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 CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the Constitution and its principles, which are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.

This case interests Cato because the constitutional right to a civil jury trial is fundamental to American liberty.

[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

BACKGROUND AND SUMMARY OF ARGUMENT

Congress enacted the Prison Litigation Reform Act ("PLRA") in 1995 to "reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002). PLRA provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], 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."[2]

Respondent Kyle Richards, a prisoner, filed a § 1983 lawsuit alleging that Petitioner Thomas Perttu, a correctional officer, committed sexual misconduct against him and other inmates—then threatened Richards and destroyed the grievances he sought to file in order to exhaust his administrative remedies. J.A. 14–15.

Without putting the issue to a jury, the district court determined that Richards had failed to exhaust his administrative remedies and dismissed his suit. Pet. App'x 22a–28a. The Sixth Circuit reversed, holding that Richards is entitled to a jury trial on the issue of exhaustion. *Id.* 19a.

The Sixth Circuit's holding was correct. The Constitution assigns to juries, not judges, responsibility for resolving disputed facts in criminal cases and civil cases involving common-law causes of action—such as damages claims against public officials. No less than other citizens, PLRA litigants are thus entitled to have disputes decided by the constitutionally appointed

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[2] 42 U.S.C. § 1997e(a).

fact-finder, particularly in cases where the issue of exhaustion is inextricably intertwined with the underlying merits.

ARGUMENT

I. THE RIGHT TO A CIVIL JURY TRIAL IS ESSENTIAL TO LIBERTY.

The Seventh Amendment provides:

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

U.S. CONST. amend. VII.

The right to a jury trial long pre-dates the Amendment's adoption in 1791. "Legal writers and political theorists who were widely read by the colonists were firmly of the opinion that trial by jury in civil cases was an important right of freemen."[3] William Blackstone said the jury trial was "the glory of the English law," possessed of "so great an advantage over others in regulating civil property."[4]

The Framers understood this right to be rooted in Magna Carta and a vital check on state power.[5]

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[3] Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653–54 (1973).

[4] 3 WILLIAM BLACKSTONE, COMMENTARIES *379.

[5] Wolfram, *supra*, at 653 n.44; *see also* Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical*

Thomas Jefferson described the right to a civil jury trial as "the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution."[6] James Madison referred to this right as being "as essential to secur[ing] the liberty of the people as any one of the pre-existent rights of nature."[7] The Stamp Act Congress called trial by jury "the inherent and invaluable right of every British subject in these colonies."[8] The First Continental Congress demanded for Americans the "great and inestimable privilege of being tried by their peers of the vicinage."[9] The Congress further protested denial by the British of the "accustomed and inestimable privilege of trial by jury, in cases of both life and property."[10] The

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Rationale of the Seventh Amendment, 21 HASTINGS CONST. L.Q. 1013, 1017 (1994) (collecting Founders' statements).

[6] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), https://founders.archives.gov/documents/Jefferson/01-15-02-0259.

[7] Hon. Kathleen M. O'Malley, *Foreword: Trial by Jury: Why It Works and Why It Matters*, 68 AM. U. L. REV. 1095, 1098 (2019) (citing Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005) (quoting 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789) (discussing civil cases))).

[8] Declaration of Rights of the Stamp Act Congress of 1765, *reprinted in* 2 THE FOUNDERS' CONSTITUTION Art. 1, Sec. 7, Cl. 1, Doc. 3, https://tinyurl.com/4swbm77z.

[9] Declaration and Resolves of 1774, *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES doc. no. 398 (Charles C. Tansill ed., 1927), https://tinyurl.com/23jun5c4.

[10] Declaration of the Causes and Necessity of Taking Up Arms (July 6, 1775), https://tinyurl.com/4fra6k9w.

