No. 08-886

IN THE

Supreme Court of the United States

CHRISTOPHER PAVEY,
Petitioner,

v.

PATRICK CONLEY, *et al.*,
Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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The petition presents the question whether the exhaustion affirmative defense under the Prison Litigation Reform Act ("PLRA") must be litigated under the usual practice for affirmative defenses or pursuant to a novel procedure conceived from whole cloth by the court of appeals. Respondents mischaracterize the holding below in an attempt to minimize the conflict between that decision and numerous precedents of this and other courts. The court of appeals did not hold simply that a district court "may," or is "permitted to," resolve the PLRA exhaustion affirmative defense before addressing the merits of the plaintiff's claim and other affirmative defenses. *See* Br. Opp. i, 13. Rather, the Seventh Circuit held that the district court *must* do so every time exhaustion is contested—even when, as here, there are genuine factual disputes common to both the affirmative defense and claim itself—and that the court must do so before the rest of the litigation may proceed. In so doing, the Seventh Circuit invented a novel procedure, unmoored from usual practice under the Federal Rules of Civil Procedure. The judgment below conflicts with numerous precedents governing the adjudication of affirmative defenses and exacerbates a widening conflict in the lower courts, meriting this Court's review, if not summary reversal.

A. The decision below conflicts with this Court's decision in *Jones v. Bock*, 549 U.S. 199, 213-16 (2007), and precedents governing the adjudication of affirmative defenses under the Federal Rules and the Seventh Amendment. Those precedents establish that the PLRA exhaustion requirement is an af-

firmative defense. And they establish the usual procedure for resolving affirmative defenses.

1. Respondents acknowledge that PLRA exhaustion is an affirmative defense, and they agree that *Jones* mandates that "absent congressional directive, courts should not depart from the 'usual' procedural practices outlined in the Federal Rules of Civil Procedure." Br. Opp. 7. The crux of respondents' opposition is that there is no conflict between the decision below and *Jones* because there is no "usual practice" when it comes to adjudicating a statutory affirmative defense to a § 1983 suit for damages, like the affirmative defense of failure to exhaust in this case. Br. Opp. 8.

Respondents are incorrect. As a procedural matter, the Federal Rules provide a roadmap for the adjudication of affirmative defenses—notably, one that does *not* include resolution by preliminary hearing. Pet. 21; *see also* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1373 (3d 1998). As *Jones* observes, affirmative defenses should be raised by a defendant in an answer. Fed. R. Civ. P. 8(c). To adjudicate the defense based on matters outside the pleadings (such as documents or testimony), such evidence must be presented "in a motion for summary judgment," *id.* 12(d), which can be granted only if "there is no genuine issue as to any material fact," *id.* 56(c). But if, as in this case, there are genuine factual disputes about an affirmative defense, they must be resolved though trial just like any other factually disputed element of a claim. *See Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 984 (9th Cir. 2002) ("[E]lements and affirmative defenses

are co-equal components of the jury's liability determination"); 5 Wright & Miller, *supra*, § 1277.

As a substantive matter, the right to a jury trial on an affirmative defense is not, as respondents assert, determined simply by "whether the issue needs to be decided as a threshold matter or whether instead it logically can be decided with the merits." Br. Opp. 6-7. Instead, the jury right is driven generally by the nature of relief sought by the underlying claim. *See City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 726 n.1 (1999) (Scalia, J., concurring). And, as demonstrated in the petition, "once the right to a jury trial attaches to a claim, it extends to all factual issues necessary to resolving that claim." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 170 (2d Cir. 2001); *see* Pet. 16-17. Thus, because petitioner invoked his Seventh Amendment right to a jury trial on his § 1983 claim, the "usual practice" calls for the jury to decide any genuine factual disputes involved in the exhaustion affirmative defense as well.

2. Respondents cannot identify any legal affirmative defenses that depart from this usual practice and require, as the decision below does, the judge to resolve the affirmative defense before litigation on the merits may proceed. Instead they assert that PLRA exhaustion "is essentially a subcategory of venue." Br. Opp. 9. But venue is not an "affirmative defense"; instead, venue must be established by a plaintiff, rather than pleaded and proven by a defendant. *See, e.g.*, *Bartholomew v. Va. Chiropractors Ass'n*, 612 F.2d 812, 816 (4th Cir. 1979); 14D Wright & Miller, *supra*, § 3826.

