No. 23-1324

In The Supreme Court of the United States

THOMAS PERTTU,

Petitioner,

v.

KYLE BRANDON RICHARDS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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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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REASONS FOR DENYING THE WRIT

Respondent Kyle Brandon Richards filed this civil rights lawsuit alleging, among other things, that Michigan correctional officers sexually assaulted him and retaliated against him for exercising his First Amendment rights. Because he alleges that their retaliation included destroying his prison grievances and preventing him from utilizing the grievance process, the question of whether he failed to exhaust available administrative remedies is inextricably intertwined with the core merits of his claim. This is a 42 U.S.C. § 1983 claim for money damages, so the Seventh Amendment clearly gives Mr. Richards a right to jury trial on the merits of his claims. Nonetheless, the magistrate judge conducted a bench trial, heard evidence from both sides, found as a fact that the testimony of Respondent and his co-plaintiffs was not credible, and recommended dismissal on the ground that they failed to exhaust available prison remedies. The district court accepted that recommendation.

The Sixth Circuit correctly held that this process violated the Seventh Amendment, given the substantial overlap between the factual disputes related to exhaustion and the actual merits of Richards' claims. In so doing, and as the petition explains, the Sixth Circuit's decision created an acknowledged circuit split with the Seventh Circuit's decision in *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008). The en banc Ninth Circuit has also endorsed the relevant holding of *Pavey* in *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc), though the Sixth Circuit characterized the Ninth Circuit's language as dicta. Pet. App. 14a. On the other side of

the equation, several district courts in the Second Circuit have like, the Sixth Circuit, disagreed with *Pavey*.

Nonetheless, review of this shallow split would be premature. The Sixth Circuit is clearly right—and the Seventh and Ninth Circuits clearly wrong—on the Seventh Amendment question. Indeed, there are strong arguments that the Seventh Amendment does not permit judicial resolution of facts related to exhaustion even when those facts *are not* intertwined with the merits. When the facts *are* intertwined, it is black-letter law that judges should defer to juries even as to facts (like amount-in-controversy) that also bear on subject matter jurisdiction. Several circuits that generally permit judge resolution of exhaustion questions have reserved decision on whether a different rule might be necessary when those facts are intertwined with the merits. There is every reason to expect that those circuits will ultimately side with the Sixth Circuit's cogent analysis in this case and reject the Seventh Circuit's puzzling and illogical *Pavey* decision. Indeed the Seventh and Ninth Circuits may well reconsider the question *en banc* without this Court's intervention.

The petition argues at length that convening a jury to decide factual disputes bearing on exhaustion of remedies would defeat Congress's intent to streamline prisoner litigation in the Prison Litigation Reform Act ("PLRA"). It says time and again that early bench trial resolution of exhaustion questions is necessary to bar "frivolous claims at the earliest possible juncture." Pet. at 2; *see also id.* at 9, 16. But the PLRA's actual pre-screening provision, 28 U.S.C. § 1915A, notably does not provide for such

a procedure. The Sixth Circuit here also ruled that Richards' "serious and detailed allegations cannot reasonably be considered frivolous," Pet. App. 8a, and observed that the defendant did "not directly contest whether his alleged actions were motivated by Richards's protected conduct." 96 F.4th at 918–19. The petition challenges neither ruling.

This Court has repeatedly rejected arguments like these suggesting that the PLRA sets up exhaustion as some kind of special and jurisdictional precondition to suit. *See, e.g., Jones v. Bock*, 549 U.S. 199, 216 (2007) ("failure to exhaust is an affirmative defense under the PLRA"); *see also Woodford v. Ngo*, 548 U.S. 81, 101 (2006) (concluding that "the PLRA exhaustion requirement is not jurisdictional"). The problem of intertwined exhaustion and merits factual disputes also is presented only in a subset of PLRA cases. And in any event the question is not whether jury resolution of disputed facts can be squared with a statute's purpose, but rather whether that statute's application can be squared with the Constitution. As this Court has repeatedly made clear, questions about Congress's intent must take a back-seat to the historic role of the jury at common law. Yet Michigan would hand Congress the keys to the car and strap the Seventh Amendment to the roof. This Court should decline that invitation.

