

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 NATIONAL SHERIFFS' ASSOCIATION AND
THE MICHIGAN SHERIFFS' ASSOCIATION
IN SUPPORT OF PETITIONER**

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December 2, 2024

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BOSTON, MASSACHUSETTS

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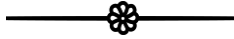
IDENTITY AND INTEREST OF THE AMICI CURIAE¹

The NATIONAL SHERIFFS' ASSOCIATION (the "NSA") is a non-profit association formed under 26 U.S.C. 501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members and is the advocate for 3,083 sheriffs throughout the United States who operate more than 3,000 local correctional facilities throughout the country.

The MICHIGAN SHERIFFS' ASSOCIATION (MSA) is a 501(c)(3) not-for-profit corporation first registered in the State of Michigan in 1877 and, at nearly 150 years old, it is the longest-running law enforcement service organization in the United States. The MSA represents the collective interests of Michigan's 83 elected sheriffs who in aggregate employ nearly 4,500 Michigan Commission on Law Enforcement Standards (MCOLES) licensed sheriff deputies, over 4,000 local corrections officers, and hundreds of civilian employees, and operate 78 jails and five lockups. The MSA is proud to serve as the leading advocate for legislative and public policy advancements that best serve the needs of the Office of the Sheriff and Michigan's citizens in addition to constantly pursuing efforts to

¹ Per Sup. Ct. R. 37.6, this brief was not authored in whole or in part by counsel for any party. No person or entity other than amici curiae made a monetary contribution to this brief's preparation or submission.

improve the quality and professionalism of law enforcement so that its members may better serve and protect their communities. Due to the fact that Michigan's 83 sheriffs employ all of Michigan's local corrections officers, as defined in MCL 791.532, in addition to operating jails in 78 of its 83 counties and lockups in the remaining five counties, the MSA believes it is in the collective interests of its membership to have this court rule on the matter of a exhaustion as it relates to the Prison Litigation Reform Act (PLRA).



SUMMARY OF ARGUMENT

Requiring a jury trial to resolve unfiled grievances would neuter the PLRA. The National Sheriffs' Association representing 3083 Sheriffs' Offices and the Michigan Sheriffs' Association representing 83 Sheriffs' Offices are uniquely qualified to understand the effect of such decision. The plethora of complaints and grievances, filed and unfiled, by inmates in local jails operated by Sheriffs are for a wide range of complaints. Most of these complaints are easily handled by staff and do not require litigation. If these complaints/grievances could not be handled by jail staff, the resources of Sheriff's Offices, especially rural and smaller Sheriffs' Offices, would be overwhelmed.

A rule requiring exhaustion of administrative remedies serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency. The PLRA thus mandates early judicial screening of prisoner complaints, and allows prison officials an opportunity to resolve disputes concerning

the exercise of their responsibilities before being hailed into court.

The whole purpose of the PLRA was for judicial economy to preserve the limited resources of the courts and reduce the undue burden on defendants of defending a long and expensive jury trial, especially for preliminary matters. And if these preliminary matters require a jury to decide, would not the same argument be made for many of the Rule 12(b) dismissal motions such as equitable tolling, lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of service of process and such? If this Court does not overrule the court below, it opens the floodgates that any attempt at pre-trial dismissal will be argued to violate the right to jury trial.

Indeed, if this Court decides that a hearing on a motion to dismiss prior to trial requires a jury verdict, such a ruling paves the way for the logical and predictable next step that any and all dismissal motions under Rule 12(b) must be decided by a jury. Since there is absolutely no reason that conclusion would apply only to actions brought in federal court that are impacted by the PLRA, ruling that a jury trial is required for a pre-trial dismissal has the very real potential of creating the precedent that destroys the entire federal court system of pre-trial dispositive motions. The impact of such an end result on the federal courts and costs to federal taxpayers and all litigants would be astounding and as result it would actually cripple access to the courts rather than promote fair and efficient use of our legal system. We urge the Court to be mindful of this very real and destructive impact if the court below is not clearly and unequivocally reversed.

Richard's Seventh Amendment right to a jury was not violated by having the court decide the PLRA issues. Factual issues relating to Richards' excuses for failure to exhaust the grievance procedure in his § 1983 claims were analytically and temporally distinct from factual issues relating to his claim on the merits. Whether Richards ever had an opportunity to be able to file a grievance depended on facts unrelated to his First Amendment claim. Whether he would have been able to ever file a grievance depended on his opportunities to try again to file a grievance and his own mental state and perception of the risk of retaliation if he did so, while his constitutional claims turn entirely on the defendant's conduct and knowledge at a time of the alleged First Amendment violation.

