of facts that changed the --
13 changes the nature of exhaustion?

14 MS. SHERMAN: I don't think there's
15 anything that changes the nature of exhaustion.
16 I think what it does is it -- it -- it makes one
17 have to consider the Seventh Amendment now.
18 If -- if there are intertwined facts, is that an
19 implication of the Seventh Amendment? And our
20 position is that it doesn't and that --

21 JUSTICE THOMAS: So, historically, has
22 there been -- do we have any analogs to -- that
23 would suggest that this would go to a jury?

24 MS. SHERMAN: No. In fact, the -- the
25 opposite is true, that the analogs suggest that

1 this would go to a judge. We think that the
2 closest analogs -- there is no precise analog.
3 There was no exhaustion in 1791. The doctrine
4 hadn't been developed yet. It came as the
5 administrative setting was coming into -- to
6 force.

7 But we know that exhaustion has its
8 roots in equity. And we think that the most at
9 least appropriate analogs here are equitable
10 defenses and equitable defenses that would have
11 been -- their -- their key characteristic is a
12 deference to another setting, another forum.

13 JUSTICE JACKSON: But, Ms. Sherman, do
14 we really have to get into that? I guess what I
15 was a little confused about from your briefing
16 was that I took you to concede that there's
17 intertwinement here. And if that's the case, we
18 can just assume, I guess, that exhaustion does
19 not entitle you to a jury. That's the part of
20 this that would ordinarily say you don't get a
21 jury, but it's the fact of intertwinement that
22 brings to the fore the question of whether or
23 not the Seventh Amendment has to be satisfied.

24 So we don't really have to worry or
25 think about or rule on whether or not the

1 exhaustion claim gets a jury independent of the
2 other one, right?

3 MS. SHERMAN: I don't think the Court
4 has to rule on that. I think it's a question
5 that is naturally embedded in the question
6 presented. I mean, obviously --

7 JUSTICE JACKSON: I understand, but if
8 I assume it, okay, so fine, aren't we still
9 faced with the question that you present, as a
10 matter of your question presented, is then we
11 have intertwinement of a claim that does not get
12 a jury, the exhaustion claim, with a claim that
13 does? Do you concede that the First Amendment
14 retaliation claim is one that would ordinarily
15 go to the jury?

16 MS. SHERMAN: When -- when the right
17 to a jury trial accrues and exhaustion has been
18 met, I agree that that is a claim that should go
19 to the jury. And this Court has been very clear
20 that 1983 claims are entitled to a jury trial.

21 JUSTICE JACKSON: All right. So we do
22 have the intertwinement. At least you concede
23 it in your brief. And so why wouldn't the sort
24 of standard Beacon Theatres view of how we deal
25 with that situation apply here?

1 MS. SHERMAN: Beacon Theatres doesn't
2 apply here for a number of reasons. One, Beacon
3 Theatres was driven by -- it -- a concern for
4 collateral estoppel. Would there -- would there
5 be a preclusive effect that would completely cut
6 off any right to have the -- the -- the jury
7 trial on the merits?

8 JUSTICE JACKSON: I don't see that in
9 the opinion. I mean, I see that it talks about
10 preclusive effect, but that didn't necessarily
11 seem to me to be driving the analysis. And
12 in -- and we've had a lot of cases that have
13 applied this sort of intertwinement principle in
14 which preclusion really hasn't been the main
15 focus.

16 MS. SHERMAN: I think Beacon Theatres
17 itself talked about preclusion, preclusive
18 effect, and that being a concern. And later on,
19 this Court in Parklane Hosiery said, when we
20 looked at Beacon Theatres, which, again, the --
21 this Court has said is -- collateral estoppel is
22 only a flexible, judge-made doctrine, and -- and
23 this Court said in Parkland Hosiery the concern
24 was collateral estoppel at --

25 JUSTICE JACKSON: All right. So why

1 isn't that a case here? I mean, what -- what
2 law do we have that says that an exhaustion
3 determination by a judge in this situation that
4 requires them to find all the facts about
5 whether or not there was actual retaliation --
6 why isn't that preclusive of a later jury trial
7 related --

8 MS. SHERMAN: Well, what --

9 JUSTICE JACKSON: -- to that same
10 issue?

11 MS. SHERMAN: Well, what we have here
12 is the flexible doctrine of collateral estoppel
13 and what we know about collateral estoppel and
14 why it's applied and why it doesn't get applied.
15 And one of the big issues here is that you
16 don't -- this Court has said over and over in
17 cases, and so have the lower courts, that --
18 collateral estoppel is applied -- is not applied
19 when the litigants have not had a full and fair
20 opportunity to litigate.

21 And when a litigant is litigating --
22 on either side is litigating exhaustion, they
23 have not had a full and fair opportunity to
24 litigate on the merits even if there are
25 overlapping factors.

1 JUSTICE SOTOMAYOR: Why?

2 JUSTICE BARRETT: Counsel --

3 JUSTICE KAGAN: General --

4 JUSTICE SOTOMAYOR: Why? If we take

5 your starting proposition that exhaustion is a

6 judge determination and you've had a full and

7 fair opportunity to litigate it, why wouldn't

8 that -- if it's interwound with the merits, why

9 wouldn't you bound -- be bound by it? So you go

10 back later, but -- and you get exhausted and you

11 come back to court on your substantive decision,

12 like you're arguing should be done here. Why

13 wouldn't you be bound?

14 MS. SHERMAN: There may be factual

15 overlap, and we concede that there's

16 intertwinement --

17 JUSTICE SOTOMAYOR: Assume --

18 MS. SHERMAN: -- of the facts there.

19 JUSTICE SOTOMAYOR: -- assume it's

20 interwound.

21 MS. SHERMAN: Yes, it is --

22 JUSTICE SOTOMAYOR: Assume everything

23 you say. Our normal preclusion rules would say:

24 If you've had a fair and full opportunity to --

25 to litigate a case -- it doesn't mean before a

1 jury. It just means, if you were entitled to
2 litigate this issue and you had a full and fair
3 opportunity to litigate it and you lost on this
4 issue, then you go back and you exhaust and you
5 come back again. At the new trial, you would be
6 collaterally estopped.

7 MS. SHERMAN: Respectfully, Your
8 Honor, those -- neither side has had a full and
9 fair opportunity to litigate the underlying
10 merits, whether that's --

11 JUSTICE BARRETT: Counsel --

12 JUSTICE SOTOMAYOR: That has nothing
13 to do with it. It has to do with would you be
14 bound by collateral estoppel.

15 MS. SHERMAN: And they would not --
16 respectfully, they would not be bound unless
17 they'd had a full and fair opportunity to
18 argue --

19 JUSTICE SOTOMAYOR: They did.

20 JUSTICE BARRETT: But --

21 MS. SHERMAN: -- on the merits. They
22 have had a full and fair opportunity on
23 exhaustion, and that is different.

24 JUSTICE SOTOMAYOR: No, collateral --

25 JUSTICE BARRETT: But --

1 JUSTICE SOTOMAYOR: I'm sorry.

2 JUSTICE BARRETT: Sorry. I was just
3 going to say I don't understand why you're
4 talking about full and fair opportunity, because
5 preclusion requires a judgment. And for
6 exhaustion, you're dismissed with prejudice, so
7 there is no judgment.

8 So, even if you filed a later suit --
9 I mean, it is a full and fair opportunity
10 because you didn't have --

11 MS. SHERMAN: Yeah.

12 JUSTICE BARRETT: -- litigate it all
13 the way to judgment. I mean, maybe there's a
14 law-of-the-case argument to be made, but I don't
15 see how collateral estoppel applies.

16 MS. SHERMAN: Well, I -- I would agree
17 with that. That's one of the key elements of
18 the test for collateral estoppel. And the other
19 is whether the issue was litigated in the prior
20 litigation and then again in the subsequent
21 litigation.

22 JUSTICE SOTOMAYOR: Counsel, can I go
23 back to --

24 MS. SHERMAN: And, here, you have two
25 separate issues.

1 JUSTICE ALITO: Under the --

2 JUSTICE SOTOMAYOR: Can I go back --

3 I'm sorry. I --

4 JUSTICE ALITO: Go ahead. Go ahead.

5 JUSTICE SOTOMAYOR: Can I go back to
6 the floodgates argument? The Second Circuit
7 hasn't had a decision like this circuit, but it
8 has said so in dicta, and the district courts
9 have followed that dicta basically.

10 And I've gone back 12 years and had
11 our library and my clerks search Second Circuit
12 opinions, and in those 12 years, only five cases
13 has there been litigation over whether or not
14 there was exhaustion because only five cases was
15 it interwound with the merits.

16 I don't see where the floodgates have
17 come up. And if any circuit has pro se
18 litigation, it's this one.

19 And I also look at all of the other
20 barriers to litigation by -- you have to -- you
21 have screening that has to go on. You have
22 to -- the defendant has to raise an exhaustion
23 defense, the plaintiff has to counter that
24 exhaustion was unavailable, the complaint
25 survives any motion to dismiss and that you have

1 a genuine dispute of material fact unrelated to
2 exhaustion to justify.

3 I don't understand the floodgates
4 argument.

5 MS. SHERMAN: I appreciate all the
6 steps that -- that you have talked about,
7 Justice Sotomayor, but I --

8 JUSTICE SOTOMAYOR: I didn't make them
9 up. They came up from an amicus that pointed
10 them out.

11 MS. SHERMAN: Yes. But -- but our
12 Michigan data reflects something a little bit
13 different than the data that you have attempted
14 to collect.

