No. 23-1324

In the Supreme Court of the United States

THOMAS PERTTU,

Petitioner,

v.

KYLE BRANDON RICHARDS,

Respondent.

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

BRIEF OF *AMICI CURIAE* THE STATE OF OHIO, 23 OTHER STATES, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF THE PETITIONER

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STATEMENT OF AMICI INTEREST

When state prisoners allege that prison officials have violated their constitutional rights, competing concerns arise. On the one hand, prisoners do not lose "the protection of the Constitution altogether." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.). Any violation of the Constitution's protections is undoubtedly serious. On the other hand, prisoners can be litigious, and many of the lawsuits they file lack merit entirely. *See Porter v. Nussle*, 534 U.S. 516, 522 (2002). As this Court has observed, "when it comes to prisoner suits," the challenge is separating "not so much wheat from chaff as needles from haystacks." *Jones v. Bock*, 549 U.S. 199, 224 (2007).

Congress took on that challenge through the Prison Litigation Reform Act of 1995. The Act is designed "to reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524. It features an exhaustion requirement, which says that "[n]o action shall be brought with respect to prison conditions" under 42 U.S.C. §1983 "until" a prisoner exhausts all "administrative remedies as are available." 42 U.S.C. §1997e(a). By requiring exhaustion, the Act reduces "unwarranted federal-court interference with the administration of prisons"; it affords prison officials the "time and opportunity to address complaints internally before allowing the initiation of a federal case." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (quotation omitted). In fewer words, "exhaustion promotes efficiency." *Id.*

But the decision below, if left in place, will promote extraordinary inefficiency. According to the Sixth Circuit, the Seventh Amendment requires a jury trial on exhaustion if there is overlap between disputed facts

relevant to exhaustion and disputed facts relevant to the merits. Pet.App.16a–17a. Tracking the Sixth Circuit's logic, such an overlap will exist anytime prisoners say that officials disregarded their grievances in retaliation for their complaints. *See* Pet.App.7a–12a. Thus, any prisoner willing to declare as much can force a jury trial. As a result, busy prison officials, along with ordinary people in jury pools, will need to make room on their calendars for a deluge of (mostly meritless) jury trials.

Of course, if the Seventh Amendment truly required such a result, then that would be the price of admission to the Union. But the Seventh Amendment requires no such thing. As the state petitioner explains, history teaches that exhaustion is not the type of defense that a jury would have decided at the founding. Pet.Br.22–34. Beyond history, this Court also looks to functional considerations when assessing the Seventh Amendment's boundaries. *E.g.*, *Markman v. Westview Instruments*, 517 U.S. 370, 388 (1996). Such considerations should remove any doubt as to the correct outcome here. Indeed, it is hard to think of a less functional approach than having juries decide exhaustion. Congress, after all, meant for exhaustion to serve as a threshold defense—a way for States to *avoid* unwarranted federal litigation over prison administration.

SUMMARY OF ARGUMENT

The Seventh Amendment "preserve[s]" the right to a jury trial as it existed at "the common law." U.S. Const. amend. VII. When assessing whether a particular issue falls within the scope of this jury-trial right, the Court first examines history. But when history supplies no clear answer, "functional considerations

also play their part." *Markman*, 517 U.S. at 388; *accord Monterey v. Del Monte Dunes*, 526 U.S. 687, 718 (1999). Here, to the extent functional considerations come into play, they weigh heavily against extending the jury-trial right to disputes about a prisoner's exhaustion of administrative remedies.

I. In the 1980s and 1990s, federal courts faced tens of thousands of prisoner lawsuits each year. The number peaked in 1995, with prisoners filing almost 40,000 civil-rights lawsuits that year. *Below* 8. Most of these prisoner lawsuits were meritless, and many were frivolous. *See Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (*per curiam*).

