No. 08-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Jones v. Bock*, 549 U.S. 199 (2007), this Court held that exhaustion of prison administrative remedies under the Prison Litigation Reform Act ("PLRA") is an affirmative defense, which must be pleaded and proved by the defendant in accordance with the usual practice under the Federal Rules of Civil Procedure. In the decision below, the Seventh Circuit nevertheless held that PLRA exhaustion is an "issue of judicial traffic control" to be litigated not under the normal procedural rules, but instead in accordance with a special preliminary procedure by which a court resolves the affirmative defense—including any underlying factual disputes about its application—before discovery or any other litigation on the merits of a claim may proceed.

The following question is presented:

When the defendant in an action for damages governed by the PLRA invokes the statutory affirmative defense of exhaustion, is the defense to be litigated under the usual rules of procedure applicable to affirmative defenses, including trial by jury to resolve disputed factual issues underlying the defense?

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states as follows:

Petitioner Christopher Pavey was plaintiff in the district court and appellee in the court of appeals.

Respondents Patrick Conley, Robert Watts, Laurence Grott, and Javadis Beaty were defendants in the trial court and appellants in the court of appeals. A fifth defendant in the trial court, Casiano (first name unknown), was not served with process and a sixth, Shepard (first name unknown), has not appeared in this action.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Pavey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a) is published at 544 F.3d 739 (7th Cir. 2008). The Order denying rehearing and rehearing en banc (App. 36a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2008. The court of appeals denied rehearing and rehearing en banc on September 12, 2008. App. 36a. Justice Stevens granted petitioner's application for an extension of time until January 12, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the U.S. Constitution provides:

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

Title 42, § 1997e of the U.S. Code states in pertinent part:

> **§ 1997e. Suits by prisoners**
>
> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

STATEMENT OF THE CASE

As the district court correctly recognized, this case presents a recurring question with a "far-reaching impact on prisoner litigation" (App. 10a): Is the statutory affirmative defense of exhaustion in the Prison Litigation Reform Act ("PLRA") to be litigated like any other legal affirmative defense, under normal rules of procedure and with disputed facts to be resolved by a jury at trial? The district court answered that question in the affirmative, but the Seventh Circuit reversed. It held that exhaustion is a quasi-jurisdictional "issue of judicial traffic control," such that judges must resolve the affirmative defense—including any factual disputes about its application—in a preliminary fashion before the parties may proceed with discovery and litigation on the merits of a claim. App. 4a. To resolve exhaustion on this threshold basis, the court of appeals mandated an elaborate special procedure distinct from the usual Federal Rules governing federal-court litigation.

The court of appeals' conclusion cannot be reconciled with this Court's recent decision in *Jones v. Bock*, 549 U.S. 199 (2007), which holds that exhaustion in the PLRA is an affirmative defense to be governed by the usual practice under the Federal Rules of Civil Procedure. The decision also conflicts with multiple decisions of this Court and others concerning the adjudication of affirmative defenses in federal-court actions at law.

While exacerbating conflicts that are already wide and spreading, the error in the Seventh Circuit's decision is nevertheless so clear, and the resolution so simple, that a summary reversal may be in order in lieu of plenary review. This Court could summarily pronounce that, rather than the complicated procedure adopted by the decision below, the PLRA exhaustion defense is to be tried like any other legal defense, in accordance with normal rules of procedure, and ultimately subject to a jury trial when necessary to resolve disputed factual issues bearing on exhaustion. If the case warrants consideration beyond that simple resolution, certiorari should be granted and the case set for full briefing and argument.

A. Factual Background

Petitioner Christopher Pavey is an Indiana state prisoner. On October 14, 2001, prison guards at the Maximum Control Facility in Westville, Indiana ("MCF"), broke his arm during a cell extraction. Petitioner was isolated in his cell following the extraction; it was not until the next day that prison staff responded to his repeated requests to speak about the incident to a prison official, who told petitioner

that he "would check into it." App. 25a. Later that day, petitioner was taken to another prison where he received medical treatment. When petitioner returned to MCF, two prison officials interviewed him about the events of the previous day and photographed his arm. Petitioner was then returned to his cell and isolated. Four days later, petitioner was transferred to a hospital in Indianapolis, where a doctor surgically repaired his broken arm with a metal plate and screws. A week after the surgery, petitioner was transferred to Pendleton Correctional Facility.

During this period, petitioner could not write because of his broken arm, but he grieved to "anyone who would listen" about his treatment by respondents. App. 29a. In January 2002, as soon as his arm healed and he was able to write, petitioner filed a written grievance about the cell extraction. *Id.* The grievance was rejected on the stated ground that it should have been filed at MCF, within 48 hours after the incident.

B. Proceedings Below

1. Petitioner, proceeding *pro se*, brought this suit against respondents—the prison guards who broke his arm—seeking damages under 42 U.S.C. § 1983. After the initial screening required by the PLRA, *see* 28 U.S.C. § 1915A(a), (b), the district court allowed petitioner to proceed on a claim that respondents used excessive force during the cell extraction. Respondents answered the complaint and admitted that a forceful extraction took place, but they asserted the affirmative defense that petitioner failed to exhaust his available administrative remedies be-

fore filing suit as required by the PLRA, 42 U.S.C. § 1997e(a). Respondents moved for summary judgment on their affirmative defense, asserting that because there was no grievance on file at MCF, petitioner must not have exhausted his administrative remedies. The district court agreed and granted summary judgment.

2. The court of appeals reversed. It held that the record reflected genuine disputes of material fact over whether petitioner exhausted his administrative remedies in accordance with prison procedures. App. 23a-24a. Summary judgment was improper for three reasons, the court explained.

