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 FOR 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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INTRODUCTION

"The right to a 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 care.'" *SEC v. Jarkesy*, 144 S. Ct. 2117, 2128 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). This is a cause of action at law for money damages, alleging in part that Petitioner prevented Respondent from utilizing the prison grievance process in retaliation for Respondent's exercise of his First Amendment rights. Petitioner's exhaustion defense is intertwined with (indeed, essentially coextensive with) his denial of those First Amendment allegations on the merits. Both issues come down to a simple dispute about the historical facts, turning on the credibility of conflicting eyewitness testimony. Denying Respondent his right to jury resolution of those factual disputes struck at the very core of the jury's historic role.

Petitioner asks this Court to recognize a special exception to basic Seventh Amendment principles because exhaustion supposedly is a "threshold" question or an "equitable defense." Both characterizations are inconsistent with history and precedent.

This Court has held that exhaustion under the Prison Litigation Reform Act (PLRA) *is not* a jurisdictional or threshold issue, but instead an ordinary affirmative defense that must be pleaded and proved by the defendant according to "the usual practice." *Jones v. Bock*, 549 U.S. 199, 212 (2007); *see also Woodford v. Ngo*, 548 U.S. 81 (2006). As this Court explained in *Jones*, Congress specifically

identified threshold issues for judicial pre-screening in the PLRA, and exhaustion was not among them. 549 U.S. at 216. Petitioner essentially repackages the same arguments for "depart[ure] from the usual procedural requirements" that this Court rejected almost two decades ago. *Id.*

Nor is PLRA exhaustion an "equitable defense"—in historical terms or otherwise. As Petitioner concedes, the exhaustion doctrine did not even exist until nearly a century after 1791, and it then emerged at law and in equity simultaneously as part of the new field of administrative law. *See, e.g., Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 n.9 (1938). Exhaustion has never been a distinctively equitable doctrine, and the particular brand of exhaustion Congress included the PLRA has no equitable features.

Exhaustion certainly is not one of the traditional equitable defenses to actions at law referenced in *Liberty Oil v. Condon*, 260 U.S. 235 (1922), which required a bill in equity and a separate equity proceeding without a jury. Petitioner gives the game away by analogizing exhaustion to the adequate remedy at law doctrine—an equitable defense *to actions in equity* which, by remitting the plaintiff to his legal remedies, actually safeguarded the jury's historic role rather than undermining it.

On the simplest path to decision, however, none of that matters. Petitioner now concedes that the exhaustion issue is intertwined with the merits. This Court has held clearly and repeatedly that whenever there is overlap between factual questions allocated to the jury and the judge, the judge must wait and defer to the jury. That is the rule for equitable claims and defenses. *See, e.g., Beacon Theatres, Inc. v.*

Westover, 359 U.S. 500, 510 (1959); *Dairy Queen Inc. v. Wood*, 369 U.S. 469, 479 (1962); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550-54 (1990). It is even the rule for subject matter jurisdiction, the ultimate "threshold" issue. *See, e.g., Land v. Dollar*, 330 U.S. 731 (1947). The Sixth Circuit based its decision in this case on the settled law that disputed jurisdictional facts are deferred to the jury when they implicate the merits. Petitioner's silence on that point is simply deafening.

The Court could decide this case on broader or narrower grounds. Either way, the Seventh Amendment clearly protects Respondent's right to jury resolution of disputed historical facts central to the merits of his legal claim.

STATEMENT OF THE CASE

The Complaint

Respondent and two co-plaintiffs, Kenneth Pruitt and Robert Kissee, filed this civil rights action on April 23, 2020, seeking both monetary damages and injunctive relief for violations of their constitutional rights while they were inmates at the Baraga Correctional Facility in Michigan.

The verified complaint describes pervasive sexual abuse at the hands of Petitioner, Residential Unit Manager Thomas Perttu, from June 2019 through April 2020. *See* J.A.2-8. The complaint also states that the plaintiffs had "attempted to exhaust remedies to the best of our ability," J.A.2, but that they "were threatened and retaliated against for 'attempting' to file grievances," and feared for their safety, J.A.13.

The complaint describes in detail more than a dozen instances in which Petitioner allegedly intercepted, destroyed, or otherwise interfered with Respondent's ability to file grievances about

Petitioner's sexual misconduct. J.A.13-27. It alleges, for example, that on April 15, 2020, Petitioner went to Respondent's cell and "rip[ped] up" three of Respondent's grievances. J.A.15. The complaint also alleges that, on February 11, 2020, Petitioner went to Pruitt's cell, "crumpl[ed] up" two grievances in front of Pruitt, and told him that they were "going in the trash." J.A.16. The complaint describes at least one occasion on which Petitioner allegedly threatened to kill Respondent if he persisted in trying to file grievances about the sexual harassment. J.A.15 ("Send another f*ing grievance boy, and Ill f*ing kill you, boy."). The complaint further alleges that Respondent was wrongfully held in administrative segregation as retaliation for attempting to file additional grievances about Petitioner's sexual misconduct. J.A.18. The complaint specifically alleges that Petitioner engaged in these acts in retaliation for Respondent's exercise of his First Amendment rights. *See, e.g.*, J.A.22.

Relevant Procedural Background

1. Petitioner moved for summary judgment on the ground that the plaintiffs had failed to exhaust their administrative remedies as required by the PLRA. Petitioner argued that there was no record of Respondent or his co-plaintiffs filing a grievance against him in 2019 or 2020. *See* D. Ct. Dkt. No. 58. He also submitted the affidavit of Grievance Coordinator Thomas Hamel, which stated that grievance forms are widely available and may be filed in kite boxes, "which are located in every housing unit and in the mess hall." D. Ct. Dkt. No. 58-2. Respondent and his co-plaintiffs submitted evidence that Petitioner had "thwarted their efforts to exhaust

their claims by intercepting and destroying their Prison Rape Elimination Act (PREA) grievances." Pet.App.85a. Both Respondent and Petitioner filed demands for a jury trial. J.A.39-40; D.Ct.Dkt. No. 33.

The magistrate judge recommended that Petitioner's motion be denied, finding that there was "a genuine issue of fact as to whether Plaintiffs were excused from properly exhausting their claims due to interference by Perttu." Pet.App.86a. The district court accepted that recommendation and ordered an evidentiary hearing before the magistrate judge, limited to the exhaustion issue. *See* J.A.88-368.

2. Representing himself at the hearing, Respondent conducted direct examinations of five eyewitnesses, who testified that they had personally observed Petitioner sexually harass and threaten Respondent and destroy Respondent's grievance forms. *See*, *e.g.*, J.A.210-14, 230 (Stevenson), J.A.234-38 (Jackson); J.A.250-55 (Cornelius). Those witnesses provided accounts of varying detail but they were generally unable to recall precise dates and times of what they witnessed.

Petitioner testified on his own behalf. He denied having destroyed any grievances, J.A.337-38, and denied being aware of any of Respondent's complaints relating to sexual harassment, J.A.341. Petitioner also put on witnesses who testified to the general availability of the grievance process and the way in which PREA complaints are handled. *See* J.A.181-93 (Cummings).

The magistrate judge found that Petitioner had carried his initial burden to prove as a factual matter "that Plaintiffs failed to exhaust their administrative remedies." Pet.App.37a. The magistrate judge

weighed conflicting testimony, crediting Petitioner's account and finding that "Plaintiffs' witnesses lacked credibility," based in part on Respondent's use of leading questions, *id.* at 69a, and the witnesses' inability to independently recall the exact dates of the incidents they had witnessed, *id.* at 76a. The magistrate judge concluded that "Plaintiffs failed to provide sufficient evidence that the grievance procedures were effectively unavailable to them," and recommended dismissal without prejudice. *Id.* The district court adopted the magistrate judge's report and recommendation. *Id.* at 29a.

3. Respondent, still *pro se*, appealed. As relevant here, he argued that the district court erred by ordering an evidentiary hearing to decide the disputed questions of fact relevant to exhaustion, rather than submitting the issue to a jury. *Id.* at 4a. The Court of Appeals appointed appellate counsel and directed the parties to file supplemental briefs addressing the Seventh Amendment issue. *Id.*

The Court of Appeals first considered whether Respondent's First Amendment claim was in fact intertwined with the factual disputes concerning exhaustion. The court noted that "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation," the courts will consider administrative remedies unavailable and allow otherwise unexhausted claims to proceed." *Id.* at 5a (quoting *Ross v. Blake*, 578 U.S. 632, 643-44 (2016)).