15 Last year alone, Michigan had 574
16 cases that were opened. In 96 of those, we
17 filed motions for summary judgment. Four --

18 JUSTICE JACKSON: What kind of case,
19 I'm sorry? Just -- just someone claiming --

20 MS. SHERMAN: Well, just prisoner --
21 prisoner --

22 JUSTICE JACKSON: Okay.

23 MS. SHERMAN: -- lawsuits.

24 Ninety-six of those, we filed motions
25 for -- motion for summary judgment on

1 exhaustion. We had four Pavey hearings or
2 evidentiary hearings on exhaustion. And if
3 those -- under Richards's rule, those four Pavey
4 hearings would now be trials. And so it's --

5 JUSTICE SOTOMAYOR: All of them were
6 mixed with the merits? I -- I -- I'm --

7 MS. SHERMAN: I -- I --

8 JUSTICE SOTOMAYOR: -- hard-pressed to
9 think that. This is an unusual case because
10 this case is about not the rape necessarily but
11 the -- of the First Amendment violation.

12 MS. SHERMAN: I don't have that --
13 that granular data, but I will say that --

14 JUSTICE SOTOMAYOR: Well, that's not
15 grandular. That's the whole case.

16 MS. SHERMAN: Well, but a -- an
17 exhaustion -- a Pavey hearing would only arise
18 if there were factual disputes. And many of
19 those factual disputes are happening over
20 prisoners asserting unavailability. And if you
21 take that data that instead of five --

22 JUSTICE SOTOMAYOR: I -- I -- I'm
23 sorry, I -- I'm -- I'm just still confused. It
24 has to do with whether the exhaustion is
25 interwound with the merits of the claim, the

1 underlying claim.

2 MS. SHERMAN: What I'm attempting to
3 do is -- is to respond to Your Honor's question
4 about will the floodgates open. And the best
5 that we can tell from us doing Pavey hearings,
6 if those had to be trials -- and many of those
7 are going to be on intertwined facts because
8 that's when Pavey hearings come up. There are
9 disputed facts, and it tends to be a credibility
10 determinations, a -- a he said/she said.

11 And if you take that data from
12 Michigan and you use that even as a national
13 average and you say: Well, okay, in Michigan,
14 it's four additional jury trials, and across the
15 country, for 50 states, that's -- that's --
16 that's 200 additional jury trials.

17 That's not municipalities. That's not
18 the Federal Bureau of Prisons. That -- that is
19 a huge, overwhelming estimated number,
20 especially when you consider that last year
21 across the board with -- there were only about
22 1300 jury -- civil jury trials in all federal
23 district courts.

24 JUSTICE KAGAN: General, when --

25 JUSTICE ALITO: Can I ask you --

1 JUSTICE KAGAN: -- when you --

2 JUSTICE ALITO: May I just ask you
3 this quick question? Under the Prison Rape
4 Elimination Act and your policy, could
5 Mr. Richards go back and now exhaust
6 administrative remedies?

7 MS. SHERMAN: Absolutely. There are
8 no time constraints for him to for -- or for any
9 prisoner across the country that has a Prison
10 Rape Elimination Act grievance, there are no
11 time constraints.

12 JUSTICE ALITO: So why in this case
13 should we be concerned about -- about
14 intertwinement, you know, if -- if exhaustion is
15 decided by the judge, the judge says you didn't
16 exhaust, the -- the prisoner can go back and
17 exhaust, and then the prisoner can come back to
18 court and, if it can get by summary judgment,
19 can have a jury trial?

20 MS. SHERMAN: Well, there's --

21 JUSTICE ALITO: So what's the --
22 what -- what's -- I don't get it.

23 MS. SHERMAN: There still is a
24 question with intertwinement here whether
25 even -- for the prisoner that can come back,

1 like Mr. -- Mr. Richards, is there a problem
2 with collateral estoppel. Does it violate a
3 right to a jury --

4 JUSTICE ALITO: Well, it's not a
5 judgment and it's a flexible doctrine. And I
6 think every court of appeals but one has said
7 this is a matter for the judge.

8 And what have they said about
9 collateral estoppel? Haven't they said that --
10 that the determination that there was no
11 exhaustion would not carry over, would not have
12 an effect on the trial of the merits?

13 MS. SHERMAN: I -- I -- I agree.
14 Collateral estoppel is not a bar here, but
15 that's the reason why it's important to consider
16 this, and that's why I believe this Court
17 granted cert.

18 JUSTICE JACKSON: Ms. Sherman,
19 would -- would the same judge who made a
20 determination in the exhaustion realm related to
21 the facts of whether or not this person
22 exhausted be presiding over the subsequent trial
23 in which those same questions about what
24 happened go to the jury?

25 MS. SHERMAN: I don't think there's

1 any -- any rule that would require that the same
2 judge hear that. It could go to any judge --

3 JUSTICE JACKSON: I'm just asking you,
4 as a matter of practice, wouldn't it --

5 MS. SHERMAN: I -- I don't -- I don't
6 think a --

7 JUSTICE JACKSON: -- would -- don't
8 judges -- don't judges ordinarily keep the case?
9 So you have a judge originally -- and I -- I
10 guess I'm just sort of musing about Justice
11 Alito's question --

12 MS. SHERMAN: Mm-hmm.

13 JUSTICE JACKSON: -- of what's the
14 harm.

15 I would think that if the concern in
16 Beacon Theatres and in other cases in which the
17 Seventh Amendment right is fronted is that
18 people really have the right to a jury deciding
19 these questions and once you've had a judge
20 decide it, the same -- we have intertwinement,
21 it's the same set of factual issues -- I wonder
22 whether there wouldn't be a burden on your right
23 to make your presentation to the jury,
24 especially if the same judge has prejudged those
25 facts because they had the essential hearing and

1 heard all the evidence and whatnot and ruled
2 themselves as to whether or not they think this
3 happened in this way.

4 MS. SHERMAN: Two responses. The --
5 this is a dismissal, and whether -- it's -- it's
6 typically without prejudice, but that doesn't
7 mean that that's going to come back to the same
8 judge. It's not the same case. They're going
9 to re-file a -- a -- a -- a -- a federal
10 lawsuit.

11 So I don't think there's any reason to
12 think that that's going to come back to the same
13 judge. I don't think it matters either way
14 because the key here -- and this is to my second
15 point -- is that there wouldn't be any
16 preclusive effect. So would Richards be coming
17 back --

18 JUSTICE JACKSON: Not by the judgment.
19 Not by the judgment. But you appreciate that
20 what I'm suggesting, that, you know, if it was
21 the same judge --

22 MS. SHERMAN: Mm-hmm.

23 JUSTICE JACKSON: -- who is presiding
24 then over a subsequent trial about an issue of
25 fact that he or she has already decided because

1 they heard the testimony before, they went
2 through the record, they said no, you know,
3 Mr. Richards -- Officer Perttu did not do X, Y,
4 and Z --

5 MS. SHERMAN: Mm-hmm.

6 JUSTICE JACKSON: -- and then
7 Mr. Richards goes and exhausts and says now I'd
8 like my jury trial on that same question, one
9 might be concerned at least that it would be
10 difficult for Mr. Richards to present his case
11 to the jury with the same judge presiding.

12 MS. SHERMAN: I don't think there's a
13 reason to think it would be the same judge.
14 But, even if it were, the jury is deciding that
15 anew, and they are, in that capacity, the
16 ultimate fact-finder. And so, if -- if on
17 exhaustion there was a particular fact that the
18 judge found, the jury may not even know about
19 that, probably shouldn't know about that.

20 JUSTICE JACKSON: Well, maybe. I
21 mean, the Judge --

22 MS. SHERMAN: And --

23 JUSTICE JACKSON: -- is ruling on
24 evidence, evidence objections, et cetera, et
25 cetera, right, in the context, if -- if it is

1 the same judge.

2 MS. SHERMAN: Yes, but, ultimately,
3 the jury is the fact-finder on those key facts
4 that Richards would then need for his First
5 Amendment --

6 JUSTICE GORSUCH: Ms. Sherman, who
7 bears the burden on -- on -- on the question of
8 whether the Seventh Amendment attaches?

9 MS. SHERMAN: The -- what's the
10 standard?

11 JUSTICE GORSUCH: Who bears the burden
12 of showing --

13 MS. SHERMAN: Oh, it's absolutely
14 the -- the defendant's burden.

15 JUSTICE GORSUCH: Now that -- that --

16 MS. SHERMAN: It's an affirmative
17 defense.

18 JUSTICE GORSUCH: Well -- well, that
19 strikes me as odd. Wright and Miller, for
20 example, says, in cases of doubt, you presume
21 the jury, and it's really incumbent upon those
22 who would displace the jury and say the Seventh
23 Amendment doesn't attach, but the default rule
24 is that you have a right to a trial by jury.

25 Do you have any authority for the

1 contrary?

2 MS. SHERMAN: I -- I think --

3 JUSTICE GORSUCH: I didn't see it in
4 your briefs.

5 MS. SHERMAN: I think what the -- what
6 the authority is for the Seventh Amendment not
7 to attach here is that there's no --

8 JUSTICE GORSUCH: No, who -- who bears
9 the burden of showing -- I -- I would have
10 thought you would have borne the burden of
11 showing the Seventh Amendment doesn't attach to
12 a -- a suit at law.