First, the prison's grievance procedures "specifically allow[ed] inmates who cannot write to get . . . a staff member to assist them in preparing grievances." App. 30a. It was "undisputed" that petitioner could not physically write during the 48-hour grievance period because of his broken arm and because he was locked in his cell. App. 31a. Thus, "[i]f there was to be a written grievance, then it had to be written for Mr. Pavey by the officers who interviewed him." *Id.* Under the prison's procedures, "[he] did not have to write it himself; he did not have to review it; and he did not have to sign it." *Id.* Accordingly, so long as the officers who interviewed him "memorialized" his "oral account of the cell extraction," then petitioner may well have "literally satisf[ied]" the required procedure. *Id.* And because respondents failed to show that his complaints were never reduced to writing, summary judgment was premature. *Id.*

Second, there was a factual dispute as to whether petitioner "reasonably believed that he had done all that was necessary to comply" with the grievance procedure. "[I]nmates may rely on the assurances of prison officials when they are led to believe that satisfactory steps have been taken to exhaust administrative remedies," the court held, and there was a genuine factual dispute over whether petitioner had reasonably relied on assurances "that his excessive-force allegations would be investigated." App. 34a.

Finally, the court of appeals held that a factual dispute existed concerning the availability of the grievance procedure. "[W]hen inmates cannot comply with [a] grievance procedure without essential help from prison officials and that assistance is withheld, the failure of the officials to facilitate the grievance process effectively renders administrative remedies unavailable." App. 34a. Because petitioner was injured and isolated during the grievance period, the affirmative defense of failure to exhaust would be irrelevant if the record showed that respondents gave him "no assistance in creating what would otherwise qualify as a written grievance." *Id.* And respondents failed to establish the lack of any genuine factual question as to their efforts to facilitate petitioner's compliance with the grievance procedure. *Id.*

For the foregoing reasons, the court concluded, respondents "did not establish the absence of material issues of fact concerning the exhaustion question." App. 35a. Accordingly, the court of appeals vacated the summary judgment and remanded the

case "for further proceedings on Mr. Pavey's excessive-force claim." *Id.*

3. Upon remand to the district court, petitioner sought and was granted a jury trial on his damages claims under 42 U.S.C. § 1983. *See City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999) (recognizing right to jury trial on damages claims under § 1983). Respondents argued, however, that before proceeding with discovery on the merits, the court should hold a hearing to resolve for itself the disputed factual questions concerning respondents' exhaustion affirmative defense. The district court declined to do so. The court acknowledged that respondents "retain[ed] their exhaustion affirmative defense (along with any other affirmative defenses that were properly raised)," but observed that "the place for presenting those defenses is to the jury, and the time for doing so is after the plaintiff has rested his case in chief." App. 20a.

Respondents sought reconsideration of the ruling, arguing that the exhaustion affirmative defense was properly tried to the court rather than the jury, and that resolution of the exhaustion issue should precede discovery and trial of the merits. The district court denied respondents' motion. The "presumption is that fact questions are resolved by juries," the court held, and nothing in the PLRA deprives a plaintiff in a § 1983 damages action of his right to a jury trial on the exhaustion affirmative defense. App. 14a. And the court reiterated that the "time for presenting affirmative defenses to the jury is no different in this case than it is in any other: after the plaintiff has rested his case in chief." App. 16a.

Respondents then moved the district court to certify this series of orders for interlocutory appeal under 28 U.S.C. § 1292(b). The district court noted that the Indiana Attorney General, counsel for respondents, had made the same arguments regarding exhaustion "unsuccessfully in several cases" but agreed to certify its orders for interlocutory appeal because of "the far-reaching impact on prisoner litigation that these new interpretations would impose." App. 10a.

4. The court of appeals reversed. It held that whenever exhaustion is contested, a judge must resolve genuine disputed facts about the affirmative defense in a preliminary hearing before litigation may proceed. The court of appeals explained that "[j]uries decide cases, not issues of judicial traffic control," and that "[u]ntil the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to." App. 4a. Thus, the court of appeals concluded, just as juries do not decide factual disputes relevant to jurisdiction, they also do not decide factual disputes about the PLRA's exhaustion provision. And unless resolution of exhaustion precedes all discovery and litigation of the merits, "the statutory goal of sparing federal courts the burden of prisoner litigation until and unless the prisoner has exhausted his administrative remedies will not be achieved." App. 7a. But because the "traffic control" theory of exhaustion is not reflected in any specific rule of federal procedure, the court of appeals articulated a novel, three-step "sequence" for resolving an exhaustion defense in a preliminary proceeding by the court before any litigation on the merits may proceed:

> (1) The district judge conducts a hearing on exhaustion and permits whatever discovery relating to exhaustion he deems appropriate. (2) If the judge determines that the prisoner did not exhaust his administrative remedies, the judge will then determine whether (a) the plaintiff has failed to exhaust his administrative remedies, and so he must go back and exhaust; (b) or, although he has no unexhausted administrative remedies, the failure to exhaust was innocent . . . and so he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround); or (c) the failure to exhaust was the prisoner's fault, in which event the case is over. (3) If and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits; and if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies.

App. 6a. The court of appeals acknowledged that in cases, like petitioner's, where the affirmative defense shares disputed facts with the underlying substantive claim, a preliminary determination of exhaustion by the court might interfere with the jury's fact-finding role. But it answered this concern by holding that whatever factual findings the judge makes

about exhaustion (so long as the judge finds exhaustion), the jury will simply "reexamine[]" at trial any relevant findings on the merits "without being bound by (or even informed of) any of the findings made by the district judge." App. 5a-6a.

5. Petitioner filed a timely petition for rehearing with suggestion of rehearing en banc. The court of appeals denied the petition but amended a portion of its opinion to permit limited discovery of factual issues related to both exhaustion and the merits. App. 6a. Upon remand, the district court referred the case to a magistrate judge for an evidentiary hearing on respondents' affirmative defense but stayed the proceedings pending review by this Court. This petition followed.

