No. 23-1324

In the Supreme Court of the United States

THOMAS PERTTU, PETITIONER

v.

KYLE BRANDON RICHARDS

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals (Pet. App. 1a–20a) is reported at 96 F.4th 911. The opinion of the United States District Court for the Western District of Michigan (Pet. App. 22a–28a) is not reported but is available at 2022 WL 842654.

JURISDICTION

The district court had jurisdiction over claims brought by Respondent Kyle Brandon Richards under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The district court entered judgment for Petitioner Thomas Perttu on March 22, 2022. Richards filed a timely notice of appeal by right on April 11, 2022. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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

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

INTRODUCTION

The importance of the Seventh Amendment right to a trial by jury is well recognized. Less clear, but equally important, is the central principle that undergirds the right: preservation of the right to a jury's *ultimate* determination of issues of fact where a case proceeds to trial. Embedded in that principle is a tacit limitation—the Seventh Amendment does not guarantee the right to a jury trial on every fact question within a jury-triable case. Rather, the right is implicated only when a particular issue or trial decision must fall to the jury to maintain the substance of the

common-law right as it existed in 1791. This limitation is consistent with this Court's jurisprudence—both its historical view of the Seventh Amendment and its treatment of cases involving an overlap of legal and equitable issues that implicate collateral estoppel concerns as opposed to cases where those concerns are not present.

The issue of exhaustion under the PLRA is not one for a jury. Exhaustion has no precise historical analog, and the closest analogs are forum-based equitable defenses, which were historically decided by judges, not by juries.

This understanding endures even where the facts underlying the question of exhaustion are intertwined with the merits of a prisoner's claim. In this circumstance, a judge's determination as to exhaustion does not impinge on the "substance" of the jury trial right—that right remains preserved. Where the prisoner has properly exhausted administrative remedies, a jury may then be impaneled to find the facts concerning the underlying claims and will not be bound by the judge's earlier factual determinations. This division of duties is consistent with a judge's gatekeeping role, comports with the goals of the PLRA, and protects the right to trial by jury.

STATEMENT OF THE CASE

A. The PLRA Framework

In 1970, just over 2,000 prisoner civil rights suits were filed in federal courts. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Approaches 20*, 28 Corr. L. Reporter, 69, 71 (2017). Shortly after that, filings exploded. *Id.*

In 1980, Congress took a first stab at an exhaustion provision for prisoner suits filed under § 1983. Under the Civil Rights of Institutionalized Persons Act, 94 Stat. 352, as amended, district courts could stay a prisoner's § 1983 suit for up to 180 days while the prisoner pursued "plain, speedy, and effective administrative remedies." 42 U.S.C. § 1997e(a)(1) (former). The exhaustion requirement was discretionary though—exhaustion could be required only if the state's prison grievance system met federal standards and if exhaustion was "appropriate and in the interests of justice." § 1997e(a)(1), (2).

But that exhaustion provision did not stem the tide of prisoner litigation. By the mid-1990s, correctional systems and federal courts were overburdened by a mammoth caseload of prisoner litigation. In 1995 alone, 39,053 prisoner lawsuits were filed in federal court, a rate of 24.6 per 1,000 prisoners. Schlanger, *Trends in Prisoner Litigation*, *supra*, at 71. Not surprisingly, this strained the resources of the federal court system, not to mention correctional systems.

In 1996, Congress enacted the PLRA "in the wake of a sharp rise in prisoner litigation in the federal courts." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006)

(citing *Alexander* v. *Hawk*, 159 F.3d 1321, 1324–25 (11th Cir. 1998) (citing statistics)). A significant component of the PLRA was a robust, mandatory exhaustion requirement. Congress "invigorated the exhaustion prescription" that had existed under the prior regime, now requiring prisoners to fully exhaust all of their available administrative remedies through the grievance process as a prerequisite to filing suit in federal court. *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002).

As stated by this Court, "Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits." *Id*. at 524. To further this end, "Congress afforded corrections officials time and opportunity to address complaints internally" prior to prisoners seeking relief in federal court. *Id*. at 525. By giving correctional officials the opportunity to address grievances, "corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation." *Id*. (citing *Booth* v. *Churner*, 532 U.S. 731, 737 (2001)). In addition, a prison's "internal review might 'filter out some frivolous claims.' " *Id*. (quoting *Booth*, 532 U.S. at 737). And the administrative record created by the prisons' internal grievance processes would facilitate consideration of those "cases ultimately brought to court." *Id*. (citations omitted).

The PLRA has been tremendously successful in reducing the burden on both prison officials and federal courts. From the peak of filings in 1995, within five years of the passage of the PLRA prisoner lawsuits had fallen by 43%, even though the total prisoner population grew by 23%. Margo Schlanger, *Inmate*

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

B. MDOC's grievance process

The Michigan Department of Corrections (MDOC) has two separate processes for grievances. One is the standard grievance procedure, governed by MDOC Policy Directive 03.02.130, which is not applicable here. J.A. 41–61. The other is the administrative process under the Prison Rape Elimination Act (PREA), 42 U.S.C. § 15601, *et seq*., and the Prohibited Sexual Conduct Involving Prisoners policy (effective date 04/24/2017), governed by MDOC Policy Directive 03.03.140. J.A. 62–87.

The PREA grievance procedure applies to Richards' claims of sexual abuse, harassment, and misconduct. MDOC uses a two-step process for PREA grievances, both of which must be exhausted. J.A. 74–75. MDOC will not facially reject or deny grievances alleging sexual abuse. J.A. 74–75. Instead, such

grievances must be investigated. J.A. 76. "A prisoner may file a PREA grievance at any time." J.A. 75.

A prisoner initiates the first step of the process by filing a PREA Prisoner Grievance Form (Step I). J.A. 75. Prisoners may grieve retaliation for reporting sexual abuse, harassment, or misconduct through the PREA grievance process. J.A. 72–73. PREA grievances may not be referred to MDOC staff who are the subject of the grievance. J.A. 76.

At Step I, the PREA Coordinator[1] must ensure that "a written response is provided to the prisoner within 60 calendar days of receipt of the Step I PREA Grievance," although an extension of up to 70 calendar days may be requested. J.A. 76–77. Prisoners must be notified in writing of any extensions and the due date for a response. J.A. 76–77.

Prisoners may appeal a Step I decision to Step II if they are unsatisfied with the response or the response was not timely. J.A. 77. MDOC's response to a Step II appeal is due within 90 calendar days of receipt, absent an extension, and it constitutes the final decision in the matter. J.A. 77.

C. District Court Proceedings and Evidentiary Hearing

Richards and co-Plaintiffs Kenneth Damon Pruitt and Robert Kissee filed suit under § 1983, alleging that Perttu, a Resident Unit Manager (RUM) for the MDOC, sexually harassed them and other prisoners,

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[1] Every prison has a PREA Coordinator designated by the warden. J.A. 67.

retaliated against them, and destroyed their property, in violation of the First, Fifth, and Eighth Amendments. J.A. 1–38. Perttu moved for summary judgment, asserting that Richards and his co-Plaintiffs failed to exhaust administrative remedies before filing their complaint. Pet. App. 3a. Richards and his co-Plaintiffs alleged that Perttu had destroyed their grievances or otherwise prevented them from being processed, making the grievance process unavailable. Pet. App. 30a, 37a, 59a–60a.

