No. 19-867

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, RESPONDENT

ON A PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR *AMICI CURIAE* TEXAS ASSOCIATION OF COUNTIES, NATIONAL SHERIFFS' ASSOCIATION, AND WESTERN STATES SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

MISC.

INTEREST OF *AMICI CURIAE*

The Texas Association of Counties ("TAC"), a Texas non-profit corporation, was formed in 1969 "to improve and promote the value of county government statewide." About the Texas Association of Counties (TAC), *available at* https://www.county.org/About-TAC (last accessed Jan. 17, 2020). All 254 Texan counties are members of the TAC, and each county office is represented on the TAC's Board of Directors. *Id.* This "cooperative effort" unites state leaders, including law-enforcement and correctional officials, helping them to understand the operation and value of county government in order to serve Texans more effectively on the municipal scale. *Id.*

The National Sheriffs' Association ("NSA"), a professional association headquartered in Alexandria, Virginia, was chartered in 1940 to represent "thousands of sheriffs, deputies and other law enforcement, public safety professionals, and concerned citizens nationwide." About NSA, *available at* https://www.sheriffs.org/about-nsa (last accessed Jan. 24, 2020). The NSA provides sheriffs and their affiliates with law enforcement education, training, and informational resources. *Id.* The NSA also "serves as the center of a vast network of law enforcement information, filling requests for information daily and enabling criminal justice professionals, including police officers, sheriffs, and deputies, to locate the information and programs they need." *Id.*

The Western States Sheriffs' Association ("WSSA") was formed in 1993 "to allow Sheriffs to assist each other in fulfilling their duties and

obligations related to law enforcement in their respective counties." About the WSSA, *available at* https://www.westernsheriffs.org/about/ (last accessed Jan. 24, 2020). The WSSA is comprised of sheriffs and their affiliates from 17 Western states, including Washington, Wyoming, Oregon, Utah, Idaho, California, Arizona, Nevada, Nebraska, New Mexico, North Dakota, South Dakota, Colorado, Kansas, Montana, Texas, and Oklahoma. *Id.* This extensive network allows Western Sheriffs to develop and maintain relationships with federal and state agencies to provide effective law-enforcement services in the "wide open spaces and abundant public land" characterizing Western America. *Id.*

Amici have a compelling interest in this case because its outcome may have significant policy consequences for correctional institutions, including prisons and short-term detention facilities (like county and municipal jails). By weakening the mandatory administrative-exhaustion requirement clearly prescribed by the Prison Litigation Reform Act ("PLRA"), the U.S. Court of Appeals for the Third Circuit has risked depriving correctional officials at all levels of the chance to address (and possibly resolve) prisoner complaints without devoting the necessary time and expense a federal lawsuit entails. In addition to increasing liability and financial exposure for already-cash-strapped counties and municipalities, the Third Circuit's decision effectively strips correctional institutions of their ability to implement internal

grievance procedures, compromising the ability to run their institutions effectively.[1]

SUMMARY OF THE ARGUMENT

The Court should grant the Petition for Writ of Certiorari ("Petition") filed by 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. ("Petitioners"). As explained more fully therein, the Circuit Courts of Appeals are divided over how the PLRA's mandatory administrative-exhaustion requirement should be interpreted and applied.[2] And the Third Circuit's decision expressly contradicts the PLRA's plain language and decades of this Court's consistent precedent.[3] These reasons alone warrant this Court's review. *See* Sup. Ct. R. 10(a), (c).

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[1] *Amici* provided notice and obtained consent from the parties to file this *amici curiae* brief more than 10 days before its filing. No party or its counsel authored this brief in whole or in part. No party, counsel, or any other person except the *amici* and its counsel contributed to the cost of preparing or submitting this brief.

[2] *Compare 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), *with Garrett v. Wexford Health*, 938 F.3d 69, 96 (3d Cir. 2019); *Jackson v. Fong*, 870 F.3d 928, 933–34 (9th Cir. 2017).

[3] The PLRA 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); *accord, e.g., Ross v.*

But the practical effect of the Third Circuit's decision (discussed briefly in the Petition's Section III) provides an additional reason that certiorari should be granted. Most important to *amici*, failure to address the Third Circuit's decision risks depriving correctional officials at all levels—federal, state, and local—of the opportunity to resolve prisoner grievances internally. Allowing prisoners to circumvent the exhaustion requirement by delaying litigation until they are released effectively curtails the utility of internal grievance procedures that have long served to adjudicate prisoner disputes without judicial intervention. Interfering with this crucial aspect of prison management will increase liability and financial exposure for both long- and short-term detention facilities by requiring them to defend federal lawsuits that should have been dismissed at the outset for the inmate's failure to exhaust his or her administrative remedies. These deleterious effects will likely be felt most heavily by short-term detention facilities, where the rate of prisoner turnover greatly exceeds the number of long-term prisoners released from larger state and federal institutions annually.

