No. 23-1324

In the Supreme Court of the United States

THOMAS PERTTU,

Petitioner,

v.

KYLE BRANDON RICHARDS,

Respondent.

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

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are professors of law who have studied, taught, and written about prisoner litigation and about rights to jury trials.[2] They submit this brief to share their views, based on that experience, on the proper interpretation of the Prison Litigation Reform Act) in light of the important jury trial rights at stake and the practical realities of prisoner litigation. Amici include:

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[1] No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici or its counsel made such a contribution.

[2] Institutional affiliations are included for identification purposes only; signatories to this brief provide their own views and do not represent the views of any institution.

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INTRODUCTION AND SUMMARY OF ARGUMENT

"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 care.'" *SEC v. Jarkesy*, 144 S. Ct. 2117, 2128 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). The Seventh Amendment reflects and enshrines that tradition, providing that in "[s]uits at common law . . . the right of trial by jury shall be preserved." U.S. Const. amend. VII (quoting *Dimick*; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710-11 (1999) (Section 1983 suits for damages are suits at common law for Seventh Amendment purposes).

The Seventh Amendment thus precludes judges from deciding questions that would have been assigned to juries in suits at common law. *Jarkesy*, 144 S. Ct. at 2128-29. Because Respondent asserts that a judge may decide the truth of a factual allegation central to a prisoner's legal claim so long as the question is also relevant to the defendant's exhaustion defense under the Prison Litigation Reform Act (PLRA), this case presents a novel and serious constitutional question whether the Seventh Amendment would permit that allocation of authority. *See* Petr. Br. 14 (admitting the defense has no clear pre-amendment analog); Resp. Br. 40-41 (arguing that the best analogy is to a plea in discharge, which was subject to a jury trial).

However, before resolving that constitutional question, this Court must first decide whether Congress intended to pose it or, instead, meant for juries in PLRA cases to decide merits question in every instance even if the Seventh Amendment *might* permit a different rule. That question of statutory interpretation is governed by this Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007). There, the Court held that when the PLRA is "silent" on the details of

how its exhaustion provision should be administered, "the usual practice should be followed" even if one could hypothesize reasons why departing from the normal course might better serve the statute's purposes. *Id*. at 212.

The tradition in our federal system is to "distribut[e] trial functions between judge and jury . . . under the influence—if not the command—of the Seventh Amendment." *Byrd v. Blue Ridge Rural Elec. Co-op., Inc*., 356 U.S. 525, 537 (1958). Consistent with that tradition, the usual practice is to allow jurors to 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 decide alone. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-511 (1959) ("[O]nly under the most imperative circumstances. . . can the right to a jury trial of legal issues be lost through prior determination" of an issue by a judge). Accordingly, although judges typically decide threshold issues such as subject-matter jurisdiction, when deciding those questions requires resolving a factual dispute that also goes to the merits of a legal claim, the court submits the factual question to the jury. *See ibid*.; *Smithers v. Smith*, 204 U.S. 632, 645-46 (1907) (applying rule to jurisdictional defense).

There is no indication that Congress intended the PLRA's exhaustion defense to depart from the usual practice dictated by *Beacon Theatres* and thereby to draw the statute's constitutionality into question. As in *Jones*, the statute is silent on the relevant question. And *Jones* instructed that "courts should generally not depart from the usual practice under the Federal

Rules on the basis of perceived policy concerns." 549 U.S. at 212.

Petitioner's policy objections are misplaced in any event. Petitioner overstates how often disputed facts concerning exhaustion also bear on the plaintiff's claim on the merits. And on the unusual occasions when they do overlap, courts have multiple tools to avoid a jury trial on meritless, unexhausted claims, including through mandatory screening for frivolous complaints and summary judgment when no reasonable juror could find the claims exhausted. Courts routinely use those tools to dismiss unexhausted claims without the need for a trial. The *Beacon Theatres* rule thus will only require a jury trial when a prisoner presents significant evidence that unconstitutional conduct has rendered administrative exhaustion unavailable. To the extent practical policy issues emerge from that application, Congress is the body to decide whether a departure from the usual practice is warranted. Unless and until Congress adopts petitioner's preferred procedures, the usual practice should prevail.

