No. 23-1324

In the Supreme Court of the United States

THOMAS PERTTU, PETITIONER

v.

KYLE BRANDON RICHARDS

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

REPLY BRIEF

Ann M. Sherman
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
ShermanA@michigan.gov
(517) 335-7628

Joshua S. Smith
Assistant Attorney General
Corrections Division

Attorneys for Petitioner

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INTRODUCTION

Relying on archaic pleading rules, Respondent Kyle Richards contends that, absent a jury, he and prisoners similarly situated will be left without a remedy if he does not receive a jury trial to determine whether he properly exhausted his administrative remedies. This is not accurate, and his concerns are unfounded. When prisoners fail to exhaust their administrative remedies, those cases are dismissed without prejudice so the prisoner can have the opportunity to use the grievance process. Moreover, the limitations period tolls while prisoners work their way through the grievance process.

Richards reveals his true aim, however, by arguing that prisoners have the right to a jury trial to decide *all* issues of fact surrounding exhaustion under the Prison Litigation Reform Act (PLRA), regardless of whether disputed facts regarding exhaustion are intertwined with the underlying merits of their claim. Br. in Opp. 13–17. This proposition has no support in the case law and, along with his misunderstanding of the PLRA, casts a shadow over his entire argument.

What is more, Richards concedes a circuit split but asks this Court to ignore a fundamental rift in the interpretation of both the Seventh Amendment and the will of Congress as plainly stated in the PLRA. Br. in Opp. 2, 13. After all, if "[t]he Sixth Circuit is clearly right—and the Seventh and Ninth Circuits clearly wrong," Br. in Opp. 2, on an issue of constitutional interpretation affecting all the prisoner litigation in those circuits, where millions of people live, then this Court should grant this Petition to resolve the split.

ARGUMENT

I. Richards misconstrues the PLRA and its jurisprudence.

Richards shows an elementary misunderstanding of the PLRA's exhaustion jurisprudence when he claims that "a finding of non-exhaustion in the PLRA context will almost always bar the claim forever." Br. in Opp. 14. When cases, like his own, are dismissed, it does not prevent a prisoner from seeking relief. Rather, the PLRA merely requires that the prisoner complete the prison's grievance process. This approach comports with one of the central purposes of exhaustion: the creation of "an administrative record that clarifies the contours of the controversy." *Porter* v. *Nussle*, 534 U.S. 516, 524–25 (2002).

Richards' argument has two key flaws. First, dismissals of prisoner cases under the PLRA for failure to exhaust are without prejudice to allow the prisoner to pursue the grievance process and then permit "the litigant to refile if he exhausts or is otherwise no longer barred by the PLRA requirements." *Bargher* v. *White*, 928 F.3d 439, 447 (5th Cir. 2019) (citing *Booth* v. *Churner*, 532 U.S. 731, 735 (2001)). See also *Boyd* v. *Corr. Corp. of Am.*, 380 F.3d 989, 994 (6th Cir. 2004) (holding that a dismissal for failure to exhaust under the PLRA "should be without prejudice"); *Gallagher* v. *Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009) (Under the PLRA, "a dismissal based on a failure to exhaust administrative remedies should be *without* prejudice.").

Second, and equally important, when a prisoner's case is dismissed for failure to exhaust, the limitations period is tolled while the prisoner exhausts his administrative remedies. *Gonzalez* v. *Hasty*, 651 F.3d 318, 323–34 (2d Cir. 2011) (holding that "equitable tolling is applicable to the time period during which a prisoner-plaintiff is exhausting his administrative remedies pursuant to the PLRA."); *Brown* v. *Morgan*, 209 F.3d 595, 596 (6th Cir. 2000) ("[T]he statute of limitations which applied to Brown's civil rights action was tolled for the period during which his available state remedies were being exhausted.").

Richards compounds his misunderstanding of the Seventh Amendment and the PLRA by arguing that prisoners have the right to a jury trial to decide *all* issues of fact surrounding exhaustion under the PLRA, regardless of whether disputed facts regarding exhaustion are intertwined with the underlying merits of their claim. Br. in Opp. 13–17. He cites no relevant authority for this novel proposition, instead relying on ancient tomes that discuss antiquated common-law pleading forms.

