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 THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, LEGAL AID SOCIETY OF THE CITY OF NEW YORK, AND PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union ("ACLU")** is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU has frequently appeared before this Court as direct counsel and as *amicus curiae*. It has been involved in litigation concerning the Prison Litigation Reform Act's exhaustion provision, 42 U.S.C. § 1997e(a), since the statute's enactment. *See, e.g.*, *Jones v. Bock*, 549 U.S. 199 (2007) (amicus brief cited by the Court); *Woodford v. Ngo*, 548 U.S. 81 (2006) (amicus); *Strizich v. Palmer*, No. 23-35082, 2024 WL 3493294 (9th Cir. July 22, 2024) (amicus); *Smallwood v. Williams*, 59 F.4th 306 (7th Cir. 2023) (amicus brief cited by court); *Coopwood v. Wayne Cnty., Mich.*, 74 F.4th 416 (6th Cir. 2023) (amicus); *Williams v. Carvajal*, 63 F.4th 279 (4th Cir. 2023) (counsel); *Eaton v. Blewett*, 50 F.4th 1240 (9th Cir. 2022) (amicus); *Geter v. Baldwin State Prison*, 974 F.3d 1348 (11th Cir. 2020) (counsel); *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781 (5th Cir. 2012) (amicus). The ACLU of Michigan is one of the ACLU's state affiliates.

The **Legal Aid Society of the City of New York** is a private, non-profit organization that has provided

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than *amici*, their members, or their counsel contributed money intended to fund the preparation or submission of the brief.

free legal assistance in New York City for over 130 years. It is the largest provider of criminal defense services in New York City, and large numbers of its clients are held in city jails and state prisons. The Society's Prisoners' Rights Project ("PRP"), established in 1971, seeks to protect incarcerated people's constitutional and statutory rights through litigation and advocacy on behalf of people held in the New York State prisons and the New York City jails. PRP has been involved in litigation concerning the interpretation of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, virtually since the statute's enactment, both as counsel and as *amicus curiae*. *See, e.g.*, *Amador v. Andrews*, 655 F.3d 89 (2d Cir. 2011) (interpreting PLRA exhaustion requirement in PRP case); *Johnson v. Testman*, 380 F.3d 691 (2d Cir. 2004) (same); *Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir. 1999) (en banc) (interpreting PLRA prospective relief provisions in PRP case), *cert. denied sub nom. Benjamin v. Kerik*, 528 U.S. 824 (1999); *Jones v. Bock*, 549 U.S. 199 (2007) (amicus);*Woodford v. Ngo*, 548 U.S. 81 (2006) (amicus); *Ross v. Blake*, 578 U.S. 632 (2016) (amicus).

Public Justice is a public interest legal advocacy organization that specializes in precedent-setting, socially-significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress for their injuries in

the civil court system. As part of this work, Public Justice has long advocated for the interests of incarcerated individuals seeking to use the civil justice system, including most recently in *Brown v. Pouncy*, No. 23-1332, 2024 WL 4426679 (U.S. Oct. 7, 2024) (statutes of limitations for civil rights claims); *In re Tehum Care Services, Inc.*, No. 23-90086 (Bankr. S.D. Tex.) (ability of incarcerated individuals to effectively participate in bankruptcy proceedings); and *Cal. Coal. for Women Prisoners v. United States*, 723 F. Supp. 3d 712 (N.D. Cal. 2024) (access to court records).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, requires incarcerated people seeking to vindicate their civil rights to exhaust "available" administrative remedies before filing suit in federal court. *Id.* By its terms, the statute does not purport to diminish incarcerated plaintiffs' Seventh Amendment jury rights. Nor could it.

The Seventh Amendment codifies "the right to a jury's resolution of the ultimate dispute." *Markman v. Westview Instruments*, 517 U.S. 370, 377 (1996). This right "is of ancient origin, characterized by Blackstone as . . . 'the most transcendent privilege which any subject can enjoy.'" *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935). Indeed, the jury right is "'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'" *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109, 121 (2024) (quoting *Dimick*, 293 U.S. at 486).

Consistent with these foundational principles, the Sixth Circuit correctly held that the Seventh Amendment mandates that a jury determine facts going to exhaustion when those facts are intertwined with the merits of the plaintiff's claim. Although the Sixth Circuit is the first court of appeals to explicitly reach this conclusion, nearly all circuit courts to consider the question have also reached decisions consistent with the Seventh Amendment's mandate that plaintiffs are entitled to a jury's determination of the ultimate dispute—holding that where questions of

fact regarding exhaustion are explicitly not "bound up" with the merits, a judge may serve as factfinder. *See Small v. Camden Cnty.*, 728 F.3d 265, 270 (3d Cir. 2013); *see also Lee v. Willey*, 789 F.3d 673, 678 (6th Cir. 2015); *Messa v. Goord*, 652 F.3d 305, 309 (2d Cir. 2011); *Dillon v. Rogers*, 596 F.3d 260, 271 (5th Cir. 2010); *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008). It logically follows that judges may *not* decide disputed facts about exhaustion when those very same facts go to the merits. The Sixth Circuit's decision is the corollary of those by the Second, Third, Fifth, and Eleventh Circuits.