While there is a right to a jury trial under the Seventh Amendment for actions brought under section 1983 seeking legal relief, this right, however, does not guarantee jury resolution of all factual disputes that arise in the course of litigation. Judges have the authority to resolve certain threshold issues without the participation of a jury before the adjudication of a case on its merits.

Further, this Court has already explained that Congress can prescribe pleading requirements to be decided by the court without violating the Seventh Amendment right to a jury. And if the complainant fails to follow the requirements set out by Congress for a Federal statutory claim, the case can be dismissed under a Rule 12(b)(6) motion decided by the court.



ARGUMENT

I. Sheriffs' Offices Do Not Have Resources to Defend Every Unfiled Grievance Via Jury Trial

As explained in Petitioner's brief, in 1995, before the passage of the PLRA with its exacting exhaustion requirement, there were 24.6 lawsuits per 1,000 prisoners, citing Margo Schlanger, *Trends in Prisoner Litigation*, as the PLRA approaches 20, at 71. At that time there were about 1.6 million prisoners in the United States, including state, local, and federal prisoners, citing Schlanger, *Trends in prisoner litigation*, as the PLRA approaches 20, at 71. As of 2021, there were approximately 1.9 million prisoners [FOOTNOTE: *See* Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, Prison Policy Initiative (March 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html>.] and 24,372 prisoner lawsuits. [FOOTNOTE: *See Data Update*, *Incarceration and the Law*, <https://incarcerationlaw.com/resources/data-update/> (last visited June 12, 2024).] At the 1995 rate of 24.6 lawsuits per 1,000 prisoners, this would result in 46,740 prisoner lawsuits—nearly doubling the number of prisoner lawsuits filed in federal courts.

Considering this data, requiring a jury trial to resolve unfiled grievances would neuter the PLRA. The National Sheriffs' Association representing 3,083 Sheriffs' Offices and the Michigan Sheriffs' Association representing 83 Sheriffs' Offices are uniquely qualified to understand the effect of such decision. The plethora of complaints and grievances, filed and unfiled, by

inmates in local jails operated by Sheriffs are for a wide range of complaints from cold “tator tots” to the volume of the television and other matters imagined by inmates. Most of these complaints are easily handled by staff and do not require litigation. If these complaints/grievances could not be handled by jail staff, the resources of Sheriff’s Offices, especially rural and smaller Sheriffs’ Offices, would be overwhelmed. The adverse impact of neutering the PLRA on Sheriffs’ Offices is obvious in terms of having to pull staff offline to be deposed, gathering discovery, and attending and testifying at trial, not to mention the added defense costs. This use of precious manpower and funds would drain Sheriffs Offices’ limited resources which is what the PLRA is meant to protect. Accordingly, inmates should not be able to simply allege they were unable to file their grievance to obtain a full-blown jury trial on any complaint at the expense of public safety.

II. Early Judicial Screening of PLRA Requirements Protects Administrative Agency Authority and Promotes Judicial Efficiency

The instant case challenges the right of a defendant in a 1983 claim to assert a PLRA defense and have an early judicial screening of a prisoner complaint by the judge at hearing. Respondent asserted that in his case, having the judge decide whether the PLRA exhaustion requirement was met violated his Seventh Amendment right to a jury trial. His basis for his claim was that the facts pertinent to the failure to exhaust the grievance process were intertwined with the facts of his legal claim, making it impossible to resolve factual issues by the judge without infringing on his right to a jury trial.

In his First Amendment retaliation claim, Richards alleged that Petitioner Perttu prevented him from filing grievances related to Perttu's alleged sexual abuse by ripping up the grievances or otherwise destroying them. The complaint lays out several specific instances when Perttu allegedly destroyed grievances that Richards had intended to file. Richards also claimed that Perttu threatened to kill him if he persisted in trying to file more grievances, and that he was wrongfully held in administrative segregation for doing so.

As the court below recognized,

A rule requiring exhaustion of administrative remedies “serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.” *McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992), superseded by statute on other grounds as stated in *Booth v. Churner*, 532 U.S. 731, 740-41, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001). The PLRA thus “mandates early judicial screening of prisoner complaints,” *Jones v. Bock*, 549 U.S. 199, 202, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007), and “allows prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being hailed into court,” *id.* at 204.