The Court of Appeals further observed that "the complaint alleges that multiple inmates witnessed [Petitioner's] harassment," and that those "serious and detailed allegations cannot reasonably be

considered frivolous." Pet.App.8a. It explained that "[b]y complaining about the alleged sexual harassment that he endured, [Respondent] 'was pursuing a grievance about prison conditions and seeking redress of that grievance,'" and was therefore "engaged in protected conduct." *Id.* The Court of Appeals concluded that Respondent had alleged "a prima facie case of First Amendment retaliation," and that "the factual disputes concerning exhaustion (i.e., whether Perttu prevented Richards from filing those grievances) are intertwined with the merits of [Respondent's] retaliation claim." *Id.* at 12a. Petitioner does not challenge that aspect of the Sixth Circuit's decision.[1]

Turning to the Seventh Amendment issue, the Court of Appeals began by noting that its own circuit precedent "did not answer the question of what happens when the factual disputes" about exhaustion are "intertwined" with the merits. *Id.* at 13a. The court then considered the Seventh Circuit's decision in *Pavey v. Conley*, 544 F.3d 730 (7th Cir. 2008), the only appellate decision directly on point. *Pavey* reasoned that "[j]uries decide cases, not issues of judicial traffic control." Pet.App.14a. *Pavey* held "that there was no Seventh Amendment violation," even where exhaustion overlaps with the merits, "because

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[1] Petitioner argued below that the "factual disputes concerning exhaustion are not intertwined with the merits in the present case." Pet.App4a. Specifically, he argued that "a prison official's interference with the grievance process can never give rise to a First Amendment claim because such interference is not an adverse action." *Id.* at 11a. Petitioner now concedes that the PLRA exhaustion issue is intertwined with the merits. *See*, *e.g.*, Pet.Br. i.

'any finding that the judge makes, relating to exhaustion, that might affect the merits may be reexamined by the jury if—and only after—the prisoner overcomes the exhaustion defense and the case proceeds to the merits.'" *Id.* The Court of Appeals observed that *Pavey*'s rationale "rings hollow if the prisoner's case is dismissed for failure to exhaust his or her administrative remedies," because "a jury would never be assembled to resolve the factual disputes." *Id.* at 15a.

The Court of Appeals acknowledged that "'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.'" *Id.* at 16a-17a (citation omitted). But none of those devices "permit[s] a judge to decide genuine disputes of material fact at a preliminary stage of the case that would normally be reserved for the jury." *Id.* at 17a. The judicial factfinding in this case, including explicit credibility determinations, invaded the merits and "stripped [Respondent] of his 'right to a jury's resolution of the ultimate dispute.'" *Id.* (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996)).

In support of its conclusion, the Court of Appeals cited its longstanding precedent instructing that even factual disputes relevant to subject matter jurisdiction should be deferred to the jury when they are intertwined with the merits. *See* Pet.App.17a-18a (citing *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." *Id.*

SUMMARY OF ARGUMENT

This is an action for money damages "brought under §1983, a context in which the jury's role in vindicating constitutional rights has long been recognized by the federal courts." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999). The district court dismissed Respondent's case after resolving factual disputes that go to the very heart of his allegations on the merits—disputes that were resolved after weighing conflicting evidence and making judgments about the credibility of witnesses. Denying Respondent his right to jury resolution of those factual disputes was a clear violation of the Seventh Amendment, whether this Court approaches the case with a narrow or a broad lens.

I. Petitioner remarkably ignores the intertwined nature of the issues, and therefore the actual Question Presented, until page 37 of his brief. That intertwinement makes this an easy case. Whatever else is true, Respondent is entitled to have a jury decide questions of historical fact bearing on the merits of his legal claim, *first*. Petitioner offers no

persuasive argument for an exception to that time-honored principle.

A. Petitioner argues throughout that exhaustion is a "threshold" issue and "logically precedent" to the rest of the merits, but there is little substance behind that mantra. Much of this argument reflects a stubborn refusal to acknowledge this Court's holdings in *Woodford* and *Jones*, which make clear that PLRA exhaustion is not jurisdictional but an ordinary affirmative defense that should be treated and resolved as such. In any event, even disputed facts concerning subject matter jurisdiction—the archetypal "threshold issue"—are deferred to the jury when they implicate the merits of a claim for legal relief. The same is true when issues such as venue and personal jurisdiction require the resolution of disputed facts relevant to the merits. Petitioner has no answer to that point.

Petitioner declines to defend the rationale of the lower court decisions that have analogized exhaustion to the old common law plea in abatement. That analogy is deeply flawed; but here again, it does not matter when exhaustion is intertwined with the merits. *Any* plea that depended on contradicting the plaintiff's factual allegations on the merits would have been treated as a traverse at common law, triggering a jury trial.

B. Petitioner alternatively argues, for the first time, that exhaustion is an "equitable defense" and thus outside the jury-trial right. Even if there were a sound basis for that characterization (there certainly is not), that would not curtail Respondent's right to jury resolution of the intertwined factual disputes at issue here. The whole point of the *Beacon Theatres* rule, which Petitioner acknowledges, is that equitable

issues must be deferred when they overlap with the merits, to avoid impairing the jury trial right. Even if those cases establish a prudential rule rather than a constitutional one, Petitioner identifies no good reason to depart from that precedent here.

Petitioner argues that judicial findings regarding exhaustion will not be binding on any subsequent jury. But *Beacon Theatres* and its progeny are about protecting the substance of the right to trial by jury, not some technical concern limited to issue preclusion. *There will never be a subsequent jury in this case*, or any case in which judicial factfinding decides the exhaustion issue and the merits in one fell swoop. And dismissals for failure to exhaust are "without prejudice" in name only. Prison grievance deadlines are measured in days; it will almost never be possible for a prisoner to go back and exhaust after an exhaustion-related dismissal in federal court.

Petitioner's remaining arguments about the supposed virtues or efficiencies of judicial factfinding are refuted by what Congress actually did in the PLRA and fundamentally at odds with the Seventh Amendment's overriding commitment to jury factfinding in actions at law.

II. Because Petitioner no longer disputes that the genuine factual issues here are inextricably intertwined with Respondent's First Amendment claim, this Court may affirm without reaching the broader question whether genuine factual disputes concerning PLRA exhaustion must *always* be submitted to the jury. But if the Court wishes to address that question, the answer is yes.

A. PLRA exhaustion is an affirmative defense to an action at law for which there is a well-established

Seventh Amendment right to a jury trial. This Court's precedents establish *at least* a strong presumption that genuine factual disputes concerning an affirmative defense to liability—no less than those concerning a plaintiff's case-in-chief—must be submitted to the jury. There is no principled justification for treating PLRA exhaustion differently for Seventh Amendment purposes than other affirmative defenses, such as the statute of limitations, that are routinely decided by juries.

B. Even when not intertwined with the merits, PLRA exhaustion is not analogous to any "matters in abatement" that were decided by judges at common law. This Court has already held that exhaustion is an ordinary affirmative defense, not a privileged threshold question. And at common law no plea in abatement could permanently resolve a claim. An incurable defect (as non-exhaustion virtually always is) would have required a plea in bar, specifically a plea in discharge, and factual disputes would have gone to the jury.

C. Nor is exhaustion an "equitable defense." As Petitioner acknowledges, the exhaustion doctrine did not exist in 1791. Exhaustion emerged nearly a century *after* the Seventh Amendment was adopted, and it was not uniquely a creature of equity. Exhaustion *under the PLRA*, in particular, is a mandatory statutory rule that permits none of the discretion that is an essential feature of equitable doctrines. *See Ross v. Blake*, 578 U.S. 632, 638-42 (2016).

Petitioner's suggested analogies to specific equitable defenses are inapt for additional reasons. The "historical equity-first order of operations," described in *Liberty Oil*, 260 U.S. 235, referred to a

specific class of defenses that could only be raised by a separate bill in equity—triggering a distinct equitable proceeding without a jury, and an injunction against the parallel proceeding at law. Exhaustion would never have been included in that category. And Petitioner goes seriously astray by attempting to analogize PLRA exhaustion to equitable defenses to *equitable* actions and remedies, such as the adequate remedy at law doctrine. Those defenses did not impair the litigant's right to jury resolution of his legal claims. To the contrary, they denied access to equitable relief and remitted the litigant to his legal remedies.