ARGUMENT

I. On The Best Interpretation Of The PLRA, Juries Decide Factual Questions Relevant To Both Exhaustion And The Merits.

Petitioner devotes most of his brief to arguing that the Seventh Amendment does not *preclude* a judge from deciding a PLRA exhaustion defense even when doing so resolves a merits issue a jury would otherwise decide. *See* Br. 16-41; *contra* Resp. Br. § II (disputing this contention). But "'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" *Lorillard v. Pons*, 434 U.S. 575, 577 (1978) (citation omitted) (avoiding Seventh Amendment question by construing statute to afford right to jury determination); *see also* Fed. R. Civ. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution—*or as provided by a federal statute*—is preserved to the parties inviolate.") (emphasis added). Accordingly, the first and ultimately dispositive question is whether the Court can interpret the PLRA in a way that preserves prisoners' jury trial rights in the uncommon cases in which exhaustion and the merits are intertwined. For the reasons that follow, it can and therefore should.

A. Under *Jones v. Bock*, Courts Must Assume That Congress Intended The PLRA's Exhaustion Requirement To Be Administered In Accordance With The "Usual Practice."

The statutory construction question is governed by the framework this Court adopted in *Jones v. Bock*,

549 U.S. 199 (2007). There, this Court considered, among other things, "whether exhaustion under the PLRA is a pleading requirement a prisoner must satisfy in his complaint or an affirmative defense the defendant must plead and prove." *Id*. at 204. Some courts had required prisoners to plead exhaustion to "facilitate early judicial screening" and dismissal of unexhausted claims. *Id*. at 203. The Court acknowledged the policy concerns but rejected the pleading rule.

The Court explained that the statute was "silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense." *Id*. at 212. The Court did not construe that silence as a license to develop whatever rule seemed best. Rather, it held that Congress's failure to address the question was "strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense." *Id*. at 212. It thus made no difference that some believed that "if the 'new regime' mandated by the PLRA for prisoner complaints is to function effectively, prisoner complaints must be treated outside of this typical framework." *Id*. at 213. Under established precedent, "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Id*. at 212. A "judge's job is to construe the statute – not to make it better." *Id*. at 216.

The same analysis applies here. Congress said nothing about the division of authority between judge and jury in administering the exhaustion defense. That silence is best understood to reflect that Congress intended the usual practice, even if one

could hypothesize policy reasons for treating PLRA exhaustion as outside the "typical framework." *Id*. at 213.

B. The Usual Practice Is That Juries Decide Factual Questions Going To Both The Merits Of A Legal Claim And A Question A Court Would Ordinarily Decide On Its Own.

The principal question in this case, then, is whether judges or juries typically decide factual questions common to both the merits of a legal claim (for which the plaintiff has a Seventh Amendment right to a jury trial) and an issue that a judge might otherwise be allowed to decide without a jury. By the time Congress enacted the PLRA, the answer to that question had been settled for more than thirty years.

The "trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law." *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935); *see also, e.g.*, *Simler v. Conner*, 372 U.S. 221, 222 (1963) ("The federal policy favoring jury trials is of historic and continuing strength.") (collecting authorities). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick*, 294 U.S. at 486.

This Court applied that principle in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). Fox West Coast Theatres sued a competitor, Beacon Theatres, seeking a declaration that Fox had not violated antitrust laws and an injunction barring

Beacon from bringing antitrust claims against it. *Id*. at 502, 506. Beacon filed an answer and a counterclaim seeking antitrust damages. Beacon then asked for a jury trial on its counterclaims. *Id*. at 503. The district court denied the motion, holding it could decide the core factual issues in the case in ruling on the request for equitable relief "before jury determination of the validity of the charges of antitrust violations made in the counterclaim." *Id*. at 503.