In contrast, Mr. Perttu and his *amici* defy the basic mandate of the Seventh Amendment and ignore the plain language of the PLRA. They would have the Seventh Amendment's fundamental protections give way to efficiency, to speculative burdens, and to the PLRA's "goals." Mr. Perttu asks this Court to hold that the jury right never attaches to factual determinations about exhaustion of administrative remedies under the PLRA, even when those determinations are dispositive of the merits. His argument has no textual basis in the PLRA and would carve out claims brought by incarcerated people from core Seventh Amendment guarantees afforded to all other plaintiffs.

The Court should reject these arguments for four reasons.

First, the court of appeals gives full effect to the exhaustion requirement enacted by Congress, despite suggestions by Mr. Perttu and his *amici* to the contrary. By the statute's plain terms, incarcerated plaintiffs are only required to exhaust administrative

remedies when those remedies are "available." 42 U.S.C. § 1997e(a). And under the Sixth Circuit's analysis, only a subset of exhaustion questions will go to a jury—the cabined category of cases in which disputed facts underlying the availability of administrative remedies are also dispositive of the merits. As set forth below, the PLRA's statutory requirements remain untouched, and judges may decide all other factual questions relating to PLRA exhaustion, including the mine run of factual disputes about the availability of administrative remedies.

Second, the text of the PLRA does not—and cannot—displace the Seventh Amendment, which guarantees the right to a jury trial on the findings of fact at issue here. Indeed, Section 1997e(a) does not purport to alter the Seventh Amendment's application to suits brought by incarcerated plaintiffs. But Mr. Perttu ignores the text, instead urging the Court to rely solely on the PLRA's "goals" in order to restrict incarcerated plaintiffs' constitutional rights. This Court squarely rejected that approach in *Jones v. Bock*, 549 U.S. 199, 213 (2007), when it held that absent express text, the PLRA's policy aims cannot displace the "usual practice" in civil litigation. *Id.* *Jones*' reasoning applies with even more force here, as Congress is not free to "conjure away the Seventh Amendment" through legislation, *Jarkesy*, 603 U.S. at 135, and courts may not interpret the statute to do so.

Third, the factual disputes in the cases falling within the Sixth Circuit's parameters are uniquely suited for a jury's resolution. This Court looks both to historical analogues and, if necessary, precedent and "functional considerations" to inform whether a particular issue must be submitted to a jury to

"preserve the right to a jury's resolution of the ultimate dispute." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999) (quoting *Markman*, 517 U.S. at 377). On the last point, the Court considers whether the issue is one of fact or law, *id.* at 720, and whether a judge or jury is best positioned to decide it. *Markman*, 517 U.S. at 384, 388. The Seventh Amendment thus provides for a jury finding in the subset of cases most likely to be at issue here—when a plaintiff alleges that staff actions made administrative remedies unavailable and brings a First Amendment retaliation claim based on that same staff misconduct. Both inquiries require the factfinder to determine whether the allegations are true, and whether that misconduct would deter a reasonable person of ordinary firmness from accessing the grievance procedure—questions of fact squarely within the province of the jury.

Fourth, interpreting the PLRA exhaustion requirement consistently with the Seventh Amendment will not flood the courts with frivolous litigation and jury trials, as Mr. Perttu and his *amici* suggest. Even if this suggestion was true (and it is not), longstanding constitutional principles prioritize the Seventh Amendment's strong mandate over Mr. Perttu's preference for efficiency. *Curtis v. Loether*, 415 U.S. 189, 198 (1974) (holding arguments about efficiency "are insufficient to overcome the clear command of the Seventh Amendment"). And the available empirical data show that there will be no flood, refuting Mr. Perttu and his *amici*'s speculation. Federal courts in New York have provided for a right to a jury trial on this limited category of facts for more than a decade, and those courts have seen *decreases* in

both the number of cases brought by incarcerated plaintiffs and the number of jury trials held.

The Court should affirm the decision below.

ARGUMENT

I. REQUIRING JURIES TO DETERMINE FACTS THAT GO BOTH TO THE AVAILABILITY OF ADMINISTRATIVE REMEDIES AND THE MERITS OF THE PLAINTIFF'S CLAIMS GIVES FULL EFFECT TO THE PLRA'S EXHAUSTION REQUIREMENT.

Mr. Perttu and his *amici* argue that the court of appeals effectively dismantled the PLRA's exhaustion requirement. Pet. Br. 14–15. It did no such thing. The Sixth Circuit's decision requires only that juries decide those issues of fact that go both to the merits of the plaintiff's claim *and* to whether administrative remedies were "available" under the PLRA. That conclusion gives full effect to the text of the PLRA's exhaustion requirement and does not disturb the basic mechanics of how the exhaustion requirement has worked for decades.

The PLRA's exhaustion provision, 42 U.S.C. § 1997e(a), requires incarcerated plaintiffs to exhaust administrative remedies before filing suit in federal court. But it contains an important limitation: Administrative exhaustion is mandatory only if those remedies are "available." *Id.* In other words, where remedies are not available, exhaustion is not required. *Ross v. Blake*, 578 U.S. 632, 643 (2016). The Sixth Circuit held that when factual disputes regarding the exhaustion of administrative remedies are also

determinative of the merits of the plaintiff's claim, the Seventh Amendment mandates that a jury resolve those disputes. Pet. App. 19a. As detailed below, this factual overlap will occur only when the exhaustion dispute centers on the availability of administrative remedies. The ruling below will not result in jury trials on general questions of exhaustion, therefore, but only on narrower questions about the availability of administrative remedies when those facts are inextricably intertwined with the merits.