REASONS FOR GRANTING THE WRIT

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This provision has been a frequent subject of litigation since its enactment, and this Court has granted certiorari on numerous occasions to resolve controversies—and provide guidance to lower courts—concerning its interpretation and application. *See Booth v. Churner*, 532 U.S. 731 (2001) (granting review to address whether exhaustion is mandatory regardless of the relief sought); *Porter v. Nussle*, 534 U.S. 516 (2002) (granting review to address whether exhaustion is required of all causes of action); *Woodford v. Ngo*, 548 U.S. 81 (2006) (granting review to address

whether the PLRA requires "proper" exhaustion); *Jones v. Bock*, 549 U.S. 199 (2007) (granting review and reversing several judicially-imposed rules "designed to implement [the] exhaustion requirement and facilitate early judicial screening" of prisoner complaints).

This case presents yet another important question concerning the PLRA's exhaustion requirement meriting review by this Court. As elaborated below, there is substantial disarray in the lower courts over the question whether the exhaustion requirement—which is a mandatory element, albeit one on which the defendant bears the burden of pleading and proof—must be adjudicated by a jury in a damages action, or whether the court can decide the issue for itself in a preliminary "screening" proceeding. Although the disarray is already broad and continually deepening, the resolution is so clear and simple that plenary consideration of the case may not even be warranted. The decision below is flatly irreconcilable with multiple precedents of this Court and others holding that a substantive legal defense to a damages claim, no less than a substantive affirmative element of the claim itself, must be tried according to normal rules of procedure and, where factual disputes remain, resolved by a jury upon proper demand. This Court could summarily reverse the decision below on the basis of those precedents and hold that the affirmative defense of exhaustion under the PLRA is subject to the same pre-trial and trial procedures as is any other legal defense under the Federal Rules of Civil Procedure. That result would still permit summary, threshold adjudication of the exhaustion defense where appropriate in accordance

with the usual pleading and summary judgment rules, but without overriding the Federal Rules and creating an entirely new procedure for preliminary adjudication of the defense, as the decision below mandates.

Whether summary reversal is appropriate or not, certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH MULTIPLE PRECEDENTS GOVERNING THE ADJUDICATION OF AFFIRMATIVE DEFENSES

A. Exhaustion Of Prison Remedies Under The PLRA Is A Substantive Legal Defense Subject To Normal Pleading And Proof Procedures

1. The PLRA was enacted in response to concerns that the federal courts were being swamped by too many non-meritorious prisoner lawsuits, which threatened to "submerge and effectively preclude consideration of [prisoner lawsuits] with merit." *Jones*, 549 U.S. at 203. To ensure that meritorious claims were not being lost in the flood, the PLRA included "reforms designed to filter out the bad claims and facilitate consideration of the good." *Id.* at 204.

The PLRA accomplishes that objective through two distinct means. First, the PLRA includes specific "judicial screening" requirements, which mark a "fundamental" departure from "the usual procedural ground rules." *Id.* at 212. The PLRA requires courts to screen prisoner complaints "before docketing, if feasible or . . . as soon as practicable after docketing," and to dismiss a complaint if the

court determines that the complaint is "frivolous, malicious . . . fails to state a claim upon which relief may be granted" or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(a), (b). All these inquires are conducted by the court even "before any responsive pleading is filed—unlike in the typical civil case, defendants do not have to respond to a complaint covered by the PLRA until required to do so by the court, and waiving the right to reply does not constitute an admission of the allegations in the complaint." *Jones*, 549 U.S. at 214 (citing 42 U.S.C. § 1997e(g)(1), (2)).

Second, the PLRA requires plaintiffs to exhaust their prison grievance procedures before filing an action challenging any aspect of prison treatment or conditions. *See* 42 U.S.C. § 1997e(a). As this Court emphasized in *Jones*, the exhaustion requirement is *not* among or akin to the specific "judicial screening" requirements described above and set forth elsewhere in the statute. 549 U.S. at 214. In the PLRA, Congress "provided for judicial screening and *sua sponte* dismissal of prisoner suits" on four specific grounds, but "failure to exhaust was *notably not added in terms to this enumeration*." *Id.* (emphasis added); *see id.* at 216 (noting "the failure of Congress to include exhaustion in terms among the enumerated grounds justifying dismissal upon early screening"). Instead, exhaustion serves several distinct functions apart from screening out meritless complaints: it "improve[s] the quality of suits that are filed by producing a useful administrative record," *id.* at 204; it "provides prisons with a fair opportunity to correct their own errors," *Woodford*, 548 U.S. at 94; and it "reduces the quantity of prisoner suits

because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court," *id.* Because exhaustion is not among the specified grounds for threshold screening and dismissal of a case, and because it serves important functions apart from such screening, courts are not allowed to employ the unusual procedures necessary "to facilitate judicial screening of complaints," but instead must adjudicate exhaustion under the PLRA according to "normal pleading rules." *Id.*; *see also Denton v. Hernandez*, 504 U.S. 25, 32 (1992) (*in forma pauperis* screening provisions "cannot serve as a fact-finding process for the resolution of disputed facts").

2. In *Jones*, this Court applied that analysis of the PLRA's exhaustion requirement to conclude that the requirement is an affirmative defense to be pleaded and proved by the defendant according to the normal procedures governing affirmative defenses, *not* an issue to be pleaded by the plaintiff and reviewed under special screening procedures. *Id.* at 213-16. Exhaustion is "typically" regarded as an affirmative defense, the Court explained, and nothing in the PLRA suggested that it was to be treated differently in cases falling within its scope. Indeed, the Court viewed the PLRA's silence on the question as "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.

Some courts prior to *Jones* had held that the PLRA's screening mechanism would operate more effectively if exhaustion were treated as the plain-

tiff's burden so that it could be addressed summarily by the court; for example, plaintiffs could be required to attach documentary proof of exhaustion to their complaints, or to plead facts establishing exhaustion with specificity. *Id.* at 202, 205. The *Jones* Court, however, rejected those policy arguments as a basis for treating exhaustion under the PLRA differently from exhaustion in any other context. "[C]ourts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns," the Court emphasized, *id.* at 213, and "[g]iven that the PLRA does not itself require plaintiffs to plead exhaustion, such a result must be obtained by the process of amending the Federal Rules, and not by judicial interpretation," *id.* at 217 (quotation omitted). The Court returned to the same theme in the conclusion of its opinion, admonishing lower courts construing and applying the PLRA's exhaustion affirmative defense:

> We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks. We once again reiterate, however . . . that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.

