No. ____

# In the Supreme Court of the United States

SHELLA A. KHATRI, M.D.; WEXFORD HEALTH SOURCES, INC.; MUHAMMAD NAJI, M.D.; DEBORAH CUTSHALL; CASEY THORNLEY, P.A.; AND JOE NAGEL, P.A.,

*Petitioners,*

v.

KAREEM GARRETT, ET AL.,

*Respondents.*

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Prison Litigation Reform Act ("PLRA" or "Act") provides: "No action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This Court has described the Act's exhaustion requirement as mandatory, unambiguous, and immune to judge-made exceptions. *Ross v. Blake*, 136 S. Ct. 1850, 1856–58 (2016). Aside from the one textual exception (remedies must be "available" to the prisoner), "the PLRA's text suggests no limits on an inmate's obligation to exhaust . . . ." *Id.* at 1856.

The Third Circuit, in conflict with other Courts of Appeals, has created an exception to Section 1997e(a)'s mandatory exhaustion requirement for a category of prisoners—those who file suit without first exhausting administrative remedies, but who are released from custody while the suit is pending and then file an amended complaint. In the Third Circuit's view, the prisoner's "change in status" during the lawsuit (from prisoner to non-prisoner) "cures" his initial failure to exhaust remedies. App. 30.

The question presented is:

If a prisoner fails to exhaust administrative remedies before filing a lawsuit, does Section 1997e(a) mandate dismissal of the unexhausted claims, or may the prisoner cure his failure to exhaust by filing an amended complaint after his release from prison?

## PARTIES TO THE PROCEEDING

Petitioners Shella A. Khatri, M.D., Wexford Health Sources, Inc., Muhammad Naji, M.D., Deborah Cutshall, Casey Thornley, P.A., and Joe Nagel, P.A. are medical providers for the Pennsylvania Department of Corrections, and they were defendants-appellees in the proceedings below.

Respondent Kareem Garrett was the plaintiff-appellant in the proceedings below.

Respondents Debra Younkin, Steven Glunt, P.A. Physician Joe, P.A. Physician Casey, Nurse Lori, Nurse Debbie, Nurse Rodger, Nurse John, Nurse Hanna, Superintendent K. Cameron, Deputy Superintendent David Close, Deputy Superintendent (Security) K. Hollinbaugh, Doretta Chencharick, Joel Barrows, James Morris, Peggy Bauchman, Tracey Hamer, Captain Brumbaugh, Captain Miller, Lt. Shea, Lt. Horton, Lt. Lewis, Lt. Glass, L.S. Kerns-Barr, F. Nunez, Jack Walmer, Program Review Committee (PRC), M.J. Barber, Mr. Shetler, Ms. Cogan, Mr. Little, Sgt. Snipes, Sgt. James, Sgt. Young, Medical Officer London, Medical Officer Owens, Officer Garvey, and Officer Uncles are officers, employees, or units of the Pennsylvania Department of Corrections and were defendants-appellees in the proceedings below.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioners state as follows:

Wexford Health Sources, Inc., a Florida Corporation, with its principal place of business in Allegheny County, Pennsylvania, is wholly owned by The Bantry Group Corporation, a Florida Corporation, with its principal place of business in Allegheny County, Pennsylvania. Neither Wexford Health Sources, Inc., nor The Bantry Group Corporation are publicly held entities.

## RELATED CASES

United States Court of Appeals (3d Cir.):

*Garrett v. Wexford Health, et al.*, No. 17-3480 (Sept. 10, 2019)

*Garrett v. Wexford Health Sources Inc.*, No. 17-2836 (Oct. 26, 2017)

United States District Court (W.D. Penn.):

*Garrett v. Wexford Health, et al.*, No. 3:14-cv-00031 (Oct. 11, 2017) (district court order)

*Garrett v. Wexford Health, et al.*, No. 3:14-cv-00031 (June 12, 2017) (report and recommendation)

*Garrett v. Wexford Health, et al.*, No. 3:14-cv-00031 (Sept. 9, 2016) (district court order)

*Garrett v. Wexford Health, et al.*, No. 3:14-cv-00031 (July 14, 2016) (report and recommendation)

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## PETITION FOR WRIT OF CERTIORARI

Congress enacted the Prison Litigation Reform Act of 1995 ("PLRA" or "Act") to reduce the number and improve the quality of prisoner suits filed in federal court. A "centerpiece" of the PLRA's reforms was its mandatory exhaustion provision, 42 U.S.C. § 1997e(a), which requires prisoners to complete the administrative grievance process "as a precondition to bringing suit in federal court." *Woodford v. Ngo*, 548 U.S. 81, 88 (2006). Given its clear language and essential function, this Court has rejected interpretations of Section 1997e(a) that would permit prisoners to "bypass" administrative remedies. *Id.* at 96–103; *see also Ross*, 136 S. Ct. at 1856 (rejecting "special circumstances" exception to exhaustion requirement); *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (rejecting construction of Section 1997e(a) that would carve out excessive-force claims from the exhaustion requirement). If administrative remedies are available to a prisoner, then he must fully exhaust those remedies before filing suit—no exceptions.