The district court denied Perttu's motion, finding that there was a question of fact as to whether the grievance process was available to Richards due to his allegation that Perttu interfered with his grievance filings. Pet. App. 79a–81a, 83a.

Following this ruling, the magistrate judge conducted an evidentiary hearing on the issue of exhaustion. J.A. 88–368. Evaluating the testimony, evidence, and arguments presented, the magistrate judge recommended that the district court conclude that Perttu carried his burden of establishing "that Plaintiffs failed to exhaust any of their claims before filing suit," Pet. App. 64a, 76a, and that the "administrative remedies were generally available" to Richards and his co-Plaintiffs. Pet. App. 68a.

In reaching that conclusion, the magistrate judge found that Richards' direct examinations, which relied on leading questions, undermined the credibility of his witnesses. Pet. App. 69a. The magistrate judge then discussed how the circumstances surrounding the alleged observations of Perttu destroying grievances similarly undermined Plaintiffs' credibility. Pet. App. 71a–73a. Notably, the evidence "demonstrate[d]

that RUM Perttu could not, and in fact did not, intercept and destroy all grievances filed by Plaintiffs in the relevant time":

> [E]ven on the dates that RUM Perttu worked, he testified that he only works from 7:00am to 3:30pm. Moreover, RUM Perttu did not work seven days a week every week from June 2019 to March 2020. Indeed, on at least one of the dates on which Richards alleges Perttu destroyed his grievances, January 1, 2020, Perttu testified that he was not working due to the New Years holiday.

Pet. App. 73a.

Moreover, the evidence showed that Richards had access to the grievance process:

> But even had Perttu been working every hour of every day . . . Richards actually took advantage of the grievance procedure by filing Step I grievance forms twenty-six times between June 6, 2019, and April 23, 2020.
>
> * * *
>
> Moreover, of Richards's six Step I grievance forms entered into evidence, three specifically grieved RUM Perttu, undermining any allegation that Perttu sorted through the grievances and discarded those directed towards him.

Pet. App. 73a–74a.

The magistrate judge noted that "Richards's successful use of the grievance procedure . . . directly contradicts Plaintiffs' claim that administrative remedies were effectively unavailable, and Plaintiffs' failure [to] use any of the alternative reporting methods . . . casts doubt on their alleged attempts to file PREA grievances." Pet. App. 75a.

The magistrate judge found that "Plaintiffs provided no evidence that RUM Perttu" influenced the corrections officers he supervised to destroy or not process their grievances. Pet. App. 75a. Indeed, "the credibility of Plaintiffs' witnesses was undermined by their inability to independently recollect the time or location of RUM Perttu's alleged destruction of Plaintiff's grievances, as well as the unlikely circumstances under which they claimed they observed such destruction." Pet. App. 75a–76a. For instance, as a matter of "common sense," Perttu could not have been "present to intercept every grievance" filed by Plaintiffs. Pet. App. 76a. Based on these findings, the magistrate judge recommended that the district court conclude that Richards and his co-Plaintiffs failed to exhaust their claims against Perttu and dismiss their claims without prejudice. Pet. App. 76a.

Richards and his co-Plaintiffs filed nine objections, which the district court overruled. Pet. App. 22a–28a. The district court adopted the report and recommendation and entered judgment for Perttu. Pet. App. 29a. Richards alone appealed the district court's ruling.

D. Sixth Circuit Proceedings

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

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

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

The Sixth Circuit then looked to the other circuits, noting that only the Seventh Circuit had squarely addressed the issue, in *Pavey* v. *Conley*, 544 F.3d 739

(7th Cir. 2008). There, the Seventh Circuit held that prisoners had no right to a jury trial to determine whether they had exhausted their administrative remedies under the PLRA, regardless of whether the exhaustion issue is intertwined with the merits of the case. Pet. App. 14a (citing *Pavey*, 544 F.3d at 741–42). According to the Seventh Circuit, "[j]uries decide cases, not issues of judicial traffic control." *Pavey*, 544 F.3d at 741. The Ninth Circuit agreed with the reasoning of *Pavey* in *Albino* v. *Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc) (citations omitted). Pet. App. 14a.

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

The Sixth Circuit held that the district court erred by ordering an evidentiary hearing rather than a jury trial on the issue of exhaustion, "emphasiz[ing] that a

jury trial is appropriate in these circumstances only if the district court finds that genuine disputes of material fact concerning PLRA exhaustion are 'decisive of the merits of the plaintiff's claim.' " Pet. App. 19a (quoting *Fireman's Fund*, 253 F.2d at 784).

SUMMARY OF ARGUMENT

The PLRA mandates that prisoners exhaust administrative remedies before filing a lawsuit in federal court. 42 U.S.C. § 1997e(a). Despite this precondition to suit, the Sixth Circuit held that prisoners are entitled to a jury trial when exhaustion disputes are intertwined with the merits of their claims. This conclusion is not grounded in the Seventh Amendment.

1. The Seventh Amendment permits courts to resolve disputed facts bearing on whether prisoners have exhausted their claims. The Amendment preserves the right to a jury trial as it existed under the English common law in 1791. Consistent with the Amendment's language, this Court has adhered to a "historical test," which asks two questions: (1) whether the cause of action at issue "either was tried at law at the time of the founding or is at least analogous to one that was," *Markman* v. *Westview Instruments*, *Inc.*, 517 U.S. 370, 376 (1996) (citation omitted), and (2) "[i]f the action in question belongs in the law category, . . . whether the particular [issue] . . . must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791," *id.*

This case turns on the second question, which, as this Court has emphasized, "must depend on whether the jury must shoulder this responsibility as necessary to preserve the 'substance of the common-law

right of trial by jury.' " *Tull* v. *United States*, 481 U.S. 412, 426 (1987) (quoting *Colgrove* v. *Battin*, 413 U.S. 149, 157 (1973)). The Court answers this question much like its first—by using a historical method, and "[w]here there is no exact antecedent," by "comparing the modern practice to earlier ones whose allocation to court or jury we do know." *Markman*, 517 U.S. at 378 (citations omitted).

Exhaustion did not exist in 1791, and it was not until the twentieth century that courts fully articulated the doctrine. Thus, there is no exact antecedent to look to for answers. But exhaustion's roots in courts of equity provide helpful guidance. Exhaustion was applied by those courts to promote an orderly procedure whereby an administrative forum was the appropriate starting point for a dispute. Other forum-based equitable defenses—such as the adequate remedy at law doctrine, *forum non conveniens*, abstention, and habeas corpus bars—therefore provide a suitable historical analog.

At common law, these defenses were not afforded a jury trial right. This was true regardless of whether those defenses were interposed in courts of law, in which case a court of equity would first dispose of the issue. Only where an issue at law remained would that issue be jury-triable. Because these equitable defenses were not subject to a jury determination at common law, neither should exhaustion.

Even if these historical analogs are insufficient, functional considerations should guide this Court's decision. In this regard, the PLRA's goals—"to reduce the quantity and improve the quality of prisoner suits," *Porter*, 534 U.S. at 524—would be

compromised, if not outright defeated, by a jury trial on exhaustion. The PLRA allows prison officials the opportunity to address prisoner complaints prior to federal-court interference. This, in turn, obviates the need for some prisoner lawsuits and creates an administrative record for those that are filed.

Judges also frequently decide threshold issues and are thus better positioned than juries to decide exhaustion questions. And due to the significant number of prisoner cases judges see, they are particularly well-equipped to deal with questions about a prison's internal operations. Consequently, an exhaustion question should be allocated to the judge, not a jury.