Id. at 224.

B. Numerous Precedents Hold That Factually Disputed Affirmative Defenses Must Be Resolved By The Jury, Not The Court, Contrary To the Decision Below

1. As a general matter, claims—like petitioner's—seeking damages under 42 U.S.C. § 1983 are subject to the Seventh Amendment and thus must be tried by a jury upon proper demand by either party. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999). And it is generally recognized that "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). An affirmative defense, in turn, is equivalent to an element of a claim, except it is one for which the defendant bears the burden of proof. *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: Liability cannot be established until after the jurors unanimously agree that the elements are satisfied and they unanimously reject the affirmative defenses."); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2304 (3d ed. 1998) ("Unfortunately, there is a misconception in some quarters that the right to a trial by jury attaches because of the legal nature of a 'claim,' and does not attach to 'defenses.'").

Accordingly, this Court and many others have held that where a plaintiff's claim is subject to a jury trial, any legal affirmative defense to that claim must also be tried to a jury. *See, e.g.*, *Byrd v. Blue*

Ridge Rural Elec. Coop., 356 U.S. 525, 538 (1958) (statutory immunity); *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988) (reliance on the advice of counsel), *overruled on other grounds by Schad v. Arizona*, 501 U.S. 624 (1991); *Nike, Inc. v. "Just Did It" Enterprises*, 6 F.3d 1225, 1233 (7th Cir. 1993) (affirmative defense of parody in a trademark case); *Kaplan v. Exxon Corp.*, 126 F.3d 221, 225 n.2 (3d Cir. 1997) (assumption of risk); *Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542, 548-49 (5th Cir. 2001) (defense to Title VII); *Intrastate Gas Gathering Co. v. Dow Chemical Co.*, 248 F.3d 1140 (5th Cir. 2001) (per curiam) (waiver); *Waco Int'l, Inc. v. KHK Scaffolding Houston, Inc.*, 278 F.3d 523, 534 (5th Cir. 2002) (fair use affirmative defense to trademark infringement claim); *Tri County Indus., Inc. v. District of Columbia*, 200 F.3d 836, 840 (D.C. Cir. 2000) (failure to mitigate); *Europlast, Ltd. v. Oak Switch Sys.*, 10 F.3d 1266 (7th Cir. 1993) (insolvency in a contract and tort case); *Chocallo v. IRS*, 2007 WL 2071880, at *5 (E.D. Pa. July 17, 2007) (statute of limitations and exhaustion requirements under 26 U.S.C. § 7433).[1]

[1] This rule arguably does not apply to affirmative defenses sounding in equity, but even the cases articulating that caveat presuppose that affirmative defenses at law must be tried to the jury. *See Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235, 242 (1922) ("Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury."); *Granite State Ins. Co. v. Smart Modular Techs., Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996) ("A litigant is not entitled to have a jury resolve a disputed affirmative defense if the defense is equitable in nature."). PLRA exhaustion

One of the most common affirmative defenses that courts have held must be tried to a jury is a statute of limitations. When there are disputed issues of material fact on a statute of limitations defense, courts have uniformly held that such issues must be tried to the jury with the rest of the claim. *See Meléndez-Arroyo v. Cutler-Hammer de P.R. Co.*, 273 F.3d 30, 38 (1st Cir. 2001); *Bertha Building Corp. v. Nat'l Theatres Corp.*, 248 F.2d 833, 835-36 (2d Cir. 1957); *Fowler v. Land Mgmt. Groupe, Inc.*, 978 F.2d 158, 162 (4th Cir. 1992); *Chambliss v. Simmons*, 165 F. 419, 423 (5th Cir. 1908); *Horn v. A.O. Smith Corp.*, 50 F.3d 1365, 1370 (7th Cir. 1995); *United States v. Edwards*, 968 F.2d 1148, 1153 (11th Cir. 1992).

The statute of limitations example is significant because this Court in *Jones* specifically analogized the PLRA exhaustion defense to the typical statute of limitations defense. As the *Jones* Court observed, statutes of limitations "are often introduced by a variant of the phrase 'no action shall be brought'"—the same phrase that introduces the PLRA exhaustion requirement. 549 U.S. at 215, 220. Other courts have emphasized this analogy as well. *See Johnson v. Johnson*, 385 F.3d 503, 516 n.7 (5th Cir. 2004); *Ray v. Kertes*, 285 F.3d 287, 293 (3d Cir. 2002); *Casanova v. Dubois*, 304 F.3d 75, 78 n.3 (1st

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is mandated by statute and thus is resolved solely according to law and facts; it involves no exercise of equitable discretion by the Court and requires no weighing of equitable factors. *See Woodford*, 548 U.S. at 85 ("Exhaustion is no longer left to the discretion of the district court, but is mandatory.").

Cir. 2002); *Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999).

Under the foregoing precedents, it is perfectly clear that disputed facts underlying a PLRA exhaustion defense in a § 1983 damages action must be adjudicated by the jury, not resolved by the court in a summary preliminary proceeding.