The burden of added expense does not stop with the correctional institutions. The Third Circuit's decision also risks overburdening the district courts with frivolous prisoner litigation and requiring the district courts to waste limited judicial resources construing successive prisoner complaints.

Blake, 136 S. Ct. 1850, 1856–58 (2016); *Woodford v. Ngo*, 548 U.S. 81, 88 (2006); *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

This Court should grant the Petition to consider these devastating policy implications, which the PLRA's mandatory administrative-exhaustion requirement was expressly designed to prevent. Given the depth of the circuit split, Supreme Court intervention is the only way to prevent the misapplication of the PLRA's mandatory exhaustion requirement and save correctional facilities and district courts alike the untold cost of adjudicating lawsuits that are (or should be declared) administratively dead.

ARGUMENT

I. This Court should grant certiorari to consider the devastating consequences of the Third Circuit's decision on prisons and short-term detention facilities.

As a gatekeeping mechanism, the PLRA's mandatory administrative-exhaustion requirement conserves many scant resources for correctional officials. "In some cases, this [requirement] may obviate the need for a suit; in others, it would filter out frivolous claims or clarify the record for those cases that proceed to federal court." *See Cano v. Taylor*, 739 F.3d 1214, 1219 (9th Cir. 2014). On the other hand, by ignoring the PLRA's mandatory administrative-exhaustion requirement, the Third Circuit has compromised Pennsylvania's well-oiled correctional grievance machine, threatening to waste the time and attention of leadership and other correctional personnel and the money that must now be spent litigating claims that should have been administratively dismissed. The Third and Ninth Circuits have turned the PLRA on its head by allowing prisoners to bypass the PLRA's

mandatory administrative-exhaustion requirement by simply delaying litigation until their release. *See Garrett*, 938 F.3d at 96; *Jackson*, 870 F.3d at 933–34.

The Third Circuit's decision will negatively impact correctional institutions, including short-term detention facilities, for a number of reasons. For example, it is more cost-effective for facilities to resolve grievances internally, rather than defending frivolous lawsuits on the merits. Also, the Third Circuit's decision effectively prevents correctional officials from establishing and enforcing internal policies and procedures by giving prisoners a way to avoid the PLRA's mandatory administrative-exhaustion requirement. And, because short-term detention facilities experience higher rates of turnover than prisons, these facilities face an increased possibility that prisoners will delay litigation until their release to avoid the PLRA's mandatory administrative-exhaustion requirement.

Increased cost to correctional facilities is perhaps the most devastating potential consequence of the Third Circuit's decision. This case is the paradigmatic example. Respondent Kareem Garrett ("Respondent") admitted in his initial complaint—Document 1 filed in the district court in early 2014—that he did not complete the Pennsylvania Department of Corrections' ("DOC") internal grievance procedure before filing this lawsuit. *See Garrett v. Wexford Health, et al.*, No. 3:14-cv-00031-KRG-CRE (Doc. 1 at 1). Petitioner Dr. Khatri moved to dismiss the case shortly thereafter, raising the issue of Respondent's failure to exhaust his administrative remedies. (*See* Docs. 98, 99). Had the district court properly applied the PLRA's mandatory

administrative-exhaustion requirement, Respondent's case would have met its "administrative death" (*see Cox*, 332 F.3d at 427) approximately five years before state-funded agencies were forced to litigate this case to the Third Circuit, and *more* than five years before the Petition was filed. Without seeing the bills of cost for legal services or estimating the accumulation of attorneys' fees over the course of those five years, the Court may only speculate about the enormous tangible cost of the district court's failure to timely dismiss this lawsuit. Sadly, this unnecessary expense falls on taxpayer shoulders and will likely be drawn from the very limited funds available to correctional facilities in Pennsylvania.[4]

The Third Circuit's decision also interferes with prison management by stripping correctional officials of their ability to observe well-settled internal grievance procedures. Again, this case underscores the point. Like many states, Pennsylvania DOC has a three-step process to address inmate grievances that has been effective since at least 2004. *See Spruill v. Gillis*, 372

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[4] *See* Pennsylvania Plans to Close Two Prisons This Year, *Philadelphia Magazine*, *available at* https://www.phillymag.com/city/2017/01/06/two-prisons-to-close/ (last accessed Jan. 24, 2020) ("'We have implemented a variety of cost-savings initiatives over the past several years, yet we are again in the position where the Department of Corrections must make significant reductions because of the dire budget forecast,' Department of Corrections Secretary John Wetzel said."); *see also* Statement from Governor Tom Wolf, *available at* https://www.governor.pa.gov/newsroom/governor-wolf-statement-on-department-of-corrections-cost-saving-measures/ (last accessed Jan. 24, 2020).