Not only have those dusty pleading rules been supplanted—since 1938—by the Federal Rules of Civil Procedure, but more recent case law strongly cuts against Richards' argument. Every circuit to examine the issue has held that "judges may resolve factual disputes relevant to the exhaustion issue without the participation of a jury." *Small* v. *Camden Cnty.*, 728 F.3d 265, 271 (3d Cir. 2013). See also *Lee* v. *Willey*, 789 F.3d 673, 678 (6th Cir. 2015); *Messa* v. *Goord*, 652 F.3d 305, 308–09 (2d Cir. 2011) (per curiam); *Dillon* v. *Rogers*, 596 F.3d 260, 272 (5th Cir. 2010); *Pavey* v.

Conley, 544 F.3d 739, 742 (7th Cir. 2008); *Bryant* v. *Rich*, 530 F.3d 1368, 1373–77 (11th Cir. 2008); *Wyatt* v. *Terhune*, 315 F.3d 1108, 1119–20 (9th Cir. 2003), *overruled on other grounds by Albino* v. *Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc). Richards' speculative argument has no basis in law.

II. This Court should resolve the concrete circuit split that implicates both the Seventh Amendment and the PLRA.

In analyzing the Seventh Amendment and the PLRA's exhaustion requirement, the Seventh Circuit correctly held that the two provisions do not conflict. Indeed, the Seventh Circuit's decision squares the text of the Seventh Amendment, which does not require a jury trial to determine all factual issues, with Congress's purpose in enacting the PLRA—to decrease the burden on district courts by weeding out nonviable claims. Under a proper reading of the two provisions, judges may decide exhaustion issues without a jury.

The Sixth Circuit held otherwise and, in doing so, relied on inapposite precedent. This Court should resolve the circuit split created by the Sixth Circuit's erroneous decision.

A. The Seventh Circuit's decision in *Pavey* follows the Seventh Amendment while also respecting the congressional intent behind the PLRA.

Contrary to Richards' assertions, Br. in Opp. 10–12, Judge Posner's well-reasoned opinion in *Pavey* v. *Conley*, 544 F.3d 739 (7th Cir. 2008), makes perfect

sense because it recognizes both that the Seventh Amendment does not require a jury to determine all factual issues and that Congress enacted the PLRA to relieve the burden on lower courts by filtering out non-viable claims.

The Seventh Circuit carefully analyzed the Seventh Amendment and the PLRA, concluding that the exhaustion requirement did not conflict with the Seventh Amendment. Deciding the threshold issue of exhaustion is no different than deciding subject-matter jurisdiction, personal jurisdiction, supplemental jurisdiction, or abstention, all of which require judges to decide issues of fact without a jury. *Id.* at 741. The Court also recognized that "the only consequence of a failure to exhaust is that the prisoner must go back" and exhaust the grievance process. *Id.* *Pavey* also noted that, should a jury be necessary to decide exhaustion, the result would be the absurdity of "a series of jury trials before there was a trial on the merits: a jury trial to decide exhaustion, a verdict finding that the prisoner had failed to exhaust, an administrative proceeding, the resumption of the litigation, and another jury trial on failure to exhaust." *Id.* It is difficult to square this labyrinthian result with either the Seventh Amendment or the PLRA, and for all his criticism of *Pavey*, Richards makes no attempt to do so.

The Ninth Circuit adopted *Pavey*, noting that courts have "exercised substantial discretion in fashioning exhaustion rules, though 'appropriate deference to Congress's power to prescribe the basic procedural scheme . . . requires fashioning of exhaustion principles in a manner consistent with congressional intent.' " *Albino*, 747 F.3d at 1171 (quoting *Booth*, 532

U.S. at 735). One of the key principles for exhaustion is that it "should be decided as early as feasible." *Albino*, 747 F.3d at 1170 (citing *Jones* v. *Bock*, 549 U.S. 199, 202 (2007) ("Among other reforms, the PLRA mandates early judicial screening of prisoner complaints and requires prisoners to exhaust prison grievance procedures before filing suit."). Thus, just as judges decide disputed issues of fact in a motion for summary judgment, or issues of jurisdiction and abstention, they likewise should decide whether a prisoner has exhausted administrative remedies—including when the issue is intertwined with the underlying merits of the claim. *Albino*, 747 F.3d at 1170–71. *Pavey* and *Albino*, which implement the clear will of Congress while acknowledging that the Seventh Amendment does not apply to threshold issues, make more sense than the Sixth Circuit's decision.