2. The decision below cannot be reconciled with the fundamental rules reflected in the foregoing precedents.

The analytical heart of the Seventh Circuit's opinion is its contention that PLRA exhaustion should not be adjudicated like statutes of limitations or other typical legal defenses because the PLRA treats exhaustion as a matter of "judicial traffic control." App. 4a. It is thus akin to jurisdiction and venue, which are matters resolved by the court at the threshold of the case, not by the jury as it addresses the merits. App. 3a; *see also Owens v. Blagojevich*, 2008 WL 4792707, at *1 n.2 (S.D. Ill. Oct. 29, 2008) (*Pavey* "requir[es] the district court to conduct a hearing to determine whether it has proper jurisdiction over a prisoner's claims by resolving the exhaustion issue *before* ruling on the merits"). Accordingly, the decision concludes, the court can and must resolve disputed PLRA exhaustion disputes for itself, before allowing the parties to proceed with litigation on the merits of the prisoner's claim. This is wrong, and irreconcilable with this Court's precedents, in at least three respects.

a. To start, this Court has squarely held that "the PLRA exhaustion requirement is *not* jurisdictional," and that courts indeed may reach the merits

of claims before addressing potentially difficult exhaustion issues. *Woodford*, 548 U.S. at 101 (emphasis added). The Seventh Circuit's holding that exhaustion *must* be litigated and resolved before litigation on the merits may proceed conflicts directly with this holding of *Woodford*. And the court's flawed analogy to jurisdiction—shown to be erroneous by *Woodford*—leads inexorably to the flawed conclusion that, like disputed facts underlying jurisdictional issues, disputed facts underlying a PLRA exhaustion defense can be taken from the jury and resolved by the court. While it is true that, as this Court has explained, "in some instances, if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own," it is equally true that where "satisfaction of an essential element of a claim for relief is at issue . . . *the jury is the proper trier of contested facts*." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (emphasis added). As shown above, it is the latter rule, not the former, that obtains here: the PLRA makes exhaustion an essential element of a claim for relief in a prisoner suit under § 1983, *see Jones*, 549 U.S. at 211, though it operates to bar relief only when the defendant carries the burden of negating the element, *id.* at 211-12. Accordingly, the jury must be "the proper trier of contested facts" bearing on exhaustion.

The court's analogy to venue is flawed for the same reason. A court may resolve disputed facts related to venue precisely because venue is "*unlike* . . . affirmative defenses such as contributory negligence," in that venue "does not bear upon the substantive right to recover." *American Dredging Co. v.*

Miller, 510 U.S. 443, 454 (1994) (emphasis added). Because proof of exhaustion vel non bears directly upon a prisoner's right to recover under § 1983, contested facts concerning exhaustion can be resolved only by the jury.

Unlike jurisdiction and venue, affirmative defenses—including exhaustion—are not subject to resolution by preliminary procedures. *See* Fed. R. Civ. P. 12(i) (limiting preliminary hearings to those defenses listed in Rule 12(b) and motions under Rule 12(c)); 5C Wright & Miller, *supra*, § 1373 ("[Rule 12(i)] only authorizes a preliminary hearing for the Rule 12(b) defenses and for a motion under Rule 12(c) . . . . [It] cannot be used . . . to adjudicate other matters, such as affirmative defenses."). Unless decided on the pleadings alone—as where, for example, the complaint's own allegations establish the defense, *see Jones*, 549 U.S. at 215—an affirmative defense must be tested at summary judgment, *see* Fed. R. Civ. P. 12(d), 56(b), with factual disputes underlying the defense reserved for trial, *see* 5 Wright & Miller, *supra*, § 1277. The decision below departs dramatically from those basic procedures, contradicting the Federal Rules, this Court's decisions in *Jones* and *Woodford*, and the Seventh Amendment's protection of the right to trial by jury of material factual disputes in actions at law.

b. This Court in *Jones* also squarely rejected the central premise of the decision below, *viz.*, that the PLRA exhaustion defense is merely a matter of "judicial traffic control," employed by courts solely as a threshold screen to determine "whether [the court] is to decide the case or the prison authorities are to."

App. 4a. In contrast to that analysis, the Court in *Jones* repeatedly noted "the *failure* of Congress to include exhaustion in terms among the enumerated grounds justifying dismissal upon early screening." *Id.* at 216 (emphasis added); *see id.* at 214 (same). Exhaustion differs from a mere judicial traffic control device, the Court explained, because it serves the more substantive purposes of creating an administrative record useful for litigation. *Id.* at 204. For these reasons, the Court concluded, exhaustion *must* be adjudicated according to the "normal pleading rules," rather than special preliminary screening procedures. *Id.* And as just shown, the "normal pleading rules" require that affirmative defenses be treated like substantive claim elements, to be analyzed successively on the complaint's allegations at the pleading stage, on the record facts viewed most favorably to the non-movant at summary judgment, and on the disputed factual record by the jury at trial. *See supra* at 16. The Seventh Circuit's holding that special preliminary procedures for adjudicating exhaustion are permissible and appropriate to serve the judicial traffic control function of exhaustion cannot be reconciled with *Jones*. *See Bryant v. Rich*, 530 F.3d 1368, 1380 (11th Cir. 2008) (Wilson, J., concurring in part, dissenting in part) (stating "I do not think [a preliminary proceeding to resolve factual PLRA exhaustion disputes judicially] can be reconciled with the Supreme Court's recent decision in *Jones*").

c. Finally, the decision below conflicts with decisions of this Court and others holding that the Seventh Amendment requires the jury to resolve disputed facts underlying a legal claim before they are

separately resolved by the court in connection with an equitable or other judge-determined issue. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-73 (1962); *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974). Consistent with that principle, other federal circuits have held that when the merits of a claim involve disputed facts that overlap with "threshold" issues such as jurisdiction and venue, the resolution of such common facts must be reserved for the jury. *See DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1291 (Fed. Cir. 2008); *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 162-63 (1st Cir. 2007); *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987); *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965); *Borg v. L & J Energy, Inc.*, 1990 WL 122225 (W.D. Mich. May 25, 1990); *Vibber v. U.S. Rubber Co.*, 255 F. Supp. 47, 50 (S.D.N.Y. 1966); *Kierulff Assocs. v. Luria Bros. & Co.*, 240 F. Supp. 640, 642 (S.D.N.Y. 1965). *See generally* 3 James Wm. Moore et al., Moore's Federal Practice § 22.01(5)(d). The decision below conflicts with these precedents because it allows—indeed requires—the court to resolve the exhaustion defense, including all underlying factual disputes, prior to any litigation on the merits, even where, as here, the facts underlying the exhaustion defense overlap substantially with the substantive allegations of wrongdoing.