2. That a question of exhaustion is intertwined with the merits of a prisoner's claim does not change this outcome. While *Beacon Theatres*, *Inc.* v. *Westover*, 359 U.S. 500 (1959), establishes a general rule prioritizing legal issues over equitable ones, it is a prudential rule that is premised on the recognition that an equitable determination could have a collateral-estoppel effect on the merits of a legal claim. These concerns are not present for an exhaustion determination, which is a threshold, pre-merits ruling that the jury may revisit if an exhausted claim goes to trial. Further, this Court has previously considered whether application of the *Beacon Theatres* rule would undermine a federal statute. Here, the PLRA's purposes would be severely undercut by a jury trial on exhaustion.

For these reasons, the Seventh Amendment does not preserve the right to a jury trial on exhaustion of administrative remedies where disputed facts regarding exhaustion are intertwined with merits of a claim.

ARGUMENT

I. The Seventh Amendment does not preserve the right to a jury trial on factual questions concerning exhaustion.

Judges frequently decide disputed questions of fact without violating the Seventh Amendment, particularly with respect to threshold issues. It is thus no surprise that all courts of appeal to have considered the issue have 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, 269–71 (3d Cir. 2013); see also *Lee*, 789 F.3d at 677–78; *Albino*, 747 F.3d at 1170–71; *Messa* v. *Goord*, 652 F.3d 305, 308–10 (2d Cir. 2011) (per curiam); *Dillon* v. *Rogers*, 596 F.3d 260, 270–72 (5th Cir. 2010); *Pavey*, 544 F.3d at 741–42; *Bryant* v. *Rich*, 530 F.3d 1368, 1373–77 (11th Cir. 2008). These holdings are consistent with the Seventh Amendment, which applies only to issues tried by a jury in suits at common law in 1791. Exhaustion, although unknown at common law, is rooted in equity and closely analogous to traditional equitable defenses, which were not historically determined by juries.

A. This Court has held that judges can decide facts related to threshold issues—like exhaustion—without violating the Seventh Amendment.

As a general matter, "issues of law are to be resolved by the court and issues of fact are to be determined by the jury." *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935). But this broad proposition overstates the Amendment's sweep, for

"the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for fact-finding in civil cases." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 460 (1977); see also *Galloway* v. *United States*, 319 U.S. 372, 390 (1943) ("The jury was not absolute master of fact in 1791."). In this vein, this Court has held that the Seventh Amendment "was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then [in 1791] so widely among common-law jurisdictions." *Galloway*, 319 U.S. at 392; see also *Walker* v. *N. M. & S. P. R. Co.*, 165 U.S. 593, 596 (1897) ("The seventh amendment . . . does not attempt to regulate matters of pleading or practice[.]").

Judges thus frequently decide disputed questions of fact without violating the Seventh Amendment. For example, this Court has held that judges may decide questions of fact related to subject-matter jurisdiction, *Wetmore* v. *Rymer*, 169 U.S. 115, 120–22 (1898); discovery disputes, *Herbert* v. *Lando*, 441 U.S. 153, 177 (1979); class certifications, *Wal-Mart Stores*, *Inc.* v. *Duke*s, 564 U.S. 338, 351–52 (2011); evidentiary objections, *Galloway*, 319 U.S. at 390; motions for summary judgment, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 336 (1979); motions for directed verdict, *Galloway*, 283 U.S. at 391–95; and motions to set aside the verdict, *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 497–98 (1943).

This makes sense for at least two reasons. First, a judge's ability to determine fact disputes related to threshold questions is consistent with the understanding that " '[t]he Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case *once it is determined that the litigation should proceed before a court*.' " *Caley* v. *Gulfstream Aerospace Corp*., 428 F.3d 1359, 1371 (11th Cir. 2005) (quoting *Am. Heritage Life Ins. Co.* v. *Orr*, 294 F.3d 702, 711 (5th Cir. 2002)), *cert. denied*, 548 U.S. 1128 (2006). In this sense a judge acts as a gatekeeper, guarding the courthouse doors from those who seek entry but have not yet satisfied mandatory preconditions to suit. *Pavey*, 544 F.3d at 741 ("Juries decide cases, not issues of judicial traffic control.").

Second, and relatedly, "[t]he limitation imposed by the [Seventh] [A]mendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the *ultimate* determination of issues of fact by the jury be not interfered with." *In re Peterson*, 253 U.S. 300, 310 (1920) (emphasis added). In other words, the Seventh Amendment "is concerned with substance and not with form." *Dimick* v. *Schiedt*, 293 U.S. 474, 490 (1935); see also *id*. ("There is nothing in its history or language to suggest that the amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution."); *Walker*, 165 U.S. at 596 ("So long as this substance of right is preserved, the procedure by which this result shall be reached is wholly within the discretion of the legislature . . . ."). Where the jury's *ultimate* determination of the facts is not obviated, the judge may serve as factfinder.

Both of these underpinnings apply with full force in the exhaustion context. Exhaustion is a threshold question. Under the PLRA, "[u]ntil the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to." *Pavey*, 544 F.3d at 741. Further, a judge's exhaustion determination does not interfere with a jury's ultimate factfinding responsibility because dismissals for failure to exhaust are generally without prejudice.[2] See *Snider* v. *Melindez*, 199 F.3d 108, 111–12 (2d Cir. 1999) (explaining that exhaustion "is often a temporary, curable, procedural flaw"). A prisoner may later refile the lawsuit, so long as the prison's grievance procedure is satisfied. And if the prisoner's case ultimately proceeds to trial, the jury may revisit facts found by the judge that may have been relevant to the exhaustion determination. See Part II; see also *Pavey*, 544 F.3d at 742.

B. The Seventh Amendment does not preserve the right to a jury trial on any factual questions concerning exhaustion because exhaustion derives from equity.

Although the types of claims Richards brought are those to which a jury trial applies, this Court has

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[2] Along these lines, some courts have identified exhaustion as matter in abatement, *Bryant*, 530 F.3d at 1374; *Small*, 728 F.3d at 269 n.3 (citation omitted), which is unsurprising since "abatement defense[s] defeat the particular action for procedural defects that are unrelated to the merits of the plaintiff's claim," and the plaintiff can therefore "typically correct the defects and proceed in another action," *Hyman* v. *City of Gastonia*, 466 F.3d 284, 287 (4th Cir. 2006) (citing *Bowles* v. *Wilke*, 175 F.2d 35, 38 (7th Cir. 1949)).

recognized the need for a separate historical analysis for particular issues or trial decisions within jury-appropriate claims. Under this analysis, there is no exact antecedent for exhaustion. But its equitable origins and the characteristics of the doctrine show that its closest parallel lies in equitable defenses—which were historically decided by judges, not juries.

1. The Seventh Amendment guarantees a jury trial right only as to issues tried by a jury in suits at common law at the time the Seventh Amendment was adopted.

The Seventh Amendment "preserve[s]" the right to jury trial "[i]n Suits at common law." U.S. Const. amend. VII. Because the Amendment speaks in terms of preservation, this Court has long held that the scope of the right must be determined by reference to history. Indeed, "[f]rom the beginning, it has been regarded as but subservient to the single purpose of the Amendment, to preserve the essentials of the jury trial in actions at law, serving to distinguish them from suits in equity and admiralty[.]" *Dimick*, 293 U.S. at 490–91 (citation omitted); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 42 (1989) (explaining that the Seventh Amendment applies to actions "that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty") (citation omitted). Consistent with this command, "resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Dimick*, 293 U.S. at 476. See also

Baltimore & Carolina Line, *Inc.*, 295 U.S. at 657 ("[T]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.").