The Third Circuit, in a ruling that widens an existing circuit split, has created an exception to the PLRA's mandate: Prisoners who file suit on unexhausted claims may pursue those defective claims if they are released from prison while their suit is pending. In the Third Circuit's view, a prisoner's "change in status (*i.e.*, his release) operates to cure the original filing defect (*i.e.*, his failure to exhaust administrative remedies)." App. 30. The Ninth Circuit also applies this change-in-status exception to the PLRA's exhaustion requirement. *See Jackson v. Fong*, 870 F.3d 928, 936–37 (9th Cir. 2017).

Three other United States Courts of Appeals—the Fifth, Sixth, and Eleventh Circuits—have rejected such an exception to Section 1997e(a). These courts hold that a prisoner's subsequent release does not relieve him of the statutory requirement to exhaust administrative remedies before filing suit. *See Bargher v. White*, 928 F.3d 439, 447–48 (5th Cir. 2019); *Smith v. Terry*, 491 F. App'x 81, 83–84 (11th Cir. 2012); *Cox v. Mayer*, 332 F.3d 422, 427–28 (6th Cir. 2003). These courts agree that Rule 15 of the Federal Rules of Civil Procedure, a rule that allows post-filing amendment or supplementation of claims, does not override the PLRA's pre-filing exhaustion requirement.

The exhaustion rule for prisoners in two circuits and 12 states (those within the Third and Ninth Circuits) is now different, and less rigorous, than the rule for prisoners in three circuits and 10 states (those within the Fifth, Sixth, and Eleventh Circuits). This Court should grant the petition, resolve the circuit split, and confirm that a confined prisoner must exhaust administrative remedies *before* bringing suit, no matter what status he may eventually occupy *after* suit is filed.

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## OPINIONS BELOW

The Third Circuit's opinion is reported at 938 F.3d 69 (3d Cir. 2019). App. 1-50. The district court's opinions and orders are available at 2016 WL 4733177 (W.D. Pa. Sept. 9, 2016), App. 69-71, and 2017 WL 6729762 (W.D. Pa. Oct. 11, 2017), App. 51-57. The magistrate judge's reports and recommendations are available at 2016 WL 4734652

(W.D. Pa. Jul. 14, 2016), App. 72-84, and 2017 WL 3053359 (W.D. Pa. Jun. 12, 2017), App. 58-68.

## JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. § 1331. The Third Circuit had jurisdiction over this appeal under 28 U.S.C. § 1291 and entered its judgment on September 10, 2019. No party sought rehearing. Justice Alito extended the time for filing this petition to January 8, 2020. This Court has jurisdiction over this appeal under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISION

The PLRA provides, in relevant part: "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." 42 U.S.C. § 1997e(a).

## STATEMENT OF THE CASE

### I. Statement of Facts

Kareem Garrett was a prisoner in the custody of the Pennsylvania Department of Corrections ("DOC") on February 2, 2014, when he filed this Section 1983 lawsuit challenging certain conditions of his confinement. App. 4, 73. The DOC has an Inmate Grievance System for resolving prisoner complaints

about prison conditions, and that grievance system was available to Garrett while he was incarcerated. App. 5-6; *see also Garrett v. Wexford Health, et al.*, No. 3:14-cv-00031-KRG-CRE (Doc. 99-A) (Inmate Grievance System, Policy No. DC-ADM 804). The DOC's Inmate Grievance System is a three-step process that terminates with an appeal to and a final decision by the Secretary's Office of Inmate Grievances and Appeals. (Doc. 99-A).[1]

Although Garret initiated the grievance process, it is undisputed that he did not complete the process before filing this federal lawsuit. App. 5-6.

## II. Procedural History

### A. Proceedings in the District Court

Garrett initiated this federal lawsuit by filing a six-page *pro se* complaint against various prison officials and medical staff, including Petitioners Dr. Shella A. Khatri, Dr. Muhammad Naji, Deborah Cutshall, Casey Thornley, and Patrick Joseph Nagel ("Medical Defendants"). App. 72. When Garrett filed suit on February 2, 2014, he was a prisoner confined by the DOC to the State Correctional Institution at

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[1] As summarized by a Pennsylvania federal district court, the DOC' grievance process has three steps: "First, an inmate is required to legibly set forth all facts and identify all persons relevant to his claim in a grievance which will then be subject to 'initial review.' . . . Second, after the initial review by a grievance officer, the inmate has the opportunity to appeal to the Facility Administrator for a second level of review. . . . Finally, an appeal to the Secretary's Office of Inmate Grievances and Appeals is available." *Runkle v. Pa. Dep't of Corr.*, 2013 WL 6485344, at *5 (W.D. Pa. Dec. 10, 2013) (quoting *Spruill v. Gillis*, 372 F.3d 218, 232 (3d Cir. 2004)).

Houtzdale, Pennsylvania. App. 4, 73. Garrett confessed in his complaint that he did not complete the DOC's internal grievance process before filing suit against the Medical Defendants. App. 5; *see also Garrett v. Wexford Health, et al.*, No. 3:14-cv-00031-KRG-CRE (Doc. 1 at 1).