Respondents' characterization of PLRA exhaustion as a category of venue is flawed for another reason. Under the procedure concocted by the court of appeals, if a judge resolves disputed facts about PLRA exhaustion against the plaintiff, then "the case is over." Pet. App. 6a. If exhaustion were simply a matter of venue, however, then the case could never be "over" on this basis. Dismissal for improper venue is not "an adjudication upon the merits," 18A Wright & Miller, *supra*, § 4436, and so does not "preclude a party from later litigating the same claim," *Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567, 571 (5th Cir. 1996); *see also* 28 U.S.C. § 1406(a); *Burnett v. New York C. R. Co.*, 380 U.S. 424, 430 (1965) (observing that transfer prevents "the unfairness of barring a plaintiff's action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run").

3. Respondents also contend that PLRA exhaustion "warrants treatment analogous to jurisdictional issues." Br. Opp. 10. This Court, however, has expressly held that PLRA exhaustion is "not jurisdictional," *Woodford v. Ngo*, 548 U.S. 81, 101 (2006), as even respondents are forced to concede, Br. Opp. 10.

The analogy to jurisdiction is flawed for reasons beyond inconsistency with *Woodford*. First, if PLRA exhaustion were similar to jurisdiction, then, as with venue, the burden would be on the plaintiff to affirmatively plead and prove the issue, which is inconsistent with *Jones*. Second, whereas federal courts are permitted to find facts to assure themselves of jurisdiction over a dispute, *Arbaugh v. Y &*

H Corp., 546 U.S. 500, 514 (2006), no such authority exists with respect to legal affirmative defenses.

4. Indeed, respondents apparently agree that the legal affirmative defense of a statute of limitations must be resolved by the jury when genuine factual disputes are involved. Respondents, however, deny that this is an appropriate model of adjudication here. Br. Opp. 10-11. Their position only underscores the conflict between the decision below and this Court's decision in *Jones*, which expressly deemed a statute of limitations *the one defense* directly analogous to PLRA exhaustion. *Jones*, 549 U.S. at 215, 220.

Ignoring this Court's analogy, respondents argue that the two affirmative defenses should be adjudicated differently because exhaustion is a "threshold" bar intended "to prevent premature lawsuits from going to trial *at all*," whereas a statute of limitations defense is merely a bar to liability that may be vindicated after trial. Br. Opp. 11-12. Respondents cite *Jones* for this view of exhaustion as a purely and solely threshold issue, Br. Opp. 11 (citing *Jones*, 549 U.S. at 202), but the cited page says nothing of the kind, and neither does any other. In fact, the law is clearly to the contrary: "Exhaustion requirements do not create absolute (or even qualified) rights to be free from litigation." *Davis v. Streekstra*, 227 F.3d 759, 763 (7th Cir. 2000). It is hard to imagine a more "threshold" inquiry than the question posed by a limitations defense: "Did plaintiff bring his suit in time?" Yet, juries resolve factual disputes about this issue as a uniform rule. Pet. 18.

Respondents also argue that PLRA exhaustion should be treated differently from a statute of limitations because successful invocation of the latter defense "ends the litigation rather than shunting it to another forum." Br. Opp. 11-12. But the *same is true for PLRA exhaustion* under the decision below: if the judge finds that the plaintiff is at fault for not exhausting, then the "the case is over." Pet. App. 6a. The decision below thus *supports* the analogy to statutes of limitations, even while failing to follow it through to the necessary conclusion that factual disputes about PLRA exhaustion, like limitations, must be tried to the jury.

5. Finally, respondents argue both that granting the petition would require this Court to reach a broad holding about the Seventh Amendment, Br. Opp. 6, and at the same time that the case is not about the Seventh Amendment at all, *id.* at 8. Neither contention is correct.