If there is any remaining doubt about how to characterize PLRA exhaustion, it should be resolved according to the longstanding presumption that predominantly factual issues relevant to liability in actions for money damages are for the jury. The purely factual disputes at issue here are archetypal jury questions. This Court should reaffirm its holding in *Jones* and make clear that PLRA exhaustion should be treated like an ordinary affirmative defense.

ARGUMENT

I. GENUINE FACTUAL DISPUTES THAT ARE INTERTWINED WITH THE ELEMENTS OF A § 1983 DAMAGES CLAIM MUST BE SUBMITTED TO THE JURY.

Petitioner no longer denies that the factual disputes about exhaustion in this case are intertwined with the merits. "Since the merger of the systems of law and equity, this Court has carefully preserved the right to trial by jury where legal rights are at stake." *Teamsters v. Terry*, 494 U.S. 558, 565

(1990), mindful that "'any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'" *Jarkesy*, 144 S. Ct. at 2128 (quoting *Dimick*, 293 U.S. at 486).

In cases that involve both legal and equitable *claims,* this Court has protected the jury-trial right by instructing that factual issues common to both must first be tried at law. *See, e.g., Beacon Theatres,* 359 U.S. at 510 (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"); *Dairy Queen*, 369 U.S. at 479 (jury must first determine "factual issues related to the question of whether there has been a breach of contract," which are issues "common with those" on which equitable claim is based); *Ross v. Bernhard*, 396 U.S. 531, 537-38 & 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."); *Lytle*, 494 U.S. at 553 (new trial before a jury was "essential to vindicating [plaintiff's] Seventh Amendment rights," where district court erroneously dismissed legal claim and decided equitable claim in bench trial).

The simplest path to resolution of this case is to hold, consistent with that precedent, that Respondent is entitled to have a jury decide questions of historical fact bearing on the merits of his legal claim first—regardless of whether the exhaustion issue itself could have been decided by a judge in the absence of factual overlap. Under settled law, that right cannot be defeated by characterizing exhaustion as a "threshold" or "equitable" issue.

A. Petitioner's Characterization of PLRA Exhaustion as a "Threshold Issue" Is Irreconcilable with this Court's Precedents and Would Not Affect the Right to Jury Resolution of the Merits in Any Event.

Petitioner says countless times that exhaustion is a "threshold issue," a "threshold precondition to reaching the merits," or "logically precedent" to the merits. Those contentions largely recycle arguments this Court already rejected in *Woodford* and *Jones*. Exhaustion *is not* a special threshold issue; it is an ordinary affirmative defense. Regardless, even true "threshold issues" are deferred to the jury when they present factual disputes intertwined with the merits.

1. PLRA exhaustion is an ordinary affirmative defense, not a special "threshold issue."

This Court has squarely held that PLRA exhaustion is "not jurisdictional," *Woodford*, 548 U.S. at 101; rather, it is an affirmative defense that should be resolved according to "the usual practice," *Jones*, 549 U.S. at 212. Petitioner nevertheless insists that PLRA exhaustion should be treated differently than other affirmative defenses, because it "remains a threshold precondition to suit that, by its nature, must be determined before the merits." Pet.Br. 38. Some variation of that assertion is repeated dozens of times in Petitioner's brief, and it is irreconcilable with this Court's holdings in *Woodford* and *Jones*.

As this Court has recognized, because PLRA exhaustion is not jurisdictional, it need not be addressed at the outset of the case. *See Woodford*, 548 U.S. at 101 (observing that court may "dismiss plainly

meritless claims" under Rule 12(b)(6) "without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies"). And in *Jones*, this Court firmly rejected the various procedural rules some lower courts had invented to accelerate the resolution of exhaustion disputes, as "exceed[ing] the proper limits on the judicial role." 549 U.S. at 203. "[W]hen Congress meant to depart from the usual procedural requirements [in the PLRA], it did so expressly." *Id.* at 216. Because Congress had "dealt extensively" with exhaustion but was "silent" on whether it was a pleading requirement or an ordinary affirmative defense, the Court explained, it should be treated according to "the usual practice" under the Federal Rules. *Id.* at 212.

Petitioner protests that PLRA exhaustion is "*logically* precedent" to the merits (*e.g.,* Pet.Br. 47); but it is no more so than other affirmative defenses—including statute of limitations defenses that are routinely submitted to the jury. *See Jones*, 549 U.S. at 220 (noting that "[s]tatutes of limitations … are often introduced by a variant of the phrase 'no action shall be brought.'"). Congress knows very well how to make an issue into a genuine threshold precondition to suit—as it did with sovereign immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq*. Indeed, in the PLRA itself Congress created a judicial pre-screening process to weed out frivolous claims. As this Court recognized in *Jones*, Congress's deliberate decision not "to include exhaustion in terms among the enumerated grounds justifying dismissal upon early screening" indicates that Congress did not view exhaustion as a threshold issue. 549 U.S. at 216. To the extent that Congress's intent matters here,

Petitioner's effort to characterize exhaustion as a threshold precondition to suit "cannot fairly be viewed as an interpretation of the PLRA." *Id.*

Finally, there can be no serious argument that an exhaustion dispute is "logically precedent" to the merits when, as here, that dispute is intertwined with the core merits of the plaintiff's claim. Deciding one necessarily resolves the other.

2. Even true "threshold" issues may not be decided by the court if they overlap with the merits of an action at law.

Even if Petitioner's characterization of exhaustion as a "threshold issue" were defensible as a statutory matter, it would not justify judicial fact-finding where, as here, the disputed facts are intertwined with the merits of Respondent's §1983 claim.

Subject matter jurisdiction is, of course, the ultimate threshold issue. But as the Sixth Circuit correctly recognized, factual questions bearing on subject matter jurisdiction are routinely deferred to the jury when they are intertwined with the merits. "In 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.").[2]

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[2] *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

That principle is evident in this Court's cases. In *Smithers v. Smith*, 204 U.S. 632 (1907), for example, this Court held that a dispute about the amount in controversy should be deferred to a jury trial when that issue is intertwined with the merits. 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." *Id.* at 645.

This Court reached a similar conclusion 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." *Id.* 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; *see also Gulf Oil Corp. v. Copp Paving Co., Inc.,* 419 U.S. 186, 203 n. 19 (1974) (citing *Land v. Dollar* and noting that jurisdictional issues may be deferred "until a hearing on the merits" if there is "an identity between the 'jurisdictional'

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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).

issues and certain issues on the merits"); *Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 (2d Cir. 2006) ("If … the overlap in the evidence is such that fact-finding on the jurisdictional issue will adjudicate factual issues required by the Seventh Amendment to be resolved by a jury, then the Court must leave the jurisdictional issue for the trial.").

Courts apply the same principle when questions bearing on personal jurisdiction or venue are intertwined with the merits of the case. The usual practice is to reserve those issues for trial when there are factual disputes overlapping with the merits.[3]

There is no rule that "threshold" questions must be decided by the judge even when they overlap with the merits; *the usual rule is the opposite.* Petitioner does not deny that principle; he simply ignores it, even though it featured prominently in the decision below and was a principal focus of Respondent's briefing below and at the certiorari stage.[4] This Court need not look further for a rule to resolve this case.

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[3] *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.").

[4] Petitioner devotes a single footnote to the central rationale of the decision below, dismissing it as a "concern" that is ameliorated by "*Pavey*'s approach." Pet.Br.44 n.4.