13 MS. SHERMAN: I -- I don't -- I think
14 that the burden --

15 JUSTICE GORSUCH: I mean, isn't the
16 default rule in this country you have a right to
17 trial by jury?

18 MS. SHERMAN: That is the default
19 rule --

20 JUSTICE GORSUCH: Okay.

21 MS. SHERMAN: -- once the claim
22 accrues. And so, you know, before -- before the
23 claim accrues, I -- I don't think the defendant
24 has --

25 JUSTICE GORSUCH: Well, we have a

1 claim. The claim -- claim is here. Now --

2 MS. SHERMAN: The --

3 JUSTICE GORSUCH: -- a -- a -- a case

4 has begun. And once the case begins, I would

5 have thought that you would have an assumption,

6 subject to background rules, there are lots of

7 exceptions, but, generally, you have a right to

8 a trial by jury -- and if you have some contrary

9 authority for that, I'd like to know what it is.

10 MS. SHERMAN: The -- the contrary

11 authority is that this is --

12 JUSTICE GORSUCH: Authority. That

13 means a case.

14 MS. SHERMAN: Well --

15 JUSTICE GORSUCH: That means a

16 statute. That means a piece of history --

17 MS. SHERMAN: Yes.

18 JUSTICE GORSUCH: -- saying that the

19 burden is on -- on the defendant rather than

20 you.

21 MS. SHERMAN: I -- I don't have a --

22 well, I -- I think -- but the --

23 JUSTICE GORSUCH: I'm not aware of one

24 either.

25 MS. SHERMAN: No, I don't have one,

1 but I think two -- two --

2 JUSTICE GORSUCH: Okay. So let --

3 MS. SHERMAN: -- pieces of authority.

4 JUSTICE GORSUCH: -- let me -- let me
5 just put a pin in it there because then we have
6 cases like Beacon, we have cases like Land
7 versus Dollar, we have cases like Smithers
8 versus Smith, where there are jurisdictional
9 issues or -- or sovereign immunity issues,
10 right, amounts in controversy and -- and
11 intertwined. Again, default rule is jury.
12 That -- that's -- and I just wonder. Now
13 Congress, maybe -- maybe it has the power to
14 displace that. May -- may -- maybe, you know,
15 question mark, but maybe, right?

16 But, if the default rule through
17 history has always been intertwined issues go to
18 the jury, and we have -- have a lot of cases,
19 why shouldn't we at least, as a matter of
20 constitutional avoidance perhaps or statutory
21 interpretation perhaps, read this statute to
22 conform with those normal background principles,
23 absent some contrary evidence from you?

24 MS. SHERMAN: I think it is the nature
25 of -- the unique nature of PLRA exhaustion.

1 And -- and we talk about --

2 JUSTICE GORSUCH: Why is exhaustion
3 different than sovereign immunity or amount in
4 controversy then? Maybe that has to be --

5 MS. SHERMAN: There --

6 JUSTICE GORSUCH: -- the nature of
7 your argument.

8 MS. SHERMAN: -- there is a
9 distinction with those jurisdictional cases
10 in -- in general, and one is that jurisdiction
11 generally, those jurisdictional cases, they are
12 closing the courthouse door at least practically
13 speaking to that -- that litigant.

14 Also, there is a -- a collateral
15 estoppel effect to the fact-finding on
16 jurisdiction, where that is not true here.
17 And --

18 JUSTICE GORSUCH: It's -- it's hard to
19 see those in -- in any of our cases, though,
20 resting on any of that. They -- they seem to be
21 resting on the notion that you -- you have a
22 presumptive right to a jury --

23 MS. SHERMAN: In none of the
24 jurisdictional --

25 JUSTICE GORSUCH: -- in this country.

1 MS. SHERMAN: -- cases was it an issue
2 that was a prerequisite to suit. If Congress
3 can say what has to be proven in order to --

4 JUSTICE SOTOMAYOR: But it's not a
5 prerequisite to suit. We called it an
6 affirmative defense. The defendant -- the --

7 JUSTICE GORSUCH: Yeah, sovereign
8 immunity.

9 JUSTICE SOTOMAYOR: -- plaintiff
10 doesn't even have to allege it. So it's not a
11 prerequisite to suit. It's an affirmative
12 defense. And I don't know of any other
13 affirmative defense that we've said isn't
14 subject -- and I think this is --

15 JUSTICE GORSUCH: Sovereign immunity,
16 yeah.

17 JUSTICE SOTOMAYOR: Sovereign immunity
18 is an affirmative defense, and we require to go
19 to a jury.

20 MS. SHERMAN: This Court said in
21 Porter versus Nussle that PLRA exhaustion was an
22 affirm -- was a prerequisite to suit, that that
23 is the term --

24 JUSTICE SOTOMAYOR: What -- but, when
25 we got to the issue in Jonas, we said it's an

1 affirmative defense.

2 MS. SHERMAN: It's affirmative
3 defense. It doesn't change the fact that it is
4 a prerequisite to suit.

5 JUSTICE KAGAN: Well, whatever it is,
6 right, you have conceded that it's completely
7 intertwined with the merits in this case,
8 correct?

9 MS. SHERMAN: One -- one correction.
10 I've -- we have conceded that it's intertwined.
11 I don't concede --

12 JUSTICE KAGAN: I'm --

13 MS. SHERMAN: -- that it's completely
14 entwined or --

15 JUSTICE KAGAN: Okay. Well, let's
16 just take a -- an example, which is a -- a -- a
17 prisoner says he tore up my grievance papers,
18 and that is the claim. You know, that --
19 that's -- it's also the exhaustion question,
20 right, because, if he tore up his grievous --
21 grievance papers, then the grievance process
22 wasn't available to him. So that's the nature
23 of the exhaustion question.

24 But it's as well the nature of the
25 substantive claim that he tore up my grievance

1 papers and in -- in some kind of retaliatory
2 act, right? So let's say that. Completely
3 intertwined?

4 MS. SHERMAN: No.

5 JUSTICE KAGAN: No?

6 MS. SHERMAN: No.

7 JUSTICE KAGAN: Why?

8 MS. SHERMAN: There is an intertwining
9 of the fact of whether the -- somebody at the
10 prison facility tore up the grievance.

11 JUSTICE KAGAN: Okay. So that's --

12 MS. SHERMAN: That's the intertwined
13 fact.

14 JUSTICE KAGAN: -- that's good enough
15 for me.

16 MS. SHERMAN: Okay.

17 JUSTICE KAGAN: So in -- the -- the
18 question of exhaustion is going to depend on
19 somebody's finding of whether the warden tore up
20 his grievance papers. And, similarly, on the
21 merits, it's going to depend on somebody's
22 finding of whether the warden tore up his
23 grievance papers.

24 MS. SHERMAN: That is the overlapping
25 fact, but exhaustion is also going to look at

1 what was the grievance process, what was the
2 system setup, were there other avenues.

3 JUSTICE KAGAN: I don't really think
4 so, General. I mean, I think, if, like, the
5 warden tears up your grievance papers, somebody
6 is going to say that the exhaustion process
7 wasn't available in the way it should be
8 according to *Ross v. Blake*.

9 So, in the end, the same fact is going
10 to be dispositive as to both these issues. And
11 let's just stipulate that in some cases that
12 might be --

13 MS. SHERMAN: Okay.

14 JUSTICE KAGAN: -- and that that's the
15 cases that we're talking about here. And so
16 then I think that the question that Justice
17 Gorsuch, for example, was asking is, okay, when
18 that is the fact, that's the crucial fact,
19 whether it's *Beacon Theatres*, whether it's
20 *Beacon Theatres* plus the default rule of the
21 Seventh Amendment, it should be the jury that
22 decides that question, shouldn't it?

23 MS. SHERMAN: And the jury would be
24 deciding that question here because the jury --
25 when *Richards* comes back, the jury is going

1 to --

2 JUSTICE KAGAN: But you see first you
3 have to convince the judge of the exact same
4 fact because, if you can't convince the judge,
5 you can't get to the jury. And so that seems as
6 though, well, if you have to convince the judge
7 before you get to the jury, the jury right
8 doesn't need all that much.

9 MS. SHERMAN: I -- I disagree because
10 I -- you know, even Moore's Federal Practice has
11 said when there is a -- a resolution of a
12 preliminary matter, for example, something like
13 exhaustion, it's not a -- a -- a merits
14 decision. It's not -- you are not deciding the
15 merits.

16 JUSTICE KAGAN: So that's --

17 MS. SHERMAN: What you are --

18 JUSTICE KAGAN: -- that seems right as
19 a general matter because the questions of fact
20 are not so intertwined as a general matter.

21 But where they are so intertwined so
22 that the question of fact that you're asking the
23 judge to decide is essentially the same as the
24 question of fact that you're asking the jury to
25 decide, in that context, which won't be every

1 context, but in that context, to say that you
2 have to convince the judge that you're right
3 before you get to the jury seems kind of like a
4 flipping of the usual default rule that Justice
5 Gorsuch was talk -- talking about.

6 MS. SHERMAN: You're convincing the
7 judge of exhaustion. And then, because -- what
8 saves the day is that collateral estoppel
9 wouldn't apply. And so, when you're coming
10 back, the jury is fully acting as the
11 fact-finder in that case.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas?

15 JUSTICE THOMAS: This was dismissed
16 without prejudice --

17 CHIEF JUSTICE ROBERTS: No.

18 JUSTICE KAGAN: You're not done,
19 sorry.

20 CHIEF JUSTICE ROBERTS: Counsel --
21 you're not, yeah.

22 (Laughter.)

23 MS. SHERMAN: I'm sorry.

24 JUSTICE THOMAS: This was dismissed
25 without prejudice, right?

1 MS. SHERMAN: Yes.

2 JUSTICE THOMAS: So what preclusive
3 effect would that have?

4 MS. SHERMAN: Well, it would have no
5 preclusive effect. Mr. Richards can come back
6 and he can -- he can come back. He still has to
7 convince a judge that he has exhausted. And
8 then, when it gets to a jury, there would be no
9 preclusive effect.