I. THE SIXTH CIRCUIT'S DECISION IS CLEARLY CORRECT

A. The Sixth Circuit Correctly Recognized That Facts Intertwined With The Merits Should Always Be Decided By Juries

The petition argues that a factual dispute about exhaustion is just a "threshold issue to determine whether a prisoner has met a procedural requirement to take his or her case to a jury," and that therefore the Seventh Amendment is not implicated by analogy to other threshold issues like abstention and venue. Pet. 19. These arguments mirror Judge Posner's "generalization" in *Pavey* that "[j]uries decide cases, not issues of judicial traffic control." 544 F.3d at 741. But they bear little resemblance to an actual Seventh Amendment analysis.

Under this Court's precedents, § 1983—the foundation of Richards's action—is clearly analogous to causes of action that were "tried at law at the time of the founding." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999). So the precise Seventh Amendment question is "whether the particular trial decision," a factual dispute about exhaustion that overlaps with the merits, "must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Markman*, 517 U.S. at 376. To figure that out, "we look to history to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time

the Seventh Amendment was adopted." *Del Monte Dunes*, 526 U.S. at 718. And "where history does not provide a clear answer, we look to precedent and functional considerations." *Id.*

The Sixth Circuit rightly acknowledged that under this Court's precedents "'many procedural devices developed since 1791 that have diminished the civil jury's historic domain,'" such as directed verdicts and summary judgment, "'have been found not to be inconsistent with the Seventh Amendment.'" Pet. App. 16a-17a (quoting *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979)). But it then recognized the key distinction between those devices and what happened here: none of them "permit a judge to decide genuine disputes of material fact at a preliminary stage of the case that would normally be reserved for the jury." Pet. App. 17a. The magistrate judge's factfinding in this case—including explicit credibility determinations—directly invaded the merits and "stripped [Richards] of his 'right to a jury's resolution of the ultimate dispute.'" Pet. App. 17a (quoting *Markman*, 517 U.S. at 377).

To buttress the point, the Sixth Circuit cited its longstanding holding that factual disputes about the amount in controversy should be deferred to the jury on the merits in diversity cases, even though that issue also has implications for subject matter jurisdiction. *See* Pet. App. 17a-18a; *Fireman's Fund Insurance Co v. Railway Express Agency*, 253 F.2d 780 (6th Cir. 1958). Because "*Fireman's Fund* requires that certain cases be heard and determined on the merits even when constitutionally implicated jurisdictional disputes might procedurally terminate the proceedings," the court explained, "we are all the more convinced that the result should be the same

when the lesser concern of an affirmative defense, such as the PLRA's requirement to exhaust administrative remedies, implicates the merits of a claim." Pet. App. 19a. After all, "[u]nlike exhaustion, an absence of subject-matter jurisdiction implicates a federal court's ability to even hear the case." Pet. App. 19a. *Fireman's Fund* also explains why its holding is not inconsistent with the general rule that judges ordinarily are allowed to hear evidence and to determine facts necessary to the court's jurisdiction: "such hearings usually involve factual issues pertaining only to the question of jurisdiction, not including factual issues which would be decisive of the merits of the plaintiff's claim." 253 F.2d at 784.

The petition criticizes the Sixth Circuit's reliance on *Fireman's Fund* on the ground that "the case did not discuss or rely on the Seventh Amendment." Pet. 20. That is only superficially true. *Fireman's Fund* relied on this Court's decision in *Smithers v. Smith*, 204 U.S. 632 (1907), which similarly held that a dispute about amount in controversy should be deferred to a jury trial when that issue is intertwined with the merits. And *Smithers* clearly *does* rely on Seventh Amendment principles, at least in part. This Court explained that judicial discretion to find jurisdictional facts "obviously is not unlimited, . . . lest under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial, *including the right to a jury*." 204 U.S. at 645 (emphasis added). "For it must not be forgotten," this Court wrote, "that where, in good faith, one has brought into court a cause of action which, as stated by him, is clearly within its jurisdiction, he has the right to try its merits in the manner provided by the

Constitution and law, and cannot be compelled to submit to a trial of another kind." *Id.*