3. At common law, "matters in abatement" intertwined with the merits of an action at law were decided by the jury.

Petitioner's "threshold precondition" argument is a somewhat elliptical allusion to the rationale underlying some lower court decisions permitting judicial resolution of exhaustion questions. Before this Court's decision in *Jones*, the lower courts frequently analogized exhaustion to a "matter in abatement," referring to an old common law plea regarding certain matters "unrelated to the merits." Pet.Br. 19 n.2. Petitioner conspicuously declines to defend the rationale of those decisions directly, addressing them only in a footnote. *Id.* The analogy is deeply flawed for the fundamental reason that, unlike a "matter in abatement," failure to exhaust is not a temporary, curable defect. *See infra* §II(B). Regardless, any plea in abatement that implicates the *merits* would have triggered a jury trial.

a. The plea in abatement was one of the "dilatory pleas," along with pleas to the jurisdiction and pleas in suspension of the action. *See* George L. Clark, Common Law Pleading §59, at 132 (1931) (Clark).[5] Typically, a plea in abatement related to the parties' identities, a misnomer in the declaration of facts, or another curable

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[5] Pleas to the jurisdiction attacked a court's subject matter or personal jurisdiction, disposing of the case entirely before that court if successful. John J. McKelvey, Principles of Common-Law Pleading §§131, 134, at 92, 95 (1894) (McKelvey). 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; Benjamin J. Shipman, Handbook of Common-Law Pleading §230, at 400 (3d ed. 1923) (Shipman).

defect in the plaintiff's writ. *See* McKelvey §§ 134–135, at 95. Such defects 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.

As Petitioner acknowledges, "'abatement defense[s] defeat the particular action for procedural defects that are *unrelated to the merits* of the plaintiff's claim,' and the plaintiff can therefore 'typically correct the defects and proceed in another action.'" Pet.Br. 19 n.2 (emphasis added) (citation omitted). Put simply, a plea in abatement, if successful, "delay[ed] the plaintiff's action instead of dealing with the merits of his claim." Clark §59, at 131; McKelvey §132, at 93 ("Judgment upon the dilatory plea was not final, … it did not determine the case upon the merits.").

At common law, any plea that contradicted the plaintiff's factual allegations was treated as a "traverse," and triggered a jury trial. McKelvey §185, at 118 ("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."); Richard Ross Perry, Common-Law Pleading: Its History and Principles 275 (1897) (Perry) (if defendant "traverse[s] the plaintiff's declaration, then . . . the jury must determine the law as well as the facts involved therein") (emphasis omitted).[6] *See also* Shipman §15, at 32-33 ("[T]he

[6] Juries once had a more prominent role in deciding legal issues. *See* James Oldham, Trial by Jury: The Seventh Amendment and Anglo-American Special Juries 25-31 (2006).

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."). It therefore was not possible, at common law, to plead a matter in abatement for decision by the judge if it raised factual disputes that implicated the merits.

b. That historical practice makes sense of the rule that jurisdictional challenges and challenges to venue intertwined with the merits are deferred to the jury. *See supra* §I(A)(2). It also explains why the federal courts that have permitted judicial resolution of some exhaustion issues by analogy to matters in abatement have recognized that the answer might be different if the relevant facts overlapped with the merits.[7] Applying this longstanding principle, the federal courts that have squarely confronted the issue since *Pavey* have held that a jury trial is required when genuine factual disputes about exhaustion are bound up with the merits of an action at law.[8]

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[7] *See, e.g., Lee v. Willey,* 789 F.3d 673, 678 (6th Cir. 2015) (bench trial permitted to resolve factual disputes "not bound up with the merits of the underlying dispute."); *Messa v. Goord,* 652 F.3d 305, 309 (2d Cir. 2011) (same); *Small v. Camden County*, 728 F.3d 265, 269-71 (3d Cir. 2013) (same); *Dillon v. Rogers*, 596 F.3d 260, 272 n.2 (5th Cir. 2010) (reserving judgment on "should serve as factfinder when facts concerning exhaustion also go to the merits"); *Bryant v. Rich*, 530 F.3d 1368, 1377 (11th Cir. 2008) (judge can resolve exhaustion "so long as the factual disputes do not decide the merits").

[8] *See, e.g., Sanchez v. Nassau County,* 662 F. Supp. 3d 369, 403-04 (E.D.N.Y. 2023); *Gunn v. Ayala,* No. 20-cv-840, 2023 WL 2664342, at *10 (S.D.N.Y. Mar. 28, 2023); *Stephens v. Venetozzi,* No. 13-cv- 5779, 2020 WL 7629124, at *3 (S.D.N.Y. Dec. 21,

B. Even if Exhaustion Could Be Considered an "Equitable Defense," Factual Disputes Intertwined with the Merits Must First Be Decided by the Jury.

Petitioner alternatively presses a novel argument that PLRA exhaustion does not implicate the Seventh Amendment at all because it is an equitable defense. *See* Pet.Br. 19-37. Once again, that argument is both wrong and irrelevant in this case. It is wrong for statutory and historical reasons explained below. *See* §II(C). But even if exhaustion *were* an "equitable defense," factual issues common to the defense and Respondent's legal claim would have to be submitted to the jury.

The whole point of *Beacon Theatres* is that the Seventh Amendment right may not be diminished by deciding an equitable issue first, when that issue factually overlaps with questions within the jury's province. *Beacon Theatres* involved a mix of equitable and legal claims. Fox, operator of a movie theater in San Bernardino, sued Beacon, operator of a drive-in theater 11 miles away, seeking a declaration that Fox was not liable to Beacon for treble damages under the antitrust laws and an injunction to prevent Beacon from suing Fox and its distributors. 359 U.S. at 502-03. This Court assumed that Fox's injunctive claim was properly pleaded but held that Fox's assertion of

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2020); *Daum v. Doe*, No. 13-cv-88, 2016 WL 3411558, at *2 (W.D.N.Y. Jun. 22, 2016). Although the Ninth Circuit cited *Pavey* with approval in *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014), that part of the opinion is dicta, because the court held that the plaintiff was entitled to summary judgment on exhaustion. *Albino* also instructs that courts should treat exhaustion "in the same manner" as jurisdiction and venue. *Id.* at 1170-71.

an equitable claim could not "justify denying Beacon a trial by jury of all the issues in the antitrust controversy." *Id.* at 506.

The Court explained that "the right to a jury trial of legal issues" cannot "be lost through prior determination of equitable [issues]" by the judge except "under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate." *Id.* at 510-11; *see also Dairy Queen*, 369 U.S. at 479. The only exception is situations where prior jury resolution of the merits of the legal claims "would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause." *Beacon Theatres*, 359 U.S. at 510. But the Federal Rules solve that problem by authorizing temporary restraining orders and preliminary injunctions to preserve the status quo. *See* Fed. R. Civ. P. 65; *see also Curtis v. Loether*, 415 U.S. 189, 198 (1974) ("[P]reliminary injunctive relief remains available without a jury trial even in damages actions.").

This Court's decision in *Lytle* reaffirmed *Beacon Theatres* and confirmed its constitutional footing. *Lytle* involved a claim for damages under § 1981 and a Title VII claim seeking equitable relief. The district court had erroneously dismissed the § 1981 claim on the theory that Title VII provided "the exclusive remedy for Lytle's alleged injuries." 494 U.S. at 548. The court then conducted a bench trial on the Title VII claim, ultimately entering judgment for the defendant. Because the district court had erred in dismissing the legal claim, this Court vacated and remanded for a jury trial under *Beacon Theatres*. "Had the § 1981 claims remained in the suit," the

Court explained, "a jury *would have been required* to resolve those claims before the court considered the Title VII claims." 494 U.S. at 550 (emphasis added). The Court observed that "[i]t would be anomalous to hold that a district court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but that a court may accomplish the same result by erroneously dismissing the legal claim." *Id.* at 552. A new trial was thus "essential to vindicating Lytle's Seventh Amendment rights." *Id.* at 553.

Petitioner offers no persuasive justification for an exception to those principles in this case.

1. Petitioner argues that *Beacon Theatres* is inapplicable here because "exhaustion is a threshold precondition to reaching the merits." Pet.Br. 41. As explained above, Petitioner's characterization of PLRA exhaustion as a "threshold precondition" runs head-on into *Jones* and *Woodford*. *See supra* §I(A). And, again, subject matter jurisdiction is the ultimate "precondition to reaching the merits"—yet the usual rule is that even jurisdictional questions overlapping with the merits are deferred to the jury. *See supra* §I(A)(2). Petitioner offers no reason why an "equitable" threshold issue would provide a greater justification for trampling the jury's traditional factfinding role than *jurisdictional* ones do.