Garrett's original complaint alleged that the Medical Defendants (and other prison staff) had violated his civil rights by discontinuing his use of a walker and wheelchair, forbidding him from receiving walking assistance from other inmates, discontinuing his "psych" medication, and conducting a rectal exam without his consent. App. 4. Garrett filed an amended complaint in March 2014 and a second amended complaint in June 2014 while in the DOC's custody. App. 5, 7. Garrett's second amended complaint realleged his claims against the Medical Defendants and named over 40 additional defendants. App. 7.

The Medical Defendants moved to dismiss Garrett's second amended complaint for failure to exhaust administrative remedies as required by the PLRA. App. 7-8. Rather than responding to the motions, Garrett requested multiple extensions and, ultimately, a stay of proceedings until after his expected release date on the premise that he would attempt to find counsel. App. 7-8. The magistrate judge stayed all proceedings until May 15, 2015, and directed Garrett to respond to the motion to dismiss by that date. App. 8. In April 2015, Garrett (still incarcerated) sought an additional stay, which the magistrate judge granted. App. 8.

Garrett was released from prison on May 19, 2015. (Doc. 155). The district court granted Garrett

leave to file a third amended complaint almost nine months after his release. App. 8-9. Garrett's third amended complaint realleged his claims against the Medical Defendants. App. 61.

The Medical Defendants renewed their motions to dismiss Garrett's claims based on his failure to exhaust administrative remedies. App. 61. After converting the motions to dismiss into motions for summary judgment, the magistrate judge recommended that Garrett's claims against the Medical Defendants be dismissed for failure to fully exhaust administrative remedies. App. 77. The magistrate judge rejected Garrett's argument that exhaustion was not required because his third amended complaint was filed after his release from prison. App. 76-77. The magistrate judge reasoned that "a plaintiff's status as a prisoner for purposes of the PLRA is judged as of the time he files his original complaint. The exhaustion requirement will continue to apply, even after a prisoner has been released, when the former prisoner amends a complaint filed while he was in prison." App. 77.

As for the other defendants, the magistrate judge recommended that Garrett "be allowed one final opportunity to amend his claims against the DOC Defendants." App. 83.[2] The district court adopted the recommendation, providing Garrett with another

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[2] In addition to the Medical Defendants, Garrett named dozens of corrections officials in his third amended complaint—the "DOC Defendants." The DOC Defendants did not raise failure to exhaust administrative remedies as a defense to Garrett's claims against them, but argued that Garrett's claims were deficient under Federal Rules of Civil Procedure 12(b)(6) and 12(e). App. 62 n.4.

chance to plead his case against the DOC Defendants. App. 70. The district court entered judgment in favor of the Medical Defendants. App. 70.

Garrett filed a fourth amended complaint, and the Medical Defendants renewed their motions to dismiss. App. 62-63. The magistrate judge recommended dismissal of all claims against the Medical Defendants because they were improperly named in Garrett's fourth amended complaint and because Garrett had failed to exhaust his administrative remedies before filing suit against them. App. 63-64. The district court adopted the magistrate judge's report and recommendation and closed the case. App. 56-57.

### B. Proceedings in the Court of Appeals

Garrett appealed to the Third Circuit, where he requested but was initially denied the appointment of counsel. After the first round of briefing, the Third Circuit appointed counsel for Garrett and requested a second round of briefing on two issues: "(1) whether Garrett's Third Amended Complaint . . . was subject to the exhaustion requirements of the [PLRA], given that he had been released from prison at the time that he filed [it] . . . and (2) if the [third amended complaint] *was* subject to the exhaustion requirements, should the [third amended complaint] have been construed as a supplemental complaint pursuant to Rule 15(d) of the Federal Rules of Civil Procedure." *Garrett v. Wexford Health, et al.*, No. 17-3480, Order (Sept. 20, 2018) (emphasis in original). All parties submitted supplemental briefs, and a panel of the Third Circuit heard oral argument.

The Third Circuit reversed the district court's judgment. App. 50. The Court of Appeals recognized that "Garrett's original complaint was defective because, although he was a prisoner when he filed it, he failed to first exhaust his administrative remedies by completing the grievance process then in effect." App. 21-22. Rather than resolve the exhaustion defense based on Garrett's prisoner status at the time that he filed suit, the Third Circuit focused on Garrett's status two years later, when he filed the third amended complaint. App. 22-38. Deeming Garrett's third amended complaint to be the "operative amended pleading" for purposes of Rule 15 of the Federal Rules of Civil Procedure, the Third Circuit reasoned that, "when he filed the [third amended complaint], Garrett was no longer a prisoner and therefore was not subject to the PLRA's administrative exhaustion requirement." App. 22. Summing up, the Court of Appeals held that Garrett's "change in status (*i.e.*, his release) operates to cure the original filing defect (*i.e.*, his failure to exhaust administrative remedies)." App. 30.

The Third Circuit acknowledged that it was joining a circuit split on the issue. It elected to follow the Ninth Circuit's rule from *Jackson v. Fong*, 870 F.3d 928 (9th Cir. 2017), rejecting the contrary view—exemplified by *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc)—as an unpersuasive application of "boilerplate language" in Section 1997e(a). App.37-38. In the Third Circuit's view, "[t]he PLRA is not sufficiently plain in its meaning to override the usual operation of Rule 15." App. 38.