This Court disagreed. It acknowledged that the Seventh Amendment permits a judge to decide equitable claims without a jury but held that this power "must, whenever possible, be exercised to preserve jury trial." *Id*. at 510. "This long-standing principle of equity," the Court explained, "dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Id*. at 510-11. Allowing a judge to decide questions of fact common to the legal and equitable claims would effectively deprive the plaintiff of a jury trial on elements of its legal claim and, therefore, "is not permissible." *Id*. at 508. Instead, the Court ordered that "any defenses, equitable or legal, Fox may have to charges of antitrust violations can be raised" in "one suit giving Beacon a full jury trial on every antitrust issue." *Ibid*. The district court could then issue any "permanent injunctive relief Fox might be entitled to on the basis of the decision in this case . . . after the jury renders its verdict." *Ibid*.

Accordingly, *Beacon Theatres* established that when "legal and equitable claims are joined in the same action, the right to jury trial on the legal claim, including all issues common to both claims, remains intact." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990) (cleaned up, citation omitted); *see also, e.g.*, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473 (1962) ("*Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury.").

The rule is not limited to suits raising both legal and equitable claims. Even before *Beacon Theatres*, this Court had applied the same principle to require jury resolution of a question going to both the merits and a threshold issue that, like exhaustion, dictates whether the federal court is the proper forum for the dispute. In *Smithers v. Smith*, 204 U.S. 632 (1907), the district court dismissed a case for lack of diversity jurisdiction after finding that the dispute did not meet the then-$2,000 amount-in-controversy threshold for diversity jurisdiction. *See id*. at 641. The court did so based on its finding that neither defendant had taken more than $2,000 worth of the plaintiff's land and that the defendants had not acted jointly, meaning that the claims could not be aggregated to meet the jurisdictional requirement. *Id*. at 645-46. On review, this Court acknowledged that deciding whether the defendants had acted jointly might well be required to determine if the court had jurisdiction. *Id*. at 646. But the Court did not "deem it necessary to decide that question." *Ibid*. Whether the defendants had acted jointly was also "an essential element of the merits of the dispute upon which the parties were at issue." *Ibid*. And in that circumstance, the "appropriate rule" was to submit the question to the

jury, *ibid*., "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.

It is thus black-letter law that in the unusual circumstance in which "a decision of [a] jurisdictional issue requires a ruling on the underlying substantive merits of the case, the decision should await a determination of the merits either by the district court on a summary judgment motion or by the fact finder at the trial." Wright & Miller, 5B Fed. Prac. & Proc. Civ. § 1350 (4th ed.) (collecting authorities)); *see* also 8 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Moore's Federal Practice § 38.34[1][c][i] (3d ed. 2009) ("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."); *Alliance for Env't Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 (2d Cir. 2006) ("If, however, 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 have applied the same rule to other threshold issues as well, such as personal jurisdiction. *See Brown v. Slenker*, 220 F.3d 411, 418-19 (5th Cir. 2000).

Accordingly, "*Beacon Theatres* requires that *any legal issues* for which a trial by jury is timely and properly demanded be submitted to a jury." *Dairy Queen,* 369 U.S. at 473 (emphasis added); *see also ibid*. (because jury trial timely demanded, "the sole

question which we must decide is whether the action now pending before the District Court *contains legal issues*") (emphasis added).[3] In such cases, "any defenses, equitable or legal" must be presented to the jury when necessary to ensure a jury decides every element of the plaintiff's legal claim. *Beacon Theatres*, 359 U.S. at 508; *see also* Wright & Miller, 9 Fed. Prac. & Proc. Civ. § 2302.1 (4th ed.) ("[W]hen an issue is common to both legal and equitable claims in the same proceeding, it must be tried first to a jury.")

It makes no difference whether this result is compelled by the Seventh Amendment itself or by "equitable doctrine." Petr. Br. 46 (quoting *Katchen v. Landy*, 382 U.S. 323, 339 (1966)). Our legal system's respect for jury trials goes beyond grudging compliance with the bare constitutional minimum. *See Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 537 (1958) ("An essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."). The modern Federal Rules and the PLRA were enacted against the backdrop of both the *Beacon Theatres* ordering rule and the general principle that "the right to trial by jury of legal claims must be preserved." *Dairy Queen*, 369 U.S. at 471-72. There is no indication in the text of the Act that Congress intended the PLRA to depart from that usual practice and our jury-preserving legal tradition, much less

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[3] In this context, a "legal issue" is a factual issue going to the merits of a legal (as opposed to equitable or admiralty) claim, not a question of law.

that Congress intended to test the limits of the Seventh Amendment.