To induce "fewer and better prisoner suits," *Jones*, 549 U.S. at 203, Congress enacted the Prison Litigation Reform Act of 1995. An exhaustion provision served as a "centerpiece" of the Act. *Woodford*, 548 U.S. at 84. The provision says that "[n]o" civil-rights lawsuit about prison conditions "shall be brought" in federal court "until" the prisoner exhausts "such administrative remedies as are available." 42 U.S.C. §1997e(a). By its plain terms, the provision supplies a threshold defense that States may invoke at "the initiation of a federal case." *See Porter*, 534 U.S. at 525. This exhaustion requirement promotes comity, as it shows due respect for the State's "procedural rules." *Woodford*, 548 U.S. at 90; *see also id.* at 95. It also "promotes efficiency," as it gives States a chance to resolve or narrow prison disputes before they reach federal court. *Id.* at 89.

II. Extending the Seventh Amendment's jury-trial right to exhaustion disputes would counteract the efficiency Congress was trying to achieve. Judges are far better positioned than juries to decide this

threshold defense. *See Markman*, 517 U.S. at 388–89. Although fact issues regarding exhaustion may sometimes arise, exhaustion remains a largely legal inquiry about a prisoner's compliance with state procedural rules. *See Woodford*, 548 U.S. at 90–91.

If the Court holds otherwise, it should expect federal courts to have their hands full overseeing jury trials about exhaustion. Even with Congress's reforms, prisoner litigation crowds the dockets of federal courts throughout this country. *See Jones*, 549 U.S. at 203. And exhaustion is a disputed issue in many, if not most, cases about prison conditions. *Below* 14–15 (collecting examples). Many prisoners already routinely try to invoke existing exceptions from the exhaustion requirement. *See Ross v. Blake*, 578 U.S. 632, 643–44 (2016). An opportunity to litigate exhaustion before a jury would invite more protracted litigation across the prison docket without assisting the courts in efficiently adjudicating the meritorious cases in that docket.

ARGUMENT

The Seventh Amendment states:

> 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.

U.S. Const. amend. VII. In discerning the scope of the jury-trial right that the Seventh Amendment "preserve[s]," this Court grapples with both historical and functional considerations.

With regard to history, the Seventh Amendment preserves the jury-trial right as it "existed under the English common law when the Amendment was adopted." *Markman*, 517 U.S. at 376 (quoting *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)). Under this historical approach, the Seventh Amendment applies to statutory causes of actions—including §1983 actions—that are "analogous to common-law causes of action" that would have traditionally been decided in a court of law rather than a court of equity. *Del Monte Dunes*, 526 U.S. at 709 (quotation omitted). But it does not follow that a jury must "decide every issue" in §1983 cases. *Id.* at 731 (Scalia, J., concurring in part and concurring in judgment). Rather, the Seventh Amendment analysis centers on whether a judge or a jury should determine "the particular issues" at stake. *Id.* at 718 (majority op.). To resolve such issue-specific questions, this Court first looks to "whether the particular issues, or analogous ones" were traditionally "decided by judge or by jury." *Id.*

But practical considerations "also play their part." *Markman*, 517 U.S. at 388. The simple reason is that history sometimes yields "no clear answer." *Id.* at 377. In those cases, this Court must "make a judgment about the scope of the Seventh Amendment guarantee without the benefit of any foolproof test." *Id.* Thus, in discerning the scope of the Seventh Amendment, this Court sometimes contemplates "functional considerations" as to the "sound administration of justice." *Id.* at 388 (quotation omitted); *accord Monte Dunes*, 526 U.S. at 718. For example, in *Markman*, the Court reasoned that "judges, not juries, are the better suited to find the acquired meaning of patent terms." *Markman*, 517 U.S. at 388. That remained true even though some patent cases require credibility determinations as to underlying issues of fact. *Id.* at 389–90.

Applying the above methodology here, the key question is whether the Seventh Amendment's jury-trial right extends to the particular issue of exhaustion. The answer is no, it does not. The state petitioner has aptly performed the historical legwork. As his opening brief explains, there is no perfect antecedent for exhaustion under the Prison Litigation Reform Act. Pet.Br.23. But equitable defenses serve as the best historical analogue to exhaustion. Pet.Br.23–33. And equitable defenses were traditionally decided by judges, not juries. Pet.Br.33–34.