10 JUSTICE THOMAS: And he would have a
11 complete trial on whether or not his filings
12 were destroyed or his grievances torn up?

13 MS. SHERMAN: In -- in part. I mean,
14 he -- he would have a trial, a full trial, on
15 his First Amendment claim.

16 JUSTICE THOMAS: Exactly.

17 MS. SHERMAN: And that would include
18 not just whether a grievance was torn up or --
19 or he was threatened but the reasons for that,
20 the motives, the -- that there -- there would be
21 a more extensive inquiry appropriate to the
22 First Amendment.

23 CHIEF JUSTICE ROBERTS: Justice Alito?

24 JUSTICE ALITO: On this issue of the
25 default rule, I thought the Seventh Amendment

1 was limited to suits at common law and,
2 therefore, applies only if a particular claim is
3 a claim that could have been asserted at common
4 law or is a close analog to a claim that could
5 be asserted at common law.

6 So, in light of that, I don't know why
7 there's -- I don't know where this idea that
8 there's a default rule in favor of jury trial
9 with respect to every claim for damages, every
10 new claim at law that Congress may create. Am I
11 wrong?

12 MS. SHERMAN: I -- I agree that there
13 is no right to a jury trial here on exhaustion,
14 and the reason is it didn't exist in 1791. The
15 closest analogs we have are equitable defenses
16 that would have been heard by judges and not by
17 juries.

18 JUSTICE ALITO: Thank you. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: Counsel, if we
22 limited the rule to your situation, meaning he's
23 not precluded because he can come back because
24 of the law that Justice Alito pointed to, the
25 rape law, I'm not sure that's true because is he

1 alleging rape or is he alleging First Amendment
2 violation?

3 MS. SHERMAN: Under the Prison Rape
4 Elimination Act, First Amendment retaliation for
5 claims of sexual abuse --

6 JUSTICE SOTOMAYOR: All right.

7 MS. SHERMAN: -- are included in it.

8 JUSTICE SOTOMAYOR: So that's it. But
9 what happens to the ordinary prisoner? If we
10 announced the rule that you want us to announce,
11 which is exhaustion never goes to a jury, in the
12 mine-run of cases that are not rape-related,
13 prisoners are precluded, practically speaking.
14 We have an amicus brief that says that most
15 exhaustion requirements are -- half of them,
16 half the states, are 15 days or less.

17 And in the others, they are matters of
18 days more than that but no more than 30. Most
19 of the time, when you file a suit as a prisoner,
20 it takes -- the answer takes 30 days. So most
21 cases as a practical matter would be precluded
22 if we adopt your rule that exhaustion under all
23 circumstances is not preclusive.

24 MS. SHERMAN: I don't agree that in
25 most cases the prisoner would not be able to

1 return. I agree that their -- the time frames
2 for --

3 JUSTICE SOTOMAYOR: Why not?

4 MS. SHERMAN: -- grievances are very
5 short. Because --

6 JUSTICE SOTOMAYOR: So, if -- if
7 they're very short, it seems to me, as a
8 practical matter, I can't see how almost any
9 prisoner could go back.

10 MS. SHERMAN: You have 31 states, the
11 District of Columbia, and the -- Federal Bureau
12 of Prisons, all that allow for some level of
13 discretion to excuse untimeliness, and --

14 JUSTICE SOTOMAYOR: Wait a minute.
15 That depends on you, meaning the prison. Why
16 would a prison ever do it? Are you aware of any
17 prison that says you failed to exhaust, but now
18 you can come back?

19 MS. SHERMAN: The reason -- I -- I --
20 I assume that when they put it -- they can --
21 they don't have to put it in their policy, so if
22 they put it in their policy, I assume that
23 that's important to them, and --

24 JUSTICE SOTOMAYOR: I -- I -- this is
25 news to me that there is any state that says if

1 you fail to -- you go to court, they say you
2 failed to exhaust after a factual finding, that
3 we're now going to let you come back to court
4 after you've brought it back to us.

5 MS. SHERMAN: The 30 --

6 JUSTICE SOTOMAYOR: Does your state do
7 that?

8 MS. SHERMAN: Yes. Yes. We have a
9 provision. And there are many states that have
10 provisions --

11 JUSTICE SOTOMAYOR: No, no, no.
12 Point -- I'd like you -- I ask the Court to --
13 to have you give us examples of that situation
14 occurring.

15 MS. SHERMAN: I -- I can't provide
16 those examples. I don't know --

17 JUSTICE SOTOMAYOR: You can't because
18 they -- I haven't found one. The policy is
19 discretionary.

20 MS. SHERMAN: Well, I -- the -- this
21 policy is discretionary. And I -- the reason
22 that a prison system would want to do that is
23 because everything in the -- the PLRA is
24 designed to encourage, to allow the prison
25 system to work out their problems, and they do

1 want to work those out.

2 JUSTICE SOTOMAYOR: Counsel, what you
3 are proposing to me is that they have an
4 exhaustion requirement that they're willing to
5 excuse every time a prisoner goes to court, the
6 court says you failed to exhaust, and now the
7 prison's going to say come back and we'll let
8 you exhaust now anyway.

9 MS. SHERMAN: It -- it -- it will
10 depend on the circumstances. There -- there --
11 and -- and a lot of these policies say they're
12 extenuating circumstances or good cause, just
13 cause --

14 JUSTICE SOTOMAYOR: It -- it -- it
15 begs the question -- it begs the question that a
16 judge has found that the prison guard didn't
17 stop you from exhausting and now the state is
18 going to permit you to come back and try again.

19 MS. SHERMAN: I think it is in the
20 best interest of the prison systems to try to
21 work out problems. And one of the things that
22 our amicus, multi-state amicus brief, led by
23 Ohio, has pointed out is that under
24 Mr. Richards's rule, if this Court adopts it,
25 there are going to be very few prison systems

1 that want to allow for any excusal of
2 untimeliness. That's going to be a disincentive
3 for them to do that because they've already gone
4 through a jury trial.

5 Now why are they going to excuse
6 untimeliness? But, if they -- a prisoner can go
7 back and, under certain circumstances, they --

8 JUSTICE SOTOMAYOR: Huh?

9 MS. SHERMAN: There -- the
10 discretion --

11 JUSTICE SOTOMAYOR: I -- I -- I'm a
12 little lost. They've gone through a jury trial.
13 They won. And the prison is going to listen to
14 the complaint again?

15 MS. SHERMAN: No. If -- if they have
16 a jury trial and they've won --

17 JUSTICE SOTOMAYOR: Why would they
18 bother?

19 MS. SHERMAN: It's --

20 JUSTICE SOTOMAYOR: Why would the
21 state bother having -- want to?

22 MS. SHERMAN: It's -- it's if --

23 JUSTICE SOTOMAYOR: What incentive
24 does it need to?

25 MS. SHERMAN: -- there's a dismissal

1 for failure to exhaust without prejudice. The
2 question is whether Richards's rule incentivizes
3 any kind of discretion.

4 JUSTICE SOTOMAYOR: All right.

5 MS. SHERMAN: If -- if --

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 MS. SHERMAN: -- if the judge is
9 deciding it, yes; if a jury, no.

10 JUSTICE SOTOMAYOR: We're on different
11 pages.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: So tell me why this
14 reading of Beacon Theatres would be wrong, that
15 although it talks about preclusion, it's not
16 particularly a preclusion case, that you can
17 draw a slightly broader principle from it, not
18 at all an all-expansive principle, that the
19 principle would be if the -- in a particular
20 case, the judge and jury and -- are -- are
21 deciding the same question, would have to decide
22 the same question and they would have to make
23 the same findings on that question in their
24 respective roles, that in that case, the jury
25 goes first and that that's necessary to protect

1 the jury right and to ensure that the judge
2 doesn't basically make that right -- you know,
3 wipe it off the table. Why -- why shouldn't --
4 why doesn't Beacon Theatres say that?

5 MS. SHERMAN: Beacon Theatres doesn't
6 say that because Beacon Theatres was not dealing
7 with a prerequisite to suit and then a later
8 legal issue.

9 Here, we have not just --

10 JUSTICE KAGAN: So that's true. I
11 mean, that's a factual distinction. And I guess
12 the question is why should that factual
13 distinction matter if what I said was true, is
14 that the -- the judge and jury are expected to
15 decide the same questions on the same facts.

16 Like, whether we label something a
17 prerequisite or an affirmative defense or
18 anything else under the sun, the same problem is
19 being presented, which is that in that case,
20 the -- it -- it seems as though it's not
21 protective of the Seventh Amendment right for
22 you have to convince the judge before you can
23 get to the jury.

24 MS. SHERMAN: When an equitable and a
25 legal claim arise together and those claims

1 have -- are -- are now in front of a -- a court
2 fully, that -- now Beacon Theaters matters and
3 now preclusion matters.

4 When you have -- it does matter. It's
5 everything that this is a prerequisite to suit
6 because, if they're -- the prerequisites aren't
7 met, this Court has said, if you have to meet
8 certain prerequisites in order to have your case
9 proceed and those prerequisites haven't been
10 met, then the case doesn't proceed.

11 This Court said that in Woodford
12 versus Ngo. And so it is everything that the
13 case -- the case isn't proceeding. And then,
14 when it does proceed, if there is no collateral
15 estoppel effect, preclusion isn't barring
16 this -- the jury from performing full on their
17 fact-finding role. And that is what -- that is
18 what the Seventh Amendment preserves and only
19 what the Seventh Amendment preserves.

20 And, here, historically --

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch?

24 JUSTICE GORSUCH: So, if -- if it were
25 impossible to re-file, exhaustion not possible,

1 would that change the analysis?