II. Respondent's Contrary Arguments Are Without Merit.

Petitioner's attempts to avoid this straightforward analysis are unavailing.

A. Respondent Fails To Distinguish Exhaustion From Other Threshold Issues Subject To The Usual Practice Of Deferring To The Jury.

Petitioner argues that exhaustion defenses are not subject to the *Beacon Theatres* rule for two reasons, neither of which withstands scrutiny.

First, petitioner argues that exhaustion is distinguishable from the kind of issue governed by *Beacon Theatres* because it is a "rule of 'orderly procedure'" that determines which forum has authority to decide the merits of the case. Petr. Br. 41-42. Allowing a judge to decide such a "threshold issue," he insists, "does not have any bearing on a prisoner's jury trial right." *Id*. 42.

That argument, however, cannot distinguish exhaustion from subject-matter jurisdiction, which is even more clearly a threshold issue that dictates whether a dispute is properly heard in federal court or some other forum. And, as discussed, it has been settled for more than a century that juries decide factual questions common to both the merits and jurisdiction.

Moreover, permitting a judge to decide such common questions *does* "have a bearing on a prisoner's jury trial right," Petr. Br. 42, because doing so takes away from the jury factual questions it would

otherwise decide. It makes no difference that a judge might be able to decide that question in other circumstances. *Every* application of *Beacon Theatres* involves an issue (a claim for an injunction or a question of subject-matter jurisdiction) that a judge ordinarily can decide without a jury. The *Beacon Theatres* ordering rule is designed to safeguard the plaintiff's right to a jury determination of the *merits*, even though doing so means that a court must forgo ruling on a question it could otherwise decide alone. *See* 359 U.S. at 510 (explaining that judicial decision-making typically must give way because "the right to jury trial is a constitutional one . . . while no similar requirement protects trials by the court").

Second, petitioner argues the *Beacon Theatres* rule is premised on a concern about the preclusive effect of a judge's decision. Br. 43. That concern does not arise here, petitioner argues, because the Court can just hold that the judicial exhaustion ruling has no preclusive effect. *Ibid*.

That argument fails as well. It is doubtful this Court could simply declare inoperative the basic preclusion rules against which the PLRA and the Federal Rules were enacted. *See, e.g.*, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established, as are the rules of preclusion, the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'") (citations omitted); Petr. Br. 43-48 (citing no evidence Congress intended the PLRA to alter preclusion rules); *Pavey v. Conley*, 544 F.3d 739, 741-42 (7th Cir. 2008) (same). And while courts may retain some

flexibility in applying ordinary preclusion rules based on the facts of each case, petitioner points to no instance in which this Court has created a categorical exception to established preclusion rules for particular kinds of cases, much less any evidence that Congress intended for the Court to exercise that power here. To the contrary, Congress would have understood that no such exception was necessary given the longstanding accommodation of jury-trial rights created by *Beacon Theatres*.[4]

In any event, if the Court has the power to alter the rules of preclusion in this case, it had that authority in *Beacon Theatres* and *Smithers* as well. And instead of re-ordering the law of preclusion, the Court re-ordered the trial schedule to give the jury determination priority. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 333 (1979) ("Recognition that an equitable determination could have collateral-estoppel effect in a subsequent legal action was the major premise of this Court's decision in *Beacon Theatres* . . . ."). That result better aligns with the preeminence of the jury trial right in our system, not only allowing the jury to decide the common question but empowering it to resolve that question conclusively, such that its resolution is the one with preclusive effect. *See* U.S. Const. am. VII ("[N]o fact

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[4] Petitioner points out that "trial courts have 'broad discretion' in determining when offensive collateral estoppel 'should be applied.'" Br. 44 (quoting *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979)). But PLRA cases do not involve "offensive collateral estopple," a particularly troublesome form of preclusion applied when a "plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Parklane Hosiery*, 439 U.S. at 329.

tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

At any rate, even if this Court could have decided *Beacon Theatres* differently, it did not. And Congress enacted the PLRA against the backdrop of what the Court did decide, not on the assumption that this Court would exercise some hitherto unacknowledged power to alter the rules of preclusion.