With that history already laid out, the *amici* States focus on functional considerations. Those considerations weigh heavily against extending the jury-trial right to exhaustion. The *amici* States explain why in two steps. *First*, they review both the history and text of the Prison Litigation Reform Act. That review reinforces that a main goal of the Act—and its exhaustion requirement—was to make prisoner litigation

more efficient for both the States and federal courts. *Second*, the *amici* States examine today's circumstances. That examination shows why, if this Court clears the path for jury trials on exhaustion, it should expect inefficient and abusive litigation, with a corresponding waste of state and judicial resources.

I. Congress enacted the Prison Litigation Reform Act to make prisoner litigation more efficient.

To understand why Congress decided to modify the area of prisoner litigation, it helps to recall what was happening before the Prison Litigation Reform Act's passage. The *amici* States start there and then turn to the statutory text.

A. Before the Prison Litigation Reform Act, prisoners frequently filed meritless and abusive lawsuits.

Begin with some legal developments from the last century. In the 1960s, this Court established that state prisoners may bring §1983 actions challenging the conditions of their confinement. *See Cooper v. Pate*, 378 U.S. 546 (1964) (*per curiam*). During the next decade, the Court clarified that state prisoners could file §1983 lawsuits without exhausting their administrative remedies. *See Wilwording v. Swenson*, 404 U.S. 249, 251–52 (1971) (*per curiam*).

Prisoners took full advantage of the unchecked ability to file federal lawsuits. Indeed, the number of prisoner lawsuits steadily increased. In 1966, there were only a few hundred lawsuits across the country in which prisoners challenged their conditions of confinement. Roger A. Hanson & Henry W.K. Daley, *Challenging the Conditions of Prisons and Jails: A*

Report on Section 1983 Litigation 1–2,U.S. Dep't of Justice (1994), https://tinyurl.com/mudwu2bj. Whereas, in 1970, there were over 2,000 prisoner civil-rights lawsuits. Margo Schlanger, *Prison and Jail Civil Rights/Conditions Cases: Longitudinal Statistics, 1970–2021* at 2 (updated April 2022) https://tinyurl.com/5n7kw6ue. Over the course of the 1980s, the annual numbers climbed to over 20,000 cases per year. *Id.* Finally, the annual number of prisoner civil-rights lawsuits peaked at over 39,000 in 1995. *Id.*

These prisoner lawsuits were a mixed bag. To be sure, a small number shed light on unacceptable prison conditions. *E.g.*, *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980). But, on the whole, the quality of prisoner lawsuits was poor. Consider the study the National Center for State Courts conducted in 1992, which reviewed thousands of prisoner lawsuits across nine states. *See* Hanson, *Challenging the Conditions of Prisons* at 6–10. According to the study, in the "overwhelming majority" of reviewed cases (94%), prisoners' claims completely failed. *Id.* at 36; *see also id.* at 19. The stated reasons for those losses varied: courts often dismissed cases because prisoners would not follow basic procedural rules; other times what the prisoners complained of did not demonstrate any constitutional violation. *See id.* at 20. Beyond those reasons, a large percentage of the studied prisoner lawsuits (about 20%) were simply frivolous on their face. *See id.*

Other accounts painted a similar picture. For example, a few years before the just-discussed study, the Fifth Circuit commented on the voluminous filings of state prisoners. *Gabel*, 835 F.2d at 125 n.1. The court noted that over a four-month stretch "one appeal in every six" stemmed from "a state prisoner's pro se civil

rights case." *Id.* By the court's count, a "high percentage of these" appeals were "meritless" and many were "transparently frivolous." *Id.* It thus appeared to the Fifth Circuit that litigation had "become a recreational activity for state prisoners." *Id.*

During this pre-reform era, some prisoners gained judicial notoriety for the amazing numbers of lawsuits they filed. *See, e.g., In re Oliver*, 682 F.2d 443, 444 (3d Cir. 1982); *Demos v. Kincheloe*, 563 F. Supp. 30, 31 (E.D. Wash. 1982). Take, for example, Clovis Carl Green, Jr. *See Green v. Arnold*, 512 F. Supp. 650, 651 (W.D. Tex. 1981). Green filed more than 500 cases on his own behalf, ranging from the "frivolous" to the "irresponsible" to the "malicious" to the "vile and scandalous." *Id.* To "proceed as a pauper"—and thus facilitate his abusive litigation—Green "attempted to deceive courts about his finances." *Id.* Green also filed cases on the behalf of others. Accounting for that litigation, Green's caseload likely made it into the 700s. Eugene J. Kuzinski, *Note: The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 Rutgers L. J. 361, 367–68 & n.40 (1998) (citing *Green v. Camper*, 477 F. Supp. 758, 759-68 (W.D. Mo. 1979)).