Under *Beacon Theaters*, juries decide all factual questions necessary to resolve the merits of a legal claim, even when some of those questions may overlap with issues a judge could otherwise decide. *See Lytle*, 494 U.S. at 550. Even if *Beacon Theatres* established only a prudential rule (*see* Pet.Br. 38), it is a rule that establishes "the usual practice," and there is no

indication that Congress intended to depart from it. *See Jones*, 549 U.S. at 212.

2. Relying on the Seventh Circuit's decision in *Pavey*, Petitioner argues (at 41, 43-45) that the concerns underlying *Beacon Theatres* are not present here because "a judge's factual findings on exhaustion would not preclude a jury's ability to consider those same facts when determining the merits of the legal claim." But as the Sixth Circuit explained in this case, that is pure nonsense. The judicial factfinding here *has* precluded jury resolution of the critical issues, for all time.

Petitioner makes this argument in two ways. First, he argues that judicial resolution of intertwined facts *might* not ultimately deny the plaintiff his right to jury trial on the merits, because *if* the judge finds the exhaustion issue in the plaintiff's favor, *then* the jury can reexamine all the facts. Pet.Br. 43. That of course is no comfort to a plaintiff like Mr. Richards, who has been denied a jury trial on the merits on account of judicial factfinding against him. Where (as here) a judge decides the intertwined exhaustion facts against the plaintiff, *there will never be a jury*.

Contrary to Petitioner's suggestion (at 38-40), *Beacon Theatres* and its progeny were not just concerned with the possibility of preclusion via collateral estoppel. *Beacon Theatres* held that any judicial discretion over the order of trial "must, wherever possible, be exercised to preserve jury trial." 359 U.S. at 510-11 (citations omitted). This Court also emphasized that, even on traditional equitable terms, there would be no justification for prioritizing equitable resolution when the issue could be decided at law. *Id.* at 509. Neither rationale turns on whether the plaintiff's right to jury trial would have been

denied by the operation of a preclusion doctrine. Petitioner has latched onto a feature of the factual and legal posture of *Beacon Theatres* and *Dairy Queen* while ignoring the substance of this Court's reasoning—which was based on the importance of preserving the jury-trial right.

Second, Petitioner argues that any potential Seventh Amendment issue is mitigated because dismissals for non-exhaustion are usually framed as without prejudice. *See* Pet.Br. 45. "[T]he ability of a prisoner to refile a case after proper exhaustion," he says, "distinguishes the issue of exhaustion from other deadline [sic] issues that juries decide." *Id.* at 45 n.5 (quoting *Pavey*). That suggestion invites this Court to trample one of our People's most cherished constitutional rights based on an abject legal fiction. The exceedingly short deadlines for filing a prison grievance have long since passed in this case. And that will virtually always be true.

In *Jones*, which also involved a Michigan inmate, this Court discussed the stringent exhaustion deadlines then required by Michigan prisons. 549 U.S. at 207. The grievance and appeal deadlines were shorter than a week. The current rules are no more forgiving.[9] Across the country, "the deadline for filing an administrative grievance is generally not very long—14 to 30 days according to the United States, and even less according to respondent." *Woodford*,

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[9] Inmates must first attempt to resolve a problem orally within two business days, unless prevented by circumstances beyond his or her control. If oral resolution is unsuccessful, the inmate has five business days to submit a completed grievance form. J.A.48-51.

548 U.S. at 95-96 (internal citations omitted).[10] "Indeed," as this Court recognized, "many prisoners would probably find it difficult to prepare, file, and serve a civil complaint before the expiration of the deadline for filing a grievance in many correctional systems." *Id.* at 96.

Some prison systems permit discretion. But if there is a prison system in the country that would allow a prisoner to go back and exhaust a grievance *as a matter of right* after a federal court has dismissed for failure to exhaust, undersigned counsel is not aware of it. Petitioner says the fact that "some prisoners will be unable to refile their lawsuit after a judge's determination" on exhaustion "is simply a consequence of the exhaustion requirement functioning as intended." Pet.Br. 45. The reality is that dismissals for non-exhaustion end the case, even when they are nominally "without prejudice."

Nor does it matter that the statute of limitations for filing *in court* is ordinarily tolled while a claimant pursues administrative exhaustion. There is no comparable rule that tolls or resets *prison* filing deadlines when a plaintiff is pursuing litigation in court. And federal courts certainly are not empowered to fashion their own. *See Jones*, 549 U.S. at 217 (rejecting court's "procedural rule" because it "lacks a textual basis in the PLRA").

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[10] *See also, e.g., Woodford*, 548 U.S. at 85-86 (detailing the California deadlines); Alison Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 Geo. Mason L. Rev. 573, 584 (2014) ("[F]or prisoners in some systems there is effectively only a two- or three-day statute of limitations on their constitutional claims….").

If anything, the case for deferring to a jury here is even stronger than it was in *Beacon Theatres* itself. The question here is not whether a litigant might be collaterally estopped from re-litigating a factual issue decided in a parallel equitable proceeding; a judicial finding that the plaintiff failed properly to exhaust the prison grievance process extinguishes the plaintiff's legal claim altogether.

3. Finally, Petitioner argues that the Court should decline to apply *Beacon Theatres* here because "judicial determination of exhaustion would implement congressional intent" to improve the quality of prisoner suits and "promote[] judicial efficiency." Pet.Br. 47-48. Like many of Petitioner's arguments, this contention is foreclosed by *Jones*, which held unanimously that Congress's "intent"—as expressed in the text of the statute—was to make exhaustion an affirmative defense, subject to the "usual practice" governing affirmative defenses. *See* 549 U.S. at 212-17; *supra* §I(A).

Nor does *Katchen v. Landy*, 382 U.S. 323 (1966), support an exception to *Beacon Theatres* based on "statutory . . . purpose." Pet.Br. 47. *Katchen* involved an equitable proceeding in bankruptcy court. The Court held only that the bankruptcy court did not have to stay its hand in resolving that purely equitable case just because the same issue *could* arise in a *future* claim for money damages. 382 U.S. at 338. Importantly, the Court recognized that the Trustee *would* have had a right to a jury trial if he had brought that hypothetical action, but he had not. *Id.* at 338-39. Put simply, there was no pending "action at law" to which the *Beacon Theatres* rule would apply.

Regardless, it is far from obvious that having the court decide intertwined exhaustion issues would systematically further any legislative goal to promote efficiency. According to Petitioner, in cases where there are genuine issues of material fact that cut across exhaustion and the core elements of a plaintiff's claim, there would be a bench trial on exhaustion, followed by a potential jury trial that would relitigate at least some of the same factual issues.

To be sure, a bench trial may be marginally more efficient in cases where it turns out that the court decides the exhaustion issue and the merits against the plaintiff in one fell swoop without impaneling a jury. But that sort of "efficiency" goal obviously cannot justify diminution of the Seventh Amendment right. *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33*,* 58-59 (1989) ("It may be that providing jury trials in some fraudulent conveyance actions … would impede swift resolution of bankruptcy proceedings," "[b]ut 'these considerations are insufficient to overcome the clear command of the Seventh Amendment.'") (quoting *Curtis*, 415 U.S. at 198); *Lytle*, 494 U.S. at 553-54 ("[C]oncern about judicial economy … remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial."); *see also Jarkesy*, 144 S. Ct. at 2128 (Framers adopted the Seventh Amendment to "secur[e]" the jury-trial right "'against the passing demands of expediency or convenience'") (quoting *Reid v. Covert*, 354 U.S. 1, 10 (1957)).

II. ALL GENUINE FACTUAL DISPUTES CONCERNING PLRA EXHAUSTION MUST BE SUBMITTED TO THE JURY.

Most of Petitioner's brief is devoted to the distinct question of whether factual disputes relevant to PLRA exhaustion can be decided by judges when they *are not* intertwined with the merits. That issue is outside the Question Presented and this Court need not address it. But if the Court wishes to address that question, the answer is that PLRA exhaustion is an affirmative defense to a legal claim, and there is no reason to treat it differently, for Seventh Amendment purposes, than any other affirmative defense.

A. Existing Precedent Establishes At Least a Strong Presumption That Factual Disputes Concerning PLRA Exhaustion Must Be Submitted to the Jury.