The decision below, in fact, explicitly recognizes the apparent conflict with these precedents. App. 5a. In an effort to avoid the conflict, the decision takes the unprecedented step of requiring the court to make its findings first, then allowing the jury to

"reexamine" the factual findings made in connection with the affirmative defense: "[I]f there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies." App. 6a. According to the decision below, policy concerns behind the PLRA simply compel this departure from this Court's established Seventh Amendment precedent: "The alternative of trying the merits before exhaustion, as under the *Beacon Theatres* line of cases, is unsatisfactory in the present setting because it would thwart Congress's effort to bar trials of prisoner cases in which the prisoner has failed to exhaust his administrative remedies." App. 5a.

The resort to PLRA policy as a justification for disregarding this Court's Seventh Amendment precedents is obviously unavailing. It is another specie of the error committed by the court in inventing a special procedure for handling the exhaustion defense, rather than abiding by the Federal Rules, as this Court unambiguously mandated in *Jones*. The asserted policy of the PLRA is no more a justification for ignoring this Court's decisions than it is for rewriting the Federal Rules of Civil Procedure.

What is more, the novel procedure proposed by the Seventh Circuit does not even succeed in its stated objective of protecting jury trial rights secured by the Seventh Amendment. The procedure does allow a jury to decide disputed facts previously resolved by the judge in deciding the exhaustion defense, but only if the judge ruled that there *was* ex-

haustion. Where the judge finds a *lack* of exhaustion and dismisses the case, by contrast, there is *no* opportunity for the jury to reexamine the judge's underlying factual findings that relate to the merits.

The inadequacy of the court's resolution illustrates the consequences of this kind of judicial ad hockery. Both the Federal Rules and this Court's Seventh Amendment precedents already establish wholly adequate and appropriate procedures for adjudicating claims and defenses fairly while protecting jury trial rights. Yet the court disregarded both and adopted its own flawed procedure for policy reasons that do not even accurately reflect PLRA policies. As explained in *Jones* and elaborated above, the PLRA exhaustion defense is *not* solely concerned with screening cases out of court at the earliest possible hour in litigation. Of course, even a well-founded grounding in policy provides no justification for a court to depart from the usual federal procedures governing affirmative defenses, as this Court expressly held in *Jones*. It is all the worse to craft and impose new procedures on the basis of misguided policy perceptions. Either way, the correct approach to adjudicating the PLRA exhaustion defense is simply to follow the rules and procedures already in place for resolving any affirmative defense. Certiorari—if not summary reversal—is warranted to make that point clear.

II. THE LOWER FEDERAL COURTS ARE IN DISARRAY OVER THE PROPER PROCEDURES FOR ADUJUDICATING THE PLRA EXHAUSTION DEFENSE

Certiorari or summary reversal is also appropriate because of the widespread conflict and uncertainty in the federal courts over the proper procedure for adjudicating the PLRA exhaustion defense—specifically, whether a jury may resolve disputed facts concerning its application. The lower courts have adopted at least three different procedural approaches, and courts across the country have expressed confusion and the need for further guidance.

1. The majority of courts adhere to the "usual procedure" called for by the Federal Rules to adjudicate the affirmative defense of exhaustion: a Rule 56(c) motion for summary judgment when appropriate on the undisputed record, with factual disputes reserved for trial. That approach has been followed by the Second, Third, Fifth, Eighth, and Tenth Circuits. *See Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006) (addressing exhaustion at summary judgment); *Williams v. Beard*, 482 F.3d 637, 639 (3d Cir. 2007) (reversing grant of summary judgment on exhaustion and remanding for further proceedings); *Hinojosa v. Johnson*, 277 F. App'x 370, 379-80 (5th Cir. 2008) (addressing exhaustion at summary judgment); *Foulk v. Charrier*, 262 F.3d 687, 697-98 (8th Cir. 2001) (reviewing evidence elicited at trial as to whether prisoner exhausted available remedies); *Fields v. Okla. State Penitentiary*, 511 F.3d 1109, 1112 (10th Cir. 2007) (addressing exhaustion

at summary judgment). The Seventh Circuit was counted among this group before the opinion below. *See Dale v. Poston*, 548 F.3d 563, 564 (7th Cir. 2008) (jury trial on exhaustion after remand on appeal from summary judgment); *Kaba v. Stepp*, 458 F.3d 678, 686 (7th Cir. 2006) (reversing summary judgment on exhaustion and remanding for further proceedings).

In addition, district courts in the First and Second circuits have expressly held that because failure to exhaust is an affirmative defense under the PLRA, disputed factual issues about PLRA exhaustion must be tried to a jury, in the usual course. *See Maraglia v. Maloney*, 499 F. Supp. 2d 93, 97-98 (D. Mass. 2007) ("[D]isputed issues of fact must be resolved by the jury and not the Court."); *Lunney v. Brureton*, 2007 WL 1544629, at *10 n.4 (S.D.N.Y. May 29, 2007). These courts have rejected decisions directing factfinding by judges on the ground that they "pre-date" *Jones*, do not conform to the standard procedure of the Federal Rules, and rest on "perceived policy concerns" instead of the statutory rules. *Maraglia*, 499 F. Supp. 2d at 94; *see also Lunney*, 2007 WL 1544629, at *10 n.4 (doubting, in light of *Jones*, the validity of previous caselaw directing trial courts to resolve disputed factual issues).[2]

2. Two circuits—the Ninth and Eleventh—have expressly declined to follow the "usual practice" under the Federal Rules for adjudicating the PLRA af-

[2] Another district court in the Second Circuit has held, however, that the exhaustion defense should be tried to the court. *See Amador v. Superintendents of Dep't. of Correctional Svcs.*, 2007 WL 4326747, at *5 (S.D.N.Y. Dec. 4, 2007).

firmative defense. These courts instead characterize exhaustion as a "matter in abatement" and hold that the exhaustion defense must be raised in an "unenumerated" Rule 12(b) motion to dismiss. *See Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003); *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008). Because a "matter in abatement" does not go to the merits of a claim, this approach requires judges to resolve any factual disputes about exhaustion just as they would with a "jurisdictional or related type of motion." *See Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir. 1988) (citation omitted).