Ultimately, faced with such behavior, federal lawmakers pushed for reform. For instance, Senator Dole—when introducing the Prison Litigation Reform Act—described to Congress the types of lawsuits that federal courts had been dealing with. 141 Cong. Rec. 26,548 (Sept. 27, 1995). They involved "such grievances as insufficient storage locker space, a defective haircut by a prison barber," and the failure to be invited to "a pizza party for a departing prison employee." *Id.* Such lawsuits, Senator Dole said, "tie[d]

up courts," "waste[d] legal resources," and consumed government "time and money better spent" elsewhere. *Id.* at 26,548. At the time, the Arizona Attorney General reported that state prisoners filed "a staggering 45 percent of civil cases" in Arizona federal courts. *Id.* That meant that roughly "20,000 prisoners in Arizona filed almost as many cases as Arizona's 3.5 million law-abiding citizens." *Id.* More broadly, the National Association of Attorneys General estimated that prisoner civil-rights lawsuits were costing state taxpayers more than $81 million annually. *Id.* at 26,553.

B. The Prison Litigation Reform Act sought to improve prisoner litigation, in part through an exhaustion requirement.

Given the above concerns, Congress decided that the problem of vexatious and burdensome prisoner litigation warranted a solution. Notably, before the Prison Litigation Reform Act, Congress attempted a less-restrictive fix. In 1980, Congress enacted a "limited exhaustion requirement" that allowed courts to stay §1983 actions while prisoners exhausted their administrative remedies. *Porter*, 534 U.S. at 523–24 (quotation omitted). But this requirement "was in large part discretionary" and it was also inapplicable to many prisoner lawsuits. *Id.* Unsurprisingly, therefore, the requirement did little to curb voluminous filings; the number of prisoner lawsuits instead continued to climb from 1980 until 1995. *See* Schlanger, *Longitudinal Statistics* at 2.

With stronger medicine needed, Congress enacted the Prison Litigation Reform Act of 1995. The Act features "a variety of reforms designed" to bring about "fewer and better prisoner suits." *Jones*, 549 U.S. at

203–04. As one example, the Act requires that courts initially screen lawsuits about prison conditions to ensure that the lawsuits are not—on their face—frivolous, malicious, or meritless. 42 U.S.C. §1997e(c)(1).

More relevant here, a "centerpiece" of the Act's reforms is an exhaustion provision. *Woodford*, 548 U.S. at 84. The provision says this:

> 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.

§1997e(a). As this Court has recognized, this language makes proper exhaustion mandatory in prison-condition cases. *Woodford*, 548 U.S. at 84–85.

This exhaustion requirement "promotes efficiency." *Id.* at 89. For one thing, it narrows the universe of prisoner litigation. "In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court." *Id.* at 89. And even when exhaustion does not eliminate a dispute, it often produces "a useful record for subsequent judicial consideration." *Id.* (quotation omitted). Exhaustion also promotes comity between States and the federal courts. *See id.* at 89, 92. It does so by respecting the States' procedural rules and by giving state officials a chance to address complaints before being "haled into federal court." *Id.* at 89 (quotation omitted).

Importantly, Congress framed exhaustion as a *threshold* inquiry for a court to decide. Under the

plain text, a federal lawsuit is not supposed to even proceed—that is, "be brought"—"until" a prisoner exhausts administrative remedies. §1997e(a). In other words, while "failure to exhaust is an affirmative defense," *Jones*, 549 U.S. at 216, it is a defense most naturally decided upon "the initiation of a federal case," *see Porter*, 534 U.S. at 525, or at least before any full-blown merits inquiry.