The petition raises only the narrow but significant question of the proper procedures for adjudicating one particular affirmative defense (the PLRA exhaustion requirement) to one particular type of claim (§ 1983 damages actions). There is not necessarily a right to a jury trial for all affirmative defenses (for example, equitable defenses may not be subject to a jury trial, *see* Pet. 17 n.1), and this Court need not hold or suggest otherwise to resolve this case. Petitioner simply contends that the exhaustion requirement in the PLRA does not permit deviation from the "usual practice" for handling legal affirmative defenses based on perceived policy concerns.

The importance of this narrow question, however, is reflected in its constitutional implications. As the decision below recognized, the question presented by this case bears directly on a plaintiff's Seventh Amendment rights. Pet. App. 1a-2a. Indeed, the decision below expressly acknowledged a potential conflict with this Court's Seventh Amendment jurisprudence. *See* Pet. App. 5a-6a. Respondents contend that the court of appeals "accounted for those cases" by taking the "pragmatic approach" of proposing a novel procedure whereby a jury can subsequently "reexamine" factual findings made by the judge. Br. Opp. 12. But it was *precisely* a "pragmatic approach" to the PLRA's exhaustion requirement that this Court rejected in *Jones*. *See* 549 U.S. at 213-17; Pet. 14-15. Again, in defending the decision below, respondents only highlight its conflict with this Court's precedent.

B. The lower courts are increasingly and intractably divided over the proper procedure for adjudicating the affirmative defense of exhaustion in cases governed by the PLRA. In a three-way split, lower courts have reached conflicting conclusions about this issue, resulting in disarray and uncertainty as to whether the affirmative defense is to be addressed at trial or resolved in a preliminary hearing, and whether judges or juries are the proper finder of disputed facts. Given the volume of prisoner litigation handled by the federal courts, the centrality of the exhaustion defense to these cases, and the simplicity with which this confusion can be dispelled, review by this Court is warranted.

1. Respondents suggest that "[t]here is no lower-court conflict justifying review" because three circuits agree that judges should resolve disputed facts regarding the exhaustion defense. Br. Opp. 4. As an initial matter, respondents ignore the courts that have expressly held that because failure to exhaust is an affirmative defense under the PLRA, disputed factual issues must be tried to a jury. *See* Pet. 27 (citing cases).

Respondents also misunderstand the issue that has divided the courts. The question raised here is not simply whether a judge or jury decides exhaustion-related facts, but rather how the affirmative defense is to be adjudicated in the course of litigation. *See* Pet. 2-3. On that question, respondents make no attempt to address the three-way split among lower courts. Respondents overlook the import of those cases reflecting the practice of the majority of circuits, which follow the "usual procedure" by testing the exhaustion defense at summary judgment. Pet. 26-27 (citing cases). These precedents demonstrate that most circuits do not treat exhaustion as a mandatory, "threshold" issue that must be resolved before litigation on the merits may commence. The majority of circuits instead treat PLRA exhaustion like any other affirmative defense. The decision below does not. It thus cannot be reconciled with the majority rule governing PLRA exhaustion procedure.

Respondents also gloss over important conflicts between the Ninth and Eleventh Circuits and the decision below. This is not merely a "formalistic dispute." Br. Opp. 4. The Ninth and Eleventh circuits do not specify *when* the exhaustion defense must be

resolved in the course of litigation, nor do they bar all pre-trial proceedings on the merits of a prisoner's claim pending a decision on exhaustion. The result is significant: prisoners in those circuits may proceed with discovery on their claims while the exhaustion defense is undecided, while prisoners in the Seventh Circuit are barred from moving forward on *any* aspect of their lawsuit until the issue is resolved by the court. In other words, the Seventh Circuit treats exhaustion as a total bar to litigation, while the Ninth and Eleventh Circuits do not. That substantive difference results in inconsistent adjudication of prisoners' rights litigation in the different circuits.

2. Respondents notably fail to acknowledge the numerous lower courts that have bemoaned the lack of guidance on the proper method for adjudicating the PLRA's exhaustion defense. *See*, *e.g.*, *Gilmore v. Stalder*, 2008 WL 4155332, at *2-3, *5 (W.D. La. Sept. 8, 2008); *see also* Pet. 32 (citing cases). They likewise ignore the observation that "[c]ourts across the country are divided" on this issue. *Singleton v. Johnson*, 2008 WL 3887633, at *1 (S.D. Ga. Aug. 18, 2008).