Independently, petitioner's premise that a jury would eventually have an opportunity to decide the common issue on the merits blinks reality. This Court has acknowledged the "typically short prison grievance time limits," *Jones v. Bock*, 549 U.S. 199, 223 (2007), which often allow just a few days and rarely more than a few weeks to initiate the administrative process.[5] Thus, by the time a judge resolves a PLRA exhaustion defense, a new grievance

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[5] *See* Priyah Kaul et al., Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey, Table 3 (2015), *available at* https://www.law.umich.edu/special/policyclearinghouse/Site%20Documents/FOIAReport10.18.15.2.pdf (half of states set deadlines at 15 or fewer days and only 5 allow more than a month); Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 Geo. 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); *see also, e.g.*, *Franklin v. Beth*, 2008 WL 4131629, * 4 (E.D. Wis., Sept. 4, 2008) (jail grievance deadline of 24 hours); *Hubbard v. Walton*, 2018 WL 1913589, *10 (W.D. Ark., Apr. 23, 2018) (same, 8 hours).

will almost always be untimely, and therefore barred by this Court's decision in *Woodford v. Ngo*, 548 U.S. 81 (2006), which held that the PLRA requires "proper exhaustion," including compliance with a grievance system's deadlines. *Id*. at 93, 95-96. Consequently, when a judge decides an exhaustion defense, there generally is no possibility of properly exhausting the claim and returning for a jury trial. *See* Fed. R. Civ. P. 12(a)(1)(A) (defendant need not file a responsive pleading until 21 days after being served with complaint); Institute for the Advancement of the American Legal System, Civil Case Processing in the Federal District Courts, App. D. (2009) (median time to rule on motion to dismiss in civil rights cases is 117 days).[6] In this case, for example, Michigan prison rules required respondent to file his grievance no more than seven business days after the relevant incidents.[7] The district court dismissed his complaint for failure to exhaust nearly two years after that deadline had passed. *See* Pet. App. 28a, 30a.[8]

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[6] *Available at* https://www.uscourts.gov/sites/default/files/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf.

[7] *See* https://www.michigan.gov/corrections/for-families/grievances-prisoner-parolee-grievance-process.

[8] Grievance time limits typically are not tolled during litigation. *See, e.g.*, *O'Bryan v. Multiple Unknown Agents of Federal Bureau of Prisons*, 2012 WL 7807951, *2 (E.D. Mich., June 29, 2012) (holding that dismissal without prejudice for non-exhaustion does not toll the statute of limitations), report and recommendation adopted, 2013 WL 1250822 (E.D. Mich., March 26, 2013); Ohio Amicus Br. 20 (noting only that some states give prison officials discretion to accept untimely grievances).

Given these realities, petitioner's rule effectively assigns the resolution of the common question exclusively to the court.

B. Respondent's Policy Arguments Fail.

Petitioner and his amici spill much ink on policy arguments about why Congress *should have* legislated an exception to the *Beacon Theatres* rule for the PLRA exhaustion defense. Those arguments, however, are misdirected and overblown.

1. *Policy Arguments Cannot Sustain Respondent's Burden To Show Congress Intended To Depart From The Usual Practice.*

Petitioner's policy objections are misdirected because "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Jones*, 549 U.S. at 212. In *Jones*, the Court pointed to a "series of recent cases" adhering to that presumption despite claims, much like those leveled here, that departures from typical practice were needed to address disruptive and meritless litigation that was interfering with the operation of state institutions. *Id*. at 212-13 (citing *Hill v. McDonough*, 547 U.S. 573, 581-82 (2006); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514-15 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166, 168 (1993)).

If exceptional treatment is warranted, Congress can provide it. But given "that the PLRA does not itself" afford that exception, "such a result must be obtained by the process of amending the Federal Rules" or statute, "not by judicial interpretation."

Jones, 549 U.S. at 217 (citation and internal quotation marks omitted).

2. Following The Usual Practice Does Not "Dismember" The Congressional Scheme.

Instead of asking whether petitioner's proposed regime is the best policy, the question is whether adhering to the usual practice under *Beacon Theatres* is so obviously inconsistent with the PLRA's design that it would effectively "dismember [the] scheme which Congress has prescribed." *Katchen v. Landy*, 382 U.S. 323, 339 (1966). Petitioner cannot make that showing.