Three things are perfectly clear under this Court's precedents. First, "there can be no doubt that claims brought pursuant to § 1983 sound in tort." *Del Monte Dunes*, 526 U.S. at 709. Second, "in suits sounding in tort, for money damages, questions of liability were decided by the jury, rather than the judge, in most cases." *Id.* at 718. Third, PLRA exhaustion is an affirmative defense, which defeats liability if proved by the defendant. *See Jones*, 549 U.S. at 216. Those principles together establish at least a strong presumption that purely factual disputes concerning PLRA exhaustion must *always* be submitted to the jury.

1. As Petitioner concedes, "no exact antecedent for exhaustion existed at common law." Pet.Br. 23. "[I]n the absence of a precise historical analogue," this

Court's approach to the Seventh Amendment "recognizes the historical preference for juries to make primarily factual determinations and for judges to resolve legal questions." *Del Monte Dunes*, 526 U.S. at 731 (opinion of Scalia, J.).

As the Court explained in *Baltimore & Carolina Line, Inc. v. Redman*, "the aim of the [Seventh] [A]mendment … is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby … 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." 295 U.S. 654, 657 (1935). The distinction between law and fact is a foundational principle of this Court's modern Seventh Amendment jurisprudence, and "is routinely applied by the lower courts in deciding § 1983 cases." *Del Monte Dunes*, 526 U.S. at 731 (opinion of Scalia, J.).

In *Del Monte Dunes*, this Court held that a suit for legal relief brought under §1983 is an "action at law" for purposes of the Seventh Amendment. 526 U.S. at 710. It then considered whether two specific issues were properly submitted to the jury: whether the city's actions "deprived the owner of all economically viable use of the land," and whether the city's decisions to reject development plans "bore a reasonable relationship to its proffered justifications." *Id.* at 718. The Court found "no precise analogue for the specific test of liability submitted to the jury," but observed that "[w]e do know that in suits sounding in tort for money damages, questions of liability were

decided by the jury, rather than the judge, in most cases." *Id.*

Having found no definitive answer in history or existing precedent, the Court turned to "considerations of process and function"—a reference to the jury's historical responsibility to decide "predominantly factual issues" in actions at law. *Id.* at 720 (citing *Redman*, 295 U.S. at 657). That "allocation," the Court observed, "rests on a firm historical foundation … and serves 'to preserve the right to a jury's resolution of the ultimate dispute.'" *Id.* (quoting *Markman*, 517 U.S. at 377). Applying that principle, the Court held that "the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question," and is "for the jury." 526 U.S. at 731 (opinion of Scalia, J.). Analyzing the second issue, the Court concluded it was a "mixed question of fact and law" that "involves an essential factual component" and thus also proper for the jury. *Id.* The Court emphasized that the action "was brought under § 1983, a context in which the jury's role in vindicating constitutional rights has long been recognized by the federal courts." *Id.*

"That fact-law dichotomy is routinely applied by the lower courts in deciding § 1983 cases." *Id.* It was also the basis of this Court's decisions in *Markman* and *Google LLC v. Oracle Am. Inc.*, 593 U.S. 1, 34-35 (2021). Both involved mixed issues of law and fact, and neither supports Petitioner's position.

In *Markman*, the issue was whether the court or the jury should resolve "the meaning of terms of art in construing patent." 517 U.S. at 388. After noting that "history and precedent provide[d] no clear answers," the Court explained that "when an issue

'falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" *Id.* (citation omitted). Having "consider[ed] both the relative interpretive skills of judges and juries," the Court concluded that "judges, not juries, are better suited to find the acquired meaning of patent terms." *Id.*

Similarly, in *Google*, this Court approved the Federal Circuit's approach to the issue of "fair use" in a copyright infringement action. Google had obtained a favorable jury verdict on "fair use," and argued that the Federal Circuit's review of that issue violated the Seventh Amendment. Affirming, this Court determined that "fair use" was a mixed question of fact and law, and that the Federal Circuit had "carefully applied the fact/law principles" of *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 583 U.S. 387 (2018), by "leaving factual determinations to the jury and reviewing the ultimate question, a legal question, *de novo*." 593 U.S. at 24-25. Notably, the Court applied that principle even though the "fair use" issue was considered "an 'equitable,' not a 'legal,' doctrine." *Id.* at 26.

Of course, purely legal questions will arise in the PLRA exhaustion context, and they will be decided by judges. But many exhaustion disputes will turn on pure questions of historical fact (as in this case) or "predominantly factual" mixed questions. *Del Monte Dunes*, 526 U.S. at 721.

2. Those principles apply with no less force to affirmative defenses. This Court recognized in *Jarkesy* that "[t]he Seventh Amendment extends to a

particular statutory claim if the claim is 'legal in nature.' " 144 S. Ct. at 2128 (citation omitted). An affirmative defense is just as central to the merits of a claim as the plaintiff's case-in-chief. *See, e.g.*, *Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 162 (4th Cir. 1992); *Katz v. Goodyear Tire Rubber Co.*, 737 F.2d 238, 243 (2d Cir. 1984) ("Where the statute of limitations operates as an affirmative defense . . . issues of fact as to the application of that defense must be submitted to the jury."); *see also Vance v. Ball State*, 570 U.S. 421, 443-44 (2013) (genuine issues of material fact about affirmative defense in Title VII case are for jury); *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 537-38 (1958) (plaintiff in diversity action seeking damages for negligence was entitled to jury determination of factual issues raised by affirmative defense). Indeed, Petitioner filed his own jury demand in this case.

There is no principled justification for treating the PLRA's exhaustion defense differently, for Seventh Amendment purposes, than a statute of limitations, Title VII exhaustion, or any other affirmative defense to an action at law. This Court has compared PLRA exhaustion to a statute of limitations defense, *see Jones*, 549 U.S. at 215, 220, and the analogy makes good sense. Both are affirmative defenses turning on events that happened (or did not happen) within a prescribed period after the claim accrued. It is therefore unsurprising that this Court and others have generally treated exhaustion as analogous to the statute of limitations—and thus a jury issue—in other contexts where it operates as an affirmative defense. *See, e.g., Zipes v. Trans World Airlines, Inc.* 455 U.S. 385, 393 (1982) ("[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional

prerequisite to suit in federal court, but a requirement . . . like a statute of limitations."); *Begolli v. Home Depot U.S.A., Inc.*, 701 F.3d 1158, 1160-61 (7th Cir. 2012) (comparing Title VII exhaustion to statute of limitations and holding that factual disputes go to the jury); *Williams v. Runyon*, 130 F.3d 568, 574 (3d Cir. 1997) (comparing Title VII exhaustion to statute of limitations; holding defendant waived the defense "[b]y failing to offer any evidence to the jury on an issue upon which he carried the burden of proof").

3. Petitioner's approach also invites ahistorical and unworkable *ad hoc* distinctions.

Judge Posner's opinion in *Begolli* vividly illustrates the point. Relying on *Pavey*, the district court had held that factual disputes about exhaustion under Title VII were for the judge. The Seventh Circuit reversed, analogizing Title VII exhaustion to a statute of limitations defense. 701 F.3d at 1160. Judge Posner distinguished his decision in *Pavey* on the ground that while Title VII exhaustion imposes only a deadline to file an administrative complaint, the PLRA requires a plaintiff "to submit [his] grievance to an administrative tribunal *for decision* before [he] can bring a suit." *Id.* Because "[t]he filing deadline is just a defense in a Title VII suit," "there is no reason to distinguish it from other defenses and therefore exclude it from the jury trial." *Id.* But that supposed distinction utterly crumbles under scrutiny. *Jones* held that PLRA exhaustion is "just a defense." PLRA exhaustion does not require that the prison grievance process result in an administrative decision. And PLRA exhaustion cases often present precisely the sort of "deadline issues that juries decide." *Pavey*, 544 F.3d at 741.

Other courts of appeals have fashioned equally flimsy rationales for treating PLRA exhaustion differently than other affirmative defenses. The Second and Third Circuits, for example, have distinguished PLRA exhaustion from statute of limitations issues because "one doctrine opens the courthouse door and the other closes it." *Messa*, 652 F.3d at 310; *accord Small*, 728 F.3d at 270 n.4 ("[E]xhaustion is a key to open the courthouse door; statutes of limitation, conversely, close that door."). But exhaustion is an ordinary, waivable, affirmative defense which—just like the statute of limitations—bars a ripe claim *after* accrual because of something the plaintiff failed to do.