Fireman's Fund also relied on this Court's opinion in *Land v. Dollar*, 330 U.S. 731 (1947), which considered a suit by a steamship company's stockholders against the U.S. Maritime Commission to recover stock previously given to the Commission. This Court held that the district court erred in deciding a jurisdictional sovereign immunity question, because "this is the type of case where the question of jurisdiction is dependent on decision of the merits." 330 U.S. at 735. "[I]f the allegations of the petition [were] true, the shares of stock never were property of the United States," so the district court had "jurisdiction to determine its jurisdiction" and should instead have "proceed[ed] to a decision on the merits." *Id.* at 738–39. *Land v. Dollar* does not explicitly invoke the right to jury trial, but the principles it relied on are plainly intended to protect that right.

It is longstanding black letter law that "[i]n a case in which there is a right to jury trial, a dismissal for lack of jurisdiction that improperly summarily decides the substantive issues also violates the parties' Seventh Amendment rights." 8 Moore's Federal Practice § 38.34[1][c][i] (3d ed. 2009) ("Trial on Merits Required When Jurisdictional Determination Depends on Determination of Merits.").[1] Factual

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[1] *See also* 5C Wright & Miller, Federal Practice and Procedure § 1350 (3d ed. 2004) ("The court may postpone a decision until evidence is submitted at trial if the jurisdictional issue is intertwined with the merits of the case."); Joshua S. Moskovitz, Note, *The Usual Practice: Raising and Deciding Failure to Exhaust Administrative Remedies as an Affirmative Defense under the Prison Litigation Reform Act*, 31 Cardozo L. Rev. 1859, 1899 n.248 (2010) (Moskovitz) (collecting sources).

questions bearing on both personal jurisdiction and venue are also reserved for trial and submitted to the jury when they are intertwined with the core merits of the case.[2] And in the related context of civil actions presenting both legal and equitable claims, this Court has consistently held that the jury trial right cannot "be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency." *Scott v. Neely*, 140 U.S. 106, 109–10 (1891); *see also Ross v. Bernhard*, 396 U.S. 531, 537–38, 538 n.10 (1970) ("[W]here equitable and legal claims are joined in the same action, [the] right to jury trial on the legal claims . . . must not be infringed.").

The rule that factual issues bearing on the merits must always be decided by a jury has very deep roots. At common law, defendants could dispute a plaintiff's declaration (*i.e.*, complaint) by either demurrer or plea. John Jay McKelvey, Principles of Common-Law Pleading § 93, at 68–69 (1894) (McKelvey). A demurrer, like a modern-day 12(b)(6) or purely legal 12(b)(1) motion, accepted the facts as alleged and "raise[d] a question of law for the determination of the court" about the declaration's sufficiency. Benjamin J.

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[2] *See, e.g.*, *Brown v. Slenker*, 220 F.3d 411, 419 (5th Cir. 2000) ("[Personal j]urisdiction remains intertwined with the merits, and on remand both must be decided at a new trial, based on valid jury findings."); *Kierulff Assocs. v. Luria Bros. & Co.*, 240 F. Supp. 640, 642 (S.D.N.Y. 1965) ("Where venue and the merits of an action are intertwined, it is often better to wait until trial where a full presentation of the issue can be made, rather than rule preliminarily on a motion."); *Fastener Corp. v. Spotnails, Inc.*, 291 F. Supp. 974, 976 (N.D. Ill. 1968) ("[T]he venue question merge[d] with the issue of infringement on the merits . . . .").

Shipman, Handbook of Common-Law Pleading §§ 8–9, at 28 (3d ed. 1923) (Shipman).

As an alternative to the demurrer, there were various types of pleas. The plea in traverse denied the declaration's factual allegations and triggered a jury trial. "Where an allegation is traversed, or denied, it is evident that a question is at once raised between the parties; and it is a question of fact . . . ." Shipman § 167, at 302; *see also* Richard Ross Perry, Common-Law Pleading: Its History and Principles 179–80 (1897) (Perry). "[T]he tender and acceptance of an issue of fact close[d] all pleading in the action, as there [was] then nothing left but a trial, which [disposed] of the action on its merits." Shipman § 15, at 32–33.