2 MS. SHERMAN: No.

3 JUSTICE GORSUCH: Because then there
4 would be preclusion effectively by the
5 district -- by the magistrate judge's order,
6 wouldn't there?

7 MS. SHERMAN: If for those prisoners
8 that can't come back because there has been
9 either a dismissal with prejudice or because
10 their -- their prison system doesn't allow for
11 any -- any kind of leeway, any discretion, for
12 those prisoners, there still is not a violation
13 of a Seventh Amendment right. Looking back
14 historically, there is no Seventh Amendment
15 right to be preserved and --

16 JUSTICE GORSUCH: So there's -- so
17 preclusion really has nothing to do with it then
18 on your theory.

19 MS. SHERMAN: It -- it has something
20 to do with the inquiry for those prisoners that
21 can come back because --

22 JUSTICE GORSUCH: I'm asking about
23 those who can't.

24 MS. SHERMAN: For those --

25 JUSTICE GORSUCH: You said same

1 result --

2 MS. SHERMAN: Yes.

3 JUSTICE GORSUCH: -- despite
4 preclusion. So something else has to be doing
5 the work.

6 MS. SHERMAN: What -- what --

7 JUSTICE GORSUCH: What is that
8 something else?

9 MS. SHERMAN: What's doing the work
10 for the prisoners that can't come back is that
11 their claims -- they have not met the exhaustion
12 requirements that Congress set forth. Congress
13 can set forth what they have to prove in front
14 of a jury, and Congress likewise can set forth
15 what they have to meet in order --

16 JUSTICE GORSUCH: Well, now that's
17 interesting.

18 MS. SHERMAN: -- to get their
19 claims --

20 JUSTICE GORSUCH: Okay. So that's
21 essentially saying Congress can choose to get
22 rid of the jury. And I thought just last term,
23 in Jarkesy, where Congress expressly said no
24 jury trial right, and we said no. We said nice
25 policy you have there. We've got the Seventh

1 Amendment here. No good.

2 Now why would we interpret the PLRA,
3 which is silent about juries, to have a rule
4 that you never get a jury? That -- that -- I --
5 I agree, I think that has to be your argument.
6 It can't be this exhaustion thing because you
7 want the same rule whether they're precluded or
8 not precluded. It's got to be that there's a
9 congressional policy, but yet there's none
10 embodied in the PLRA.

11 MS. SHERMAN: The congressional policy
12 is in the PLRA. It doesn't -- it does --

13 JUSTICE GORSUCH: It says exhaustion,
14 but it doesn't talk about juries. Why shouldn't
15 we understand that statute as we often have
16 against the backdrop --

17 MS. SHERMAN: Mm-hmm.

18 JUSTICE GORSUCH: -- of the
19 Constitution of the United States?

20 MS. SHERMAN: It doesn't -- because it
21 doesn't implicate the Constitution. And I --
22 I -- although the PLRA did not say -- Congress
23 did not say this has to be decided by a judge
24 instead of a jury, Congress was not silent on
25 that issue either. They said "no action shall

1 be brought until."

2 Now Congress also didn't use the term
3 "proper exhaustion." But this Court said
4 everything in the PLRA, the language, the way it
5 was structured, suggested that proper exhaustion
6 was -- was -- was what had to happen. That's --
7 you can't find that --

8 JUSTICE GORSUCH: Now you're not
9 disputing at common law somebody could bring
10 a -- a suit for sexual abuse and ask for a jury,
11 right? You don't dispute that?

12 MS. SHERMAN: I don't dispute that.

13 JUSTICE GORSUCH: Yeah. All right.
14 And, here, we have an individual who brought
15 such a claim, and instead of a -- and demanded a
16 jury of his peers and, instead, he got a
17 magistrate judge over Zoom.

18 MS. SHERMAN: Because Congress can set
19 what has to be required, what has to be met in
20 order to get your jury trial right. That is
21 not -- that leaves intact the Seventh Amendment.

22 JUSTICE GORSUCH: And it says you can
23 have sovereign immunity as a defense and there's
24 certain jurisdictional amounts and lots of other
25 things, and in all of those circumstances

1 through history, we've said, when those are
2 bound up with merits questions, the jury right
3 wins out. We're going to presume the jury.
4 We're not going to -- we're not going to go
5 against that presumption, absent something
6 clearer.

7 MS. SHERMAN: This Court has given
8 district courts even in the jurisdictional
9 context wide authority to decide the mode of how
10 to decide jurisdictional questions.

11 And this Court has said when it is
12 dependent -- and I read -- I read Land versus
13 Dollar to be pretty much wholly dependent, the
14 jurisdictional question, on get -- you can't
15 answer it until you get to the merits. And then
16 the -- the -- the Court has said, you know, it
17 should go to a jury.

18 JUSTICE GORSUCH: Yeah.

19 MS. SHERMAN: There is nothing stop --
20 in the jurisdictional context, especially
21 because the door is closing for that litigant,
22 there's -- there's nothing that stops the
23 jury -- the judge from having that discretion.
24 Here, the barrier is the language of the PLRA.

25 JUSTICE GORSUCH: Yeah. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 Justice Barrett?

4 Justice Jackson?

5 JUSTICE JACKSON: Can I just ask you
6 about the very last thing you said? Because I
7 think the thing that is puzzling me so much
8 about your argument is that even before we had
9 Beacon Theatres, we have the intertwinement
10 principle being articulated -- articulated in
11 cases like Land versus Dollar and Smithers.

12 And so, in Land versus Dollar, which
13 involved sovereign immunity, the Court says you
14 have to go to the jury because this is the type
15 of case where the question of jurisdiction is
16 dependent on the merits.

17 In your response to Justice Gorsuch,
18 you seem to say that the case we have before us
19 is not the same. So can -- can I -- can I
20 understand why if, as Justice Kagan points out,
21 the critical fact is did your client do what
22 he's being accused of doing that resulted in the
23 grievance not being filed -- and that's the same
24 fact in both the merits and this exhaustion
25 question -- why is this not one in which both of

1 those are so bound up that you can't separate
2 them out in the way that you would like to?

3 MS. SHERMAN: I -- I'm not going to
4 fight with the idea that they're intertwined. I
5 do disagree that they are inextricably
6 intertwined. There are things that have to be
7 decided in -- for First Amendment purposes that
8 don't need to be decided for exhaustion and vice
9 versa. But, in the end, it doesn't matter
10 because what is different here from the
11 jurisdictional context is that jurisdiction
12 itself is different.

13 This Court typically, you know,
14 because it's -- this Court just is not going to
15 be acting ultra vires, is deciding that
16 logically --

17 JUSTICE JACKSON: But different in
18 what way? I mean, you say the reason why
19 exhaustion deserves this special treatment is
20 because it's a prerequisite to suit. Well, so
21 is jurisdiction. You have to convince the Court
22 that they have jurisdiction in order to allow
23 the suit to proceed.

24 So I don't understand why that's not
25 the same for the purpose of this analysis.

1 MS. SHERMAN: There are still critical
2 distinctions. This Court typically is
3 looking -- is going to try to look at
4 jurisdiction at the -- the outset of the case
5 but may not be able to. And -- but this Court
6 has the authority and the obligation to revisit
7 subject matter jurisdiction at any time in a
8 case.

9 JUSTICE JACKSON: No, I understand.

10 MS. SHERMAN: Congress has said --

11 JUSTICE JACKSON: But we're at the
12 beginning. We're at the beginning. And the
13 obligation at the beginning for all courts in
14 the federal system is to assure that you have
15 jurisdiction before you continue. So we're at
16 the beginning for both jurisdiction and
17 exhaustion, and it involves consideration of a
18 fact that you've said at least in your briefing
19 is intertwined with the fact of the merits.

20 I -- I don't understand, first of all,
21 why preclusion -- I appreciate that Beacon
22 Theatres has the preclusion language. But this
23 principle, as I'm now talking about it, predates
24 Beacon Theatres. It has nothing to do with
25 preclusion. And so help me to understand how

1 you get around the what I'll call Land versus
2 Dollar problem.

3 MS. SHERMAN: There are distinctions
4 with -- with the -- the subject matter
5 jurisdiction inquiry. The court is generally
6 deciding it at the beginning, and the judge is
7 doing it without a jury. It is the rare
8 circumstance where the judge --

9 JUSTICE JACKSON: And we said in this
10 case, when the fact is intertwined, you had
11 to --

12 MS. SHERMAN: When it's intertwined,
13 this Court still has expressed that the district
14 court has discretion to decide that but suggests
15 that when they're -- it's dependent, that it
16 should go to a jury. There's no barrier at that
17 point in terms of this Court's jurisdiction to
18 sending it to a jury.

19 JUSTICE JACKSON: Thank you.

20 MS. SHERMAN: That's not true with
21 exhaustion.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 MS. SHERMAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Ms. McGill.

1 ORAL ARGUMENT OF LORI ALVINO MCGILL
2 ON BEHALF OF THE RESPONDENT

3 MS. MCGILL: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 I just wanted to begin with two
6 clarifying points. This is the first time in
7 this five years of litigation that the State has
8 represented that the -- all of the claims might
9 be able to be exhausted. The First Amendment
10 claim that was the subject of the Sixth
11 Circuit's decision here, as far as we can tell,
12 is not protected by the PREA policy. And the
13 Sixth Circuit held that exhaustion and the
14 merits here were completely coterminous under
15 Sixth Circuit First Amendment law.