There is nothing unusual about this order of operations. Consider, for instance, the historic order of operations for equitable defenses. This Court once instructed that when "an equitable defense" was raised "to a suit at law," the "equitable issue" was to "first be disposed of as in a court of equity; and then, if an issue at law" remained, it was "triable to a jury." *Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235, 242 (1922) (collecting authority). That sequence preserved the "right of trial by jury … exactly as it was at common law." *Id.* at 243. Or think of it this way. Notwithstanding the Seventh Amendment, courts often resolve "issues of judicial traffic control" before juries "decide cases" on the merits. *Pavey v. Conley*, 544 F.3d 739, 741 (7th Cir. 2008) (collecting examples).

II. Functional considerations weigh strongly against extending the jury-trial right to exhaustion.

As the statutory order of operations foreshadows, functional considerations counsel against expanding the jury-trial right to exhaustion. Judges, not juries, are best positioned to decide the threshold issue of exhaustion. *See Markman*, 517 U.S. at 388–89. Typically, deciding whether a prisoner has properly exhausted claims should involve a largely legal inquiry into the prisoner's "compliance" with a prison's

"deadlines and other critical procedural rules." *See Woodford*, 548 U.S. at 90–91. By contrast, because prisons have their "own incentives to maintain functioning remedial processes," it will "not often" be the case where a legitimate, fact-intensive dispute arises. *See Ross*, 578 U.S. at 643. This Court's cases already teach, moreover, that the mere possibility that a fact dispute might arise in an area does not justify impractical extensions of the jury-trial right. *See Markman*, 517 U.S. at 389.

All that said, if this Court cracks the door for jury trials about exhaustion, it should expect litigants to force it wide open. Even with Congress's reforms in the mid-1990s, prisoner litigation continues to crowd dockets across this country. Exhaustion is frequently at issue in such litigation, and prisoners already try to work around exhaustion through the loopholes that currently exist. Thus, if the Court blesses the Sixth Circuit's easy-to-satisfy blueprint for obtaining a jury trial on exhaustion, it should expect such jury trials to consume the attention of federal courts nationwide.

A. Prisoner lawsuits remain voluminous, with exhaustion often in dispute.

Remembering the Prisoner Litigation Reform Act's history, fast-forward to present day. To some degree, Congress's reforms have resulted in "fewer" prisoner lawsuits. *See Jones*, 549 U.S. at 203. Most notably, the rate at which prisoners file federal lawsuits has dropped (in comparison to earlier decades) with such reforms in place. *See* Schlanger, *Longitudinal Statistics* at 2–3. At the same time, prisoner litigation remains an outsized portion of federal courts' workload. As one datapoint, in 2005, "nearly 10 percent of all civil cases filed in federal courts nationwide were

prisoner complaints challenging prison conditions or claiming civil rights violations." *Jones*, 549 U.S. at 203. Little has changed since then. In several recent years, prisoners filed around 10,000 lawsuits challenging their prison conditions. *See* United States Court, Federal Judicial Caseload Statistics, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit (2020, 2021, 2023) (Table C-2); *accord Wexford Health v. Garrett*, 140 S. Ct. 1611, 1612 (2020) (Thomas, J., dissenting from the denial of certiorari).

Even with reforms, it is debatable whether the quality of prisoner litigation is significantly "better." *See Jones*, 549 U.S. at 203. Prisoners continue to lose the overwhelming majority of their cases. *See* Schlanger, *Longitudinal Statistics* at 5–6. Thus, "when it comes to prisoner suits," federal courts must still separate "needles from haystacks." *See Jones*, 549 U.S. at 224.