The Ninth Circuit actually adopted the "matter in abatement" approach as a general method for addressing exhaustion requirements long before Congress enacted the PLRA. *See Ritza*, 837 F.2d at 368-69 (failure to exhaust intra-union remedies); *Stauffer Chem. Co. v. FDA*, 670 F.2d 106, 108 (9th Cir. 1982) (failure to exhaust intra-agency review process); *Studio Elec. Technicians Local 728 v. Int'l Photographers of Motion Picture Indus. Local 659*, 598 F.2d 551, 552 n.2 (9th Cir. 1979) (failure to exhaust remedies required by the Labor Management Relations Act). Thus, when confronted in *Wyatt* with the question of how to adjudicate the PLRA exhaustion requirement, the Ninth Circuit simply applied its existing precedent to this affirmative defense. *See* 315 F.3d at 1119-20.

But *Wyatt* was decided before this Court's decision in *Jones*, and that circuit appears not to have revisited this issue since. However, in the aftermath of *Jones*, courts have expressed doubt that *Wyatt*'s

"matter in abatement" approach remains viable. *See, e.g.*, *Percival v. Knowles*, 2007 WL 2827789, at *5 (E.D. Cal. Sept. 27, 2007) (holding "that a motion for summary judgment" and not an unenumerated Rule 12(b) motion "is the proper mechanism for resolving the question of whether plaintiff satisfied the exhaustion requirement"); *Lunney*, 2007 WL 1544629, at *10 n.4.[3]

Despite the evident conflict between the Ninth Circuit's precedent and this Court's decision in *Jones*, the Eleventh Circuit recently adopted the Ninth Circuit's approach and held that PLRA exhaustion should be adjudicated as a "matter in abatement" rather than an affirmative defense. *Bryant*, 530 F.3d at 1376. Over a vigorous dissent, the Eleventh Circuit in *Bryant* adopted the holding of the Ninth Circuit that "exhaustion should be decided on a Rule 12(b) motion to dismiss" and that because "exhaustion . . . is treated as a matter in abatement and not an adjudication on the merits, it is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes." *Id.* Notably, the majority's conclusion was premised on the policy-driven determination that putting factual disputes about the affirmative defense of exhaustion to a jury would "unnecessarily undermine Congress's

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[3] Yet another district court in the Ninth Circuit has held that exhaustion should be tried to a jury, even though that circuit has adopted a contrary position. *See Baines v. Maddock*, 2007 WL 173948, at *6 (S.D. Cal. Jan. 3, 2007) (finding "a genuine issue of material fact as to whether Plaintiff exhausted his administrative remedies" and noting that "Plaintiff . . . will be exercising his right to have a jury try this issue as to exhaustion of administrative remedies at trial").

intent in enacting the PLRA's exhaustion requirement." *Id.*

The dissent in *Bryant* strongly rejected this view. It warned that the approach cannot "be reconciled with the recent Supreme Court decision in *Jones v. Bock*." 530 F.3d at 1379 (Wilson, J., concurring in part and dissenting in part). The dissent observed that the majority's (and the Ninth Circuit's) approach conflicts with "usual procedural practice by directing district courts to treat failure to exhaust not as an affirmative defense, but to consider it on a 'motion to dismiss' not enumerated in Rule 12(b)." *Id.* at 1380. "More strikingly," the dissent continued, "rather than submitting genuine issues of material fact to the jury, the majority compels district courts to decide these factual issues." *Id.* "In the context of failure to exhaust under the PLRA," the dissent emphasized, "the Supreme Court has indicated that deviations from the usual procedural practice 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 1380 n.3 (citing 549 U.S. at 213).

3. In the decision below, the Seventh Circuit has now adopted yet a third position, by characterizing exhaustion as an "issue of judicial traffic control." The decision below expressly rejects the Ninth and Eleventh Circuits' "unenumerated" Rule 12(b) motion as a procedural vehicle for raising the affirmative defense, conceding that under *Jones* a defendant must plead failure to exhaust pursuant to Rule 8(c). App. 3a. But the decision also rejects the majority approach of simply adhering to the usual procedure under the Federal Rules for adjudicating affirmative

defenses. Rather than abide by the standard pleading, summary judgment, and trial procedure mandated by the Rules for resolving claims and defenses, the decision below mandates a distinct procedure unique to resolving a disputed PLRA defense. Under the procedure, once a PLRA exhaustion defense is pleaded by a defendant, a district judge must convene a special evidentiary hearing focusing solely on the exhaustion defense, before litigation on the merits may proceed. The judge may permit "discovery relating to exhaustion he deems appropriate." App. 6a. Then, only "[i]f and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery . . . on the merits." *Id.*[4]

The Seventh Circuit is the only court of appeals thus far to categorically preclude litigation on the merits of a suit—including any discovery—pending the court's resolution of the exhaustion affirmative defense.[5]

4. Given the various approaches taken by the courts of appeals, it can be no surprise that the dis-

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[4] The Seventh Circuit's opinion adds that "if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies." App. 6a.