Petitioner's discussion of the importance of exhaustion (Br. 47-48) is beside the point. No one argues that prisoners should be allowed to forgo proper exhaustion of remedies that are actually available. The question is whether allowing a jury, instead of a judge, to sometimes decide factual questions related to the exhaustion defense dismembers the scheme. Regardless of who decides the facts, when an exhaustion defense is raised, the suit will be dismissed unless available remedies have been exhausted and prison officials have been given the opportunity to "rectify their own mistakes" and "creat[e] an administrative record." Br. 47. Regardless of who makes those factual findings, the dismissal will have the same filtering effect against potentially meritless litigation. *See ibid*.

To be sure, applying *Beacon Theatres* to exhaustion defenses may sometimes result in some discovery and trials on the merits that would have been avoided if a court had resolved the defense on its own. But the same is true when a jury trial is required to resolve a question going to subject-matter

jurisdiction (or any other affirmative defense, for that matter), a result the judicial system has tolerated for more than a century. *See supra* pp. 8-9. And this Court in *Jones* rejected the argument that a departure from the usual practice was justified to facilitate early dismissal of unexhausted claims. *See* 549 U.S. at 213-15.

Moreover, petitioner overstates the costs of the usual practice in two important respects.

First, petitioner and its amici offer no convincing evidence that exhaustion disputes frequently overlap with the merits of prisoners' claims. Exhaustion disputes are generally distinct from the merits because inmates have no constitutional right to a functional grievance system. *See, e.g.*, *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 541 (4th Cir. 2017). If the system malfunctions or the prisoner is denied access to it, the prisoner's remedy is to contest any exhaustion defense by showing the remedy was unavailable and, if successful, to proceed with the merits of the underlying suit. *See Ross v. Blake*, 578 U.S. 632, 643-44 (2016).[9] Only in a case like this,

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[9] *See id.* at 552 n.2 (Traxler, J., dissenting on other grounds); *see also, e.g.*, *Riddick v. Semple*, 731 Fed. Appx. 11, 13 (2d Cir. 2018) (unpublished) (holding that grievance restrictions did not violate plaintiff's right to petition the government since the PLRA would not preclude him from pursuing his Section 1983 claim); *Fogle v. Gonzales*, 570 Fed. Appx. 795, 797 (10th Cir. 2014) (unpublished) (holding denial of grievance form made remedy unavailable, so plaintiff's right of court access was not denied); *Jackson v. Berean*, 2019 WL 1253196, *11 (W.D. Mich., Mar. 19, 2019) (holding interference with grievances did not deny due process, Petition Clause, or access to courts, since the remedy would be rendered unavailable and exhaustion not

where access to the grievance system is prevented through unconstitutional means, or the exhaustion defense is otherwise intertwined with a merits claim, would the *Beacon Theatres* rule apply. *See* Pet. App. 7a. The infrequency of that kind of overlap is illustrated by the fact that only three circuits (at most) have decided the jury's role in such cases in the almost 30 years since the PLRA was enacted. *See* Pet. 12.[10]

Petitioner and his amici also ignore that even when the *Beacon Theatres* rule applies, courts have multiple tools for preventing unexhausted or otherwise meritless claims from requiring a jury trial. To start, the PLRA enacted substantial deterrents to even *filing* meritless, unexhausted claims through its filing fee and "three strikes" provisions. *See Jones*, 549 U.S. at 224 (citing 28 U.S.C. § 1915(g)). When a claim *is* filed, the PLRA requires the court to screen the complaint *ex parte* and dismiss the suit before the defendant is even served "if the court is satisfied that the action is frivolous, malicious, or fails to state a claim." 42 U.S.C. 1997e(c)(1). And even when a complaint is not frivolous, it is sometimes possible to dismiss for lack of exhaustion on the pleadings, *Jones*, 549 U.S. at 215, or at summary judgment. *See, e.g.*, *Millness v. Montana State Prison Infirmary*, 2024 WL 5158362 (D. Mont. Dec. 18, 2024) (dismissing for failure to exhaust); *see also, e.g.*, *Yearwood v. Fisher*, 2024 WL 5186895 (D. Md. Dec. 20, 2024) (entering

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required), aff'd, 2019 WL 6208147 (6th Cir., Nov. 19, 2019) (unpublished).