Today, exhaustion is a key dispute in a large portion of these prisoner lawsuits. What is more, federal courts must frequently resolve parties' disputes over exhaustion through evidentiary hearings or bench trials. *See, e.g.*, *Garcia v. Heath*, 74 F.4th 44, 46 (2d Cir. 2023); *Lanaghan v. Koch*, 902 F.3d 683, 685 (7th Cir. 2018); *Small v. Camden Cnty.*, 728 F.3d 265, 267–68 (3d Cir. 2013); *Boyd v. Rechcigl*, 790 F. App'x 53, 53–54 (8th Cir. 2020) (*per curiam*); *Jackson v. Beard*, 704 F. App'x 194, 195 (3d Cir. 2017) (*per curiam*); *Lee v. Willey*, 789 F.3d 673, 677 (6th Cir. 2015); *Hubbard v. Mbride*, 471 F. App'x 625, 627 (9th Cir. 2012); *Castro v. Smith*, No. 23-cv-1409, 2024 WL 4678937, *1 (E.D. Wis. Nov. 5, 2024); *Johnson v. Englander*, No. 1:20-cv-398, 2024 WL 4217423, *1 (D.N.H. Aug. 16, 2024) (report and recommendation); *Chatman v. Gentry*, No.

3:22-cv-02023, 2024 WL 2864368, *2 (S.D. Ill June 6, 2024); *Santamaria v. Wexford Health Sources, Inc.*, No. 3:21-cv-01539, 2024 WL 2801520, *1, *3 (S.D. Ill. May 31, 2024); *Wine v. Black*, No. 3:18-cv-704, 2024 WL 2113734, *3 (D. Conn. May 11, 2024); *Wilson v. Delano State Prison*, No. 1:21-cv-01651 (PC), 2024 WL 1312342, *10 (E.D. Cal. Mar. 27, 2024) (recommendation); *Apodaca v. Unknown 1*, No. 6:23cv156, 2024 WL 1202916, *4–*6 (E.D. Texas Feb. 26, 2024) (report and recommendation); *Johnson v. Mason*, No. 9:22-CV-590, 2024 WL 396679, *1, *5 (N.D.N.Y. Feb. 2, 2024); *Huggins v. Williams*, No. 1:20-cv-01273, 2023 WL 4628370, *2 (N.D. Ohio July 19, 2023); *Evans v. Chambers-Smith*, No. 1:19-cv-02870, 2023 WL 3453639, *1 (N.D. Ohio May 13, 2023); *cf. also Dillon v. Rogers*, 596 F.3d 260, 273 (5th Cir. 2010); *Allen v. Fields*, No. 7:21-cv-00207, 2024 WL 4534749, *1 (W.D. Va. Oct. 21, 2024).

In Ohio's experience, many prisoners will go to great lengths to evade the exhaustion requirement. By way of background, this Court has held that administrative remedies will not be truly "available" to prisoners, *see* §1997e(a), if "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation," *Ross*, 578 U.S. at 644. Far from thwarting prisoners, Ohio has attempted to improve its prison grievance system through technology. In recent years, Ohio has given its prisoners the option to file grievances electronically—first via electronic kiosks, and then via personal tablets. *See Kirkland v. ODRC*, No. 4:23-cv-00305, 2024 WL 3345439, *2 (N.D. Ohio July 9, 2024); *Rodgers v. Driesbach*, No. 2:20-cv-2848, 2021 WL 1102466, *3 (S.D. Ohio Mar. 23, 2021) (report and recommendation).

Despite Ohio's efforts to make the grievance process easy, many prisoners still claim that Ohio's grievance system is unavailable to them. *E.g.*, *Gibson v. Yaw*, No. 1:22-cv-773, 2024 WL 3226120, *3 (S.D. Ohio June 27, 2024) (report and recommendation); *Johnson v. Barney*, No. 1:21-cv-141, 2024 WL 755441, *4–*5 (S.D. Ohio Feb. 23, 2024); *McKinney v. Paddock*, No. 2:20-cv-1450, 2024 WL 383412, *8 (S.D. Ohio Feb. 1, 2024) (report and recommendation); *Driesbach*, 2021 WL 1102466 at *3; *Hargrove v. Holley*, No. 1:17-cv-560, 2020 WL 5651476, *1 (S.D. Sept. 22, 2020). Last year, for example, Ohio tried (and won) a bench trial in which the central issue was whether eleven days of access to an electronic kiosk was enough to make Ohio's grievance process "available" to a prisoner. *See Evans*, 2023 WL 3453639 at *3–*4. Other Ohio prisoners—attempting to keep their claims alive—have been more than willing to allege that they fear reprisals if they file grievances. *See Irizarry v. Ohio Dep't of Rehab. & Corr.*, No. 4:23CV1376, 2023 WL 8543886, *2 (N.D. Ohio Dec. 11, 2023); *Huggins*, 2023 WL 4628370 at *1.