The common law permitted various other types of pleas—such as a plea in abatement or plea in bar—that might raise legal or factual issues collateral to the merits. But critically, if any such plea actually contradicted the factual allegations of the plaintiff's declaration, the common law would have regarded it as a traverse and proceeded immediately to a trial by jury. "The word traverse . . . is synonymous with the word denial. Where the defendant intends to rely for his defense upon the fact that the allegations contained in the declaration as to the subject matter of the action are untrue, he must put in the plea known as a traverse." McKelvey § 185, at 118; *see also* Perry, at 275. Therefore in a case (like this one) where the facts relevant to a threshold defect were intertwined with the merits, it would not even have been possible to frame the issue for a purely judicial decision at common law.

The petition argues that a bench trial before a magistrate judge gave Mr. Richards many of the *other* important protections of a trial, such as a right to

present evidence and cross examine opposing witnesses. Pet. 20-21. No doubt those rights are important. But the right to trial by jury in civil cases is separately and specially protected by the Seventh Amendment. This Court recently recognized that "the right to trial by jury 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 case.'" *SEC v. Jarkesy*, Slip Op. at 7 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). And that is by no means a newfound sentiment: Justice Story once explained that the civil jury trial right is "justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 466 (1830). The Sixth Circuit's decision is entirely consistent with that tradition.

B. The Seventh Circuit's Decision In *Pavey* Makes No Sense

The Seventh and Ninth Circuit decisions, by contrast, do not genuinely grapple with the Seventh Amendment problem and clearly get the answer wrong.

Judge Posner's opinion in *Pavey* takes for granted that questions of subject matter jurisdiction "often . . . turn[] on factual issues that may be genuinely debatable, but even if so the issues are resolved by the judge," without recognizing that an opposite rule applies when jurisdictional facts are intertwined with the merits. *Pavey*, 544 F.3d at 741. The *Pavey* opinion then leaps from the observation

that judges *sometimes* are permitted to decide questions of fact relevant to preliminary threshold issues to an entirely unwarranted "generalization" that juries do not decide any questions that can be characterized as matters of "judicial traffic control." *Id.*

In reaching that conclusion, *Pavey* wrongly characterizes exhaustion as just an issue of "judicial traffic control" on the naked assertion that "in many cases" exhaustion is simply a question of the choice of forum because "the only consequence of a failure to exhaust is that the prisoner must go back to the bottom rung of the administrative ladder." *Id.* "That distinguishes the issue of exhaustion from deadline issues that juries decide," the Seventh Circuit reasoned, because "[a] statute of limitations defense if successfully interposed ends the litigation rather than shunting it to another forum." The Seventh Circuit acknowledged, however, that in that actual case the defendant "would no longer have any administrative remedies" if the exhaustion issue was resolved against him, so the issue was entirely dispositive of the merits. *Id.* Surely this Court understands that that will almost always be true in PLRA cases. Prisons have grievance and appeal processes with extremely tight filing windows—measured in days. By the time an exhaustion issue is raised in federal court, those deadlines will generally be years in the past and will make it impossible for the plaintiff to go back and seek further exhaustion. *See* Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 George Mason L. Rev. 573, 584 (2014) ("In the last few years, many corrections departments have also reduced the amount of time within which a

prisoner must file her initial grievance and any subsequent appeals. In the light of the deference shown to [these internal] rules in the PLRA exhaustion analysis, this reduction means that for prisoners in some systems there is effectively only a two- or three-day statute of limitations on their constitutional claims.") (footnotes omitted).

Finally, the Seventh Circuit reasoned that, "[b]y analogy to the cases that require that claims at law be decided before equitable claims when both types of claim are presented," a jury later hearing the case on the merits would not be bound by any exhaustion findings the judge made. *Id.* at 742. But as the Sixth Circuit correctly explained, that line of reasoning "rings hollow" because "if the prisoner's case is dismissed for failure to exhaust his or her administrative remedies" then "a jury would never be assembled to resolve the factual disputes" on the merits. Pet. App. 15a.