Richards v. Perttu, 96 F.4th 911, 917. However, the Sixth Circuit in *Richards* declined to follow this procedure.

The Sixth Circuit in the decision below admitted that where disputed facts as to exhaustion are not intertwined with the disputed facts of the legal claim,

the judge can resolve factual disputes without a jury as follows:

Before addressing Richards's Seventh Amendment argument, we must first determine if the factual disputes about exhaustion in fact overlap with the merits of his First Amendment retaliation claim. If the factual disputes do not overlap, then we need not reach the Seventh Amendment question because there is no doubt that a judge may otherwise resolve factual disputes regarding exhaustion under the PLRA. *Lee*, 789 F.3d at 677. But if the exhaustion issue is in fact intertwined with the merits of Richards's claim, then we must address his Seventh Amendment argument.

Richards, 96 F.4th 917.

In *Richards*, the Sixth Circuit erred in conflating PLRA exhaustion fact issues with issues of fact involving the merits of the legal claim which are analytically and temporally distinct. In so doing, the court held *Richards* was denied his right to a jury to decide the facts on the PLRA exhaustion defense. The flaw in the court's analysis is evident when examining other cases involving similar preliminary procedural matters and defenses, such as equitable tolling of prescription, that are decided by the bench prior to a jury trial.

III. Equitable Tolling Issues, like PLRA Exhaustion Issues, Are Distinct From Merits of Legal Claim

The instant case presents a Seventh Amendment issue identical to a recent Second Circuit case involving a prescription defense to a 1983 claim where the plaintiff sought equitable tolling of the prescription statute,

and the judge decided factual issues at a hearing. The Second Circuit analyzed such a situation in *Clark v. Hanley*, 89 F.4th 78 (2nd Cir. December 20, 2023). There, the Second Circuit concluded that plaintiff's Seventh Amendment right to a jury trial was not violated.

In *Clark*, during the summer of 2011, Plaintiff-Appellant Veronica-May Clark ("Clark"), an incarcerated transgender woman serving a 75-year term of imprisonment for murder, assault, and burglary, was repeatedly sexually assaulted by Defendant-Appellee Thomas Hanley ("Hanley"), a corrections officer at the Connecticut prison facility where Clark was then housed. *Id.* at 83. Clark initiated the present action in 2018—more than seven years after Hanley's abuse—asserting federal civil rights claims under 42 U.S.C. § 1983 for violation of her Eighth Amendment rights, along with tort claims under Connecticut law. *Id.* Conceding that she filed this action more than four years beyond the applicable statute of limitations, Clark asserted that the trauma she suffered in 2011 and her fear of retaliation from corrections staff, aggravated by her then-undisclosed gender dysphoria, constitute extraordinary circumstances that prevented her from taking timely steps to file this action against Hanley and other allegedly acquiescent corrections officers (together, the "Defendants"). Clark sought equitable tolling of the statute of limitations. *Id.*

Based primarily on its assessment of Clark's testimony at an evidentiary hearing, the United States District Court for the District of Connecticut (Meyer, J.) denied Clark's equitable tolling claim and dismissed her suit as untimely. *Id.* The court concluded that portions of Clark's testimony, which focused on the

circumstances that allegedly hampered her from timely filing, were not credible, and that Clark's asserted bases for equitable tolling were, in large part, a post hoc rationalization to buttress her equitable tolling claim. *Id.*

Clark sought reversal or, in the alternative, vacatur of the district court's denial of her equitable tolling claim. *Id.* at 92. At the outset, Clark contended it was inappropriate for the district court to hold an evidentiary hearing on the Defendants' motions to dismiss pursuant to Rule 12(b)(6), in which posture a district court may not rely on matters outside the pleadings or engage in factfinding. *Id.* And, while a district court may convert a Rule 12(b)(6) motion into one for summary judgment under Rule 12(d), Clark emphasized that the district court did not purport to do so here.

Clark next argued that the district court violated her Seventh Amendment right to a jury trial by resolving contested factual issues bearing on the merits of her legal claims. *Id.* at 99-100. Recognizing the overarching principle that "claims in equity, including tolling, generally fall outside the Seventh Amendment's scope," Clark contended that the district court neglected the significant overlap between her equitable tolling argument and her Section 1983 claims, which both arise from the same set of operative facts—Hanley's sex crimes. *Id.* at 100. Clark asserted that it was impossible to disentangle the district court's factual findings on equitable tolling from those relating to her legal claims. *Id.*

The Second Circuit explained that it has repeatedly approved—sometimes even required—evidentiary hearings to resolve equitable tolling claims. *Id.* The Circuit

court reasoned that equitable tolling is an issue that is generally appropriate for a court, rather than a jury, to resolve, so long as the court's factual findings do not deprive plaintiffs of their Seventh Amendment right to a jury trial on any legal claims. *Id.* at 83-84.