## REASONS FOR GRANTING THE WRIT

The Court should grant certiorari review to resolve the split among the circuits as to the proper application of the PLRA's exhaustion requirement in cases where a prisoner is released after filing suit on unexhausted claims. The Third Circuit's decision permitting such suits to continue conflicts with the decisions of other Courts of Appeals, departs from Section 1997e(a)'s plain language, and misapplies this Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), which addressed post-filing procedural issues, not the PLRA's pre-filing exhaustion mandate.

This case is the right vehicle to resolve the circuit split. There is no dispute that administrative remedies were available to Garrett, and there is no dispute that Garrett failed to properly exhaust those remedies before filing suit. Unlike most *pro se* prisoner suits in which this issue will arise in the future, Garrett is represented by counsel who are familiar with the legal issues, having briefed and argued Garrett's case in the Third Circuit.

### I. The Circuits Are Split Over the Proper Interpretation of the PLRA's Mandatory Exhaustion Requirement.

The Third Circuit acknowledged that it was departing from another Court of Appeals by holding that a prisoner who fails to exhaust remedies *before* filing suit may cure that defect by filing an amended complaint *after* his release. The circuit split is wider than the Third Circuit recognized, and the conflict is on an important matter of federal statutory law that warrants this Court's review. *See* Sup. Ct. R. 10(a).

The PLRA provides: "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." 42 U.S.C. § 1997e(a).

The Courts of Appeals are divided on how Section 1997e(a) applies to prisoners like Garrett, who file suit on unexhausted claims while in custody and are released while their suit is pending. Three circuits—the Fifth, Sixth, and Eleventh—hold that Section 1997e(a)'s exhaustion requirement requires dismissal of such suits because the claims were not properly exhausted at the outset and the prisoner's subsequent release cannot cure an initially defective claim. Two other circuits—the Third and Ninth—hold that the statutory exhaustion mandate yields to liberal pleading rules once a suit is filed, and a released prisoner may "cure" his defective suit by amending his complaint.

The Sixth Circuit was the first court of appeals to address the issue. In *Cox v. Mayer*, 332 F.3d 422 (6th Cir. 2003), the Sixth Circuit held that a prisoner's subsequent release does not excuse him from complying with the PLRA's exhaustion requirement if he filed suit while imprisoned. *Id.* at 424–428. In *Cox*, the district court dismissed a prisoner's claims because he had not exhausted administrative remedies before filing suit. *Id.* at 424–25. The prisoner, having been released after filing suit, moved to reconsider the dismissal, arguing that "he was no longer a prisoner" and thus not subject to the PLRA's

exhaustion requirement. *Id.* at 424. The district court reinstated the unexhausted claims, reasoning that because the prisoner could "immediately refile his claims without exhausting administrative remedies . . . , judicial economy would not be served by the dismissal of [his] complaint." *Id.*

The Sixth Circuit reversed. Relying on Section 1997e(a)'s "straightforward and unmistakable" text, which focuses on the prisoner's status at the time of filing, the court held that the unexhausted claims must be dismissed. *Id.* at 424. The analysis was simple: "Because (1) plaintiff was a prisoner when he 'brought' his suit, and (2) plaintiff's suit implicates 'prison conditions,' § 1997e(a) applies and plaintiff was required to exhaust any available administrative remedies before he filed suit." *Id.* at 425. The Sixth Circuit rejected the contention that a supplemental complaint filed after a prisoner's release could "cure" defective claims, explaining that "a procedural rule 'cannot overrule a substantive requirement or restriction contained in a statute (especially a subsequently enacted one).'" *Id.* at 428 (quoting *Harris*, 216 F.3d at 983).

The Sixth Circuit's analysis relied, in part, on the Eleventh Circuit's earlier decision in *Harris v. Garner*, which addressed Section 1997e(e)—an analogous section of the PLRA that provides "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility for mental or emotional injury" unless certain preconditions are met. 216 F.3d at 972–73. Focusing on the PLRA's use of the term "brought," the *Harris* court explained that "[t]he dispositive question is

whether 'bring' means to commence or start a lawsuit, or instead means to maintain or continue it to conclusion." *Id.* at 973. Applying this "load-bearing word" as written, and recognizing that it has the same meaning in both Sections 1997e(a) and 1997e(e), the Eleventh Circuit held that "'brought' means 'commenced.'" *Id.* at 974. Accordingly, a prisoner's "confinement status at the time of filing" is the relevant inquiry for purposes of Section 1997e(e), *id.* at 978, just as it must be for Section 1997e(a). *Harris* also rejected the argument that an amended or supplemental pleading under Rule 15 could cure an unexhausted claim that the PLRA deemed defective at the outset. *Id.* at 981–84.

The Eleventh Circuit formally extended the *Harris* rationale to Section 1997e(a) in *Smith v. Terry*, 491 F. App'x 81 (11th Cir. 2012), holding that a prisoner's subsequent release and filing of a supplemental complaint did not cure his initial failure to exhaust administrative remedies before filing suit. As the Eleventh Circuit explained: "The only facts pertinent to determining whether a prisoner has satisfied the PLRA's exhaustion requirement are those that existed when he filed his original complaint." *Id.* at 83.