Mr. Richards' case presents just such a situation. In order to prevail on his First Amendment claim, Mr. Richards must prove what he alleged in his complaint: that Mr. Perttu retaliated against him after sexually harassing him, by blocking his access to the prison's grievance process. The same factual nexus underlies whether administrative remedies were "available" under the PLRA and whether Mr. Perttu violated Mr. Richards' constitutional rights.

The court of appeals' decision thus leaves untouched long-settled law on PLRA exhaustion, and incarcerated plaintiffs must continue to clear the many ordinary hurdles under the PLRA and civil procedure rules.

Exhaustion of available remedies prior to filing suit is still "mandatory." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Plaintiffs must exhaust "properly" by strictly complying with all deadlines, steps, and requirements of a facility's grievance procedure. *Woodford v. Ngo*, 548 U.S. 81, 93 (2006); *Jones*, 549 U.S. at 218.

After an incarcerated plaintiff files a complaint, a court screens the claims under 28 U.S.C. § 1915A to

determine if they have merit. 28 U.S.C. § 1915A(a). If a court concludes any claim is "frivolous, malicious, . . . fails to state a claim" or "seeks monetary relief from a defendant who is immune from such relief," those claims are dismissed. 28 U.S.C. § 1915A(b). This remains unchanged under the Sixth Circuit's rule.

If a complaint survives screening, defendants may assert failure to exhaust as an affirmative defense. *See Jones*, 549 U.S. at 218 (holding that exhaustion is not a pleading requirement but an affirmative defense). Typically raised on a motion for summary judgment, defendants have the burden of demonstrating that there was an available administrative remedy, and that the plaintiff failed to exhaust it. *See, e.g.*, *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014). If the plaintiff is unable to point to a genuine dispute of material fact, the court will grant summary judgment for the defendant. This, too, remains unchanged under the Sixth Circuit's rule.

Section 1997e(a) contains an explicit exception to the exhaustion requirement: Plaintiffs need not exhaust remedies when they are not "available." *See* 42 U.S.C. § 1997e(a); *see also Ross*, 578 U.S. at 635–36. Grievance procedures are not "available" if they are not "capable of use for the accomplishment of a purpose" and "accessible." *Ross*, 578 U.S. at 642. For example, where prison grievance regimes are simple "dead ends" or have requirements that are functionally impossible to meet, remedies are not "capable of use." *Id.* at 643. And, relevant here, where staff "thwart" a plaintiff from using the grievance process through "machination, misrepresentation, or intimidation," remedies are no longer "accessible." *Id.* at 644.

To avail themselves of this exception, plaintiffs must present evidence in response to defendant's motion for summary judgement demonstrating that the grievance procedure was unavailable to them. *See, e.g.*, *Rinaldi v. United States*, 904 F.3d 257, 268 (3d Cir. 2018); *Albino*, 747 F.3d at 1172; *Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011). Again, this remains unchanged under the Sixth Circuit's rule.

Judges routinely resolve factual disputes regarding exhaustion that do not also go the merits of the plaintiff's claim, including basic factual questions like whether the plaintiff filed a grievance or pursued all steps in the grievance process. *See, e.g.*, *Lee*, 789 F.3d at 678 (holding that judge was empowered to decide whether plaintiff had submitted letter in lieu of a grievance in case alleging failure to protect from rape); *Small*, 728 F.3d at 270 (holding that judge may decide factual questions about what was required under prison's grievance process and whether plaintiff met those requirements in case alleging failure to provide accommodations to plaintiff with paraplegia).

Judges also find many facts regarding the availability of administrative remedies when those facts do not speak to the plaintiff's substantive claims. *See, e.g.*, *Messa*, 652 F.3d at 309 (holding that judge may decide factual questions regarding availability of remedies to illiterate, monolingual Spanish-speaker in excessive force case); *Dillon*, 596 F.3d at 271 (holding that judge may resolve disputed facts on whether prison staff prevented plaintiff from filing grievance in excessive force case); *Bryant*, 530 F.3d at 1376 (holding that judge did not err in deciding facts about plaintiff's access to grievance forms in excessive force case). In such cases, courts must perform a

"thorough review" of the facts, taking into consideration the "real-world workings of prison grievance systems." *Ross*, 578 U.S. at 648, 643. This, too, remains unchanged under the rule below.

Indeed, incarcerated plaintiffs alleging, *inter alia*, violations of religious liberties, sexual abuse, the failure to provide adequate medical care, or other common claims will continue to have those claims dismissed in the usual course if they do not first exhaust administrative remedies. Rarely, if ever, will the facts underlying these claims be intertwined with facts about the availability of remedies—whether the grievance procedure was too convoluted to complete, simply a "dead end" with no possibility of relief, or whether staff thwarted the plaintiff from completing the grievance procedure. *See id.* at 644–45 (describing examples of unavailability). Resolution of exhaustion in these mine run conditions of confinement cases remains unchanged under the Sixth Circuit's rule.