[10] No question of overlap actually arose in *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014), although the court addressed the possibility in dicta. *See id*. at 1167-68, 1171.

summary judgment for failure to exhaust); *Flowers v. Meeks*, 2024 WL 5150648 (N.D. Miss. Dec. 17, 2024) (same); *Green v. Ross*, 2024 WL 5107286 (N.D. Ill. Dec. 13, 2024) (same); *Brumback v. Centurion Health of Indiana, LLC*, 2024 WL 5088875 (S.D. Ind. Dec. 12, 2024) (same); *Bradley v. Charles*, 2024 WL 5058434 (D. Conn. Dec. 10, 2024) (same); *Collins v. Feder*, 2024 WL 5058435 (D. Conn. Dec. 10, 2024) (same); *Barker v. Kelly*, 2024 WL 4979261(E.D. Ark. Dec. 4, 2024) (same); *Velez v. Lassiter*, 2024 WL 4979409 (S.D.N.Y. Dec. 4, 2024) (same); *Davis v. Crabtree*, 2024 WL 4942369 (E.D. Tenn. Dec. 2, 2024) (same); *Wilski v. Does 1-10*, 2024 WL 4904643 (D. Or. Nov. 27, 2024) (same); *Burkett v. Washington Cnty. Det. Ctr.*, 2024 WL 4870490 (D. Md. Nov. 22, 2024) (same); *Rodriguez v. Machinski*, 2024 WL 4871642 (D. Conn. Nov. 22, 2024) (same); *Wallace v. Fed. Bureau of Prisons*, 2024 WL 4860786 (E.D. Ky. Nov. 21, 2024) (same); *Mitchell v. Barrows*, 2024 WL 4846835 (E.D. Mich., Nov. 20, 2024) (same).

Accordingly, adhering to usual practices will result in a jury deciding an exhaustion question only when the issue both overlaps with the merits and a court has found that there are genuine disputes of material fact regarding both exhaustion and the merits. That is, it will affect cases involving plausible claims that prison staff have not only engaged in unconstitutional abuse but also have tried to cover up their misconduct by thwarting prisoners' access to the remedy that the PLRA directed them to use. That is unlikely to happen all that often, but when it does, allowing a jury to resolve those genuine issues furthers the core jury trial right the *Beacon Theatres* rule is designed to protect.

Cases that survive screening and summary judgment will involve serious claims of abuses of governmental power against those least able to defend themselves and most reliant on our traditional legal institutions for protection. Prisoner abuse, including the kind of sexual abuse alleged in this case, is a persistent problem in correctional institutions. *See, e.g.*, Prison Rape Elimination Act of 2003, 34 U.S.C. § 30301(1) (estimating that "nearly 200,000 inmates now incarcerated have been or will be victims of prison rape"); U.S. Dep't Justice, Sexual Victimization Reported by Adult Correctional Authorities, 2019-2020 at 1, 7 (July 2024) (finding that in 2020, there were 8,628 reports of staff sexual misconduct in U.S. correctional facilities, 627 of which were substantiated).[11]

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[11] Available at https://bjs.ojp.gov/document/svraca1920st.pdf; *see also* Federal Bureau of Prisons, Deterring Staff Sexual Abuse of Federal Inmates (Apr. 2005) ("The BOP also has recognized that staff sexual abuse is a significant problem within its institutions."), https://oig.justice.gov/sites/default/files/archive/special/0504/index.htm; U.S. Dep't Justice, Investigation of the Texas Juvenile Justice Dep't, at 24 (Aug. 1, 2024) ("Our review of hundreds of investigation reports from the Office of Inspector General shows a pervasive atmosphere of sexual abuse, grooming, and lack of staff accountability and training at TJJD."), available at https://www.justice.gov/d9/2024-07/2024_tjjd_findings_report.pdf; U.S. Dep't Justice, Investigation of the Edna Mahan Correctional Facility for Women (Union Township, New Jersey), at 5-6 (Apr. 2020) ("Sexual abuse of women prisoners by Edna Mahan correction officers and staff is severe and prevalent throughout the prison," resulting in criminal convictions of multiple staff), *available at* https://www.justice.gov/opa/press-release/file/1268391/dl; U.S. Dep't Justice, Investigation of Alabama's State Prisons for Men,