The Fifth Circuit has reached the same conclusion as the Sixth and Eleventh Circuits. In *Bargher v. White*, 928 F.3d 439 (5th Cir. 2019), the court held that a prisoner's "subsequent release does not relieve him of the requirement to exhaust administrative remedies for th[e] current legal action that he initiated while in prison." *Id.* at 447. The Fifth Circuit concluded that the proper course of action for

a plaintiff in these circumstances is to drop the lawsuit and "immediately refile." *Id.* at 448; *see also Williams v. Henagan*, 595 F.3d 610, 619 (5th Cir. 2010) ("Williams was incarcerated when he brought this suit, and this court holds, following the Supreme Court, that whatever remedies are 'available' must be exhausted before a prisoner's suit may be filed in federal court. . . . Williams's release during the pendency of the suit does not relieve him of the obligation to comply with [the PLRA].").[3]

Contrary to these decisions, the Third and Ninth Circuits hold that Section 1997e(a)'s mandate is not absolute; a prisoner who fails to exhaust administrative remedies before filing suit may cure this defect by filing an amended or supplemental complaint after his release. App. 22-38; *Jackson*, 870 F.3d at 933–34. In these circuits, the exhaustion analysis does not focus on the plaintiff's status at the "initiation of the suit," but on the plaintiff's status

[3] Though it does not appear to have addressed the question in the precise procedural posture of Garrett's case, the Seventh Circuit has issued decisions suggesting that it would follow the rule adopted by the Fifth, Sixth, and Eleventh Circuits. *E.g.*, *Stites v. Mahoney*, 594 F. App'x 303, 304 (7th Cir. 2015) ("Stites also contends that the exhaustion requirement fell away because he no longer was incarcerated by the time he amended his complaint to supply the defendants' names (he initially had called two of them John or Jane Doe). All that matters, though, is that he was incarcerated when he initiated this lawsuit, which is the relevant point of analysis in applying § 1997e(a)."); *Dixon v. Page*, 291 F.3d 485, 489 (7th Cir. 2002) ("[W]hen Dixon filed his complaint, he was a prisoner, who had access to [the prison's] administrative grievance system. That he is no longer a prisoner at the time of this appeal does not excuse him from the exhaustion requirement since exhaustion is a precondition to the filing of a complaint in federal court.").

when the "operative" amended complaint is filed. App. 32; *Jackson*, 870 F.3d at 935. As the Ninth Circuit explained: "Exhaustion requirements apply based on when a plaintiff files the operative complaint, in accordance with the Federal Rules of Civil Procedure." *Jackson*, 870 F.3d at 935.

In *Jackson*, the Ninth Circuit acknowledged that the prisoner-plaintiff failed to exhaust remedies before filing suit, but held that this defect was cured when the plaintiff filed a third amended complaint after his release from prison. 870 F.3d at 933–34. The Ninth Circuit reasoned that the third amended complaint was the "operative complaint" under Rule 15(d), which supersedes earlier complaints and defeats an exhaustion defense. *Id.* at 935. The *Jackson* court summed up its rule this way:

> A plaintiff who was a prisoner at the time of filing his suit but was not a prisoner at the time of his operative complaint is not subject to a PLRA exhaustion defense. Jackson was not a prisoner when he filed his operative third amended complaint, and therefore cannot be subject to an exhaustion defense.

*Id.* at 937. The Ninth Circuit rejected contrary precedent as unpersuasive in light of this Court' decision in *Jones v. Bock*, 549 U.S. 199 (2007). *Id.* at 935. As discussed below, *Jones* does not address—much less alter—the operation of the PLRA's pre-suit exhaustion requirement. *See infra* at 21–23.

The Third Circuit, citing the Ninth Circuit's Rule 15 analysis in *Jackson*, reached the same conclusion in this case. App. 31-38. Although Garrett did not exhaust his administrative remedies before filing suit, the Third Circuit permitted him to pursue unexhausted claims because his third amended complaint—the "operative" complaint under a Rule 15 analysis—was filed after he was released from prison. App. 32. The Third Circuit, like the Ninth, rejected contrary precedent based on this Court's decision in *Jones*, 549 U.S. at 224, despite acknowledging that *Jones* "does not directly address the issues in [this] appeal." App. 27.[4]

In the circuits without binding Court of Appeals precedent, district courts are divided on the issue. Some district courts hold that a prisoner's status at the time of filing controls the analysis. *E.g.*, *Jefferson v. Roy*, 2019 WL 4013960, at *2 (D. Minn. Aug. 26, 2019) (noting "the majority of circuits that have addressed this issue have concluded that the relevant time when determining the applicability of the PLRA is the date when the lawsuit was filed"); *Tomassini v. Corr. Health Servs. Corp.*, 2012 WL 1601528, at *2 (D.P.R. May 7, 2012); *Banks v. York*, 515 F. Supp. 2d 89, 118–19 (D.D.C. 2007); *Chase v. Peay*, 286 F. Supp. 2d 523, 527–28 (D. Md. 2003). Other district courts hold that a post-release amended pleading may defeat an exhaustion defense.

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[4] The Tenth Circuit recently suggested without deciding that claims asserted in a prisoner's post-release *amended* complaint that relate back to the original complaint would be subject to the PLRA's pre-suit exhaustion requirement, while claims asserted in a post-release *supplemental* complaint would not. *May v. Segovia*, 929 F.3d 1223, 1230–34 (10th Cir. 2019).