Treating PLRA exhaustion (consistent with *Jones*) as an ordinary affirmative defense and applying the routine fact/law distinction for Seventh Amendment purposes would bring clarity and predictability to all this confusion.

B. PLRA Exhaustion Is Not Analogous to a Matter in Abatement at Common Law.

The courts of appeals that have justified treating PLRA exhaustion differently than other affirmative defenses have done so on the ground that it is analogous to "a rule of judicial administration," or a "matter in abatement" that would have been decided by judges at common law. *See supra* §I(A)(3). But those old analogies do not hold up after *Jones*. PLRA exhaustion is an affirmative defense that, if successfully proved, ends the case.

None of the court of appeals decisions analogizing PLRA exhaustion to matters in abatement wrestles with the significance of this Court's central holding in *Jones*, that PLRA exhaustion is an ordinary

affirmative defense, and thus part of the merits of an action at law.

a. Shortly after the PLRA was enacted, several courts of appeals—citing exactly the same policy concerns that animate Petitioner's brief in this case—invented a variety of procedural vehicles to ensure that exhaustion disputes could be resolved at the threshold of the litigation. This Court firmly rejected all of that, holding that exhaustion is an affirmative defense like any other. *Jones,* 549 U.S. at 212-14.

No doubt Petitioner and some lower courts find this Court's holdings "unsatisfactory," but they represent this Court's conclusion that Congress intended to make PLRA exhaustion an affirmative defense, and not a threshold super-requirement or question of "judicial traffic control." *Pavey*, 544 F.3d at 741-42. Indeed, Congress knows exactly how to specify that an issue should be resolved up front and by the judge, and it did so repeatedly in the PLRA itself. *Jones*, 549 U.S. at 216. So even if exhaustion could be fairly characterized as a "rule of judicial administration" rather than a merits issue in some contexts, *Myers*, 303 U.S. at 51 n.9, that is not true here, where Congress has made it an affirmative defense to an action at law, with the burden of proof on the defendant, as it has done in the PLRA.

The "judicial traffic control" metaphor is a particularly poor fit for cases like this one, where the exhaustion issue—and the First Amendment claim—involve allegations that, if true, demonstrate that administrative remedies were unavailable. In such cases, the question is not what "forum" is appropriate; the case will be heard in federal court or not at all.

b. Following this Court's lead in *Jones*, at least one federal court has held that disputed issues of fact concerning PLRA exhaustion "must be resolved by the jury and not the Court," where the facts concerning exhaustion were not intertwined with the merits. *Maraglia v. Maloney*, 499 F. Supp. 2d 93, 97-98 (D. Mass. 2007). Taking due account of this Court's holding in *Jones* that PLRA exhaustion is an affirmative defense, the court reasoned that the "the ordinary practice is to submit disputed questions underlying affirmative defenses to the jury." *Id.* at 95. There was no reason to depart from that practice where "the resolution of the exhaustion question depends … on credibility determinations—archetypal jury issues fit for jury resolution." *Id.* at 96.

Judge Wilson made similar points concurring in part and dissenting in part in *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008). Judge Wilson explained that "[o]ur usual practice is to consider affirmative defenses, such as failure to exhaust administrative remedies or statute of limitations, on summary judgment" under Rule 56, and to "submit[] genuine issues of material fact to the jury." *Id.* at 1379-80 (opinion of Wilson, J.). He also explained that the majority's contrary treatment could not "be reconciled with the recent Supreme Court decision in [*Jones*]," and that he was "unaware of … any precedent wherein this Court has treated exhaustion, or any other affirmative defense, as a 'matter in abatement,' directing a district court to decide genuine issues of material fact." *Id.* at 1380-82.

c. The reason there is no precedent for treating an affirmative defense that defeats liability as a "matter in abatement" fit for judicial resolution is that such defenses are *not* matters in abatement, by definition.

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 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. For example, 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 (Ill. 1900), as an example of a plea in abatement alleging "failure to exhaust remedies provided in [a] contract").

At common law, an affirmative defense that would permanently end the litigation would have been raised either by demurrer (if the issues were purely legal) or by a "plea in bar." 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). *See* Shipman § 197-199. The latter category included "pleas in discharge," which (just as it sounds) 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. Statute of limitations was one such ground for a plea in discharge. *Id.* §199; *cf.* Fed. R. Civ. P. 8(c)(1).

Like a statute of limitations defense, failure to exhaust prison remedies is a defect that arises after a §1983 tort claim accrues, and that is, in virtually all

cases, incurable and permanently ends the litigation. A judge would never have decided disputed facts posed by a plea in discharge at common law. *See* Perry, at 179-80, 272-73.

C. PLRA Exhaustion Is Not an "Equitable Defense."

Petitioner argues at length that PLRA exhaustion is exempt from those basic principles either because it is an inherently "equitable defense" or analogous to various doctrines applied in equity. *See* Pet.Br. 19-37. None of those arguments is persuasive.

1. PLRA exhaustion is a mandatory statutory rule, not an equitable doctrine.

As far as Respondent can tell, *no* court has suggested that PLRA exhaustion is an equitable defense, and for good reason. It is a specific, "mandatory" prescription, *Jones*, 549 U.S. at 211, and thus lacks the essential characteristic of an equitable defense: the exercise of discretion. *Starbucks Corp. v. McKinney*, 602 U.S. 339, 347 (2024) ("Crafting 'fair' and 'appropriate' equitable relief necessitates the exercise of discretion—the hallmark of traditional equitable practice.") (citation omitted); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("Equity eschews mechanical rules; it depends on flexibility."); *see* E. Allan Farnsworth, Contracts §§4.28, 9.1-9.9, at 837 (1982) (discretionary defenses developed from historical origin of equity as a court of conscience).

This Court explained this point at length in *Ross v. Blake*, while unanimously rejecting the Fourth Circuit's judge-made "special circumstances" exception to PLRA exhaustion. 578 U.S. at 638-42.

Examining the text and history of the PLRA, this Court observed that the PLRA's "language is 'mandatory.'" *Id.* at 638 (quoting *Woodford*, 548 U.S. at 85). The Court explicitly distinguished the PLRA's exhaustion defense from "judge-made exhaustion doctrines," which "remain amenable to judge-made exceptions," explaining that "a statutory exhaustion provision stands on a different footing." *Id.* at 639. Because "Congress sets the rules," "mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion." *Id.*

Writing separately in *Ross*, Justice Breyer agreed that "Congress intended the term 'exhausted' to 'mean what the term means in administrative law, where exhaustion means proper exhaustion.'" *Id.* at 639 (opinion of Breyer, J., concurring in part) (quoting *Woodford*, 548 U.S. at 103 (Breyer, J., concurring in the judgment)). But he would have read into the PLRA, as a statutory matter, "administrative law's 'well-established exceptions to exhaustion.'" *Id.* at 650 (quoting *Woodford*, 548 U.S. at 103 (Breyer, J., concurring in the judgment)). No Member of the Court has suggested that the PLRA's mandatory exhaustion provision embodies equitable principles.

Ross makes perfectly clear that PLRA exhaustion bears no resemblance to any "discretionary rule adopted by courts of equity" as a limitation on "equitable relief." Pet.Br. 28 (citations omitted). Congress certainly knows how to codify an equitable doctrine when it wants to—as it did, for example, in the Copyright Act. Quite unlike the PLRA's exhaustion defense, the "statutory provision [of the Copyright Act] that embodies the [fair use] doctrine indicates, rather than dictates, how courts should

apply it." *Google*, 593 U.S. at 18. In the PLRA, by contrast, Congress chose to enact a "hard and fast rule" in lieu of any equitable principles that might otherwise have been applicable. *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 580 U.S. 328, 334-35 (2017); *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014) ("[L]aches … cannot be invoked to bar legal relief" "[i]n the face of a statute of limitations enacted by Congress."). So even if an equitable exhaustion defense might exist in some hypothetical equitable action, that obviously does not mean that *PLRA exhaustion* is an equitable defense in this § 1983 action. *Cf. Del Monte Dunes*, 526 U.S. at 730-31 (opinion of Scalia, J.) ("Nor … is the tort nature of the cause of action, and its entitlement to a jury trial, altered by the fact that another [equitable] cause of action was available … to obtain the same relief.").