16 The State also agrees that the
17 historical facts at issue here are of the type
18 that juries decide, and I think that makes this
19 an easy case on the actual question presented
20 because, whatever else is true, this is a 1983
21 action for money damages. So the jury must
22 resolve those facts regardless of how you
23 characterize exhaustion. That is the point of
24 Beacon Theatres, which is just a specific
25 application of the general rule that even truly

1 threshold issues must be deferred to the jury
2 when they're intertwined with the merits.

3 It's no answer to say that the facts
4 could be relitigated in front of a jury maybe if
5 and only if the case proceeds. It's simply not
6 good enough that the jury trial right might
7 sometimes be preserved.

8 And the State's suggestion that
9 judicial findings would not be binding on a
10 future hypothetical fact-finder really gives the
11 game away. The only reason that would be so is
12 because of the Seventh Amendment. That was this
13 Court's unanimous holding in *Lytle*. And there's
14 certainly nothing in the statute or the federal
15 rules that would suggest the non-binding factual
16 findings procedure that the State suggests here.

17 The State warns that having jury
18 trials on exhaustion will undermine the goals of
19 the PLRA. Those very same arguments were
20 presented and rejected in *Jones*, and they're
21 even less persuasive here.

22 The State's approach would not reduce
23 the number of trials required. We're talking
24 about the cases that have survived judicial
25 screening and Rule 56, the needles in the

1 haystack as it were. Regardless, policy
2 arguments are no match for the Bill of Rights.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Are you suggesting
5 that the exhaustion -- or your exhaustion
6 argument has historical analogs?

7 MS. MCGILL: I'm suggesting that this
8 Court held in Del Monte Dunes that a 1983 action
9 at law for damages is an action at law for
10 Seventh Amendment purposes.

11 And I think the State has conceded,
12 and we submit as well, that there is no precise
13 historical analog for the specific theory of the
14 affirmative defense in this case.

15 And I think Del Monte Dunes tells you
16 that when that is so, you look to the functional
17 considerations, the -- the divide between the
18 judge and jury, and, predominantly, factual
19 issues are for the jury as a default rule.

20 CHIEF JUSTICE ROBERTS: Why -- why
21 isn't it enough for you to get the right to a
22 jury after an exhaustion determination if that
23 determination is non-binding?

24 MS. MCGILL: Two things. I'm not sure
25 why it would be non-binding. But the second is,

1 this -- in this lawsuit, Mr. Richards got past
2 summary judgment on a theory of unavailability
3 under Ross versus Blake and a First Amendment
4 claim that the Sixth Circuit said stated a prima
5 facie case for -- for First Amendment
6 retaliation.

7 He got to the point where he should
8 have had a jury decide that. The Seventh
9 Amendment can't turn on whether, after
10 dismissal, a pro se plaintiff might be able to
11 file Lawsuit 2.0 on -- on some of these claims.

12 CHIEF JUSTICE ROBERTS: Well, why not?
13 I -- I mean, it -- it -- if the prior
14 determination without a jury is not binding,
15 what exactly has been taken away? If you can
16 proceed to litigate before a jury with respect
17 to exhaustion, what -- what's the great loss?
18 The time, of course, but --

19 MS. MCGILL: Other than five years
20 of --

21 CHIEF JUSTICE ROBERTS: -- but he's
22 got time on his hands, right?

23 MS. MCGILL: -- of effort.

24 CHIEF JUSTICE ROBERTS: Yeah.

25 MS. MCGILL: It's no small feat for a

1 litigant like Mr. Richards, who was representing
2 himself throughout these proceedings until the
3 Sixth Circuit appointed counsel, to even get a
4 case filed and before a court and all the way
5 past summary judgment. So I think that's a
6 significant consideration.

7 But our, you know, second point is
8 that I think, you know, the modern Restatement
9 of Judgments would say that once an issue is
10 finally decided, the words "without prejudice"
11 are not magic words that mean that nothing has
12 actually been decided.

13 And I don't think the State would take
14 the position that in this hypothetical Lawsuit
15 2.0, Mr. Richards could re-argue the very
16 thwarting facts and allegations that were the
17 basis of both the unavailability claim and the
18 First Amendment claim.

19 JUSTICE BARRETT: Counsel, can I ask
20 you a question? And this is a methodological
21 one. In some ways, this case presents the
22 problem that we've seen in the Second Amendment
23 context because this is a history and tradition
24 test, but it's one that goes all the way back to
25 Justice Story in, like -- like, 1812, right?

1 And, you know, in other cases, we've been able
2 to draw analogs based on the cause of action.

3 And I think that's a -- a more or less
4 stable line when you're trying to find a -- a
5 historical analog, is this more like a common
6 law or -- or an equitable question. This
7 defense thing is a lot harder, right, especially
8 since there was no really good analog at the
9 time of the founding.

10 So I think what we have now is
11 Congress coming up with something new and then
12 how do -- what do we do in the face of
13 historical uncertainty.

14 And, you know, functional
15 considerations may guide, but I guess what I'm
16 trying to figure out -- and this is really just
17 a question -- I mean, it's true, as you say,
18 that one set of circumstances we could look at
19 in making a judgment about whether this goes to
20 a jury or has to go to a jury if he invokes the
21 Seventh Amendment right is the factual nature of
22 it.

23 Another one, though, is does Congress
24 have some room here to create new defenses that
25 are functioning more as equitable, like these

1 threshold questions.

2 And it seems to me like in Wetmore,
3 the Court did, even though jurisdiction was a
4 jury -- a jury issue in the beginning, did kind
5 of back off a little bit and said: Well, you
6 know, a judge has discretion to go one way or
7 another based on the 1875 Act that didn't lock
8 in the form of pleading.

9 So, I mean, I -- I -- I guess my
10 question is: In the face of historical
11 uncertainty, how do we weigh what Congress has
12 to say about threshold considerations? Because
13 it is clear that in the PLRA, exhaustion was
14 designed to try to weed out suits.

15 MS. MCGILL: Okay. And that's --

16 JUSTICE BARRETT: I'm not saying that
17 that's determinative.

18 MS. MCGILL: Right.

19 JUSTICE BARRETT: I'm just trying to
20 figure out how to think about it.

21 MS. MCGILL: I think I understand the
22 question. I mean, I think most of your question
23 is sort of answered by the detailed analysis of
24 the majority opinion and Justice Scalia's
25 concurring opinion, which the majority said that

1 they agreed with in full in Del Monte Dunes.

2 And, there, I mean, history certainly
3 was the guide and -- and provided the analog,
4 which is a common law, you know, tort claim for
5 damages, was the historical analog that allowed
6 the Court to say: No question that a -- a 1983
7 action for damages is an action at law.

8 And so the question is, you know,
9 how -- what work does the history do on the
10 specific issue question, and I think the Court
11 resolved that by simply saying: Where we don't
12 have a guide, we look to precedent and then, you
13 know, functional considerations.

14 And the Court described those
15 functional considerations as preserving the --
16 the jury's historic role as the trier of fact.
17 So I think it's sort of a -- a well-worn path.

18 And the -- the only thing I would add
19 is that this Court last term in Jarkesy pointed
20 out that Congress can't sort of take an action
21 at law and morph it into something else by
22 tweaking its elements or adding something or
23 narrowing it in some respect and then just
24 saying: Hey, this isn't actually the common law
25 cause of action anymore.

1 JUSTICE BARRETT: Yeah. But, in
2 Jarkesy -- I agree, but in Jarkesy, we drew an
3 analogy to fraud and said, like, this is fraud,
4 it's analogous to frog and -- fraud, not frog,
5 sorry -- fraud, and that it had an analog. And,
6 here, the problem is we don't have that same
7 line.

8 And I'm not saying that -- I'm not
9 saying that you lose. I'm just saying we
10 haven't had a case quite like this where we had
11 to make that methodological choice, which does
12 make it a -- a bit different. And I think
13 Wetmore does complicate the question -- the
14 issue a little bit for you.

15 MS. MCGILL: So I think, if you -- if
16 you wanted to take a slightly more circuitous
17 route than what Justice Scalia and the majority
18 did in Del Monte Dunes, what you would say is:
19 We have this action at law. There's no specific
20 analog. But you could still look to history to
21 see, for example, well, what are the types of --
22 you know, would a jury have -- have gotten to
23 decide factual issues with respect to an
24 affirmative defense in this type of tort action
25 and common law.

1 We think that historical answer is
2 very clear. So, even though there wasn't an
3 affirmative defense called "exhaustion" in 1791,
4 there were affirmative defenses to tort
5 liability damages, including the statute of
6 limitations. And we know that juries decided
7 factual disputes with regard to an affirmative
8 defense. It's just like --

9 JUSTICE KAVANAUGH: If -- if -- if
10 we --

11 JUSTICE ALITO: Well, along those
12 lines, I -- I want to understand the
13 implications of what you are asking the Court to
14 hold.

15 So, in Judge Posner's decision in
16 Pavey -- I know you think his logic is
17 nonsense -- he ticked off a number of other
18 questions that are threshold issues that are not
19 necessarily decided by the jury: subject matter
20 jurisdiction, personal jurisdiction, abstention,
21 forum non conveniens, venue.

22 What would be the implications of a
23 decision in your favor here on all of those?

24 MS. MCGILL: Potentially very little
25 to none if you -- if --

1 JUSTICE ALITO: Well, if there's an
2 overlap between --

3 MS. MCGILL: Right.

4 JUSTICE ALITO: -- the -- would the --
5 wouldn't the logic apply there? Or why would it
6 not?

7 MS. MCGILL: It -- it would. It
8 would, Justice Alito. I think the general rule,
9 the rule that is applied by the federal courts
10 almost uniformly -- I think uniformly, and the
11 State doesn't really take issue with it -- is
12 where you have a common factual issue. So you
13 have real intertwinement with the merits. Even
14 so-called matters in abatement or judicial
15 administration get deferred to the jury, and
16 that is because we're preserving the -- the
17 jury's historic role to resolve factual disputes
18 on the merits.