F.3d 218, 232 (3d Cir. 2004). Respondent wholly bypassed this layered mechanism, and the Third Circuit sanctioned his failure to initiate and complete the mandatory inmate-grievance process. Now, inmates within the Third Circuit's geographic footprint—spanning three states and approximately 71,000 inmates—have no incentive to observe the mandatory grievance procedure as long as their release from custody is in sight.[5] *See Cox*, 332 F.3d at 427 ("[T]o excuse [a] plaintiff's duty to exhaust in every instance would encourage all prisoners nearing completion of their sentences to eschew the grievance process in favor of the court."). This harsh reality weakens inmate respect for institutional rules and the ability of correctional officials to oversee and effectively manage the inmate population.

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[5] *See* Pennsylvania Department of Corrections, *Monthly Population Report as of December 21, 2019*, *available at* https://www.cor.pa.gov/About%20Us/Statistics/Documents/Current%20Monthly%20Population.pdf (last accessed Jan. 24, 2020); Delaware Department of Corrections, *Daily Population Summary*, *available at* https://doc.delaware.gov/ (last accessed Jan. 24, 2020); New Jersey Department of Corrections, *Total Inmates in New Jersey State Correctional Institutions and Satellite Units*, *available at* https://www.state.nj.us/corrections/pdf/offender_statistics/2019/Total%20Residents%20-%20Offender%20Characteristics%20Report.pdf (last accessed Jan. 24, 2020). According to these reports, Pennsylvania has a total inmate population of 47,590; Delaware has a total inmate population of 4,150; and New Jersey has a total inmate population of 19, 212.

Local jails and other short-term detention facilities will probably feel these effects most potently, as short-term detainees will be most tempted to bypass the PLRA's mandatory administrative-exhaustion requirement in favor of the courts. The Third Circuit's erroneous decision creates the likelihood that short-term detention facilities will experience a crippling uptick in litigation following custodial release. As noted in the Petition at 24–25, the average period of incarceration for short-term detainees is 26 days. Assume, for instance, that an incident occurs within those 26 days, and the aggrieved inmate wishes to file a lawsuit or otherwise complain. Since no statute of limitations will run within that 26-day window, there is now no reason for the inmate to use his or her own time and capital litigating the claim internally, simply to turn around and do it again in the court system once he or she is released. The inmate's easiest option is to wait it out and bypass the internal grievance procedure entirely. Again, allowing this option is more costly to the counties and municipalities that will then be forced to litigate the case on the merits. And it severely hamstrings the ability of sheriffs, their affiliates, and other local jailers to efficiently manage their own facilities.

What's more, allowing inmates in short-term detention facilities to exercise this defeat-by-delay tactic may make it more difficult for correctional officials to address meritorious grievances. Consider, for example, an inmate alleging that his commissary items were stolen or tossed. These allegations could be verified by video if timely reported, considering that many jails recycle surveillance footage after a couple of weeks. If the inmate chooses to avoid the PLRA's

mandatory-administrative exhaustion requirement by waiting until his release to report the theft, the evidence substantiating his allegations will already have been erased. Or consider the case of an alleged inmate-on-inmate sexual assault. If timely reported, officials may collect relevant evidence from the victim's cell before the evidence may be destroyed. If not timely reported, that evidence would be long gone. Thus, bypassing the PLRA's mandatory administrative-exhaustion requirement and an established grievance system could seriously jeopardize the safety and security of inmates and staff and compromise officials' ability to administratively resolve claims on their merits.

The deep circuit split on this issue, along with the Third Circuit's wholesale disregard for this Court's clear instruction, plainly counsel the grant of certiorari in this case. *See* Sup. Ct. R. 10(a), (c). But that's not all: The ruinous consequences of the Third Circuit's decision on correctional facilities nationwide also counsel the exercise of this Court's supervisory power. *Id.* (noting that certiorari may be granted where a lower court "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power"). The Petition should be granted.

II. Likewise, this Court should grant certiorari to consider the equally devastating consequences of the Third Circuit's decision on the federal district courts.