Nearly every circuit to consider the question, however, has recognized a judge's authority to resolve these factual disputes in cases where the facts of exhaustion were "not bound up with the merits of the underlying dispute." *Small*, 728 F.3d at 270; *see also Lee*, 789 F.3d at 678 & n.3 (holding that judge may decide factual disputes because "the record reflects that the factual disputes concerning exhaustion were not intertwined with the merits"); *Messa*, 652 F.3d at 309 (same); *Dillon*, 596 F.3d at 272 n.2 ("We do not determine today who should serve as factfinder when facts concerning exhaustion also go to the merits of a prisoner's claim."); *Bryant*, 530 F.3d at 1376 (holding a judge may "resolve factual disputes so long as the factual disputes do not decide the merits"). *But see*

Pavey v. Conley, 544 F.3d 739, 741–42 (7th Cir. 2008) (holding judge may resolve disputes of fact regarding availability where there was a "possible overlap" with the merits). That discrete subset of cases—where the facts regarding the availability of administrative remedies *are* intertwined with the merits—is where the Sixth Circuit's rule becomes relevant.

Before any exhaustion dispute will be heard by a jury, therefore, a plaintiff must (1) plead a claim that survives screening; (2) present an unavailability argument; (3) submit evidence sufficient to create a genuine dispute of fact to overcome the defendant's summary judgment motion on failure-to-exhaust grounds (and all other arguments in the summary judgment motion); and (4) the court must determine that the factual disputes underlying the availability of administrative remedies are intertwined with the merits.

If, following this inquiry, a judge determines there is no factual overlap, under the Sixth Circuit's rule, the judge may resolve the disputed facts regarding exhaustion. Pet. App. 6a. If the facts are inextricably intertwined, and the district court finds that facts concerning PLRA exhaustion are "decisive of the merits of the plaintiff's claim," only then will the question proceed to a jury. Pet. App. 19a (quoting *Fireman's Fund Ins. Co. v. Ry. Express Agency, Inc.*, 253 F.2d 780, 784 (6th Cir. 1958)).

II. THE PLRA'S EXHAUSTION PROVISION DOES NOT DIMINISH THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

Mr. Perttu's argument is silent on the text of the PLRA—a striking omission. Instead, Mr. Perttu and

his *amici* assert that the legislative intent behind the PLRA requires judges, not juries, to determine questions of administrative exhaustion—even when those questions are inextricably intertwined with the merits. But 42 U.S.C. § 1997e(a) provides no textual support for that assertion.

Section 1997e(a) provides: "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." 42 U.S.C. § 1997e(a). Nothing in this text remotely suggests that Congress intended to disturb the core Seventh Amendment guarantee of a jury trial on the ultimate facts in dispute.

Courts must "enforce plain and unambiguous statutory language according to its terms," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010), rather than relying on "[v]ague notions of statutory purpose," *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012). And this Court has consistently, and repeatedly, rejected efforts to add or subtract from the PLRA's text. *See, e.g.*, *Porter*, 534 U.S. at 532 (declining to exempt certain claims from the exhaustion requirement); *Booth v. Churner*, 532 U.S. 731, 733 (2001) (declining to exempt certain relief from the exhaustion requirement); *Jones*, 549 U.S. at 212, 218 (holding that exhaustion is not a pleading requirement and declining to require certain content in grievances); *Ross*, 578 U.S. at 638 (rejecting "special circumstances" exceptions to exhaustion). This "adherence to the PLRA's text . . . applies regardless

of whether it benefits the inmate or the prison." *Id.* at 640 n.1.

Rather than locating any basis for his position in the statute's text, Mr. Perttu bases his argument solely on the PLRA's "goals." Pet. Br. 14, 36. But in *Jones*, this Court specifically rejected a similarly atextual argument based on the PLRA's purported policy goals. 549 U.S. at 212, 216. There, the question was whether administrative exhaustion is a pleading requirement or an affirmative defense. Arguing for the former, lower courts and the government asserted that to "function effectively" and "serve its intended purpose," the PLRA required a heightened pleading standard for incarcerated litigants. *See id.* at 231.

This Court rejected that argument and concluded, based on the PLRA's text, that Congress did not alter ordinary litigation procedures. *Id.* at 213. Reviewing Section 1997e(a)'s text, the Court observed that Congress provided for early judicial screening of complaints filed by incarcerated plaintiffs, but enumerated only four grounds on which courts may dismiss those complaints *sua sponte*. *Id.* at 213 (citing 42 U.S.C. § 1997e(c)(1); 28 U.S.C. § 1915A(b)). Because "failure to exhaust was notably not added in terms to this enumeration" the Court concluded that "there is no reason to suppose that the normal pleading rules have to be altered." *Jones*, 549 U.S. at 214.

Further, the Court noted that elsewhere in the statute the PLRA explicitly departs from the usual pleading rules. *Id.* at 216. Section 1997e(g) allows defendants to waive their right to reply without that waiver constituting an admission of the allegations.

"This shows that when Congress meant to depart from the usual procedural requirements, it did so expressly." *Jones*, 549 U.S. at 216.