Cases from other jurisdictions present comparable stories. In one case, an Illinois district court held an evidentiary hearing on exhaustion because a prisoner claimed he had been threatened with punishment for filing grievances. *Phillips v. Walker*, 443 F. App'x 213, 214 (7th Cir. 2011) (*per curiam*). At the hearing, however, it became apparent to the district court that the prisoner "was lying." *Id.* In another case—also out of the land of Lincoln—a district court held an evidentiary hearing to resolve a prisoner's assertion that he did not know with whom to file grievances. *See Minerly v. Nalley*, No. 3:19-CV-0467, 2021 WL 4924739, *1–*3 (7th Cir. Oct. 21, 2021) (*per curiam*).

Sometimes, prisoners' arguments about exhaustion are more intricate. For instance, an Indiana prisoner claimed that, given decades-old IQ scores, he was not capable of navigating his prison's grievance system. *Smallwood v. Williams*, 59 F.4th 306, 316 (7th Cir. 2023). That theory was inherently questionable, because the prisoner (who was litigating *pro* se) had been quite able to make "coherent" arguments in federal court. *See id.* But because the prisoner's theory involved disputed facts, the Seventh Circuit remanded for an evidentiary hearing. *Id.* at 318. A final example involves a West Virginia prisoner, who argued that prison staff had injected liquid into his body "to monitor his thoughts." *Greene v. Ballard*, No. 2:17-cv-02897, 2020 WL 3055459, *2 (S.D. W.Va. Feb. 25, 2020) (proposed findings and recommendation). Despite the implausible nature of his claim, the prisoner knew enough to argue that prison staff had thwarted his ability to file grievances. *See id.* at *5. As these cases display, prisoner litigation in this area ranges from the dishonest, to the mundane, to the suspect, to the fanciful.

B. The Sixth Circuit's jury-trial rule will greatly burden the States.

Imagine, then, what happens if this Court extends the jury-trial right to disputes over exhaustion. The evidentiary hearings and bench trials just discussed become jury trials. With respect to state and federal resources, that is no small matter. Although evidentiary hearings and bench trials impose some burdens, district courts are often able to handle such proceedings in a day or less. Ohio's bench trial in *Evans*, for example, took only a few hours. *See Evans v. Chambers-Smith*, No. 1:19-cv-2870 (N.D. Ohio) (docket minutes entered on May 12, 2023). But jury trials add

a host of legal and logistical complications: things like motions in limine, voir dire, and jury instructions, to name just a few. A switch to jury trials will thus significantly increase the time and resources state officials and federal judges must devote to prisoner litigation. And that does not even account for the burdens on ordinary citizens, who will need to serve on the many juries that will be required.

A closer look at the Sixth Circuit's ruling drives these points home. The Sixth Circuit acknowledged—consistent with its own precedent and decisions from other circuits—that judges may resolve factual issues surrounding exhaustion if there is no "overlap" between the facts relevant to exhaustion and the facts relevant to the merits. Pet.Appx.6a. But juries are required, in the Sixth Circuit view, when disputed facts regarding exhaustion overlap with disputed facts regarding the merits. Pet.App.17a–18a. On the surface, that ruling might seem narrow. It is not. The Sixth Circuit held that the merits and exhaustion overlapped in this case because the prisoner (Richards) alleged that the petitioner destroyed his grievances in retaliation for his complaints. Pet.App.7a. According to the Sixth Circuit, those allegations, if true, also amounted to unlawful retaliation under the First Amendment. Pet.App.7a–12a. Thus, under the Sixth Circuit's logic, the destruction of a grievance will generally double as (1) a defense for failure to exhaust and (2) a merits claim under the First Amendment. It follows that any prisoners willing to swear that their grievances were destroyed because they complained is entitled to a jury trial about exhaustion.