19 JUSTICE ALITO: Well, I -- I don't
20 know that we've ever -- I don't think we've ever
21 held that, and I don't know that the lower
22 courts say that that always has to be done.

23 Well, let me ask you another question
24 about the implications of this.

25 What about other exhaustion

1 requirements that are connected with a claim
2 that may have a 1791 analog? So something that
3 occurred to me -- maybe this is completely off
4 base, but it did occur to me.

5 What about a -- a Title -- exhaustion
6 under Title VII? So that has never been
7 considered to be a jury issue. Now there is a
8 right to a jury trial on a Title VII claim.
9 Congress has -- has extended it, but there's
10 an -- an argument, commentators have made the
11 argument, that the Seventh Amendment would also
12 cover that because a -- a -- a claim for
13 unlawful termination would have some 1791
14 analog.

15 So what about that?

16 MS. MCGILL: If I understand the
17 question correctly, you're asking about
18 exhaustion in the Title VII context --

19 JUSTICE ALITO: Yeah.

20 MS. MCGILL: -- and whether there
21 would be a jury trial right?

22 JUSTICE ALITO: Yeah.

23 MS. MCGILL: I mean, Judge Posner,
24 four years after Pavey, wrote a decision saying
25 exactly that, that because Title VII exhaustion

1 is very similar to the statute of limitations
2 and is an affirmative defense, there's no basis
3 in the statute or history to treat it
4 differently than another affirmative defense for
5 Seventh Amendment purposes. So, actually,
6 the -- at least the Seventh Circuit and several
7 other circuit decisions that we cite in our
8 brief have treated that as a jury trial issue
9 regardless of -- of overlap with the merits.

10 JUSTICE JACKSON: But do we really
11 have to take a position as to whether or not
12 exhaustion is a jury trial issue? I mean, I --
13 I -- I'm maybe confused, but I thought
14 intertwinement was really the principle that was
15 doing the work here so that we could assume for
16 the purpose of this argument that exhaustion
17 does not have a jury trial attached -- right
18 attached to it, but the -- your friend on the
19 other side has conceded that it is intertwined
20 with a claim that has a jury trial issue.

21 So, in that case -- in that situation,
22 we're not touching any of the cases that Justice
23 Alito mentioned or making a determination about
24 whether there's an analog to exhaustion. We're
25 assuming for the moment that there is no jury

1 trial right on the exhaustion issue and speaking
2 to what happens with respect to intertwinement.

3 Is that right?

4 MS. MCGILL: That's right, Justice
5 Jackson. You could -- and we think in most
6 cases you would normally -- just address the
7 question presented, which is about
8 intertwinement. We did brief the broader issue,
9 but that is, you know, principally because of
10 the way the State briefed it as well.

11 JUSTICE GORSUCH: And would -- would
12 one even -- even need to go that far? I mean,
13 you've got an amicus brief and others have
14 pointed out there's a long federal policy of --
15 you know, background, almost federal common law,
16 or at least an interpretive of -- of the statute
17 and -- and what constitutional avoidance
18 concerns say, unless Congress speaks more
19 clearly, we're not going to assume it took away
20 the jury trial right in cases of intertwinement
21 under the PLRA.

22 MS. MCGILL: I think that's also
23 right. I mean, Congress didn't speak to this
24 issue, and you could hold, consistent with your
25 opinion in Jones versus Bock, that Congress's

1 silence means that the ordinary procedures
2 should apply. And in this case, the ordinary
3 situation is that disputed facts about
4 affirmative defenses that are intertwined with
5 the merits go to a jury.

6 JUSTICE KAVANAUGH: If we get to
7 functional considerations that Justice Barrett
8 was raising, it does seem to me like you would
9 look at the policy of the PLRA. The Court has
10 said to look to statutory policies. And that
11 policy seems quite inconsistent with a jury
12 trial right on the exhaustion question because
13 the whole idea of exhaustion was to be speedy,
14 to have the prison be able to resolve things
15 quickly.

16 And it seems just -- you know -- you
17 know the argument on the other side, it just
18 seems generally inconsistent with the policy in
19 the PLRA. So you want to respond to that?

20 MS. MCGILL: Sure, Justice Kavanaugh.
21 Two points. I mean, I -- the State relies, I
22 think, principally upon a 1966 case called
23 Katchen versus Landy that has some language that
24 sort of suggests that congressional policy can
25 be relevant to functional considerations.

1 I think the Court has moved
2 significantly away from that, and after cases
3 like Granfinanciera, I'm not sure about the
4 continuing viability of Katchen versus Landy.

5 But the other thing is that --

6 JUSTICE KAVANAUGH: What about
7 Markman? Markman --

8 MS. MCGILL: I mean, Del Monte Dunes
9 was an application of Markman itself. And I
10 think that, you know, this case, if -- if you
11 have a spectrum from sort of -- pure historical
12 facts to legal issues, Markman is sort of on one
13 end and our case and Del Monte Dunes are on the
14 other. The -- we're not talking about
15 construing a legal term of art, you know, in
16 a -- in a legal instrument.

17 JUSTICE BARRETT: Well, my --

18 JUSTICE SOTOMAYOR: One would have
19 thought that if Congress was thinking about this
20 as requiring the judge to make a determination
21 to supplant the jury trial question, the PLRA
22 does have a list of things that a court has to
23 do without objection. It has to look at the
24 complaint and decide whether any immunities
25 apply, whether -- a bunch of other things that

1 it requires. Grievance is not one of them.

2 MS. MCGILL: That's right, Justice
3 Sotomayor. And that was part of the Court's
4 holding in -- in Jones --

5 JUSTICE SOTOMAYOR: Jonas.

6 MS. MCGILL: -- when it determined
7 this is an affirmative defense. I mean, to be
8 clear, there are other things that Congress
9 could do but hasn't done to narrow the scope of
10 cases that can get past Rule 56 and require a
11 trial.

12 But, once an issue is made, to use the
13 language from Tellabs, once a -- a genuine issue
14 of fact is made under whatever the requirements
15 are in the statute, it goes to the jury, and I
16 don't think Congress has anything to say on
17 that.

18 JUSTICE BARRETT: So, on this
19 antecedent question of whether you're entitled
20 to the jury trial right in the first place,
21 because of the analog, because of the historical
22 considerations, what have you, no circuit has
23 held that, right? So we would be kind of
24 treading into new territory that's different --
25 I mean, it goes beyond the QP. It was briefed

1 that way. And -- and let's just assume, if you
2 lose on the intertwined question, you could
3 still win if we decided that the, you know,
4 defense was entitled to a jury trial regardless,
5 that it didn't depend on factual intertwinement.

6 But isn't it the case that that would
7 be going into -- that would be striking
8 significantly new ground?

9 MS. MCGILL: In some sense, it would,
10 and in some sense, it wouldn't. I think the
11 problem with the -- the current state of the
12 law, frankly, is that the first decisions on this
13 after the PLRA was enacted came about in the
14 early 2000s. I think it was a Ninth Circuit
15 case called Wyatt. And it was before this Court
16 decided Jones. And the Court just sort of
17 referred to exhaustion as a matter of abatement
18 or a rule of judicial administration without
19 really thinking through what that means. And
20 the courts have -- have not reconsidered those
21 decisions in a meaningful way after Jones.

22 JUSTICE BARRETT: So, true, I'm not --
23 I'm not saying that they've gotten it right.
24 That's kind of an argument for, hey, they've
25 done this reflexively or they all followed the

1 first court to --

2 MS. MCGILL: Right.

3 JUSTICE BARRETT: -- answer the
4 question. But we don't have cases where circuit
5 courts or courts of appeals have reflected on
6 this issue and said here are, you know, the
7 historical analogs and the reasons why it comes
8 within the Seventh Amendment or here are the
9 functional reasons why it does or it doesn't.
10 We would be doing that for the first time,
11 right?

12 MS. MCGILL: You would. And I don't
13 think it's that different than what you did in
14 Jones, although there were a couple circuits
15 on -- on the Court's side. But I think that
16 there's a pretty well-worn path between what
17 you've held in Jones and what we know from Del
18 Monte Dunes and other cases.

19 JUSTICE KAVANAUGH: And why -- why
20 would we do that, though? I mean, just to
21 follow up on that question, that seems like a
22 big question. A lot of the questions from my
23 colleagues have pointed out the historical
24 uncertainty.

25 MS. MCGILL: Right.

1 JUSTICE KAVANAUGH: I guess I'm not
2 certain why, as a matter of prudence, we would
3 leap into something like that without lower
4 court opinions, et cetera.

5 MS. MCGILL: Yeah. I mean, I -- it
6 would be contrary to the Court's normal sort of
7 preference to decide only what must be decided.
8 I think the only reason you would do it is if
9 you thought the law is so clear that it's
10 actually the simpler path to resolution and it
11 would clarify the confusion that would, you
12 know, otherwise still exist in the courts of
13 appeals and the district courts. So that would
14 be the reason to do it.