Here, as in *Jones*, Congress did not purport to alter the applicable procedural rules and practices. Nor did Congress purport to diminish incarcerated plaintiffs' right to a jury trial. This is "strong evidence that the usual practice should be followed." *Jones*, 549 U.S. at 212. And the "usual practice" is juror adjudication. Indeed, the Seventh Amendment's bedrock protections mandate that a jury serve the role of factfinder where disputes of fact simultaneously resolve questions on exhaustion and the "ultimate dispute." *Markman*, 517 U.S. at 377.[2]

More fundamentally, Congress cannot legislate away the Seventh Amendment. The jury right is of "ancient origin." *Dimick*, 293 U.S. at 485. The Framers adopted the Seventh Amendment to "embed[]" this ancient right in the Constitution, "securing it 'against the passing demands of expediency or convenience.'" *Jarkesy*, 603 U.S. at 122 (quoting *Reid v. Covert*, 354 U.S. 1, 10 (1957) (plurality opinion)). As such, just as "Congress cannot 'conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal,'" *id.* at 135, neither can it "siphon" merits questions away from a jury just because the facts also resolve questions of

[2] The *amici* States suggest that *Porter v. Nussle* stands for the proposition that exhaustion must be considered at the outset of the case. States Amici Br. at 12. It does not. *Porter* did not purport to address that procedural question at all, *see generally Porter*, 534 U.S. 516, and the quoted language is taken out of context.

administrative exhaustion, *see id.* As set forth in Part III, Mr. Perttu's interpretation of the exhaustion provision would put it on a collision course with the core Seventh Amendment guarantee of a jury trial on ultimate issues of fact.

Thus, even if there were any ambiguity in the PLRA's text (and there is not), it cannot be interpreted as Mr. Perttu urges. "Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018).

III. THE SEVENTH AMENDMENT REQUIRES THAT FACTUAL DETERMINATIONS UNDERLYING BOTH EXHAUSTION AND THE MERITS BE DECIDED BY A JURY.

The factual questions implicated here fall squarely within the scope of the Seventh Amendment. Under the Seventh Amendment, "[i]n actions at law, issues that are proper for the jury must be submitted to it 'to preserve the right to a jury's resolution of the ultimate dispute.'" *Del Monte Dunes*, 526 U.S. at 718 (quoting *Markman*, 517 U.S. at 377). Whether a particular issue is proper for a jury is determined by looking first for historical analogues and second, if necessary, to precedent and "functional considerations." *Id.* at 718.

Mr. Richards' brief sets out the primary analysis demonstrating that the factual determinations at issue here are in the heartland of the Seventh

Amendment's protection; *amici* need not repeat that here. Instead, *amici* draw on their significant experience litigating under the PLRA to explain how functional considerations confirm what history and precedent make plain: Questions of fact that go both to the merits of a plaintiff's claim and to exhaustion must be tried to a jury and not to a judge.

On this count, the Court primarily considers whether the issue is one of fact or law, and who is best suited to decide it. Specifically, "predominantly factual issues are in most cases allocated to the jury." *Del Monte Dunes*, 526 U.S. at 720. And the Court must consider "the relative interpretive skills of judges and juries" and whether "one judicial actor is better positioned than another to decide the issue in question." *Markman*, 517 U.S. at 384, 388 (internal quotation marks and citation omitted). Technical questions, like those requiring "sophisticated analysis" of documents, are appropriate for judges. *Id.* at 389. By contrast, juries are particularly suited to "evaluate demeanor," "sense the mainsprings of human conduct," and "reflect community standards." *Id.* at 389–90 (internal quotation marks and citation omitted).

The court of appeals' decision implicates primarily cases where the plaintiff claims the defendant retaliated against him in violation of the First Amendment and the same actions by the defendant also made administrative remedies unavailable. The questions of fact common both to the merits and the availability of administrative remedies fall squarely in the jury's domain: Did officials retaliate against the plaintiff for trying to file a grievance or threaten to do so? Did this misconduct block or deter the plaintiff

from accessing administrative avenues for relief? Would the misconduct have deterred a reasonable person from filing a grievance? If the answer to these factual questions is yes, then the plaintiff has no obligation to exhaust under Section 1997e(a)'s plain language—and those findings may ultimately be dispositive of the plaintiff's retaliation claim.

It is settled law that staff misconduct—including threats, intimidation, and retaliation—can render remedies unavailable under Section 1997e(a). *Ross*, 578 U.S. at 644. To demonstrate that staff misconduct rendered remedies unavailable, the courts of appeals agree on a straightforward framework. A plaintiff must show: (1) subjectively, that the threat or intimidation actually deterred the plaintiff from filing a grievance or pursuing a particular step in the administrative process; and (2) objectively, that the staff misconduct would have similarly deterred "a reasonable inmate of ordinary firmness and fortitude" from filing or pursuing a grievance. *Turner v. Burnside*, 541 F.3d 1077, 1085 (11th Cir. 2008); *see also Tuckel*, 660 F.3d at 1254 (adopting *Turner*'s two-part test); *McBride v. Lopez*, 807 F.3d 982, 987–88 (9th Cir. 2015) (same); *Rinaldi*, 904 F.3d at 269 (same).