Finally, treating PLRA exhaustion as a legal defense is consistent with *Jones*, where this Court compared PLRA exhaustion to statutes of limitation. *See* 549 U.S. at 215, 220. It is also consistent with the case law drawing that same analogy between statutes of limitation and statutory exhaustion provisions in other contexts. *See supra* §II(A).

2. Exhaustion developed in both law and equity, more than a century after the Seventh Amendment was adopted.

Any *relevant* historical analogue would have to be found among the defenses to damages liability that existed "at the time the Seventh Amendment was adopted." *Del Monte Dunes*, 526 U.S. at 718; *see also Markman*, 517 U.S. at 379-384 (explaining that "the

time relevant for Seventh Amendment analogies" is "the time of the framing"). As Petitioner notably concedes, the exhaustion doctrine did not even "begin to take shape," until nearly a century later. Pet.Br. 23. But Petitioner also greatly overstates exhaustion's supposedly equitable pedigree.

a. Exhaustion doctrines developed in both law and equity roughly at the same time, in the late 19th century. As this Court explained in 1938, the exhaustion rule "has been most frequently applied in equity where relief by injunction was sought," but is "applicable to proceedings at law as well as suits in equity." *Myers*, 303 U.S. at 51 n.9. *Myers* cited *Anniston Manufacturing Co. v. Davis*, 301 U.S. 337 (1937), and *First National Bank v. Board of County Commissioners*, 264 U.S. 450 (1924), for that proposition. Both were actions at law for money damages. *Anniston* upheld "the power of Congress to prescribe a refund procedure other than by suit against a collector, and to withdraw the right to that suit." 301 U.S. at 357; William T. Plumb, Jr., *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 685, 703-04 (1947). *First National Bank* held that the plaintiff could not sue at law because he had not first challenged his assessment before the state board of equalization. 264 U.S. at 453. *First National Bank* relied on this Court's even earlier decision in *Stanley v. Supervisors of Albany*, another action at law challenging a property assessment in which this Court held "citizen[s] must apply for relief against excessive and irregular taxation" to "boards of revision or equalization" created by law. 121 U.S. 535, 550 (1887). *Stanley* was decided contemporaneously with the equity cases that scholars have often pointed to as the first exhaustion cases. *See* Raoul Berger,

Exhaustion of Administrative Remedies, 48 Yale L.J. 981, nn.1 & 4; *Dundee Mortg. Tr. Inv. Co. v. Charlton*, 32 F. 192 (C.C.D. Or. 1887); *Altschul v. Gittings*, 86 F. 200 (C.C.D. Or. 1893).

In short, there is no historical basis for characterizing exhaustion as a traditionally equitable doctrine. Exhaustion entered our jurisprudence in both law and equity cases at the same time, long after the time that would be relevant to identifying potential exceptions to the jury-trial right.

b. Petitioner relies on the "historical equity-first order of operations" described in *Liberty Oil*. Pet.Br. 41. At common law there were some issues that a court at law could not resolve, and that a defendant could raise only by filing a separate bill in equity and seeking an injunction against the legal proceeding. "If the defendant, when prosecuted in an action at law, had an equity which, if worked out, would defeat the recovery, his only mode of redress was to commence an independent suit in chancery by which he might enforce his equitable right."[11] And since that new proceeding would have been an action at equity, no jury would have been involved. The possibility of an "equitable defense" in an action at law first arose in federal court in 1915, when Section 274b of the Judicial Code was amended to permit defendants in actions at law to raise such matters "'without the

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[11] John N. Pomeroy, Remedies and Remedial Rights by the Civil Action According to the Reformed American Procedure, §87, at 107 (3d ed. 1894) (Pomeroy); *see also* Edward W. Hinton, *Equitable Defenses Under Modern Codes*, 18 Mich.L.Rev. 717, 720 (1920) (Hinton) ("[T]he defendant in a legal action has a right of action in equity, the enforcement of which will give him a defense to the legal claim.").

necessity of filing a bill on the equity side of the court.'" *Liberty Oil*, 260 U.S. at 240 (citation omitted). *Liberty Oil* reasoned that there is no Seventh Amendment right to trial by jury on issues fitting that pattern. *Id.* at 242-43.

It is not clear whether that portion of *Liberty Oil* —which predates *Beacon Theatres* and the adoption of the Federal Rules—states any still-viable holding. The whole passage appears to be dicta, since "[a] jury was waived in writing." 260 U.S. at 119 (syllabus). *Beacon Theatres* also makes clear that the later "expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity" in ways that significantly change the jury trial analysis. 359 U.S. at 956. This Court similarly explained in *Ross v. Bernhard* that the jury trial practice "under older procedures, now discarded" is no longer a reliable guide to what the Seventh Amendment requires. 396 U.S. at 539-42.

Regardless, exhaustion would not fall within the category of "equitable defenses" identified in *Liberty Oil,* because it would not have provided any justification for "a bill on the equity side of the court." 260 U.S. at 240. Pomeroy cites *Dobson v. Pearce*, 12 N.Y. 156, 166 (1854), as a "concise and accurate definition" of an equitable defense: "all matters which would before have authorized an application to the Court of Chancery for relief against a legal liability, but which at law could not be pleaded at bar." Pomeroy, §90, at 110. Stated another way, "[w]henever equity confers a right, and the right avails to defeat a legal cause of action,—that is, shows that the plaintiff ought not to recover in his legal action,—then the facts from which such rights arise

may be set up as an equitable defence in bar." *Id.* §92, at 114. An "equitable defense" that could even arguably justify denying a jury trial therefore must be "a right which was originally recognized by courts of equity alone," and that could have been the basis of a bill in equity—and, potentially, an injunction against parallel actions at law—prior to the merger of law and equity. Pomeroy, §90, at 110. Fraud in the inducement of certain contracts is a classic example. *See* James Fleming, Jr., *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655, 679 (1963).

Petitioner cannot point to any similar pedigree for exhaustion of administrative remedies. Exhaustion clearly *was not* "originally recognized by courts of equity alone," but instead by courts of law and equity. Pomeroy, §90, at 110. It would never have justified a separate "bill on the equity side of the court," *Liberty Oil*, 260 U.S. at 240 (citation omitted), because an adequate remedy at law would have been available.

That history eviscerates the analogy that Petitioner is trying to draw. If a defendant had raised failure to exhaust administrative remedies as a defense to an action at law in the late 19th or early 20th centuries, there would have been no bill in equity, no separate equitable proceeding without a jury, and no equitable injunction against the action at law. The whole issue would have been resolved at law, under legal procedures—including jury resolution of fact issues. Petitioner cites no authority suggesting otherwise.

c. Petitioner also goes seriously astray by analogizing exhaustion to "equitable defenses to equitable claims," like the adequate remedy at law doctrine. Pet.Br. 29-33. These defenses did not

"destroy the [plaintiff's] legal right," including its right to jury resolution of factual disputes bearing on legal remedies. They merely defeated any distinct claim to equitable relief. Hinton, at 719. For example, "a court of equity might recognize various matters as sufficient to defeat a suit for specific performance without questioning the plaintiff's right to sue at law for a breach of the contract." *Id.*

It is entirely unsurprising that a judge, not a jury, would have resolved a traditionally equitable issue (like the adequate remedy at law doctrine) raised in a court of equity as a reason to defeat equitable relief and to remit the plaintiff to his remedies at law (where the case would be tried to a jury). That cannot be warped into a justification for denying that litigant a right to trial by jury *on his claims for legal relief*.

3. Any doubt should be resolved according to the strong presumption in favor of jury factfinding in actions at law.

Petitioner argues that judges are "better suited" to resolve factual issues relevant to exhaustion due to specialized knowledge. Pet.Br. 36-37. But when it comes to pure questions of historical fact like those posed here, this Court's cases employ the *opposite* presumption.

When historical methods "do not establish a definitive answer," the Court has time and again resolved any doubt in favor of the jury's traditional role as factfinder. *Del Monte Dunes*, 526 U.S. at 719. "That fact-law dichotomy is routinely applied by the lower courts in deciding §1983 cases." *Id.* at 731 (opinion of Scalia, J).

Resolution of the PLRA exhaustion issue in this case depends on credibility determinations and purely factual questions that are textbook jury issues. This Court should reaffirm its holding in *Jones* and make clear that PLRA exhaustion must be treated like an ordinary affirmative defense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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