Declaration of Independence accused the King of "[d]epriving us in many cases, of the benefits of Trial by Jury."[11]

Americans were well aware of the tactics that government officials might use to avoid facing juries—such as those the Petitioner is alleged to have used in this case. British colonial authorities would try ship-condemnation cases in vice-admiralty courts without the benefit of a jury, then rely on judgments procured there to preclude recovery of damages at civil jury trials.[12] Colonists specifically protested the practice of trying wage cases involving shipwrights and shipyard laborers in jury-free vice-admiralty courts.[13] The Stamp Act was also originally enforced via suits in the vice-admiralty courts.[14] George Mason thus condemned the British for having "depriv[ed] us of the ancient Tryal, by a Jury of our Equals, and substituting in its[] place an arbitrary Civil Law Court."[15]

Colonists perceived a further threat to jury trials in the Quebec Act, which is sometimes considered one of the "Intolerable Acts" triggering the American Revolution. The Act restored French civil law—under which

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[11] *Declaration of Independence: A Transcription*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/declaration-transcript.

[12] *See* Wolfram, *supra*, at 654 n.47.

[13] *Id.*

[14] *See* Stamp Act, 1765 (Gr. Brit.) at LVII–LVIII, https://tinyurl.com/bdess58a.

[15] Letter from George Mason to the Committee of Merchants in London (June 6, 1766), https://tinyurl.com/3sp54p9r.

there was no jury trial right—in the Canadian province.[16]

In response to these curtailments, the members of the Founding Generation were united in their demand for a civil jury trial guarantee. Indeed, the lack of that right in the original Constitution nearly derailed its ratification.[17] Antifederalists galvanized opposition due specifically to the lack of a civil jury trial right.[18] George Mason and Elbridge Gerry noted this omission as a reason why they did not sign the Constitution.[19]

For Antifederalists, the right to a civil jury trial meant "the protection of debtor defendants; the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty . . . and the protection of litigants against overbearing and oppressive judges."[20] Of particular concern was "the vindication of the interests of private citizens in litigation with the government."[21] One pseudonymous writer in the *Pennsylvania Packet* warned that "it was quite predictable that a 'lordly court of justice' sitting without a jury in

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[16] *See* The Quebec Act, 1774 (Gr. Brit.) at VIII, https://tinyurl.com/ypb3ddvu.

[17] *See* Klein, *supra*, at 1017–20.

[18] *See* Wolfram, *supra*, at 660 n.59 & 667; *see also Parsons v. Bedford*, 26 U.S. (1 Pet.) 433, 446 (1830) ("One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases.").

[19] Wolfram, *supra*, at 660 n.59, 667.

[20] *Id.* at 670–71.

[21] *Id.* at 671; *see also id.* at 708 ("Another important function of the civil jury . . . was to provide the common citizen with a sympathetic forum in suits against the government.").

the federal courts would likely be 'ready to protect the officers of government against the weak and helpless citizens[.]'"[22]

Antifederalist concern became so intense that Alexander Hamilton dedicated the Federalist No. 83 to assuring readers that "[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury."[23] Of course, the Constitution's Framers responded with crucial reassurance of their own—the Seventh Amendment.

This Court's precedents have continued to recognize civil jury trials' importance. Justice Rehnquist noted how the Founders "considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."[24] Last year, in *SEC v. Jarkesy*, Justice Gorsuch emphasized that despite "its weaknesses and the potential for misuse, we continue to insist that [the jury trial] be jealously preserved."[25]

The Seventh Amendment was adopted both to expose official government actions to the scrutiny of ordinary citizens and to ensure that they, not

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[22] *Id.* (citation omitted).

[23] THE FEDERALIST No. 83 (Alexander Hamilton).

[24] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

[25] 144 S. Ct. 2117, 2150 (2024) (Gorsuch, J., concurring) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *Patton v. United States*, 281 U.S. 276, 312 (1930)) (internal quotation marks omitted).

government officials, would be the final arbiters of who did what to whom.