The availability analysis in this context overlaps substantially with the elements of a First Amendment retaliation claim, as typically applied by the courts of appeals: whether (1) the plaintiff was engaged in a constitutionally protected activity; (2) government actors took an adverse action that would "deter a person of ordinary firmness from continuing to engage in that conduct"; and (3) there is a causal connection between the first two elements. *Thaddeus-X v. Blatter*, 175 F.3d 378, 389, 394 (6th Cir. 1999) (citing, *inter*

alia, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

Thus, both the unavailability inquiry and the merits inquiry, as applied by courts adjudicating these claims, require a determination about whether the staff misconduct would deter a reasonable person of ordinary firmness from pursuing the grievance procedure. These are quintessential questions of fact for resolution by jury trial. *See, e.g.*, *Bell v. Johnson*, 308 F.3d 594, 603 (6th Cir. 2002) ("Whether a retaliatory action is sufficiently severe to deter a person of ordinary firmness from exercising his or her rights is a question of fact."); *see also Del Monte Dunes*, 526 U.S. at 720 ("[P]redominantly factual issues are in most cases allocated to the jury.").

Allocating these factual disputes to a jury also respects "the relative interpretive skills of judges and juries." *Markman*, 517 U.S. at 384. Questions of fact concerning state of mind and applying a "reasonable person of ordinary firmness" standard are uniquely within the juror's wheelhouse. They include "questions of human behavior, reasonableness, and state of mind, matters historically considered at the core of the province of jurors, whose primary function has been to make determinations about people's conduct based on objective standards." Arthur R. Miller, *The Pretrial Rush to Judgment: Are the 'Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1132 (2003).

Indeed, courts have recognized a jury's "unique competence in applying the 'reasonable man'

standard." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 n.12 (1976) (citing 10 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2729 (1973)). For these reasons, in retaliation cases, the ordinary-firmness determination "is usually best left to the judgment of a jury" which, "after all, represents the conscience of the community." *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003).

Juries are similarly tasked with applying "reasonable person" standards across many analogous contexts. For example, in negligence cases, application of the reasonable-person standard is "a determination that is generally left to the jury." *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 376 (6th Cir. 2009). For statutes of limitations determinations, "[q]uestions of when a reasonable person would discover an injury and what a reasonable person would have done are generally within the province of the jury." *Wolf v. Preferred Risk Life Ins. Co.*, 728 F.2d 1304, 1307 (10th Cir. 1984). Questions about "what a reasonable investor would have known" are "usually reserved for juries." *Briskin v. Ernst & Ernst*, 589 F.2d 1363, 1369 (9th Cir. 1978). And juries are routinely found qualified to make "reasonable person" determinations without the aid of expert testimony. *See United States v. Hanna*, 293 F.3d 1080, 1086 (9th Cir. 2002) (collecting cases).

Ultimately, the answer to this "reasonable person" inquiry resolves both the unavailability determination and the merits of the First Amendment claim—confirming that the question must be allocated to the jury "'to preserve the right to a jury's resolution

of the ultimate dispute.'" *Del Monte Dunes*, 526 U.S. at 720 (quoting *Markman*, 517 U.S. at 377).

Mr. Perttu fails to engage with the nature of the factual determinations at issue or their obvious susceptibility to juror adjudication. Instead, he tries to wave away any constitutional concerns by asserting that a jury could re-examine a judge's factual findings on exhaustion, thereby preserving the right to a jury's determination of the ultimate dispute. Pet. Br. 43–44. But this misunderstands how litigation proceeds under the PLRA. The remedy for non-exhaustion is dismissal. And most plaintiffs are then forever barred from court—restarting and completing the grievance process following dismissal will virtually never be permitted. To properly exhaust under the PLRA, a plaintiff must meet the deadlines contained in a facility's grievance policy, which are often less than two weeks and can be as short as two days. 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, 148 (2008). By the time a case has been filed, processed, and dismissed by a federal court, those deadlines have long passed. And even if a grievance policy provides for filing out of time in certain circumstances, a plaintiff seeking to restart the grievance process following dismissal is unlikely to meet the criteria for a late filing. For example, of the five largest state corrections systems in the country—Texas, California, Florida, Georgia, and Ohio—not one would clearly allow a plaintiff to restart the grievance procedure after a claim had been

dismissed, months or years after the underlying incident.[3]

IV. PETITIONER'S FLOODGATES ARGUMENT IS IRRELEVANT TO THE SEVENTH AMENDMENT ANALYSIS AND CONTRARY TO THE EMPIRICAL EVIDENCE.

Mr. Perttu and his *amici* assert that the decision below will result in significant inefficiencies and an increased burden on the courts and governments. *See,*

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[3] Texas has a 15-day deadline with no exceptions. *See* Tex. Dep't of Crim. J., Offender Orientation Handbook 74 (2017), http://bit.ly/3C2wu97.

California provides 60 days to grieve; extensions are provided only if the grievant is (1) in a different agency's custody for court proceedings; (2) in an outside hospital; (3) in a medical or mental health crisis bed; or (4) actively fighting fires. *See* Cal. Code Regs. tit. 15, § 3482 (2025).

Florida requires grievances to be filed within 15 or 20 days, depending on the type of concern. Fla. Admin. Code 33-103.011(1)(a), (b)(2). Extensions are granted only if the grievance is about "being physically restrained during pregnancy, labor or post-partum recovery" or if the grievant "clearly demonstrated" that it was "not feasible" to file the grievance in a timely way. Fla. Admin. Code 33-103.011(1)(a), (2).

Georgia has a 10-day deadline; late grievances will only be considered upon a showing of "good cause"—examples of which are serious illness or being away from the facility for court or medical treatment. Ga. Dep't of Corr., Statewide Grievance Procedure 1, 8 (2019), https://perma.cc/UK2H-X7W6.