This historical lens does not mean that the right to a jury trial is available only in suits "which the common law recognized among its old and settled proceedings." *Parsons* v. *Bedford*, *Breedlove & Robeson*, 28 U.S. 433, 447 (1830). As this Court has noted, historical analysis allows for reasoning by analogy. Therefore, the determination whether the Seventh Amendment confers a right to a jury trial entails a two-part inquiry. A court first considers whether it is " 'dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was.' " *City of Monterey* v. *Del Monte Dunes at Monterey*, *Ltd.*, 526 U.S. 687, 708 (1999) (quoting *Markman*, 517 U.S. at 376). If a court determines that "the action in question belongs in the law category," it must "then ask whether the *particular trial decision* must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Markman*, 517 U.S. at 708 (emphasis added). See also *Tull*, 481 U.S. at 426 (" 'Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.' ") (quoting *Colgrove*, 413 U.S. at 156 n.11.).

As applied to this case, the first inquiry is straightforward. While the scope of prisoners' federal rights was significantly limited at common law, see, *e.g.*, *Ruffin* v. *Commonwealth*, 62 Va. 790, 799 (1871); *Bethea* v. *Crouse*, 417 F.2d 504, 505 (10th Cir. 1969),

following *Del Monte Dunes*, 526 U.S. at 720–21, the types of claims that Richards brought—§ 1983 claims for damages—are those for which a jury trial applies.

This conclusion is not the end of the inquiry, though. Rather, it leads to the second question—whether the particular issue of exhaustion is "proper for determination by the jury."[3] *Id.* at 718; see also *id.* at 731 (Scalia, J., concurring in part and in concurring in the judgment) ("To say that respondents had the right to a jury trial on their § 1983 claim is not to say that they were entitled to have the jury decide every issue."); *Google LLC* v. *Oracle Am., Inc.* 593 U.S. 1, 25 (2021) (rejecting an argument that the jury should decide a fair-use defense). As explained below, it is not.

2. Exhaustion did not exist at the common law, but closely analogous equitable issues were not decided by juries in 1791.

To answer the second question—whether exhaustion should be determined by a judge or jury—this Court again looks to history, asking "whether the particular issue, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted." *Del Monte Dunes*, 526 U.S. at 718; see also *Markman*, 517 U.S. at 378 ("Where there is no exact antecedent, the best hope

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[3] The practice of submitting some issues for judicial determination, while others are submitted to the jury, is consistent with Fed. R. Civ. P. 39(a) and (a)(2), which provides that a "trial on all issues so demanded must be by jury unless . . . the court . . . finds that on *some* or all of those issues there is no federal right to a jury trial." (Emphasis added).

lies in comparing the modern practice to earlier ones whose allocation to court or jury we do know . . . seeking the best analogy we can draw between an old and the new.") (citations omitted); *Tull*, 481 U.S. at 420–21 (explaining that courts must search the common law for "appropriate analogies" instead of a "precisely analogous common-law cause of action").

Although no exact antecedent for exhaustion existed at common law, its origins lie in equity. These origins and exhaustion's characteristics result in an appropriate analog—equitable defenses—for which there was no traditional right to a jury trial.

a. No historical antecedent to exhaustion existed at common law, but its origins are equitable in nature.

The doctrine of exhaustion "is as old as federal administrative law," meaning that it did not begin to take shape until the creation of the Interstate Commerce Commission in 1887. Raoul Berger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 981 n.1 (1939). Intended as a rule of "orderly" procedure designed to allow administrative bodies to perform their statutory functions without preliminary interference from the courts, *United States* v. *Sing Tuck*, 194 U.S. 161, 168 (1904), the concept first arose in tax cases in which courts of equity refused to grant injunctive relief where a plaintiff failed to pursue administrative remedies.

In *Dundee Mortgage Trust Invest Co.* v. *Charlton*, 32 F. 192, 192–93 (C.C.D. Ore. 1887), for example, a corporation brought suit in equity to enjoin the

collection of its taxes, arguing that the county assessor and county board of equalization had erred in their assessment. While the court agreed that the corporation "appear[ed] to be entitled to an injunction," *id*. at 193, it nevertheless held that the corporation was not entitled to relief because it did not seek redress from the county board of equalization, as provided by statute, *id*. at 193–94. "[T]he plaintiff, having neglected to avail itself of this means of redress, cannot maintain a suit for relief in this court." *Id*. at 195; see also *Altschul* v. *Gittings*, 86 F. 200, 202 (C.C.D. Ore. 1898) (No. 2,236) (same); *Brown* v. *Drain*, 112 F. 582, 585 (C.C.S.D. Cal. 1901) ("The remedy of one who considers himself unfairly assessed is to apply for redress to the statutory tribunal, if one is provided with the power to review.").

The exhaustion concept was applied in courts of equity in other contexts as well. In *Sing Tuck*, an immigration case in which the Court denied a writ a habeas corpus, the Court concluded that the petitioner failed to comply with the "mode of procedure which must be followed before there can be resort to the courts." 194 U.S. at 167. Explaining that "it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way," the Court reasoned that the petitioner failed to first file an appeal with the Secretary of Commerce and Labor. *Id*. at 168. The Court analogized the exhaustion requirement to habeas corpus cases arising out of state confinement:

> A familiar illustration is that of a person imprisoned upon criminal process by a state court, under a state law alleged to be

> unconstitutional. If the law is unconstitutional the prisoner is wrongfully held. Yet, except under exceptional circumstances, the courts of the United States do not interfere by habeas corpus. The prisoner must, in the first place, take his case to the highest court of the state to which he can go, and after that he generally is left to the remedy by writ of error if he wishes to bring the case here.

Id. (citations omitted). Because the petitioner failed to first resort to his administrative remedy, any attempt "to swamp the courts by resort to them in the first instance[ ] must fail." *Id.* at 170; see also *id.* ("[B]efore the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with. Whether after that a further trial may be had we do not decide."). Other cases highlight exhaustion's equitable origins. *E.g. Pittsburgh Ry.* v. *Bd. of Pub. Works*, 172 U.S. 32, 47 (1898); *United States* v. *Abilene & S. Ry. Co.*, 265 U.S. 274, 282 (1924); *United States* v. *Ill. Cent. R.R. Co.*, 291 U.S. 457, 463 (1934); *Natural Gas Pipeline Co.* v. *Slattery*, 302 U.S. 300, 310–11 (1937).

While these cases confirm exhaustion's equitable origins, the doctrine, as we understand it today, did not fully emerge until the twentieth century. See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 154 (1998) (explaining that "[i]n the early part of th[e] [twentieth] century, the doctrine was still quite amorphous, and as late as the 1920's, courts were still using other equitable doctrines . . . to decide cases that would later be considered exhaustion precedents"). Indeed, it was only in

1938, in *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938), that this Court expressly articulated the modern underpinning of the doctrine. See *Duffy*, *supra*, at 155.