II. FACTUAL ISSUES REGARDING EXHAUSTION SHOULD BE TRIED BY A JURY.

A. Prison officials can easily abuse the exhaustion requirement.

Allowing factual questions regarding PLRA's exhaustion requirement to be tried by a judge would frustrate the purpose and design of the Seventh Amendment. Prisoners bringing § 1983 claims are ordinarily entitled to a jury trial on the merits. But PLRA requires prisoners to first exhaust available administrative remedies. Such remedies are deemed unavailable as a matter of law when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 578 U.S. 632, 644 (2016). Factual disputes regarding whether administrative remedies were or were not encumbered, as exist in this case, should be tried by a jury.

Under PLRA, prison facilities are charged with designing and implementing their own internal grievance processes, which presents the self-evident moral hazard of officials designing and using those procedures to hamper prisoners' ability to assert claims against them.[26] One such ruse is transferring sexual assault victims into isolation—or, as Richards alleged happened here, into more dangerous living quarters.[27] Internal grievance processes are not the "neutral

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[26] Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 574 (2014).

[27] *Id.* at 574.

administrative mechanisms" that courts often assume them to be.[28] To the contrary, correctional officers "have a tangible stake in whether or not prisoners 'properly exhaust' their administrative complaints, as those internal complaints may turn into lawsuits in which they, their colleagues, or their staff could be held liable."[29] Absent a jury trial on the facts of exhaustion, officers can even more easily bury abuses they commit.

Richards alleges a paradigmatic example of this: the same correctional officer who allegedly violated his rights avoided his ensuing claim by making the grievance process unavailable. And it is easy for government officials to thwart prisoners' claims, considering that "the only way that compliance [with PLRA] can be achieved by men and woman who are incarcerated, earn little or no money, and have few or no possessions is if the prison provides them with resources—namely paper, pens, and a delivery system." *Napier v. Laurel County*, 636 F.3d 218, 227 (6th Cir. 2011) (Martin, J., dissenting). Compliance certainly cannot be achieved by thwarting efforts to exhaust administrative remedies and then using failure to exhaust as a get-out-of-jury-trial-free card. Courts must not remain "blind to the vital role that a prisoner's capacity to exhaust"—and officers' perhaps inevitable efforts to thwart exhaustion—"ought to play" in PLRA litigation.[30]

By design, the Seventh Amendment provides a safeguard: the right to a jury trial. That right extends to § 1983 claims—including potentially dispositive

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[28] *Id.* at 578.

[29] *Id.* at 581.

[30] *Id.* at 574.

factual disputes around exhaustion. After all, juries are the constitutionally appointed finders of fact, and allowing judges to dispose of cases based on exhaustion would block claimants from ever having the merits of their cases reach a jury.

B. The Seventh Amendment applies to § 1983 claims.

The Seventh Amendment preserves the right to a jury trial "which existed under the English common law when the Amendment was adopted." *Balt. & Carolina Line, Inc.*, 295 U.S. 654, 657 (1935). In assessing the Amendment's scope, this Court first asks "whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was[.]" *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). If so, the Court "then ask[s] whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Id.*

In most PLRA cases, including this one, the claimant is entitled to a jury trial on the merits. Generally, this Court recognizes that monetary relief is a legal remedy, including "[d]amages for a constitutional violation." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999). This Court has consistently recognized that § 1983 claims, as a "species of tort liability," are appropriate for a jury. *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986)); *see also City of Monterey*, 526 U.S. at 709.

Because a § 1983 claim is legal in nature, the Court looks to history to determine whether a specific issue

arising within one is proper for the jury. *City of Monterey*, 526 U.S. at 708. If the historical analysis is unclear, the Court turns to "precedent and functional considerations." *Id.* at 718.

The issue of exhaustion is appropriate for jury resolution. "[C]ase law recognizes a right to a jury trial where the determination of the plea, whether in bar or to the jurisdiction, reaches the merits of the cause of action or disposes of the case." *Union Pac. Fuels, Inc. v. Johnson*, 909 S.W.2d 130, 134 (Tex. App. 1995). Exhaustion is an affirmative defense that can dispose of a case. Hence, the Sixth Circuit correctly held that there is "no reason to treat exhaustion differently from a jurisdictional rule in this context because the effect of successfully raising the defenses is the same—the plaintiff may not proceed in the action." Pet. App'x 18a.