The Second Circuit explained that when a district court holds an evidentiary hearing on equitable tolling, the hearing functions within the rubric of the federal rules as a bifurcated bench trial on the issue of equitable tolling. *Id.* at 96. Because district judges sit in equity when adjudicating equitable tolling, they are empowered at this hearing (*qua* bench trial) to make credibility findings, weigh evidence, and resolve factual disputes that bear on equitable tolling, so long as they stay within the bounds of the Seventh Amendment. *Id.* Sometimes, district courts convene an evidentiary hearing after deciding on summary judgment that the issue cannot be resolved based on the record compiled in discovery. *Id.* Other times, district courts hold a hearing earlier in the case, with an eye toward facilitating the efficient adjudication of the possibly controlling issue of equitable tolling. *Id.* District courts have discretion on how to sequence the hearing, so long as they afford the parties a full and fair opportunity to be heard on the issue. *Id.*

First, Clark took issue with the district court's "sweeping credibility determinations," which she asserted usurped the jury's role to gauge her credibility on the critical issue of the impact of Hanley's abuse. *Id.* at 102. But the district court's credibility findings, according to the Second Circuit, were limited to specific aspects of Clark's testimony that related squarely to whether she encountered circumstances that caused her to delay in filing her complaint. *Id.* These findings cannot

be said to have resolved any issues “identical” or even “common” to those presented on her legal claims. *Id.*

At the start, the appeals court noted that the factual issues relevant to Clark’s equitable tolling claim and her § 1983 claims were analytically and temporally distinct. *Id.* at 101. Her deliberate indifference claim, for instance, was fundamentally backward-looking, pertaining to the conditions of Clark’s confinement and Defendants’ awareness and behavior up to the time she was sexually assaulted, citing, *Morgan v. Dzurenda*, 956 F.3d 84, 89 (2d Cir. 2020) (outlining the elements of an Eighth Amendment deliberate indifference claim, which requires an inmate to prove “(1) that [the plaintiff] is incarcerated under conditions posing a substantial risk of serious harm, and (2) “that the prison official had a sufficiently culpable state of mind, which in prison-conditions cases is one of deliberate indifference to inmate health or safety” (internal quotation marks omitted)). *Clark*, 89 F.4th at 101. So, too, Clark’s constitutional claim against Hanley for sexual abuse required assessing his assaultive conduct at the time it occurred, citing, *Crawford v. Cuomo*, 796 F.3d 252, 256-58 (2d Cir. 2015) (explaining that sexual abuse by a corrections officer is cognizable where (1) “the defendant acted with a subjectively sufficiently culpable state of mind” and (2) the conduct was objectively harmful enough or sufficiently serious to reach constitutional dimensions” (internal quotation marks and citation omitted)). *Clark*, 89 F.4th at 101.

The Second Circuit explained that the equitable tolling inquiry, by contrast, was trained solely on the circumstances that Clark faced after the date her claims accrued, citing, *Smalls*, 10 F.4th at 145 (“Generally, a litigant seeking equitable tolling bears the

burden of establishing two elements: (1) that [s]he has been pursuing [her] rights diligently, and (2) that some extraordinary circumstance stood in [her] way.”). *Clark*, 89 F.4th at 101. The court stated that her equitable tolling claim hinged on her own mental state and perception of the risk of retaliation, while her constitutional claims turned entirely on the Defendants’ conduct and knowledge at a time prior to the period she sought to have tolled. *Id.* at 104.