In *Myers*, the Court declined a request to enjoin the National Labor Relations Board's administrative proceedings despite allegations that the NLRB lacked jurisdiction. *Id.* at 43, 46. The Court refused to grant injunctive relief, in part on the ground that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.* at 50. The Court recognized the exhaustion doctrine's equitable roots, see *id.* at 51 n.9 ("The rule has been most frequently applied in equity where relief by injunction was sought") (citation omitted), and noted the extension of the doctrine to courts of law, *id.* ("because the rule is one of judicial administration—not merely a rule governing the exercise of discretion—it is applicable to proceedings at law as well as suits in equity") (citations omitted). *Myers* stands as "the seminal decision" on the exhaustion doctrine and has been described as "complet[ing] the doctrine's evolution." Duffy, *supra*, at 155.

In short, although exhaustion has deep roots in equity, the doctrine as we know it today was unknown in the late eighteenth century. Consequently, there is no "clear historical evidence that the very . . . question" of exhaustion was a question for the jury under the common law. *Markman*, 517 U.S. at 377.

b. Traditional equitable defenses such as adequate remedy at law, forum non conveniens, abstention, and habeas corpus bars are an appropriate common-law analog for exhaustion.

With no precise analog existing in the English common law, "the best hope lies in comparing the modern practice to earlier ones whose allocation to court or jury we do know, . . . seeking the best analogy we can draw between the old and the new." *Markman*, 517 U.S. at 378 (citations omitted). In this regard, this Court has instructed that the analog be "appropriate" rather than "precise[ ]," *Tull*, 481 U.S. at 420–21, and can be drawn on the basis of function, *Markman*, 517 U.S. at 379–80.

Exhaustion's foundations in courts of equity provide a logical starting point in the search for an appropriate analog. As explained in the prior section, from its earliest articulations, it was viewed as a limitation, albeit discretionary, on a court's equitable jurisdiction. See *Charlton*, 32 F. at 195; *Altschul*, 86 F. at 202. In other words, a court of equity would not exercise its extraordinary powers where a plaintiff failed to avail itself of an available administrative process. *Gorham Mfg. Co.* v. *State Tax Comm'n of N.Y.*, 266 U.S. 265, 270 (1924) (holding that the petitioner, "having failed to avail itself of the administrative remedy provided by the statute . . . was not entitled to maintain a bill in equity"); *Ill. Cent. R.R. Co.*, 291 U.S. at 463 ("The various steps to be taken constitute parts of the administrative process which must be completed before the extraordinary powers of a court of equity may be invoked.") (citation omitted); *Slattery*, 302 U.S. 300, 310–11 (1937) ("The rule that a suitor must exhaust

his administrative remedies before seeking the extraordinary relief of a court of equity . . . is of special force when resort is had to the federal courts to restrain the action of state officers.") (citations omitted); *Island Creek Coal Co.* v. *Bryan*, 937 F.3d 738, 748 (6th Cir. 2019) (noting that "the exhaustion 'doctrine had its origin in a discretionary rule adopted by courts of equity to the effect that a petitioner will be denied equitable relief when he has failed to pursue an available administrative remedy by which he might obtain the same relief.' ") (quoting *Smith* v. *United States*, 199 F.2d 377, 381 (1st Cir. 1952)).

Thus, historically, exhaustion was an equitable defense applied by courts when another forum—an administrative tribunal or agency—was the more appropriate starting point for a dispute. Tracking this principle, this Court has said that exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy* v. *Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute*, § 1997e(a), *as recognized in Woodford*, 548 U.S. at 84–85. As to the first purpose, the exhaustion requirement "recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *Id.*; see *id.* ("The exhaustion doctrine recognizes the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes . . . *before it is haled into federal court*.") (emphasis added); *Preiser* v. *Rodriguez*, 411 U.S. 475, 492 (1973) ("Since the[ ] internal problems of state prisons involve issues so peculiarly within state authority and

expertise, the States have an important interest in not being bypassed in the correction of those problems."). As to the second purpose, "[w]hen an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *McCarthy*, 503 U.S. at 145 (citations omitted).

These twin purposes call back to early articulations of the exhaustion doctrine as a rule of "orderly" procedure. *Sing Tuck*, 194 U.S. at 168, 173. And although the exhaustion doctrine was discretionary, as opposed to jurisdictional, *Slattery*, 302 U.S. at 311 (explaining that the rule "rests in the sound discretion which guides exercise of equity jurisdiction") (citations omitted); *Abilene & S. Ry. Co.*, 265 U.S. at 282, it nevertheless was treated by courts of equity as a threshold inquiry, see *Sing Tuck*, 194 U.S. at 168, 170.

These guideposts offer a clear path in the search for an appropriate common law analog. Indeed, exhaustion's origins as a forum-based equitable defense call to mind other similar equitable defenses—the adequate remedy at law doctrine, *forum non conveniens*, abstention, and habeas corpus bars.

Adequate remedy at law. The adequate remedy at law doctrine was a fundamental principle guiding courts of equity. These courts "stood ready to fashion remedies for legal wrongs, so long as the basic requirements of equity—such as irreparable injury and no adequate remedy at law—were met." Duffy, *supra*, at 124. See also *Younger* v. *Harris*, 401 U.S. 37, 43–44 (1971) ("One is the basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will

not suffer irreparable injury if denied equitable relief."); *Morales* v. *Trans World Airlines*, *Inc.*, 504 U.S. 374, 381 (1992) ("It is a 'basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law[.]' ") (citations omitted).

The adequate remedy at law doctrine was grounded in comity and federalism concerns, with federal equity courts refusing to provide relief where it was available at law in federal courts of law, *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 297 (1943) (citation omitted), as well as in state proceedings, *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977). This doctrine, like exhaustion, thus focused on whether a court of equity should defer to another court (or forum) to hear the dispute. And, like exhaustion, courts viewed the doctrine as a threshold issue. *Brown*, *Bonnell & Co.* v. *Lake Superior Iron Co.*, 134 U.S. 530, 536 (1890) (explaining that the adequate remedy at law objection "should be taken at the earliest opportunity").

Forum non conveniens. Under this equitable, common-law doctrine, a federal court may dismiss an action in favor of an alternative forum when, among other things, "the chosen forum [is] inappropriate because of considerations affecting the court's own administration and legal problems." *Koster* v. *Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947); see also *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506–07 (1947) (explaining that the doctrine is premised on the assumption that there are "at least two forums in which the defendant is amenable to process"). Both *forum non conveniens* and exhaustion therefore permit courts to consider judicial efficiency in deciding

whether they are the appropriate forum for a case to be heard. See *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007) ("A district court . . . may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.").

Abstention. "[E]xhaustion of administrative remedies" in general and "abstention" are "related doctrines." *McCarthy*, 503 U.S. at 144. As with exhaustion, the power of a federal court to dismiss a case via abstention "derives from the discretion historically enjoyed by courts of equity." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). The driving principles behind exhaustion and abstention also share a common root—deference to state or administrative authority. See *id.* at 728 (quoting *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 334 (1943)). *Younger* abstention, for example, respects a "State's interest in pursuing an ongoing state proceeding," *Ohio Bureau of Emp. Servs.* v. *Hodory*, 431 U.S. 471, 477 (1977) (citations omitted), barring a federal court from enjoining a state prosecution, a civil enforcement action, or a unique state action that "implicate[s] a State's interest in enforcing the orders and judgments of its courts," *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 72–73 (2013). Likewise, PLRA exhaustion requires a federal court to stay its hand where a state has not had its full opportunity to regulate its own prisons by considering a prisoner's grievance.