In *Albino v. Baca*, the en banc Ninth Circuit appeared to embrace *Pavey*, with the court noting that "[w]e agree with the Seventh Circuit that, if a factual finding on a disputed question is relevant both to exhaustion and to the merits, a judge's finding made in the course of deciding exhaustion is not binding on a jury deciding the merits of the suit." 747 F.3d at 1171. But the claims at issue in *Albino* did not actually implicate the underlying merits, and elsewhere in its opinion the Ninth Circuit used less definitive language: "Exhaustion should be decided, *if feasible*, before reaching the merits of a prisoner's claim." *Id.* (emphasis added); *see also id.* ("We reiterate that, if feasible, disputed factual questions relevant to exhaustion should be decided at the very beginning of the litigation."). Now that the Sixth

Circuit has explained the flaws in the Seventh Circuit's reasoning it seems unlikely that other circuits will follow along. Indeed, there is reason to hope that the Seventh and Ninth Circuits will reconsider their position *en banc* without a need for this Court's intervention.

This Court also may benefit from more percolation. Among the courts of appeals, only the Sixth and Seventh Circuits have addressed the issue presented head-on. Several district courts in the Second Circuit have parted ways with *Pavey*. Other circuits have identified the problem as well and will almost certainly in due course wrestle with it more fully. *See Small v. Camden County*, 728 F.3d 265, 270 (3d Cir. 2013) ("[T]he Seventh Amendment is not implicated as long as the facts are not bound up with the merits of the underlying dispute."); *Messa v. Goord*, 652 F.3d 305, 309 (2d Cir. 2011) ("[T]he factual disputes relating to exhaustion are not intertwined with the merits . . . ."); *Dillon v. Rogers*, 596 F.3d 260, 272 n.2 (5th Cir. 2010) ("We do not determine today who should serve as factfinder when facts concerning exhaustion also go to the merits of a prisoner's claim."). And, given the favorable decision in the Sixth Circuit, prisoners will be more likely to raise the issue going forward.

C. Exhaustion Facts Should Be Decided By Juries Even When They Are Not Intertwined With The Merits

The Sixth Circuit decided this case against the backdrop of its own precedent holding that facts related to exhaustion can be resolved by judges when

they *are not* intertwined with the merits. That assumption is widely shared by the lower courts. Although it is not necessary to reach the issue in this case, the Court should understand that that assumption is probably wrong. The reason goes back to the issue the Seventh Circuit failed to wrestle with in *Pavey*: that a finding of non-exhaustion in the PLRA context will almost always bar the claim forever.

Recall that at common law a defendant who could not or chose not to demur could either file a traverse or a plea. There were a variety of pleas, but the most common were "pleas in abatement" and "pleas in bar." The plea in abatement was one of the "dilatory pleas," which raised a class of common law defenses that merely "delay[ed] the plaintiff's action instead of dealing with the merits of his claim." George L. Clark, Common Law Pleading § 59, at 131 (1931) (Clark); McKelvey § 132, at 93 ("Judgment upon the dilatory plea was not final, . . . it did not determine the case upon the merits.").[3] A plea in abatement, if successful, "dispose[d] of the particular suit" but allowed the plaintiff to "commence anew upon the same cause of action in the same court" so long as the plaintiff avoided the mistake that caused the original abating. McKelvey § 131, at 92. Typically, a plea in abatement related to the parties' identities, a misnomer in the declaration of facts, or a defect in the

[3] The other dilatory pleas were pleas to the jurisdiction and pleas in suspension of the action. Clark § 59, at 132. Pleas to the jurisdiction attacked a court's subject matter or personal jurisdiction, disposing of the case entirely before that court if successful. McKelvey §§ 131, 134, at 92, 95. Pleas in suspension of the action sought to identify the plaintiff's temporary incapacity to bring suit. *Id.* § 131, at 92; Clark § 60, at 134; Shipman § 230, at 400.

plaintiff's writ. *Id.* §§ 134–135, at 95; Moskovitz, at 1885. Defects in the plaintiff's writ included "wrong venue," that the "action was brought prematurely," that "the same claim was pending in another court," that "the parties were misnamed," or that "a necessary party was not joined or . . . was misjoined." Moskovitz, at 1885.