The Second Circuit explained that should liability be established, the damages inquiry as to Clark’s claims would require that the jury determine how much money would compensate Clark for the harm that the Defendants’ misconduct caused her to suffer. *Id.* at 101. But this is distinct from the district court’s equitable tolling inquiry, which required assessing whether the harm Clark suffered caused her to miss the filing deadline despite reasonable diligence in pursuing the claim. *Id.* at 101-102. To be sure, both inquiries touched upon the consequences of Hanley’s sexual assault, but neither depended on the other; a jury could assign any degree of monetary value to the harm notwithstanding whether the district court found that harm to have been an extraordinary obstacle that prevented Clark from timely filing suit, according to the Circuit court. *Id.* at 102. Clark argued, to the contrary, that several features of the decision below foreclosed aspects of her legal claim. *Id.* But this was simply incorrect according to the Circuit court. *Id.*

The appeals court stated that in sum, the district court did not intrude on Clark’s jury trial right by determining whether she was entitled to relief from the statute of limitations before proceeding further with her case. *Id.* at 104. Clark’s argument for equit-

able tolling was distinct from the merits of her legal claims and the decision below treated them as such. *Id.* Accordingly, the Circuit court held that the district court did not violate the Seventh Amendment in determining that Clark failed to establish the “rare and exceptional circumstances” necessary to excuse an untimely filing. *Id.*

As in *Clark*, in the instant case, Richards excuses for failure to exhaust the grievance procedure in his § 1983 claims were analytically and temporally distinct. Whether Richards ever had an opportunity to be able to file a grievance depended on facts unrelated to his First Amendment claim. Whether he would have been able to ever file a grievance depended on his opportunities to try again to file a grievance and his own mental state and perception of the risk of retaliation if he did so, while his constitutional claims turn entirely on the defendant’s conduct and knowledge at a time of the alleged First Amendment violation. And in *Clark*, the Second Circuit held that the judge was able to decide that issue in a hearing without a jury, without violating the Seventh Amendment. Accordingly, Richards was not entitled to have a jury decide the factual issues related to his failure to exhaust.

IV. Making Pre-trial Issues Subject to Jury Trials Opens the Floodgates of Litigation

The whole purpose of the PLRA was for judicial economy to preserve the limited resources of the courts and reduce the undue burden on defendants of defending a long and expensive jury trial, especially for preliminary matters. And if these preliminary matters require a jury to decide, then where does it stop? Would not the same argument be made for many of the Rule 12(b) dismissal motions such as lack of

subject matter jurisdiction, lack of personal jurisdiction, insufficiency of service of process and such? If this Court does not overrule the court below, it opens the floodgates that any attempt at pre-trial dismissal will be argued to violate the right to jury trial.

Indeed, if this Court decides that a hearing on a motion to dismiss prior to trial requires a jury verdict, such a ruling paves the way for the logical and predictable next step that any and all dismissal motions under Rule 12(b) must be decided by a jury. Since there is absolutely no reason that conclusion would apply only to actions brought in federal court that are impacted by the PLRA, ruling that a jury trial is required for a pre-trial dismissal has the very real potential of creating the precedent that destroys the entire federal court system of pre-trial dispositive motions. The impact of such an end result on the federal courts and costs to federal taxpayers and all litigants would be astounding and as result it would actually cripple access to the courts rather than promote fair and efficient use of our legal system. We urge the Court to be mindful of this very real and destructive impact if the court below is not clearly and unequivocally reversed.

V. Judges Have the Authority to Resolve Threshold PLRA Issues Without a Jury

The Fifth Circuit in *Dillon* below also found that a judge can resolve issues of fact regarding whether claimant was precluded from exhausting the grievance procedure without violating claimant's Seventh Amendment right to a jury.

In *Dillon v. Rogers*, 596 F.3d 260 (5th Cir. February 4, 2010), claimant brought a 1983 action as a

result of alleged abuse he received in prison. On August 29, 2005, when Hurricane Katrina made landfall in southeastern Louisiana, Dillon was being held as a prisoner at the Jefferson Parish Correctional Center (“Jefferson”), within the New Orleans metropolitan area. *Id.* at 265. Due to the devastation caused by the hurricane, the Louisiana Department of Public Safety and Corrections (“DPSC”) evacuated Dillon and other inmates from Jefferson on August 31, 2005 and moved them to a temporary facility in Jena, Louisiana (“Jena”). *Id.* Dillon alleges that he was beaten and mistreated by Appellees in late September 2005 during his detention at Jena, resulting in hearing loss and other injuries. *Id.* Shortly after this alleged abuse, in early October 2005, DPSC transferred Dillon to Allen Correctional Center (“Allen”) in Kinder, Louisiana, and the temporary facility at Jena closed. *Id.*

In July 2006, Dillon filed this section 1983 suit alleging violations of his civil rights during his incarceration. Dillon does not seriously dispute that he failed to satisfy the steps of the Administrative Remedy Procedure that are prerequisite to filing a section 1983 action. *Id.* at 266. Rather, he argues that his suit should not be barred because there was no remedy “available” to him during the 90-day period following the alleged abuse. *Id.* Alternatively, he also argues his failure to exhaust should be excused on the basis of estoppel or the “special circumstances” surrounding his detention at Jena. *Id.*