Ohio provides 14 days to grieve; staff may waive this deadline for "good cause." Ohio Admin. Code 5120-9-31. "Good cause" is not defined. However, the Ohio Attorney General conceded that staff have "a strong incentive" not to waive the deadlines to prevent a matter from proceeding to court. States Amici Br. at 20–21.

e.g., Pet. Br. 36. These arguments should be rejected for three reasons.

First, Mr. Perttu's concerns about efficiency are not relevant to the constitutional question before this Court. Even if jury trials may delay the disposition of some actions, "these considerations are insufficient to overcome the clear command of the Seventh Amendment." *Curtis*, 415 U.S. at 198. Indeed, the most efficient path would be to cease jury trials altogether. Yet this Court has repeatedly rejected arguments of efficiency in favor of the Seventh Amendment's mandate. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 63 (1989) (upholding jury right despite recognizing that providing jury trials in certain cases may "impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations"); *Curtis*, 415 U.S. at 198 (upholding jury right despite the "force" of policy arguments that jury trials "may delay to some extent the disposition of Title VIII damages actions"); *Pernell v. Southall Realty*, 416 U.S. 363, 384 (1974) (discounting argument that jury trials would be unduly burdensome for district courts and rejecting the "notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial").

Second, even if efficiency *were* relevant (and it is not), the decision below will not result in a flood of jury trials because it is cabined to cases meeting defined parameters. As discussed above in Part I, before any exhaustion dispute will be heard by a jury, a plaintiff must first plead a substantive claim that survives screening under 28 U.S.C. § 1915A, present an unavailability argument, submit sufficient evidence to

raise a genuine dispute of material fact, and demonstrate to a court's satisfaction that factual disputes underlying the availability of administrative remedies are intertwined with the merits. That is a high bar to surpass.[4]

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[4] The a*mici* States highlight nearly a dozen cases in which incarcerated plaintiffs argued administrative remedies were unavailable. States Amici Br. at 16–17. Notably, none of the cases included facts underlying the merits that were clearly intertwined with the facts underlying availability. Thus, *none* of the cases would require a jury trial under the Sixth Circuit's rule. *See Smallwood v. Williams*, 59 F.4th 306, 310, 316 (7th Cir. 2023) (merits: sexual abuse and excessive force by staff; exhaustion: argued unavailability due to cognitive disabilities and inability to understand complex grievance process without assistance); *Minerly v. Nalley*, No. 3:19-CV-0467, 2021 WL 4924739, at *1–2 (7th Cir. Oct. 21, 2021) (merits: retaliation for filing grievances unrelated to present case; exhaustion: argued unavailability due to staff failure to respond); *Phillips v. Walker*, 443 F. App'x 213, 214 (7th Cir. 2011) (merits: failure to address serious medical needs; exhaustion: argued unavailability due to staff interference and threats); *Gibson v. Yaw*, No. 1:22-CV-773, 2024 WL 3226120, at *1–3 (S.D. Ohio June 27, 2024), *report and recommendation adopted*, No. 1:22-CV-773, 2024 WL 3430365 (S.D. Ohio July 16, 2024) (merits: conditions of confinement; exhaustion: argued unavailability due to being denied access to kiosk and then kiosk being down/offline); *Johnson v. Barney*, No. 1:21-CV-141, 2024 WL 755441, at *1, *4–5 (S.D. Ohio Feb. 23, 2024) (merits: excessive force; exhaustion: argued unavailability due to staff interference); *McKinney v. Paddock*, No. 2:20-CV-1450, 2024 WL 383412, at *1–2 (S.D. Ohio Feb. 1, 2024), *report and recommendation adopted*, No. 2:20-CV-1450, 2024 WL 1193074 (S.D. Ohio Mar. 20, 2024) (merits: confiscation of property and related disciplinaries; exhaustion: argued unavailability due to staff failure to respond within requisite time period); *Rodgers v. Driesbach*, No. 2:20-CV-2848, 2021 WL 1102466, at *1, *3 (S.D. Ohio Mar. 23, 2021), *report and recommendation adopted sub nom. Rodgers v. Morgan*, No. 2:20-CV-2848, 2021 WL 3169154 (S.D. Ohio, July 26, 2021) (merits: First Amendment violation

Cases that trigger the jury right will typically mirror the matter at hand—involving First Amendment claims of retaliation based on staff interference with the grievance procedure, and unavailability arguments based on that same staff misconduct. Given the number of hurdles to overcome before the jury right will attach, incarcerated plaintiffs are unlikely to assert frivolous retaliation claims as an end-run around exhaustion. As the Tenth Circuit observed: "[D]emonstrating that an official objectively chilled an inmate from relying on administrative remedies presents a significant challenge in any context. As such, there is little incentive for an inmate to assert baseless retaliation claims rather than simply utilizing a grievance procedure." *Tuckel*, 660 F.3d at 1254.