C. Juries, not judges, are constitutional factfinders.

Though it may seem elementary, it bears emphasizing that jurors should determine factual issues regarding exhaustion because they, not judges, are the constitutionally designated factfinders. *See Balt. & Carolina Line, Inc.*, 295 U.S. at 657 (affirming that "issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."). "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a

jury trial should be scrutinized with the utmost care." *Id.*

Whether administrative remedies were in fact available to a given prisoner in a given case is a factual issue and therefore reserved for determination by a jury. While a judge may have to decide some facts incidental to a legal question for the purposes of determining whether jurisdiction or venue is proper, exhaustion issues are primarily factual. Because a jury is better equipped to find facts and assess the credibility of witnesses regarding whether a prisoner had access to the prison's administrative process, these issues should be resolved by jurors instead of judges.

Further, the right to a jury trial is most urgent in cases like this one, where government officials have been accused of constitutional violations. "The essence of that right lies in its insistence that a body of laymen not permanently attached to the sovereign participate along with the judge in the factfinding necessitated by a lawsuit." *Parklane Hosiery Co.*, 439 U.S. at 348–49 (Rehnquist, J., dissenting). The importance of unaffiliated factfinders is no less important in civil cases pitting citizens against government than in criminal cases governed by the Sixth Amendment's corresponding guarantee. *Id.* at 349.

Prisoners are among the most vulnerable members of society, unavoidably subjected to potential abuse due to their confinement. Prison officials have significant power over them, including the power to deny them access to the independent arbiter that the Constitution guarantees to all citizens—those who are incarcerated no less than any others. For Richards, and those similarly situated to him, a jury trial at the

exhaustion stage is essential to ensure that their claims are fairly heard.

D. A jury trial is necessary to preserve the claimant's right to have a jury resolve the ultimate dispute.

"In 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[.]'" *City of Monterey*, 526 U.S. at 718 (citation omitted). A jury trial is necessary at the exhaustion stage to preserve Richards's right to have a jury resolve the ultimate dispute in his § 1983 claim.

It is important for a jury, rather than a judge, to hear factual disputes at the exhaustion stage because the issue of exhaustion is dispositive in most PLRA cases. While "[m]atters of judicial administration often require district judges to decide factual disputes that are not bound up with the merits of the underlying dispute[,]" a jury trial is appropriate here because a finding of non-exhaustion will almost always dispose of the claim. *Messa v. Goord*, 652 F.3d 305, 309 (2d. Cir. 2011) (per curiam).

Although a § 1983 claimant should be entitled to a jury trial at the exhaustion stage whenever there is a factual dispute, there is an even stronger argument to grant one here where the factual issues regarding exhaustion are intertwined with the merits of the claim.

CONCLUSION

"[N]o amount of argument that [a doctrinal] device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791." *Parklane*

Hosiery Co., 439 U.S. at 346 (Rehnquist, J., dissenting); *cf. Erlinger v. United States*, 602 U.S. 821, 842 (2024) ("There is no efficiency exception to the . . . Sixth Amendmen[t]."); *Ramos v. Louisiana*, 590 U.S. 83, 100 (2020) ("When the American people chose to enshrine [the criminal jury trial] right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed."). "To rule otherwise would effectively permit judicial repeal of the Seventh Amendment because nearly any change in the province of the jury, no matter how drastic the diminution of its functions, can always be denominated 'procedural reform.'" *Parklane Hosiery Co.*, 439 U.S. at 346 (Rehnquist, J., dissenting). Indeed, "the Seventh Amendment will prove burdensome in some instances," but "the onerous nature of the protection is no license for contracting the rights secured by [it]." *Id.* at 346.

This Court should affirm the decision below, holding that Richards and other claimants subject to PLRA are entitled to a jury trial when there is a factual dispute regarding exhaustion.

Respectfully submitted,

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