In November 2007, Appellees filed a motion to dismiss Dillon’s suit for failure to exhaust administrative remedies, and shortly thereafter the magistrate judge hearing the case recommended that Appellees’ motion be granted. *Id.* at 265. However, the district

court rejected the magistrate's recommendation and under Rule 12(d) converted Appellees' motion into a motion for summary judgment, as the parties had submitted evidence with their briefing going beyond the factual allegations in their pleadings. *Id.* Subsequently, the district court granted summary judgment for Appellees in March 2008, on the ground that Dillon had failed to exhaust administrative remedies before bringing this suit. *Id.* The appeal followed.

Since the Fifth Circuit remanded this case, it had to also address the procedure by which the district court should resolve disputes pertaining to exhaustion of administrative remedies. *Id.* at 270. When Appellees filed their motion to dismiss for failure to exhaust administrative remedies, they attached affidavits and records in support of the factual claims in their motion. *Id.* Dillon responded in kind, providing several affidavits and copies of grievances to support his motion opposing Appellees' motion to dismiss. *Id.* at 270-271. Faced with this evidence going beyond the facts alleged in the parties' pleadings, the district court converted Appellees' motion to dismiss into a motion for summary judgment. *Id.* at 271.

Appellees argued, however, that the district court should not have converted their motion. *Id.* at 271. Instead, they assert that the court should have ruled on their motion to dismiss and, if necessary, resolved any factual disputes concerning exhaustion on the basis of the evidence before it. *Id.* In support of this position, Appellees pointed to the decisions of three of sister circuits in *Pavey v. Conley*, 544 F.3d 739, 741-42 (7th Cir. 2008), *Bryant v. Rich*, 530 F.3d at 1373-77, and *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). *Dillon*, 596 F.3d at 271. In these cases, the

Seventh, Ninth, and Eleventh Circuits all agreed that judges may resolve factual disputes concerning exhaustion of remedies without the participation of a jury. *Id.* However, they diverged as to the proper procedure for deciding these questions. In both *Wyatt* and *Bryant*, the Ninth and Eleventh Circuits held that exhaustion should be resolved via an “unenumerated” Rule 12(b) motion rather than on a motion for summary judgment. *Id.*, citing, 315 F.3d at 1119; 530 F.3d at 1374-75. On the other hand, in *Pavey*, the Seventh Circuit suggested that summary judgment provided a proper vehicle for settling exhaustion disputes. *Dillon*, 596 F.3d at 271, citing, 544 F.3d at 741.

The Fifth Circuit in *Dillon* agreed with its sister circuits that factual disputes concerning exhaustion may be resolved by judges. *Dillon*, 596 F.3d at 271. However, the court also conclude that when courts rule on exhaustion on the basis of evidence beyond the pleadings, the nonmoving party should be granted the protections of Rule 56. *Id.* Consequently, it found that the district court did not err in converting Appellees’ motion into a motion for summary judgment under Rule 12(d). *Dillon*, 596 F.3d at 271.

The Fifth Circuit recognized there is a right to a jury trial under the Seventh Amendment for actions brought under section 1983 seeking legal relief. *Id.* The Circuit court explained that this right, however, does not guarantee jury resolution of all factual disputes that arise in the course of litigation. *Id.* Judges have the power to resolve certain threshold issues without the participation of a jury before the adjudication of a case on its merits. *Id.* For example, when subject matter jurisdiction over a case turns on disputed facts, judges have the power to resolve these

disputes in assuring themselves of their courts' jurisdiction. *Id.*, citing, e.g., *Wetmore v. Rymer*, 169 U.S. 115, 120-21, 18 S. Ct. 293, 42 L. Ed. 682 (1898). The court noted that a prisoner's failure to exhaust administrative remedies does not deprive courts of subject matter jurisdiction in suits covered by the PLRA. *Dillon*, 596 F.3d at 271. But the factfinding power of judges is not limited to addressing subject matter jurisdiction. *Id.* It also extends to deciding factual questions concerning certain affirmative defenses like personal jurisdiction and venue, which may be waived by a defendant. *Id.* at 271-271, citing, e.g., *Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co.*, 517 F.3d 235, 241-42 (5th Cir. 2008) (personal jurisdiction); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1139-40 (9th Cir. 2004) (venue).