15 JUSTICE SOTOMAYOR: Well -- well, we
16 would have to do it if we don't rule in your
17 favor on the limited Bacon -- Bacon Theatres
18 question, meaning, if we say that Beacon
19 Theatres doesn't control here for whatever set
20 of reasons we make up, then we would have to
21 reach your alternative argument that there's a
22 Seventh -- we would have to basically be saying
23 there's no --

24 MS. MCGILL: You -- you would be
25 saying in effect -- I mean, it's hard for me

1 to -- to sort of figure out what the opinion
2 looks like that rules against us on
3 intertwinement but rules for us on the broader
4 opinion, to be --

5 JUSTICE SOTOMAYOR: That -- that --

6 MS. MCGILL: -- honest, but I -- I
7 think you would have to be saying something
8 like -- well, I -- I'm not even going to sort of
9 guess --

10 JUSTICE SOTOMAYOR: Well, I -- I -- I
11 just don't --

12 MS. MCGILL: -- what that opinion
13 would look like.

14 JUSTICE SOTOMAYOR: -- I don't see --
15 I don't see how we get around Beacon Theatre,
16 rule against you, and not by definition answer
17 the broader question.

18 MS. MCGILL: Right, I mean, because,
19 if you don't think that Mr. Richards has a right
20 to a jury on his First Amendment claim, it seems
21 unlikely to me that you're going to rule for him
22 on the broader question.

23 JUSTICE SOTOMAYOR: I -- I agree.

24 JUSTICE ALITO: Well, he has a -- he
25 has a right to a jury on his First Amendment

1 claim assuming that he does -- his suit is not
2 barred for failure to exhaust. But, if we want
3 to decide this case on the narrow ground -- on
4 narrow grounds, if, in fact, he can go back and
5 exhaust now, I think Beacons Theatres is
6 completely out of the picture.

7 Beacon Theatres is either about
8 collateral estoppel -- and -- and, in my view,
9 that's what it was about -- or it's a rule of
10 equity and has nothing to do, essentially, with
11 the right to a -- the Seventh Amendment right to
12 a jury trial.

13 If it weren't about collateral
14 estoppel, the -- the -- you could -- the judge
15 could have -- the two -- the two claims could
16 have been tried. They both could have been
17 tried. You could try the -- and it wouldn't
18 matter which order -- which order you did it in.
19 You try the -- whichever one you want to do
20 first and then you try the other one.

21 If it's a rule of equity, then that --
22 a rule of equity is different from anything
23 that's protected by the Seventh Amendment.

24 MS. MCGILL: So I think, you know,
25 this Court's unanimous opinion in Lytle referred

1 to it as a constitutional mandate that the
2 Seventh Amendment -- that Lytle's Seventh
3 Amendment rights could not be protected, except
4 for a remand on a clean slate with a -- a jury
5 trial on all the issues that had already been
6 decided by the Court.

7 And it -- it did that. It -- it sort
8 of declined to apply collateral estoppel, which
9 is, I -- I think, the solution the State is
10 proposing here, only because, otherwise, the
11 Seventh Amendment would be violated.

12 But this Court has solved that problem
13 by saying ex ante we want to avoid judicial fact
14 findings that are going to extinguish legal
15 claims, so we're going to make sure the jury
16 goes first.

17 And it doesn't mean that there's exact
18 perfect -- you know, a coextensive
19 intertwinement. It's enough that the judge
20 decides a fact that the jury would have to
21 decide the other way in order to prevail on the
22 merits of the claim.

23 JUSTICE ALITO: Well, as you present
24 this, this may not be just a case about the
25 right to a jury trial on the issue of exhaustion

1 under the PLRA when there's intertwinement
2 because it may have a lot of other implications.
3 And we don't know what the implications are of
4 the logic of the argument that you're presenting
5 as to all of these other threshold issues that
6 Judge Posner set out as to other statutes that
7 have exhaustion requirements.

8 You're really asking us to -- and --
9 and go against the consensus so far of the
10 courts of appeals. You're really asking us to
11 take a big step.

12 MS. MCGILL: I think, with respect,
13 Justice Alito, it -- it would be a -- a very
14 small step if you wrote your opinion and just
15 affirm the Sixth Circuit on the ground of
16 decision there. The -- the only appellate
17 opinion I am aware of that disagrees on the
18 basic intertwinement issue is Judge Posner's
19 opinion in Pavey.

20 And, you know, so, with respect, we --
21 we don't think it would be a sea change in the
22 law to rule on the -- the narrower question
23 presented here.

24 JUSTICE KAGAN: I think one concern is
25 that even if we rule that narrowly, it still has

1 a big effect on PLRA litigation, in other words,
2 that it's easy enough for any prisoner to
3 essentially evade the exhaustion requirement by
4 pleading his claims in the right way and
5 ensuring that the case immediately goes to a
6 jury.

7 So what do you think about that?

8 MS. MCGILL: Sure. I mean, to the
9 extent there -- there are concerns about a
10 roadmap, it already exists, right?

11 This trial -- I mean, this case got
12 through Rule 56. There was going to be a trial.
13 So I'm not sure that the incentives are any
14 greater from a -- a roadmap perspective.

15 I mean, also, this Court doesn't
16 usually fashion constitutional rules assuming
17 that litigants are going to perjure themselves
18 or fabricate evidence to get past Rule 56, so
19 I -- I don't think it should do so here.

20 And the other point I would just make
21 is that this has been the rule in the Second
22 Circuit and the First Circuit more recently for
23 more than a decade. There hasn't been a flood
24 of litigation. In fact, the data show that the
25 cases filed and the trials have gone down in

1 those districts.

2 I found one case that's actually going
3 to trial in the Southern District of New York on
4 exhaustion, an intertwined case. This -- this
5 has not been a -- a big problem in the last, you
6 know, 30 years that we've had the PLRA.

7 JUSTICE ALITO: Suppose you have a
8 prisoner who's serving a lengthy prison sentence
9 and files a -- files a grievance, and the State
10 says: Well, you didn't exhaust. So the
11 prisoner says: Well, yeah, I did exhaust. I
12 put the -- I put the grievance in the box or I
13 handed it to a guard. So, at a minimum, he gets
14 a -- he gets a trip to the courthouse. He gets
15 a trip out of the prison.

16 MS. MCGILL: Well, in our client's
17 case, everything was --

18 JUSTICE ALITO: Well, I'm not
19 talking --

20 MS. MCGILL: -- over Zoom, so --

21 JUSTICE ALITO: -- about your client.
22 I'm talking about -- about other -- other --

23 MS. MCGILL: Understood.

24 JUSTICE ALITO: -- prisoners who may
25 want to take advantage of this.

1 MS. MCGILL: I mean, I -- I don't
2 think that's a --

3 JUSTICE ALITO: So then there's a
4 genuine dispute of --

5 MS. MCGILL: Right.

6 JUSTICE ALITO: -- material fact about
7 whether he -- you know, is he telling the truth?
8 Is he not telling the truth?

9 MS. MCGILL: I mean --

10 JUSTICE ALITO: Is he really going to
11 fear that on top of everything else that's
12 happened they're going to bring a perjury
13 prosecution against him?

14 MS. MCGILL: I -- I think this is not
15 a -- a new problem, right, and that the rule
16 that the Sixth Circuit adopted isn't really
17 relevant to whether a case is going to pass, you
18 know, screening and -- and all of these other
19 hurdles and get past summary judgment.

20 We're talking about the very few cases
21 that -- that get there. And district courts are
22 well-equipped to decide whether there's a
23 genuine issue of material fact even in prisoner
24 litigation.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 Anything further?

4 No?

5 Thank you, counsel.

6 Rebuttal, Ms. Sherman?

7 REBUTTAL ARGUMENT OF ANN M. SHERMAN

8 ON BEHALF OF THE PETITIONER

9 MS. SHERMAN: Thank you, Mr. Chief

10 Justice.

11 All claims, including First Amendment
12 claims here, stem from the sexual harassment
13 claim. And the PREA grievance policy for the
14 MDOC includes First Amendment retaliation.
15 That's in Joint Appendix 72, 73.

16 Mr. Richards, contrary to my friend's
17 argument, can reargue facts if he exhausts and
18 gets in front of a jury again, and that is
19 crucial here to preserving the Seventh Amendment
20 even if this Court believes that the Seventh
21 Amendment is somehow otherwise implicated.

22 Addressing Justice Barrett's questions
23 about discretion, Wetmore does -- the -- the key
24 in Wetmore is the discretion that is given to
25 the district court judge. Here, that's

1 discretion that, you know, based on historical
2 considerations and based on the -- especially
3 the functional considerations here, the fact
4 that there is no precise analog, based on the
5 functional considerations and the goals of the
6 PLRA, that discretion should -- in -- in every
7 case, it would have to -- it would -- there
8 would be no discretion, whereas that is what
9 drove the jurisdictional decisions in Wetmore
10 and other cases.

11 Justice Kagan, you asked about a
12 roadmap. It would be very easy for prisoners to
13 create disputes of fact that turned on
14 credibility, a he said/she said where those
15 cases would have to go to a jury.

16 And I think, even if there aren't
17 floodgates open now, they will be open under
18 Richards's proposed rule because it is not hard
19 for a prisoner to do that. As this Court said
20 in Woodford versus Ngo, not all -- sometimes
21 prisoners file claims in bad faith, and if they
22 want to make trouble for a corrections officer
23 they don't like or they want to get out of their
24 cell and have a respite -- these are the courts'
25 words, not mine -- they -- they will file in bad

1 faith, and you are incentivizing them to add
2 facts that will get them to a jury.

3 On a final point, it is the nature of
4 exhaustion as a prerequisite that leaves the
5 Seventh Amendment intact here because the
6 Seventh Amendment doesn't guarantee that claims
7 get to a jury, they -- it applies once the
8 claims get to a jury. And, here, once the
9 claims are getting to a jury, because exhaustion
10 has been met, as Congress intended, Mr. Richards
11 and other prisoners will have their day in
12 court.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 The case is submitted.

17 (Whereupon, at 12:51 p.m., the case
18 was submitted.)

19

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Official

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