*E.g.*, *Minix v. Pazera*, 2007 WL 4233455, at *5 (N.D. Ind. Nov. 28, 2007); *Morris v. Eversley*, 205 F. Supp. 2d 234, 241 (S.D.N.Y. 2002).

Federal courts are deeply divided over whether the PLRA requires dismissal of unexhausted claims if a prisoner is released while his suit is pending. This Court has not had an opportunity to address this conflict in the lower courts, as the aggrieved parties in the two most recent circuit court decisions—*Jackson* (Ninth Circuit) and *Bargher* (Fifth Circuit)—did not seek certiorari review. The Court should take this opportunity to resolve the conflict over the proper application of this important federal statute.

## II. The Third Circuit's Decision Is Contrary to the PLRA's Plain Language and This Court's Precedent.

The Third Circuit's decision invokes a liberal pleading rule, which embodies a preference for merits-based decision making, to create an exception to the PLRA's mandatory exhaustion requirement, which was enacted to relieve courts and corrections officials of the obligation to address unexhausted claims on their merits. That exception is contrary to Section 1997e(a)'s plain text and to this Court's decisions rejecting unwritten exceptions to that text.

### A. The PLRA's text requires dismissal of a prisoner's suit on exhausted claims.

The text of the PLRA's exhaustion requirement is both "mandatory" and "unambiguous." *Ross*, 136 S. Ct. at 1856 (discussing 42 U.S.C. § 1997e(a)). Aside from its one textual exception (remedies need not be

exhausted if they are not available), "the PLRA's text suggests no limits on an inmate's obligation to exhaust . . . ." *Id.*

By its plain terms, Section 1997e(a) prohibits the "bringing" (or commencing) of a lawsuit by a prisoner who has failed to exhaust administrative remedies. The text fixes the exhaustion analysis on the point in time when an "action" is "brought" by a prisoner, not on some later time when an amended pleading is filed in the action that was brought. *See Cox*, 332 F.3d at 424; *Harris*, 216 F.3d at 973–74; *cf. Ross*, 136 S. Ct. at 1856 ("An inmate 'shall' bring 'no action' (or said more conversationally, may not bring any action) absent exhaustion of available administrative remedies.").

The PLRA's text provides a straightforward and easily applied rule: If a prisoner fails to exhaust available administrative remedies before bringing suit while he is confined, then he has violated the statute and his suit must be dismissed. *See Cox*, 332 F.3d at 424. Nothing in the text suggests that a failure to exhaust may be "cured" after a defective suit is filed. And this Court has "reject[ed] every attempt to deviate . . . from [Section 1997e(a)'s] textual mandate," as excusing a prisoner's failure to exhaust would contravene both the text and the purpose of the PLRA. *Ross*, 136 S. Ct. at 1857–58.

The PLRA's purpose and history confirm that dismissal is required when a prisoner brings suit on unexhausted claims. Congress's purpose in enacting the PLRA was "to reduce the quantity and improve the quality of prisoner suits," *Porter*, 534 U.S. at 524, as most of those suits "have no merit" and "many are

frivolous," *Jones*, 549 U.S. at 203. One of the most important mechanisms for filtering out bad prisoner claims is Section 1997e(a)'s exhaustion mandate, which ensures that prisoners present their grievances to prison officials before haling those officials into court. *Id.* at 203–04; *see also Woodford*, 548 U.S. at 84–85. The PLRA's filter does not work if prisoners may file meritless federal lawsuits on unexhausted claims, but then avoid dismissal by filing an amended complaint after their release from prison.

The PLRA's legislative history confirms Congress's intent to prevent prisoners from bringing civil actions if they have not first exhausted administrative remedies. Under the PLRA's predecessor, the Civil Rights of Institutionalized Persons Act (CRIPA), district courts were given significant discretion when deciding whether to require administrative exhaustion. *Porter*, 534 U.S. at 523–24. Significantly, federal courts were not required to dismiss prisoner suits that were filed before the prisoner exhausted his remedies; instead, the courts could stay federal suits while prisoners attempt exhaustion after filing. *Id.* The PLRA eliminated that discretion and made clear that "exhaustion is a prerequisite to suit." *Id.* at 524; *see also Ross*, 136 S. Ct. at 1857–58. Permitting a prisoner to "cure" his pre-filing failure to exhaust through a post-filing amended pleading, as the Third and Ninth Circuits do, effectively restores the discretion that Congress expressly revoked.

As the Eleventh Circuit noted, "[t]he legislative history of the PLRA shows that Congress was concerned with the number of prisoner cases being

*filed*, and its intent behind the legislation was to reduce the number of cases *filed*, which is why Congress made confinement status at the time of *filing* the decisive factor." *Harris*, 216 F.3d at 977–78 (collecting statements from legislators) (emphasis in original). Committee reports also reflect Congress's intent to bar prisoner suits from being "filed" or "initiated" on unexhausted claims. As the House Committee Report explained, the proposed act "addresses the problem of frivolous lawsuits in three significant ways," and first among them "it requires that all administrative remedies be exhausted prior to a prisoner initiating a civil rights action in court." H.R. Rep. No. 104-214, at 7 (1995); *see also id.* at 22 ("This section requires prisoners to exhaust all available administrative remedies before filing a civil rights action in a federal court."); H.R. Rep. No. 104-378, at 166 (1995) (conference report).