In *Dillon*, the Fifth Circuit explained that exhaustion resembles personal jurisdiction and venue in that it is an affirmative defense that allows defendants to assert that plaintiffs have not invoked the proper forum for resolving a dispute. *Id.* at 272. The Circuit court noted:

The Supreme Court has described exhaustion in similar terms, as "rule of judicial administration" controlling access to the courts, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L. Ed. 638 & n.9 (1938), akin to doctrines like "abstention, finality, and ripeness . . . that govern the timing of federal-court decision-making." *McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992). Since exhaustion is a threshold issue that courts must address to determine whether litigation

is being conducted in the right forum at the right time, we conclude that judges may resolve factual disputes concerning exhaustion without the participation of a jury.

Dillon, 596 F.3d at 272.

In *Dillon*, the Fifth Circuit provided a brief summary of how district courts should approach exhaustion questions under the PLRA as follows:

When the defendant raises exhaustion as an affirmative defense, the judge should usually resolve disputes concerning exhaustion prior to allowing the case to proceed to the merits. If the plaintiff survives summary judgment on exhaustion, the judge may resolve disputed facts concerning exhaustion, holding an evidentiary hearing if necessary. Then, if the judge determines that the plaintiff has exhausted administrative remedies or that his or her failure to exhaust should be excused, the case may proceed to the merits. On appeal, when the judge below has served as factfinder, the Circuit court will review rulings on exhaustion de novo, but will accept the judge's factual conclusions unless they are clearly erroneous.

Dillon, 596 F.3d at 272-273.

The court in *Dillon* vacated the district court's grant of summary judgment for Appellees and remanded the case for discovery and further development of the record. *Id.* at 273.

As can be seen by the cases cited above from numerous Circuit courts, judges can decide matters

involving failure to exhaust the grievance procedure under the PLRA without infringing on a plaintiff's right to a jury trial.

VI. Congress Can Prescribe Pleading Requirements Decided by the Court Without Violating the Seventh Amendment

This Court has already explained that Congress can prescribe pleading requirements to be decided by the court without violating the Seventh Amendment right to a jury. And if the complainant fails to follow the requirements set out by Congress for a Federal statutory claim, the case can be dismissed under a Rule 12(b)(6) motion decided by the court. And if a Rule 12(b)(6) motion can be decided by the court, so too can the court dismiss a claim under the PLRA that does not conform to Congress' requirements of exhausting the grievance procedure without violating the Seventh Amendment right to a jury on the merits.

In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (June 21, 2007), Respondent shareholders of a corporation brought a securities fraud action against petitioner officer of the corporation, alleging that the officer deceived the public concerning the value of the corporation's stock. Upon the grant of a writ of certiorari, the officer challenged the judgment of the Seventh Circuit which held that the shareholders sufficiently pleaded scienter under 15 U.S.C.S. § 78u-4(b)(2).

The shareholders contended that their allegations were sufficient to establish a strong inference that the officer acted with the intent to deceive, manipulate, or defraud, as required by § 78u-4(b)(2). The officer argued that the shareholders failed to allege any

financial motive of the officer to support scienter and offered vague and ambiguous allegations.

In evaluating the case, this Court established the following procedure for courts to decide a Rule 12(b)(6) motion in a securities fraud case:

First, faced with a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss a § 10(b) (securities fraud) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. Second, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions. The inquiry is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard. Third, in determining whether the pleaded facts give rise to a “strong” inference of scienter, the court must take into account plausible opposing inferences. The Seventh Circuit expressly declined to engage in such a comparative inquiry. But in § 21D(b)(2), Congress did not merely require plaintiffs to allege facts from which an inference of scienter rationally could be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a “strong”—*i.e.*, a powerful or cogent—inference.

Tellabs, 551 U.S. at 322-323.

In *Tellabs*, this Court explained that as a check against abusive litigation in private securities fraud actions, the Private Securities Litigation Reform Act of 1995 (PSLRA) includes exacting pleading requirements. *Id.* at 323. The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant’s intention “to deceive, manipulate, or defraud.” As set out in § 21D(b)(2), plaintiffs must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2). *Tellabs*, 551 U.S. at 323.