B. The Sixth Circuit decision is clearly incorrect and relied on its own inapposite intra-circuit precedent.

The Sixth Circuit's decision not only creates a split with the Seventh Circuit, but it is also wrong. Richards acknowledges that the Sixth Circuit relied on in-circuit precedent, *Fireman's Fund Insurance Co.* v. *Railway Express Agency, Inc.*, 253 F.2d 780, 784 (6th Cir. 1958), rather than a robust discussion of the PLRA. Br. in Opp. 6–7. And although he grudgingly admits that *Fireman's Fund* did not discuss the Seventh Amendment at all, he refers to this as "only superficially true" because the case relied on *Smithers* v. *Smith*, 204 U.S. 632 (1907) and *Land* v. *Dollar*, 330 U.S. 731 (1947). Br. in Opp. 6–7. But *Smithers* and *Land* fail to make *Fireman's Fund* applicable and

instead underscore that the Sixth Circuit's decision is based on a porous foundation.

At issue in *Smithers* was the title to 1,280 acres of land. 204 U.S. at 633. The defendant argued not only that the amount in controversy failed to meet the necessary jurisdictional requirement of $2,000, but also that the plaintiff's allegations to the contrary were fraudulent. *Id.* at 641. As in *Fireman's Fund*, the district court agreed with the defendant and dismissed the case. *Id.* at 642.

This Court reversed, in part because the plaintiff's allegations of the amount in controversy typically controlled, rendering it unnecessary for a judge to rule on this issue. *Id*. Moreover, after examining the evidence, it concluded that the value of the land in question was "much in excess of the jurisdictional amount." *Id.* at 643–44. And the district court appeared not to have considered the plaintiff's evidence. *Id.* In addition, this Court found no precedent supporting the district court's determination, particularly where the procedure that was used omitted "the ordinary incidents of trial." *Id*. at 644–45. Although "the right to a jury" constituted an ordinary incident of trial, the primary basis for reversal was the evidence itself. *Smithers* simply does not speak to the Seventh Amendment's applicability to exhaustion determinations.

Land is similarly inapposite. There, the plaintiff contended that several federal officials had refused to return stock pledged in exchange for a governmental loan. 330 U.S. at 733. The district court held a hearing on the plaintiff's motion for a preliminary injunction, after which it sua sponte dismissed the case because the suit was against the United States and thus

barred by immunity. *Id.* at 734–35. But the decision was based in part on affidavits and "had not been submitted for decision on the merits," and "the question of jurisdiction is dependent on decision of the merits." *Id.* at 735. This Court did not discuss either the Seventh Amendment or whether a jury was necessary to determine the merits.

So, while it is true that the line from *Smithers* and *Land* to *Fireman's Fund* is clear and straight, that line is not based on Seventh Amendment principles. As such, these cases serve to highlight the flawed basis of the Sixth Circuit's reasoning below.

The applicable principle that does emerge from these cases is that courts have the discretion to determine threshold issues without a jury. So long as the court provides the parties the incidents of trial, a jury is not necessary. Instead of following this line of reasoning, however, the Sixth Circuit mechanically applied the Seventh Amendment's jury requirement without regard to the other incidents of trial. The court was heedless of the precedent allowing courts to make findings of fact on threshold issues, and it countermanded Congress's intent in the PLRA. Thus, not only did the Sixth Circuit's decision create a circuit split on this issue, it was also wrong on the merits.

And on the underlying exhaustion question, the magistrate who heard the testimony and scrutinized the evidence found Richards' proofs lacking. Richards characterizes his claims as " 'serious and detailed allegations [that] cannot reasonably be considered frivolous.' " Br. in Opp. 3 (quoting App. 8a). But this Court

is not bound by the Sixth Circuit's finding here.[1] Indeed, the magistrate judge found that Richards and his witnesses lacked "personal knowledge of the incidents" at issue and, for that matter, lacked any semblance of credibility. App. 69a–76a. Richards challenges none of these findings, showing that his request for a jury is the type of "sportive filing[ ]" that the PLRA was designed to end. *Skinner* v. *Switzer*, 562 U.S. 521, 535 (2011).

CONCLUSION

For these reasons, this Court should grant this Petition.

Respectfully submitted,

Ann M. Sherman
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
ShermanA@michigan.gov
(517) 335-7628

Joshua S. Smith
Assistant Attorney General
Corrections Division

Attorneys for Petitioner

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[1] In fact, the Sixth Circuit was bound by the magistrate judge's determinations of credibility—or lack thereof—because the appellate court, unlike the magistrate judge, had no opportunity to observe the testimony. See *Moss* v. *Hofbauer*, 286 F.3d 851, 868 (6th Cir. 2002); *United States* v. *Raddatz*, 447 U.S. 667, 674–76 (1980).