Habeas Corpus. Federal habeas principles reinforce the analogy between exhaustion and equitable

defenses. Indeed, this Court explicitly linked PLRA exhaustion requirements to certain habeas defenses, deeming them "substantively similar." *Woodford*, 548 U.S. at 92; see also *Schlesinger* v. *Councilman*, 420 U.S. 738, 756 (1975) (noting that "the practical considerations supporting . . . the exhaustion requirement in habeas corpus . . . are similar to those that underlie the requirement of exhaustion of administrative remedies") (citation omitted).

Habeas exhaustion, like PLRA exhaustion, sounds in equity. *Withrow* v. *Williams*, 507 U.S. 680, 699 (1993) ("Concerns for equity and federalism resonate throughout our habeas jurisprudence.") (Scalia, J., concurring in part); Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. U. L. Rev. 139, 142 (2013) (habeas defenses "share features that correspond with the [habeas] remedy's historical equitable origins"). Premised on the same equitable underpinnings as administrative exhaustion, habeas exhaustion requires a prisoner to avail himself of all "available" state-court remedies before entering federal court to seek a writ of habeas corpus. 28 U.S.C. § 2254(c); see also *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 847 (1999).

The doctrine of procedural default, 28 U.S.C. § 2254(b)(1)(A), (c), another limitation on habeas relief, also shares similarities with exhaustion. It prevents federal court review of a claim that has not been properly presented to the state courts. *Woodford*, 548 U.S. at 92. Procedural default guards against "overturning a state-court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *Id.* (quoting

O'Sullivan, 526 U.S. at 845). That requirement mirrors PLRA exhaustion—giving prison systems the opportunity to correct violations before litigating in federal court. See *Rose* v. *Lundy*, 455 U.S. 509, 518–19 (1982).

3. Juries did not historically determine questions of fact related to equitable defenses analogous to exhaustion.

With these similarities in mind, these equitable defenses offer a sound analog to exhaustion, and eighteenth-century practices concerning these defenses are instructive. It is well understood that a plaintiff is not entitled to have a jury determine a disputed affirmative defense that is equitable in nature. *Liberty Oil Co.* v. *Condon Nat'l Bank*, 260 U.S. 235, 242–43 (1922) ("The equitable defense makes the issue equitable, and it is to be tried to the judge as a chancellor."); *Tull*, 481 U.S. at 417 ("[T]hose actions that are analogous to 18th-century cases tried in courts of equity . . . do not require a jury trial.") (citation omitted); *Granite State Ins. Co.* v. *Smart Modular Techs.*, 76 F.3d 1023, 1027 (9th Cir. 1996) ("A litigant is not entitled to have a jury resolve a disputed affirmative defense if the defense is equitable in nature.") (citation omitted); *Smith* v. *World Ins. Co.*, 38 F.3d 1456, 1462 (8th Cir. 1994) ("[T]he determination of equitable defenses and equitable remedies is a matter for the court to decide, not the jury."). This was true even where an equitable defense was "interposed in [an] action at law," in which circumstance the equitable defense was generally "first . . . disposed of as in a court of equity, and then, if an issue at law remain[ed], it [was] triable to a jury." *Liberty Oil Co.*, 260 U.S. at

242 (citations omitted). This equity-first order of operations was laid out by this Court over 100 years ago:

> The same order is preserved as under the system of separate courts. If a defendant at law had an equitable defense, he resorted to a bill in equity to enjoin the suit at law, until he could make his equitable defense effective by a hearing before the chancellor. The hearing on that bill was before the chancellor, and not before a jury, and, if the prayer of the bill was granted, the injunction against the suit at law was made perpetual, and no jury trial ensued. If the injunction was denied, the suit at law proceeded to verdict and judgment. This was the practice in the courts of law and chancery in England when our Constitution and the Seventh Amendment were adopted, and it is in the light of such practice that the Seventh Amendment is to be construed.

Id. at 243.

* * *

In sum, exhaustion was not part of the common law in 1791, and it has its origins in equity. This historical background, along with exhaustion's functional similarities to forum-based equitable defenses such as adequate remedy at law, *forum non conveniens*, abstention, and habeas bars—all historically non-jury issues—leads to the conclusion that the Seventh Amendment does not require juries to try exhaustion inquiries.

4. Functional considerations demonstrate that judges, not juries, should determine exhaustion questions.

Even if history did not provide a clear answer, this Court can, as a last resort, "look elsewhere"—including at "statutory policies" and the respective skills of judges and juries—to inform the proper allocation between a court or jury for purposes of the Seventh Amendment. *Markman*, 517 U.S. at 384; see also *Del Monte Dunes*, 526 U.S. at 718 (citation omitted).

Beginning with the statutory policies at issue, the PLRA's statutory history is well documented. "Congress enacted the [PLRA] . . . in 1996 in the wake of a sharp rise in prisoner litigation in the federal courts." *Woodford*, 548 U.S. at 84 (citing *Alexander*, 159 F.3d at 1324–25). The statute thus contains a variety of gatekeeping provisions "designed to bring this litigation under control." *Id*. (citations omitted). A "centerpiece" of this effort is the PLRA's exhaustion requirement. *Id*. (citation omitted).

The PLRA's exhaustion requirement was, "beyond doubt," "enacted . . . to reduce the quantity and improve the quality of prisoner suits[.]" *Porter*, 534 U.S. at 524. To this end, the provision "afford[s] corrections officials time and opportunity to address complaints internally *before* allowing the initiation of a federal case." *Id*. at 525 (emphasis added); see also *Woodford*, 548 U.S. at 93 ("The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons . . . ."). This might "obviat[e] the need for litigation" in some instances, or it might "filter out some frivolous claims." *Porter*, 534 U.S. at 525 (citing *Booth*, 532 U.S. at 737). For cases that do make

it to court, "adjudication could be facilitated by an administrative record that clarifies the contours of the controversy." *Id*. (citing *Booth*, 532 U.S. at 737); see also *Woodford*, 548 U.S. at 95 ("When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved."). These goals mirror the purposes of traditional administrative exhaustion—they safeguard "administrative agency authority and promot[e] judicial efficiency." *McCarthy*, 503 U.S. at 145.

These goals would be severely undercut if a court were to permit an exhaustion question to go to the jury. Prison officials would be denied the opportunity to address and potentially rectify complaints internally. Unexhausted claims could proceed to discovery without the benefits of full administrative record. Most critically, exhaustion questions would require either a mini-jury trial before the merits adjudication or a jury trial heard simultaneously with the merits. In either scenario, judicial resources and jurors' time would be expended on claims that should never have reached the courthouse doors. Such a result directly contradicts the PLRA's aims.

On the second point, judges' established role as gatekeepers in prisoner lawsuits supports the conclusion that judges, not juries, are "better suited" to ascertain a prisoner's compliance with the exhaustion requirement. See *Markman*, 517 U.S. at 384, 388–89 (consulting "existing precedent" and considering "the relative interpretive skills of judges and juries"); *Del Monte Dunes*, 526 U.S. at 720 (looking to "considerations of process and function"). As explained in Part

I(A), judges routinely resolve threshold issues and act as gatekeepers on factual questions that would otherwise be presented to the jury. This is especially true in PLRA cases, where, due to the sheer volume of prisoner lawsuits, *Alexander*, 159 F.3d at 1324, judges are well-acquainted with the internal operations of prison systems and their multi-level grievance processes. The screening requirement of 28 U.S.C. § 1915A reinforces this notion, as judges already ensure compliance with other aspects of the PLRA. This knowledge base has well prepared the judiciary to settle questions surrounding exhaustion under the PLRA.