Third, the Court need not rely on speculation and conjecture when considering the effect of the Sixth

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due to improper opening of legal mail; exhaustion: argued unavailability due to kiosks being out of order); *Hargrove v. Holley*, No. 1:17-CV-560, 2020 WL 5651476, at *1–2 (S.D. Ohio Sept. 22, 2020) (merits: deliberate indifference resulting in assault by cellmate; exhaustion: argued unavailability due to computers not working and staff ripping up paper grievances); *Irizarry v. Ohio Dep't of Rehab. & Corr.*, No. 4:23-CV-1376, 2023 WL 8543886, at *1 (N.D. Ohio Dec. 11, 2023) (merits: failure to protect from assault by cellmate; exhaustion: argued unavailability due to fear of retaliation); *Huggins v. Williams*, No. 1:20-CV-01273, 2023 WL 4628370, at *1 (N.D. Ohio July 19, 2023) (merits: excessive force and negligence; exhaustion: argued unavailability due to intimidation and fear of retaliation); *Greene v. Ballard*, No. 2:17-CV-02897, 2020 WL 3055459, at *1 (S.D. W. Va. Feb. 25, 2020), *report and recommendation adopted*, No. 2:17-CV-02897, 2020 WL 1482568 (S.D. W. Va. Mar. 27, 2020) (merits: range of claims including excessive force and inadequate medical care; exhaustion: argued unavailability due to staff interference).

Circuit's rule on court operations. District courts in New York have followed this same rule for more than a decade, and their experience is instructive.

In 2013, the Southern District of New York recognized the right to a jury trial where facts underlying questions of exhaustion are intertwined with the merits. *Rickett v. Orsino*, No. 10 CIV. 5152, 2013 WL 1176059, at *22–23 (S.D.N.Y. Feb. 20, 2013), *report and recommendation adopted*, No. 10-CV-5152 CS PED, 2013 WL 1155354 (S.D.N.Y. Mar. 21, 2013); *see also Stephens v. Venetozzi*, No. 13-CV-5779, 2020 WL 7629124, at *3 (S.D.N.Y. Dec. 21, 2020) (holding that factual questions underlying the availability of administrative remedies that were "plainly intertwined with Plaintiff's substantive claim" must be resolved by a jury).

The Western District of New York followed suit in 2016. *Daum v. Doe*, No. 13-CV-88V(F), 2016 WL 3411558, at *2 (W.D.N.Y. June 22, 2016).

In the intervening decade, there has been no evidence of New York federal courts being flooded with frivolous litigation by incarcerated plaintiffs. Nor is there evidence that jury trials on exhaustion have imposed any additional burden on litigants or the courts. To the contrary, both the number of new cases brought by incarcerated plaintiffs and the number of jury trials have decreased in those districts.

In 2013, incarcerated plaintiffs docketed 831 cases concerning conditions of confinement or civil rights in the Southern District of New York.[5] By 2023,

[5] Admin. Off. U.S. Courts, Judicial Business of the United States 2013, tbl.C-3, https://perma.cc/95G4-SFH3. All data cited herein

that number had dropped to 557.[6] Similarly, between 2013 and 2023, civil jury trials in the Southern District of New York decreased from 81 to 65.[7]

Meanwhile, in 2016—when *Daum v. Doe* was decided—incarcerated plaintiffs initiated 316 cases regarding conditions of confinement or civil rights in the Western District of New York.[8] In 2023, that number was 312.[9] Between 2016 and 2023, civil jury trials in the Western District of New York dropped from fifteen to nine.[10]

Most recently, in 2023, the Eastern District of New York also recognized the right to a jury determination of disputed facts underlying both exhaustion and the merits. *Sanchez v. Nassau Cnty.*, 662 F. Supp. 3d 369, 403 n.34 (E.D.N.Y. 2023). The *Sanchez* court observed that it was following the lead of other district courts in the Second Circuit—and

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from the Administrative Office of the U.S. Courts include figures for a 12-month period ending September 30 of the cited year.

[6] Admin. Off. U.S. Courts, Judicial Business of the United States 2023, tbl.C-3, https://perma.cc/R4YQ-6AV7.

[7] *Compare* Admin. Off. U.S. Courts, Judicial Business of the United States 2013, tbl.T-1, https://perma.cc/6G7T-WPGY, *with* Admin. Off. U.S. Courts, Judicial Business of the United States 2023, tbl.T-1, https://perma.cc/8GLW-TYA2.

[8] Admin. Off. U.S. Courts, Judicial Business of the United States 2016, tbl.C-3, https://perma.cc/B6PY-ZGVM.

[9] Admin. Off. U.S. Courts, Judicial Business of the United States 2023, tbl.C-3, https://perma.cc/CYY5-DBVL.

[10] *Compare* Admin. Off. U.S. Courts, Judicial Business of the United States 2016, tbl.T-1, https://perma.cc/4BF4-PGKM *with* Admin. Off. U.S. Courts, Judicial Business of the United States 2023, tbl.T-1, https://perma.cc/M5JG-BMSD.

expressed no concerns about inefficiencies or adverse outcomes seen in those jurisdictions. *See id.* at 403–04.

Moreover, courts applying this rule have continued to deny requests for jury trials on exhaustion when the facts are *not* intertwined with the ultimate question. One court, for example, held it was appropriate for a judge to rule on exhaustion where the facts underlying exhaustion were "extraneous" to the plaintiff's excessive force and property claims and "simply required review of whether Plaintiff had complied with the procedural rules outlined in the Inmate Handbook." *Edwards v. DeStefano*, No. 13-CV-4345, 2023 WL 6307341, at *6 (E.D.N.Y. Sept. 28, 2023).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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