Many lower courts have broadly analogized exhaustion of administrative remedies to the old plea in abatement, and held that there is no Seventh Amendment right to jury factfinding because supposedly factual disputes relevant to a plea in abatement were resolved by judges. *See, e.g.*, *Bryant v. Rich*, 530 F.3d 1368, 1374 (11th Cir. 2008) ("Exhaustion of administrative remedies is a matter in abatement, and ordinarily does not deal with the merits." (cleaned up) (quoting 5C Wright & Miller § 1360, at 78 n.15)); *Albino*, 747 F.3d at 1168. That assumption is actually disputed by scholars.[4] Regardless, the analogy is wrong. The dilatory pleas (including abatement) "did not determine the case upon the merits." McKelvey § 132, at 93. A plea in abatement merely "delay[ed] the plaintiff's action instead of dealing with the merits of his claim." Clark § 59, at 131. By definition, therefore, a plea in abatement could not present an argument that the

[4] Pleas in abatement typically tendered an issue of law properly "eliminated on demurrer" by the judge. A.C. Umbreit, *Outline of the Law of Common Law Pleading*, 4 Marq. L. Rev. 130, 133 (1920). But if the plaintiff *did not* demur, "[t]here is extensive historical support that a factual dispute on a matter in abatement [could also be] decided by the jury . . . as documented in civil cases, in criminal cases, and in numerous treatises." Moskovitz, at 1896 & nn.234–36 (collecting sources supporting jury resolution of fact disputes posed by various dilatory pleas).

plaintiff's claim was permanently barred. Matters in abatement "could only go so far as to defeat the present action, and not to demonstrate that the plaintiff was permanently disabled from bringing the claim." Moskovitz, at 1886. Any plea in abatement based on a prematurity defect necessarily alleged that the action was *curably* premature. *See, e.g.*, Shipman § 225, at 390 n.18 (citing *Grand Lodge Bhd. of R.R. Trainmen v. Randolph*, 57 N.E. 882 (1900), as an example of a plea in abatement alleging "failure to exhaust remedies provided in [a] contract"). Again, however, in most PLRA cases the very short prison grievance timelines will have expired long before suit so a finding of non-exhaustion will permanently bar the claim.

In common law terms, an affirmative defense that would permanently end the litigation would have been raised by a "plea in bar," and specifically a variant called a plea "in discharge." Pleas in bar could be pled negatively, as a traverse denying the factual allegations, or affirmatively, as a confession and avoidance admitting the facts but denying their legal effect by alleging new facts. Shipman § 197–199, at 348. Pleas in confession and avoidance were divided into two categories: pleas in justification or excuse and pleas in discharge. *Id.* Pleas in discharge included bankruptcy, release, payment, and the statute of limitations—all of which alleged that the plaintiff's cause of action had "been discharged by some matter subsequent, either of fact or of law." *Id* § 198(b), at 348; *id.* § 199, at 350; *cf.* Fed. R. Civ. P. 8(c)(1).

Like a statute of limitations issue, an exhaustion defect arises *after* a § 1983 claim accrues and therefore is more analogous to a matter in discharge than in abatement. And a judge would never have

decided disputed facts posed by a plea in discharge. If the plea contained a traverse disputing the plaintiff's facts, the issue was joined and a jury trial was triggered. If the plea was instead framed as a confession and avoidance, then the ball was in the plaintiff's court. *See* Perry, at 179–80, 272–73. The plaintiff could respond with his own demurrer, accepting the new facts alleged in avoidance but denying their legal effect, which would frame up an issue of law for the judge. *Id.* Or the plaintiff could respond with a traverse to the plea, joining issue on the merits and triggering a trial. *See id.* There were some other ways to procure judicial decision of a true question of law, such as the arcane concept of "express color" in trespass actions.[5] As far as counsel can determine, however, a defendant could never procure judicial resolution of disputed *facts* relevant to a dispositive affirmative defense like exhaustion.