These considerations provide sufficient reason to treat the disposition of questions of fact concerning exhaustion like many other factfinding responsibilities ceded to judges in the normal course of litigation.

II. The Seventh Amendment does not preserve the right to a jury trial on factual questions concerning exhaustion even when those factual questions are intertwined with the underlying merits.

At common law, the Seventh Amendment did not preserve the right to a jury trial on equitable defenses such as exhaustion. Following the merger of the courts of law and equity in 1938, however, courts have recognized that "[d]ifficulties may arise . . . when the legal and equitable issues overlap and the evidence is intertwined." *Danjaq LLC* v. *Sony Corp*., 263 F.3d 942, 962 (9th Cir. 2001); *Ross* v. *Bernhard*, 396 U.S. 531, 536–39 (1970). This Court has held that, as a prudential matter, where factual issues overlap between legal and equitable issues, jury-triable issues should

generally be prioritized. See, *e.g.*, *Beacon Theatres*, 359 U.S. at 510–11; *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 472–73 (1962).

But exhaustion remains a threshold precondition to suit that, by its nature, must be determined before the merits. With that that order of operation in mind, this Court has applied the *Beacon Theatres* principle only where an equitable claim could, through collateral estoppel or res judicata, bar a subsequent jury trial on a legal claim. Exhaustion does not present such a circumstance. And, in any event, this Court has considered departure from the *Beacon Theatres* prudential rule when it would undercut congressional intent, as it would here. For these reasons, Richards does not have a jury trial right on factual questions concerning exhaustion—even when those questions are intertwined with the merits of his claims.

A. *Beacon Theatres* created a presumption that juries should decide intertwined legal and equitable issues, but that presumption does not apply here.

Beacon Theatres stands for the proposition that, where legal and equitable claims are grounded in the same set of facts, the right to a jury trial on the legal claims should prevail, precluding a prior determination of the equitable claims. This "general prudential rule," *Parklane Hosiery*, 439 U.S. at 334, is primarily concerned with the collateral estoppel or res judicata effect that an inverse ordering would present, *id.* See also *Katchen* v. *Landy*, 382 U.S. 323, 339–40 (1966) (explaining that *Beacon Theatres* announced an "equitable doctrine," not a bright-line rule). Consequently,

all order-of-trial problems should, "wherever possible," be resolved in favor of granting a jury trial to preserve the Seventh Amendment right. *Beacon Theatres*, 359 U.S. at 510. The resolution of an exhaustion question, however, does not present such a scenario.

Beacon Theatres involved a dispute between two theatres regarding the validity of contracts in which the film distributors had given one of the theatres, Fox, the exclusive right to show "first run pictures" in the area. *Id.* at 502. Because another theatre, Beacon, "notified Fox that it considered [the] contracts . . . to be overt acts in violation of antitrust laws," *id.*, Fox filed suit seeking both declaratory judgment and an injunction against Beacon asserting an antitrust claim against it. *Id.* at 502–03. Beacon then filed a counterclaim and cross-claim that the contracts violated antitrust laws and requested treble damages. *Id.* at 503. Despite an issue of common fact among the complaint and counterclaim and Beacon's request for a jury trial on legal issues, the district court ordered Fox's claims, which were traditional suits in equity, to be tried by the court before a determination of Beacon's claims. *Id.* at 503–04. The court of appeals affirmed, holding that the district judge could try the equitable claim first, even if it might preclude a jury trial on the legal claims. *Id.* at 505.

This Court disagreed. Reasoning that trying the equitable claims first could, by way of collateral estoppel or res judicata, bar a subsequent trial on the merits of Beacon's legal claims, the Court held that order-of-trial problems be resolved in favor of granting a jury trial unless there are "imperative circumstances, circumstances which in view of the flexible procedures

of the Federal Rules we cannot now anticipate." *Id.* at 508; see *id.* at 504 ("[I]f Beacon would have been entitled to a jury trial in a treble damage suit against Fox, it cannot be deprived of the right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first."); see also *Parklane Hosiery*, 439 U.S. at 333 ("Recognition that an equitable determination could have collateral-estoppel effect in a subsequent legal action was the major premise of . . . *Beacon Theatres*.").

Dairy Queen, decided three years later, involved similar timing concerns. There, the claims were both legal (monetary damages for breach of contract) and equitable (relief in the form of injunction), and the district court denied the defendants' demand for a jury trial on the ground that the jury claim was only "incidental" to the non-jury claim. 369 U.S. at 470. This Court, relying on *Beacon Theatres*, explained that "the right to trial by jury may [not] be lost as to legal issues where those are characterized as 'incidental' to equitable issues." *Id.* Again, the Court was concerned with the preclusive effect that a determination on equitable issues would have on legal ones. *Id.* at 472–73.

Beacon Theatres is therefore instructive in determining the order of trial on merits-based arguments. Where a party has a right to a jury trial on a legal claim, the order of trial should be arranged to preserve that right. This is consistent with "[t]he limitation imposed by the [Seventh] [A]mendment . . . that the *ultimate* determination of issues of fact by the jury be not interfered with." *In re Peterson*, 253 U.S. at 310 (emphasis added); see also *Markman*, 517 U.S. at 377 (asking "whether a particular issue . . . is itself

necessarily a jury issue, the guarantee being essential to preserve the right to a jury's resolution of the ultimate dispute").

Exhaustion questions, whether intertwined with the merits or not, do not raise the same concerns as those in *Beacon Theatres* for two interrelated reasons. First, unlike the substantive claims in *Beacon Theatres*, exhaustion is a threshold precondition to reaching the merits. Second, unlike the concerns of collateral estoppel or res judicata in *Beacon Theatres*, a judge's factual findings on exhaustion would not preclude a jury's ability to consider those same facts when determining the merits of the legal claim.

1. The presumption does not apply because exhaustion is a threshold issue that is logically precedent to the merits.

Beacon Theatres involved competing causes of action—claims for declaratory and injunctive relief on the one hand and claims for treble damages on the other. Under the historical equity-first order of operations, see *Liberty Oil Co.*, 260 U.S. at 242, the latter merits claims would have been bound by the determination of the former and thus never tried before a jury. This Court held that this would violate the Seventh Amendment.

No such scenario is present here. Unlike the claims at issue in *Beacon Theatres*, exhaustion is a threshold precondition to suit that, by its nature, must be determined before the merits. Given that it is a rule of "orderly" procedure, *Sing Tuck*, 194 U.S. at

168, "[u]ntil the issue of exhaustion is resolved, a court cannot know whether it is to decide the case or the prison authorities are to," *Pavey*, 544 F.3d at 741. See also *Perez* v. *Wis. Dep't of Corr.*, 182 F.3d 532, 534 (7th Cir. 1999) (explaining that exhaustion is "designed to prevent [a] decision on the merits"). To do otherwise would flip exhaustion on its head—deference to agency authority would be bypassed and judicial efficiency lost. See *McCarthy*, 503 U.S. at 145; *Perez*, 182 F.3d at 534 (explaining that "[e]xamining the merits first and then ordering a case dismissed on exhaustion grounds . . . would disregard the statutory approach").