That is not a sound approach to the administration of justice. It is the opposite: if the Court adopts the reasoning below, it should expect federal courts to be

flooded with jury trials. Given both past and existing practices in this area, *see above* 7–10, 15–17, there can be little doubt that many prisoners will take advantage of the Sixth Circuit's simple formula for obtaining a jury trial. That is, many prisoners will attest that their grievances, too, were destroyed in retaliation for their complaints.

The proceedings below are illustrative. Richards was able to survive summary judgment, creating a fact dispute through allegations within a verified complaint. Pet.App.93a. But, during an exhaustion hearing, Richard's allegations unraveled. At the hearing, Richard convinced several other prisoners to testify on his behalf. *See* Pet.App.56a. But Richards and his fellow prisoners could muster only a "far-fetched" story of one prison official "single-handedly" intercepting and destroying all grievances over a ten-month span, a story the magistrate judge handily rejected. Pet.App.75a. That is the type of jury trial this Court should anticipate if it wrongly extends the Seventh Amendment's protections here.

From a scheduling standpoint, if district courts are forced to try exhaustion disputes to juries, they will likely follow one of two paths. Neither is efficient.

First, many district courts will likely hold off on deciding exhaustion, combining any exhaustion trial with a trial on the merits. That will deprive States of the benefit that the Prison Litigation Reform Act intends. *See Pavey*, 544 F.3d at 742. Once again, Congress meant for exhaustion to prevent lawsuits from "be[ing] brought … until" exhaustion took place. §1997e(a). But, if exhaustion is conflated with a trial on the merits, it no longer serves as a front-end shield to cut off potentially avoidable litigation. Exhaustion

will instead become a largely superfluous back-end protection relevant only after the State shoulders the burden of waging a full-blown trial defense. In short, such a decision would effectively nullify the exhaustion requirement and thwart the clear intend of Congress.

Second, it is possible that some district courts might entertain the idea of bifurcated proceedings. In other words, some courts might be willing to hold a trial limited to exhaustion before a case shifts to the merits. But that approach seems less likely, as it comes with its own inefficiencies. District courts will likely be worried about the possibility (even if remote) of duplicative proceedings if a case is not tried all at once.

A final complicating factor warrants quick mention. Even if a case is tried and dismissed for failure to exhaust, such dismissals are typically without prejudice. *See, e.g.*, *Garrett v. Wexford Health*, 938 F.3d 69, 81 n.16 (3d Cir. 2019); *Bell v. Konteh*, 450 F.3d 651, 653 n.4 (6th Cir. 2006). That creates the possibility of "a series of jury trials." *Pavey*, 544 F.3d at 741 (noting the chance of "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"). To be sure, by the time a prisoner's lawsuit is dismissed without prejudice for lack of exhaustion, the prisoner's deadline for timely exhausting claims will have likely run. *See Woodford*, 548 U.S. at 95–96. But many States, including Ohio, give their prison officials flexibility to forgive such deadlines. *See, e.g.*, Ohio Admin. Code §5120-9-31(J). Under the Sixth Circuit's approach, prison officials will have a strong incentive to *not* forgive belated grievances. After all, why would

prison officials—having gone through a jury trial on exhaustion—willingly subject themselves to the chance of another jury trial? In this way, leaving the Sixth Circuit's ruling in place would also be bad, in the long run, for prisoners.

*

The *amici* States end with a coda. The discussion above has focused on the practical burdens that the Sixth Circuit's jury-trial ruling would place on the States. But a significant sovereign harm underlies all of this. In addition to individual rights, the "vertical … separation of powers" embedded within our Constitution also operates as a "guardian of liberty." *MCP No. 165 v. United States DOL*, 20 F.4th 264, 269 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing *en banc*). That is, one way the Constitution protects the People is by reserving power to the States. *See Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991). That reserved power includes "broad authority" to act for the public's general welfare. *Bond v. United States*, 572 U.S. 844, 854 (2014). And the administration of prisons fits neatly within that reserved power. If anything, "it is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" *Woodford*, 548 U.S. at 94 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973)).

These basic principles make the stakes in this case even higher. If the Court misreads the Seventh Amendment here, it will also offend our constitutional structure by allowing for "unwarranted federal-court interference with" a core state activity. *See id.* at 93.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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