Accounting for its construction of § 21D(b)(2), the Seventh Circuit in *Tellabs* explained that the court thought it wise to adopt an approach that could not be misunderstood as a usurpation of the jury’s role. This Court reasoned, “In our view, the Seventh Circuit’s concern was undue. A court’s comparative assessment of plausible inferences, while constantly assuming the plaintiff’s allegations to be true, we think it plain, does not impinge upon the Seventh Amendment right to jury trial.” *Tellabs*, 551 U.S. at 326-327.

This Court in *Tellabs* explained that no decision of this Court questions the authority in general, or suggests, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims as follows:

Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits. It is the federal law-

maker's prerogative, therefore, to allow, disallow, or shape the contours of—including the pleading and proof requirements for—§ 10(b) private actions. No decision of this Court questions that authority in general, or suggests, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims. *Cf. Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512-513, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); *Leatherman*, 507 U.S., at 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (both recognizing that heightened pleading requirements can be established by Federal Rule, citing Fed. Rule Civ. Proc. 9(b), which requires that fraud or mistake be pleaded with particularity).

Tellabs, 551 U.S. at 327.

This Court further provided in *Tellabs* that courts dismissing a federal claim for failure to follow Congress' pleading requirements do not impinge on a claimant's Seventh Amendment right to a jury trial as follows:

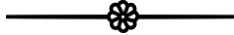
Our decision in *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 23 S. Ct. 120, 47 L. Ed. 194 (1902), is instructive. That case concerned a rule adopted by the Supreme Court of the District of Columbia in 1879 pursuant to rulemaking power delegated by Congress. The rule required defendants, in certain contract actions, to file an affidavit “specifically stating . . . , in precise and distinct terms, the grounds of his defen[s]e.” *Id.*, at 318, 23 S. Ct. 120, 47 L. Ed. 194 (internal quotation marks omitted). The defen-

dant's affidavit was found insufficient, and judgment was entered for the plaintiff, whose declaration and supporting affidavit had been found satisfactory. *Ibid.* This Court upheld the District's rule against the contention that it violated the Seventh Amendment. *Id.*, at 320, 23 S. Ct. 120, 47 L. Ed. 194. Just as the purpose of § 21D(b) is to screen out frivolous complaints, the purpose of the prescription at issue in *Fidelity & Deposit Co.* was to "preserve the court from frivolous defen[s]es," *ibid.* Explaining why the Seventh Amendment was not implicated, this Court said that the heightened pleading rule simply "prescribes the means of making an issue," and that, when "[t]he issue [was] made as prescribed, the right of trial by jury accrues." *Ibid.*; accord *Ex parte Peterson*, 253 U.S. 300, 310, 40 S. Ct. 543, 64 L. Ed. 919 (1920) (Brandeis, J.) (citing *Fidelity & Deposit Co.*, and reiterating: "It does not infringe the constitutional right to a trial by jury [in a civil case], to require, with a view to formulating the issues, an oath by each party to the facts relied upon."). See also *Walker v. New Mexico & Southern Pacific R. Co.*, 165 U.S. 593, 596, 17 S. Ct. 421, 41 L. Ed. 837 (1897) (Seventh Amendment "does not attempt to regulate matters of pleading").

Tellabs, 551 U.S. at 327-328.

In the instant case, the PLRA was enacted for the twin purposes of protecting administrative agency authority and promoting judicial efficiency and mandates early judicial screening of prisoner complaints.

Like the PSLRA, the PLRA is a check against frivolous litigation and requires exacting pleading requirements of exhausting grievance procedures to assert a federal statutory claim. And as this Court stated in *Tellabs*, Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of—including the pleading and proof requirements for, Federal statutory actions. And just as in *Tallab*, the Seventh Amendment is not implicated in this preliminary screening by the court to determine if the PLRA requirements were followed before allowing the case to proceed to trial.



CONCLUSION

Creating a right to a jury trial for a PLRA exhaustion defense opens a floodgate of litigation, defies judicial economy and strains law enforcement budgets needed for public safety. A jury is not needed to resolve fact issues bearing on a claimant's ability and opportunity to comply with the grievance procedure under the PLRA which are analytically and temporally distinct from fact issues on the merits of the legal claim. No decision of this Court questions the authority of Congress to establish whatever pleading requirements it finds appropriate for federal statutory claims. Judges have the authority to resolve threshold issues without the participation of a jury before the adjudication of a case on its merits. Such a determination does not violate a claimant's Seventh Amendment right to have a jury decide facts bearing on the merits of the legal claim. Accordingly, this Court should reverse the Circuit Court below and hold that PLRA issues can be resolved without a jury.

Respectfully submitted,

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December 2, 2024