Because exhaustion is a threshold issue, it does not have any bearing on a prisoner's jury trial right. Indeed, " '[t]he Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court.' " *Caley*, 428 F.3d at 1372 (quoting *Am. Heritage Life Ins. Co.*, 294 F.3d at 711); see also *Sydnor* v. *Conseco Fin. Serv. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (same). In contrast to *Beacon Theatres*, in which there were competing equitable and legal causes of action, exhaustion presents a threshold precondition to suit. Legal claims that are subject to trial by jury may be tried by that jury only after determination of the threshold issue. *Beacon Theatres* is therefore distinguishable and does not compel a different result.

2. The presumption does not apply because a judge's factual findings regarding exhaustion would not preclude a jury's consideration of the same facts when determining the merits of the legal claim.

This case differs from *Beacon Theatres* for a second reason. A jury can reexamine factual determination made by a judge regarding exhaustion when deciding the merits of the claim.

Both *Beacon Theatres* and *Dairy Queen* involved circumstances in which the right to a jury trial on a legal issue would be lost through the determination of an equitable issue. And *Beacon Theatres* itself recognized that there would be cases in which a trial court has "discretion in deciding whether the legal or equitable cause should be tried first," 359 U.S. at 510, keeping in mind that this discretion "must, wherever possible, be exercised to preserve jury trial." *Id*. See also *Markman*, 517 U.S. at 377 (asking whether the jury must hear this question to "preserve the 'substance of the common-law right of trial by jury' ") (quoting *Tull*, 481 U.S. at 426) (emphasis omitted). Here, that right can be preserved through a jury's ability to reexamine the fact questions common to exhaustion and the underlying legal claim at trial. As explained in *Pavey*:

> [A]ny finding that the judge makes, relating to exhaustion, that might affect the merits may be reexamined by the jury if—and only after—the prisoner overcomes the exhaustion defense and the case proceeds to the merits.

544 F.3d at 742.

This approach is consistent with the "flexible" nature of collateral estoppel. *Duvall* v. *Att'y Gen. of the United States*, 436 F.3d 382, 390 (3d Cir. 2006) ("Courts and commentators have consistently recognized that collateral estoppel was borne of equity and is therefore 'flexible,' bending to satisfy its underlying purpose in light of the nature of the proceedings.") (citation omitted); *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165, 176 (1984) (White, J., concurring) (explaining that collateral estoppel "is a flexible, judge-made doctrine"). Cf. *Parklane Hosiery*, 439 U.S. at 331 (explaining that trial courts have "broad discretion" in determining when offensive collateral estoppel "should be applied").

Pavey's pragmatic approach disposes of the primary concern at issue in *Beacon Theatres* and *Dairy Queen*—namely, that the "right to a jury trial of legal issues [would] be lost through prior determination of equitable claims." 359 U.S. at 511 (citation omitted). Following *Pavey*'s approach, "[i]f and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits[.]" 544 F.3d at 742; see also *id.* at 741 (explaining that "in many cases the only consequence of a failure to exhaust is that the prisoner must go back to the bottom rung of the administrative ladder").[4] Then, "if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even

[4] This approach also allays the concerns in *Fireman's Fund*, which the Sixth Circuit relied on below, that "the merits of a controversy could be summarily decided" "without the ordinary incidents of trial." 253 F.2d at 784 (citing *Smithers* v. *Smith*, 204 U.S. 632, 645 (1907)).

informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies."[5] *Id.* In short, the "substance of the common-law right of trial by jury" is preserved. *Colgrove*, 413 U.S. at 156.

Of course, some prisoners will be unable to refile their lawsuit after a judge's determination that they failed to properly exhaust administrative remedies. See *Pavey*, 544 F.3d at 742 (explaining that where a judge decides that "the failure to exhaust was the prisoner's fault . . . the case is over"). But this is simply a consequence of the exhaustion requirement functioning as intended. See, *e.g.*, *Woodford*, 548 U.S. at 89–92 (discussing the purposes of exhaustion); *id.* at 95 ("A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction."). And again, this consequence has no bearing on the Seventh Amendment, which guarantees a jury trial only after it is determined that the case belongs in court.

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[5] As recognized in *Pavey*, the ability of a prisoner to refile a case after proper exhaustion "distinguishes the issue of exhaustion from [other] deadline lines issues that juries decide." *Id.* at 741. For example, "[a] statute of limitations defense if successfully interposed ends the litigation rather than shunting it to another forum." *Id.*; see also *Messa*, 652 F.3d at 309–10 (explaining that the doctrines of exhaustion and statutes of limitations "play . . . important—and distinct—roles in our system of justice") (citation omitted).

B. Unlike in *Beacon Theatres*, a judicial determination of exhaustion would implement congressional intent.

Even assuming *Beacon Theatres* applies generally to threshold issues that would not implicate the jury's ultimate determination of the merits, its presumption should not apply in the PLRA exhaustion context.

Post-*Beacon Theatres*, this Court has noted the limitations of its order-of-trial presumption. In *Katchen*, for example, the Court explained that "[b]oth *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Courts could proceed to resolve the equitable claims first even though the results might be dispositive of the issues involved in the legal claim." 382 U.S. at 339 (emphasis added). The *Katchen* Court addressed "the mode of procedure for trying out the issue" of voidable preferences against an estate in bankruptcy proceedings. 382 U.S. at 325, 326. Recognizing the equitable jurisdiction of bankruptcy courts and the "specific statutory scheme contemplating the prompt trial of a disputed claim but without the intervention of a jury," this Court permitted a bankruptcy court to decide the preference issues in an equitable proceeding notwithstanding the argument that it would "render unnecessary a trial in a [legal] action." *Id*. at 336, 339. The Court rejected the petitioner's reliance on *Beacon Theatres* and *Dairy Queen*, noting that the rule of those cases "is itself an equitable doctrine" and that application of the rule would "dismember a scheme which Congress has prescribed." *Id*. at 339; see also *id*. at 339–40 ("Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim

first even though the results might be dispositive of the issues involved in the legal claim."); but see *Granfinanciera*, 492 U.S. at 58–59 (noting the limitations on the scope of Congress's ability to "divest [parties] of their Seventh Amendment right to a jury trial").

As in *Katchen*, this case involves a specific statutory scheme whose purpose would be compromised absent prompt resolution of disputed facts by the court. See *Katchen*, 383 U.S. at 339. Congress passed the PLRA "to reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524. The "invigorated" exhaustion requirements is the "centerpiece" of this legislation, *Woodford*, 548 U.S. at 84, and it serves dual purposes. It allows prisons to rectify their own mistakes *before* they are "haled into federal court," *id.* at 89, and promotes judicial efficiency by reducing litigation and creating an administrative record for the litigation that does occur, *id.*

Allowing potentially unexhausted claims to proceed to a jury trial subverts both purposes. See also Part I(B)(4). This subversion is further reason why the prudential rule set forth in *Beacon Theatres* should not apply to PLRA exhaustion.

That an exhaustion question is intertwined with the merits of a prisoner's claim does not transform exhaustion into a jury-triable issue. Exhaustion is a threshold issue that is logically precedent to the merits. And *Beacon Theatres*' presumption would not apply where any judicial determination of overlapping facts remains subject to later review by a jury in a trial on the merits. Finally, that a judicial determination of

exhaustion would implement congressional intent serves as yet another reason why *Beacon Theatres*' prudential rule should not apply to exhaustion questions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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