II. THE PETITION OVERSTATES THE SUPPOSED CONFLICT WITH THE PLRA'S PURPOSES, WHICH DO NOT TRUMP THE SEVENTH AMENDMENT IN ANY EVENT

The Seventh Circuit justified its distortion of traditional jury trial principles because it thought "[t]he alternative . . . is unsatisfactory" and "would thwart Congress's effort to bar trials of prisoner

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[5] *See* Shipman §§ 200–202, at 350–55; Perry, at 274–76. Even then, if the issue of law was not "wholly foreign to the merits of the cause," Shipman § 202, at 354–55, and could not be "segregate[d] . . . from the remaining matters of fact," Perry, at 275, then the defendant could not withdraw the matter from the jury.

cases in which the prisoner has failed to exhaust his administrative remedies." *Pavey*, 544 F.3d at 742. The petition doubles down on that position, devoting barrels of ink to arguing that Congress intended to make exhaustion a "threshold issue[] of judicial administration," Pet. 17 (quoting *Lee v. Willey*, 789 F.3d 673, 678 (6th Cir. 2015)), to weed out frivolous claims. The petition notably ignores the Sixth Circuit's conclusion that Richards's allegations were "serious and detailed" and could not "reasonably be considered frivolous." Pet. App. 8a. Instead, the petition elects to criticizes the Sixth Circuit for "fail[ing] to give deference" *in its Seventh Amendment analysis* to Congress's supposed objectives, Pet. 20.

All of this is both irrelevant and overstated. It is irrelevant because Congress's desire to reduce the workload of the federal courts does not give it a free pass to violate the Bill of Rights. If the Seventh Amendment protects a right to jury resolution of all facts intertwined with the merits of a legal claim (and it does) then the Seventh Amendment controls. Congress has ample tools to address this perceived problem without violating the jury trial right, and it has used them—aggressively.

These concerns are overstated for a couple of reasons. First, in *Woodford* and *Jones* this Court has already rejected the once-pervasive arguments and holdings that PLRA exhaustion is a jurisdictional or quasi-jurisdictional right not to face litigation at all, which necessarily must be resolved before anything else happens in a case. Prior to *Woodford* and *Jones*, the lower courts invented procedural vehicles found nowhere in the Federal Rules, such as the "unenumerated 12(b) motion," *Wyatt v. Terhune*, 315

F.3d 1108 (9th Cir. 2003); requiring prisoner plaintiffs to plead exhaustion with specificity up front; or dismissing entire complaints if any claim was not exhausted. *See Jones*, 549 U.S. at 203 (holding that these innovations "exceed[ed] the proper limits on the judicial role"). But this Court held that exhaustion is an ordinary affirmative defense. *See id.* at 212-214. Affirmative defenses (all of them) must be raised by answer under Rule 8(c), which places the burden of proof on the defendant and leaves the question to be resolved in the ordinary course through summary judgment or trial. No doubt the lower courts find those holdings inconvenient (or "unsatisfactory," *Pavey*, 544 F.3d at 742), but they represent this Court's conclusion that in fact Congress *did not* intend to make exhaustion of administrative remedies some kind of threshold super-requirement. When it wants to, Congress knows how to write jurisdictional statutes, or immunity statutes like the Foreign Sovereign Immunities Act, which create a vehicle for threshold resolution of some important issue before anything else happens. It did not take that course in the PLRA, and this Court has already said so. *See id.* at 216 (noting the conspicuous "failure of Congress to include exhaustion in terms among the enumerated grounds justifying dismissal upon early screening").

Second, the Sixth Circuit's holding is narrow and there is no reason to think it will have a dramatic impact on prisoner litigation. The Sixth Circuit "emphasize[d] that a jury trial is appropriate in these circumstances *only* if the district court finds that genuine disputes of material fact concerning PLRA exhaustion are decisive of the merits of the plaintiff's claim." Pet. App. 19a. (internal quotation marks omitted). The petition argues that every

prisoner suit will somehow allege exhaustion facts intertwined with the merits, but the ordinary rules of civil procedure are up to that challenge—and if not this Court has, "[i]n a series of recent cases, . . . explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *See id.* at 212. The Sixth Circuit's rule has already been applied in district courts throughout the Second Circuit for more than a decade without issue. *See* Pet. App. 15a-16a.

CONCLUSION

The petition should be denied.

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