Respondents do, however, appear to recognize that the question presented ultimately will require this Court's attention. *See* Br. Opp. 12. They simply urge deferral of that attention pending more input on the "practical 'traffic control' issues at stake." Br. Opp. 12-13. But there is no need for more "practical" input, particularly given this Court's admonition in *Jones* that "practical" concerns about prisoner litigation should *not* compel judge-made departures from

established procedures governing prisoner litigation. Only Congress can rewrite the rules as necessary and appropriate to provide different "traffic control" tools. Delaying review will result in the expansion of the Seventh Circuit's invented procedures, or the judicial invention of even more creative procedures—every one of which will be at odds with existing federal civil rules, which already provide a complete structure for adjudicating affirmative defenses. No matter how clever the scheme a court may devise for addressing the "'traffic control' issues at stake" in these cases, a scheme that departs from the federal rules is categorically impermissible, as *Jones* makes clear. The fact that courts are likely to test a variety of different departures from the standard rules, as respondents suggest, is not a reason to delay review—it is a reason to review this issue *now*, to stem the inevitable tide of error before it is fully unleashed.

C. Respondents also do not address the significant adverse consequences of the decision below for parties and courts, which are already suffering costly delays, burdens, and inefficiencies trying to implement the novel procedural system prescribed by the court of appeals. For example, some district courts have abandoned pending summary judgment motions in favor of preliminary fact-finding hearings on exhaustion. *See Hatch v. Cravens*, 2008 WL 2952355 (S.D. Ill. July 30, 2008); *Snipes v. Witthrop*, 2008 WL 2952359 (S.D. Ill. July 30, 2008). Still another court that had denied a defendant's summary judgment motion due to factual disputes reconsidered its decision and set the matter for a preliminary hearing. *Piggie v. Robertson*, 2009 WL 198004 (N.D.

Ind. Jan. 23, 2009). Further underscoring the confusion sown by the decision below, yet another district court recently employed a hybrid approach: addressing PLRA exhaustion at summary judgment but explaining as part of the legal standard that the judge must now resolve factual disputes. *See Chess v. Pindelski*, 2009 WL 174992, at *1 (N.D. Ill. Jan. 23, 2009).

Nor is the uncertainty spawned by the decision below limited to the Seventh Circuit. A district court in Pennsylvania felt compelled to excuse an untimely summary judgment motion on the exhaustion issue, citing the decision below for the proposition that "by raising the affirmative defense of Plaintiff's failure to exhaust, Defendant raises a question of law that must be resolved by the court before proceeding to a trial on the merits." *Drippe v. Gototweski*, 2008 WL 4919401, at *1 (M.D. Pa. Nov. 17, 2008). Of course, PLRA exhaustion is an affirmative defense, not a "question of law," but the flawed analysis of the decision below is generating considerable uncertainty for district courts.

Moreover, as predicted in the petition (Pet. 35), the decision below is prejudicing prisoners who are incompetent to litigate their own claims and therefore require the appointment of counsel. For example, in one case a court found it necessary to appoint counsel to a *pro se* prisoner, but concluded based on the decision below that "before the court expends more energy attempting to find pro bono counsel . . . the issue of exhaustion of administrative remedies should first be resolved." *Mendoza v. Ring*, 2008 WL 2959848, at *1 (C.D. Ill. July 30, 2008). As a result,

a plaintiff who was deemed unable to litigate his own claims will be without the benefit of counsel for a potentially dispositive fact-finding process.

D. Finally, respondents nowhere deny that this case is an ideal vehicle for resolving the important question presented. Because the Seventh Circuit has already found that there are genuine factual disputes about exhaustion in this case, Pet. App. 24a-35a, the issue of the appropriate procedure for adjudicating those disputes is ripe and cleanly presented. And because the "present case is one in which the exhaustion issue and the merits issue share common facts," Pet. App. 7a, it effectively demonstrates the conflict between the decision below and the usual practice under the Federal Rules and the Seventh Amendment.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted, or the decision below should be summarily reversed.

Respectfully submitted,

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