Congress's purpose, made clear in its text, was to employ a more rigorous exhaustion requirement to curb frivolous prisoner *filings*. Congress did not intend to achieve this goal by requiring dismissal of only *some* suits on unexhausted claims (those filed by prisoners who remained incarcerated for the duration of suit), while allowing other suits on unexhausted claims to proceed to the merits (those filed by prisoners who happened to be released before the exhaustion defense can be addressed).

The Third Circuit's change-in-status exception to Section 1997e(a), which allows post-filing events to control what Congress plainly intended to be a pre-filing requirement, defeats the PLRA's purpose.

### B. This Court's precedent reinforces the necessity of proper exhaustion before a prisoner files a federal lawsuit.

Not only does the Third Circuit's decision ignore the PLRA's plain language, it is contrary to this Court's consistent pronouncements that there are no exceptions to the requirement that a prisoner exhaust remedies before filing a federal lawsuit. *E.g.*, *Ross*, 136 S. Ct. at 1856; *Woodford*, 548 U.S. at 84–85, 93–95; *Porter*, 534 U.S. at 524; *Booth v. Churner*, 532 U.S. 731, 739 (2001).

As this Court has explained, the PLRA's "invigorated" exhaustion provision was a "centerpiece" of Congress's effort to reform and reduce prisoner litigation. *Woodford*, 548 U.S. at 84. The purpose of mandatory exhaustion is two-fold: Exhaustion protects the authority of correctional agencies to address grievances about the programs they administer before being "haled into federal court," and it promotes efficiency by encouraging resolution of prisoner complaints at the agency level. *Id.* at 89–90. "The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance." *Id.* at 95.

That is why "exhaustion is a prerequisite to suit," *Porter*, 534 U.S. at 524, as opposed to a mere preference that can be overcome after suit is filed. As this Court has explained, "if the party never pursues all available avenues of administrative review, the person will never be able to sue in federal court." *Woodford*, 548 U.S. at 100. The PLRA's "mandatory language means a court may not excuse a failure to exhaust" even for "special circumstances." *Ross*, 136

S. Ct. at 1856. In fact, this Court has "reject[ed] every attempt to deviate . . . from its textual mandate." *Id.* at 1857 (citing cases).

The Third Circuit's decision contravenes this Court's precedent by adopting a change-in-status exception that allows post-filing events (the prisoner's release) to cure an initially defective prisoner suit. The Third Circuit's rule improperly "excuses" a prisoner's failure to exhaust remedies.

### C. *Jones v. Bock*, 549 U.S. 199 (2007), does not alter the PLRA's exhaustion requirement.

The Third and Ninth Circuits relied on *Jones v. Bock*, 549 U.S. 199 (2007), when departing from the decisions of other circuits. In the view of these two Courts of Appeals, *Jones* signaled that the prisoner's status when the "operative" amended pleading is filed—and not his status when the original complaint is filed—controls the Section 1997e(a) exhaustion analysis. That is not a proper reading of *Jones*.

In *Jones*, this Court held that federal courts could not adopt special screening procedures that placed heightened pleading requirements on *pro se* prisoner suits. *Id.* at 203. The Court reasoned that "normal pleading rules" governed prisoner pleadings and, under those normal rules, the prisoner need only satisfy Rule 8's requirement of a "short and plain statement of the claim" in his complaint. *Id.* at 211–17. The prisoner was not required to affirmatively plead that he had exhausted administrative remedies; the burden of raising an exhaustion defense remained on the defendant. *Id.* The Court also held

that prisoners need not identify defendants by name during the grievance process in order to later name them as a defendant in a federal lawsuit. *Id.* at 217–19. Finally, the Court held that, when a prisoner has failed to exhaust some but not all claims, the court should—again, following normal rules for a complaint that raises "good and bad claims"—dismiss the unexhausted claims and retain the rest. *Id.* at 219–24.

*Jones* rejected court-made pleading rules for *pro se* prisoners that were more "onerous" than the normal pleading rules. That result, as in other PLRA cases, was dictated by the text and purpose of the PLRA. As *Jones* explained, "the PLRA's screening requirement does not—explicitly or implicitly—justify deviating from the usual procedural practice *beyond the departures specified by the PLRA itself*." *Id.* at 214 (emphasis added). Of course, the PLRA requires pre-suit exhaustion, and *Jones* did not declare that normal pleading rules may be invoked to circumvent Congress's mandate. To the contrary, *Jones*—which was decided in the term immediately after *Woodford* established the need for proper exhaustion—reiterated the consensus on and importance of pre-suit exhaustion: "All agree that no unexhausted claim may be considered." *Id.* at 219–20; *see also id.* at 211 ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.").