Attempts to cover up abuse through threats, intimidation, and retaliation occur regularly as well. *See, e.g.*, *Jordan v. Large*, 27 F.4th 308, 310, 312 (4th Cir. 2022) (reinstating jury verdict to prisoner who was kicked in the testicles and had his property destroyed in retaliation for filing grievances and lawsuits); *Hoever v. Carraway*, 815 Fed. Appx. 465, 470-71 (11th Cir. 2020) (per curiam) (unpublished) (affirming jury verdict in suit alleging systematic threats in response to grievances), *on rehearing en banc*, 993 F.3d 1353 (11th Cir. 2021) (remanding to allow prisoner to seek punitive damages); *Gipson v. Renninger*, 750 Fed. Appx. 948, 953 (11th Cir. 2018) (per curiam) (unpublished) (noting "unrebutted testimony" that officers "threatened to break Gipson's jaw" if he filed a grievance or lawsuit, and that "other inmates had been retaliated against at SCI for filing grievances").[12]

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at 34-35 (Apr. 2, 2019) (finding pattern of sexual abuse and retaliation in men's prisons, including instances of "prisoners suffer[ing] sexual abuse in retaliation for having reported previous sexual abuse"), *available at* https://www.justice.gov/crt/case-document/file/1149971/dl?inline=; Letter from U.S. Dep't Justice to Hon. Samuel D. Brownback, Investigation of the Topeka Correctional Facility (Sep. 6, 2012) (finding pattern and practice of sexual abuse and retaliation at state women's prison), available at https://www.justice.gov/sites/default/files/crt/legacy/2012/09/10/topeka_findings_9-6-12.pdf.

[12] *See also, e.g.*, *Armstrong v. Newsom*, 58 F.4th 1283, 1289-95 (9th Cir. 2023) (affirming finding of pattern of retaliation against disabled prisoners who requested accommodations or made complaints about failure to provide them); *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 793-94 (9th Cir. 2018) (inmate threatened with being released into yard with rival gang members, beatings, and false criminal charges); *Haynes v.*

When they arise, these are precisely the kinds of cases for which the right to a jury trial is most essential. Americans insisted on enshrining the jury trial right in the Constitution because of their long and bitter experience with having their cases decided by representatives of the very government that threatened their liberty. *See SEC v. Jarkesy*, 144 S. Ct. 2117, 2128 (2024). As one Anti-Federalist put it, the jury trial "'brings with it an open and public discussion of all causes, and excludes secret and arbitrary proceedings.'" *Id*. at 2144 (Gorsuch, J., concurring) (quoting Letter from a Federal Farmer (Jan. 18, 1788), in 2 The Complete Anti-Federalist 320 (H. Storing ed. 1981)). The participation of ordinary Americans "'drawn from the body of the people'" affords the public confidence that their most fundamental grievances against the government are not resolved by representatives of a government that some may suspect has an incentive to "'subvert the laws'" when government authority is challenged. *Ibid*. (Gorsuch, J., concurring).

These concerns are particularly present when inmates allege violations of their constitutional rights by prison officials. The ability to call upon one's fellow citizens to vindicate rights against the government is what made the jury trial right "'the glory of the English law'" and continues to make it not only a "'great and inestimable privilege'" but a fundamental feature of our constitutional system. *Ibid*. (citations

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Stephenson, 588 F.3d 1152, 1155-59 (8th Cir. 2009) (affirming award of punitive damages to inmate subject to retaliatory discipline for filing grievance); *see also* John Boston, The PLRA Handbook: Law and Practice Under the Prison Litigation Reform Act 311 (2022) (collecting additional examples).

omitted). Such a foundational protection should not yield to the "'passing demands of expediency or convenience.'" *Id*. at 2128 (quoting *Reid v. Covert*, 354 U.S. 1, 10 (1957) (plurality)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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