[5] The First Circuit, however, has on at least one occasion, without discussion, authorized a district court to find facts on the issue of exhaustion before proceeding with the merits of a prisoner's appeal. *Casanova v. Dubois*, 304 F.3d 75, 77 (1st Cir. 2002) ("We remanded this case to the district court for additional fact-finding with respect to whether the exhaustion requirement of the [PLRA] precludes the appellants' lawsuit.").

trict courts, which bear the brunt of this uncertainty, have frequently expressed a need for guidance on the proper method for adjudicating the affirmative defense of failure to exhaust available remedies. "Courts across the country are divided," one recently noted. *Singleton v. Johnson*, 2008 WL 3887633, at *1 (S.D. Ga. Aug. 18, 2008). Another court stated that "there is substantial ground for difference of opinion," yet "no guidance" on the issue. *Gilmore v. Stalder*, 2008 WL 4155332, at *2-3, *5 (W.D. La. Sept. 8, 2008); s*ee also Finch v. Servello*, 2008 WL 4527758, at *8 (N.D.N.Y. Sept. 29, 2008) (seeking special briefing on "the question of whether the disputed factual issue can be decided in a hearing or if it must be decided by a jury"); *Amador v. Superintendent of Dept. of Corr. Svcs.*, 2007 WL 4326747, at *5 n.7 (S.D.N.Y. Dec. 2, 2007) (recognizing conflicting caselaw and noting that "[i]t is unclear whether factual disputes regarding the exhaustion defense should ultimately be decided by the court or by a jury"). There is no good reason to require the district courts administering the requirements of the PLRA to remain mired in such confusion and uncertainty on such a crucial procedural issue. This Court should grant review to provide them the guidance they need.

III. THE PROPER ADJUDICATION OF THE PLRA EXHAUSTION DEFENSE IS AN IMPORTANT AND RECURRING ISSUE

1. The issue presented here is "important, both procedurally and substantively and deserve[s] further consideration." *Gilmore*, 2008 WL 4155332, at *3. The cases discussed in the previous section

indicate the frequency with which courts are faced with the question of when and how to adjudicate the PLRA exhaustion issue, and the uncertainty they face in answering it. And this Court itself has recognized that disputes about exhaustion under the PLRA "occur frequently." *Woodford*, 548 U.S. at 101 n.5.

This Court should not allow the already substantial uncertainty concerning the issue presented here to continue or, inevitably, broaden further. Although *Jones* explicitly held that the PLRA's exhaustion requirement is an affirmative defense to be adjudicated according to the "usual practice" under the Federal Rules, *see supra* at 15, three circuits have adopted two different types of special procedures to resolve the defense, neither of which reflects "usual practice" under the Rules. The district courts are rightly complaining about the lack of clear guidance on what is or should be a straightforward issue. The PLRA is specifically designed to make prisoner litigation more efficient to courts and thus more fair to all parties—including prisoners with meritorious claims. The current uncertainty over how to litigate the exhaustion defense—a crucial feature of the PLRA and a major issue in much PLRA litigation—plainly thwarts that fundamental statutory objective.

2. Beyond the adverse consequences of general uncertainty over what approach is lawful and appropriate, the specific approach adopted by the Seventh Circuit will itself have numerous adverse, and unnecessary, consequences for prisoner litigation in

courts within the Seventh Circuit, and in courts elsewhere if the approach is adopted more broadly.

First, the decision below will impose costly delays and further burden district courts. The court of appeals held that courts must immediately stay all proceedings and hold an evidentiary hearing every time exhaustion is pleaded by a defendant. App. 6a. Because a plaintiff need not demonstrate exhaustion in his complaint, *see Jones*, 549 U.S. at 212, and because a defendant must plead the exhaustion defense or risk waiver, *id.*, a defendant has every incentive to plead non-exhaustion in each case and abandon the defense only when it becomes clear that a plaintiff exhausted his administrative remedies. But this incentive of notice pleading, coupled with the Seventh Circuit's directive to resolve exhaustion before litigation may proceed, will inevitably require district courts to hold preliminary hearings on exhaustion in virtually every case governed by the PLRA.

Second, forcing courts to hold preliminary hearings in every case would severely prejudice litigants with meritorious claims. The screening requirements of 42 U.S.C. § 1997e(c) (prisoner cases) and 28 U.S.C. § 1915A (*in forma pauperis* filings) already delay by many months the actual filing of a complaint and the call for an answer. Barring merits-related litigation until after a preliminary hearing on exhaustion can easily delay even the most basic progress on a case for a year or more. And it is *meritorious* claims that will suffer the most under the Seventh Circuit's novel scheme, because defendants now have an incentive to forcefully litigate even

marginal exhaustion defenses in any case that presents a risk on the merits. This result runs contrary to Congress's stated intent in enacting the PLRA to "improve the quality of prisoner suits," *Woodford*, 548 U.S. at 94, without "prevent[ing] inmates from raising legitimate claims," *id.* at 117 (Stevens, J., dissenting).

Finally, the decision below will disrupt usual procedures for the appointment of counsel. Courts are often reluctant to appoint counsel for prisoner-plaintiffs in the early stages of litigation. *See Pruitt v. Mote*, 503 F.3d 647, 661 (7th Cir. 2007) (en banc) (Rovner, J., concurring) (noting that requests for counsel during pre-trial phases of a case are frequently denied). The usual presumptions that attach to pleadings and the prohibition on fact-finding at summary judgment allow courts to defer decisions on appointing counsel until the merits of a claim become apparent. *Id.* Forcing courts to decide whether to appoint counsel for preliminary hearings on exhaustion—well before the merits of a case come into view—will compromise their ability to efficiently deploy scarce resources. Yet without the benefit of counsel for a fact-finding hearing on exhaustion, *pro se* litigants will be at a disadvantage in gathering and presenting evidence establishing their efforts to exhaust (or establishing the prison's efforts to thwart them from doing so).

The novel procedure invented by the court of appeals might allow lower courts to more quickly dispose of some meritless prisoner claims. But it also might not. And it might well interfere with litigation of meritorious claims. What should ultimately

matter most is that "[o]ur legal system . . . remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled *according to the law*." *Jones*, 549 U.S. at 202 (emphasis added). The decision below breaches that commitment because it does not provide for prisoner claims to be handled "according to the law," but instead according to an ad hoc structure—notably, one not designed by the legislators actually responsible for fixing the rules governing prisoner litigation. But as this Court rightly noted in *Jones*, whether the PLRA exhaustion defense should be treated differently from every other affirmative defense is a choice for Congress to make, not a court of appeals.

CONCLUSION

For the foregoing reasons, the petition should be granted, or the decision below should be summarily reversed.

Respectfully submitted,

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