*Jones* addresses what is required of prisoners once they arrive in a federal court; it says nothing about what the PLRA requires of prisoners before they make it to court. The Third and Ninth Circuits

are mistaken in their view that *Jones* supports treating an amended or supplemental complaint as a "cure" for a prisoner's failure to exhaust administrative remedies before filing suit. App. 22-38; *Jackson*, 870 F.3d at 934. As both *Cox* and *Harris* rightly recognized, Rule 15's permissive pleading standard does not overrule the PLRA's strict exhaustion requirement. *Cox*, 332 F.3d at 428; *Harris*, 216 F.3d at 982–83. If there were a conflict between Rule 15 and the PLRA, "the rule would have to yield to the later-enacted statute to the extent of the conflict." *Harris*, 216 F.3d at 982. Rule 15 "does not and cannot overrule a substantive requirement or restriction contained in a statute (especially a subsequently enacted one)." *Id*. at 983.

## III. The Third Circuit's decision will permit the type of abusive litigation that the PLRA is designed to prohibit.

The Third and Ninth Circuits' construction of the PLRA has real consequences for federal, state, and local corrections officials and for federal district courts, which bear the burden of screening, managing, and adjudicating the nearly 30,000 civil rights and conditions-of-confinement suits that prisoners file every year.[5]

First, in the 12 states within the Third and Ninth Circuits, a significant subset of prisoners may

[5] *See* Administrative Office of the United States Courts, Federal Judicial Caseload Statistics, U.S. District Courts – Civil Cases Filed, by Jurisdiction and Nature of Suit (Table C-2) (Mar. 31, 2019), avail. at https://www.uscourts.gov/report-names/federal-judicial-caseload-statistics (last accessed Jan. 3, 2020).

now avoid presenting their grievances to corrections officers and medical staff before suing them. This deprives prison officials of the chance to address—and possibly resolve—a prisoner's complaint without the need for a federal lawsuit. It also deprives district courts of an administrative record that could aid in its resolution of the federal suit. The result is prolonged prisoner lawsuits that should have met an "administrative death" early in the proceeding. *See Cox*, 332 F.3d at 427. Garrett's case proves the point. Garrett has now pursued unexhausted claims for over five years, and the federal courts have not yet reached the merits of those claims.

Second, the Third Circuit's decision invites prisoners to engage in the type of "deliberate strategy" aimed at defeating the exhaustion requirement that this Court rejected in *Woodford*. A prisoner confronting dismissal for failure to exhaust administrative remedies before filing suit may delay until he can defeat the defense by amending his complaint post-release. Delays are common in prisoner litigation, resulting from frivolous and excessive filings (which district courts carefully vet in *pro se* cases) or—as in Garrett's case—from a prisoner's stay requests (which may be leniently granted in *pro se* cases). This defeat-by-delay tactic will impact prison officials and strain prison resources at all levels, but its detriments may fall hardest on local jails and other short-term detention facilities, where stays are shorter than in state and federal prisons. According to the most recent report by the U.S. Department of Justice's Bureau of Justice Statistics, county and city jails hold over 745,000

inmates and the average jail time for these inmates is 26 days.[6]

Third, the change-in-status exception creates practical concerns for judicial administration in the district courts. District courts in some circuits must now attempt to determine if a *pro se* prisoner's "amended" complaint, which might remain subject to the pre-suit exhaustion requirement, should be construed as a "supplemental" complaint that can avoid the exhaustion requirement. *See Jackson*, 870 F.3d at 934; *May*, 929 F.3d at 1230–34. District courts must also balance prisoners' requests for stays pending release with the possibility of depriving defendants of a meritorious exhaustion defense. And the courts will have to police prisoners' requests to amend or supplement their pleadings for "gamesmanship," which the Ninth Circuit has recognized as a reason for denying a post-release motion to amend a prisoner complaint—an exception to the exception. *See Bosworth v. United States*, 2018 WL 5880734, at **4-5 (C.D. Cal. Sept. 4, 2018), *adopted by* 2019 WL 1469480 (C.D. Cal. Apr. 2, 2019) (denying former prisoner's post-release motion to amend because it was an attempt to "gam[e] the courts"). Decisions on these procedural questions are not only time consuming for the district court, they are apt to generate appeals from magistrate judge recommendations to district judges and from district courts to appellate courts.

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[6] *See* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Jail Inmates in 2017, at pp. 1, 7-8 (April 2019), avail. at https://www.bjs.gov/content/pub/pdf/ji17.pdf (last accessed Jan. 3, 2020).

These procedural considerations will delay and complicate the very cases that Congress intended for federal courts to dispense with quickly, so as not to divert resources from the meritorious cases on their dockets. In fact, the impact of the Third Circuit's decision is already being felt in the lower courts within its jurisdiction. *See Dixon v. Pa. Dep't of Corr.*, 2019 WL 5420091, at *3 (M.D. Pa. Sept. 24, 2019) (holding that *Garrett* mandated the denial of summary judgment in favor of the defendants because the plaintiff "was no longer a prisoner when she filed her amended complaint, [so] administrative exhaustion is not an appropriate basis for the dismissal of [her] claims").

This Court should grant certiorari to ensure that the Third Circuit's decision does not undermine the PLRA's mandatory exhaustion requirement and foster the type of procedural wrangling in prisoner suits that the PLRA intended to prevent.

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## CONCLUSION

For the foregoing reasons, Petitioners Dr. Khatri, Wexford Health, Dr. Naji, Ms. Cutshall, P.A. Nagel, and P.A. Casey respectfully request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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