Unfortunately, the negative impact of the Third Circuit's decision is not limited to correctional facilities

alone. Applied correctly, the PLRA's mandatory administrative-exhaustion requirement greatly reduces the amount of federal lawsuits filed by prisoners each year. *See Woodford*, 548 U.S. at 88 (noting that the PLRA's mandatory administrative-exhaustion requirement operates "as a precondition to bringing suit in federal court"). So the federal district courts will face equal—if not greater—consequences of the Third Circuit's rebellion against Congress's plain intent. The Third Circuit's total disregard for the PLRA's mandatory administrative-exhaustion requirement creates multiple separate and independent consequences that may cripple the district courts in years to come, if left unchecked. For example, the district courts may experience a massive influx of prisoner lawsuits being initiated. And the district courts may be required to reserve judgment on the issue of administrative exhaustion, pending a prisoner's release from custody. The district courts will therefore pay for the Third Circuit's error with their most precious and limited commodity—time.

The Third Circuit's erroneous decision wholly frustrates the primary purpose of the PLRA, which is to curb the number of prisoner cases being filed. *See Cano*, 739 F.3d at 1219 ("[The exhaustion] requirement is in keeping with the main purpose of the PLRA, which was to address the overwhelming number of suits brought by prisoners."); *Harris v. Garner*, 216 F.3d 970, 977–78 (11th Cir. 2000) ("The 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."). In its early years, the PLRA struck the necessary balance between reducing the number of frivolous filings and preserving the prisoners' capacity to file meritorious claims. 141 Cong. Rec. 27042, 27044 (1995) (comments of Senators Hatch and Thurmond). As of 2006, "the number of civil rights suits filed by prisoners in federal court dropped from 41,679 in 1995 to 25,504 in 2000, and the rate of prisoner filing dropped even more dramatically during that period, from 37 prisoner suits per 1,000 inmates to 19 suits per 1,000 inmates." *Woodford*, 548 U.S. at 115–16 (Stevens, J., dissenting). Thus, proper application of the mandatory administrative-exhaustion requirement will not act as an impediment to the filing of meritorious claims; it will merely prevent the massive influx of frivolous prisoner filings that the PLRA was specifically enacted to address. *See id.* There is no reason at this point to frustrate this delicate balance by allowing prisoners to pursue unexhausted claims simply because they were released from custody during the pendency of the lawsuit.

The Third Circuit's erroneous decision also limits a district court's ability to manage its own crowded docket. The most powerful way to illustrate the PLRA's mandatory administrative-exhaustion requirement as a time-saving mechanism is to examine the truncated timeline of a case resolved on a prisoner's failure to exhaust, rather than one that is fully litigated on the merits. For starters, some Circuits vest district courts with the authority to *sua sponte* dismiss a prisoner's complaint for failure to exhaust administrative remedies "if the complaint itself makes clear that the prisoner failed to exhaust." *E.g.*, *Carbe v. Lappin*, 492 F.3d 325, 327–28 (5th Cir. 2007); *accord*

United States v. Del-Toro-Alejandre, 489 F.3d 721, 723 (5th Cir. 2007); *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998).[6] Under these circumstances, the district courts may dismiss unexhausted claims before the named defendants are even served, and the PLRA's purpose as a time-saving and screening mechanism is fully recognized. *See* H.R. Rep. No. 104-214, at 7 (1995) (noting that the PLRA "addresses the problem of frivolous lawsuits" by "requir[ing] that all administrative remedies be exhausted prior to a prisoner initiating a civil rights action in court").

Even if the district court does not *sua sponte* dismiss unexhausted claims, it still takes far longer to litigate a case on the merits than it would to adjudicate the issue of failing to exhaust administrative remedies. Again, this case is paradigmatic. As noted *infra*, this case should have been dismissed approximately five years ago because it was clear on the face of Respondent's complaint that he had not exhausted his administrative remedies. Instead, the district court did not strictly observe the PLRA's mandatory administrative-exhaustion requirement, this case is still ongoing, and the parties *have yet* to litigate the merits of Respondent's operative complaint. There is no predicting how long it will take to resolve Respondent's claims on the merits on remand. Conversely, cases may

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[6] *But see Snider v. Melindez*, 199 F.3d 108, 1212 (2d Cir. 1999); *accord Henry v. Med. Dep't at SCI-Dallas*, 153 F. Supp. 2d 553, 555 (M.D. Pa. 2001) (citing *Snider* for the proposition that "a federal court may not invoke [the PLRA] to dismiss a prisoner's complaint for failure to exhaust administrative remedies prior to service of process.").

be resolved in far less time when the PLRA's mandatory administrative-exhaustion requirement is correctly observed and applied. *E.g.*, *Freedland v. Fanelli*, No. 2:18-cv-2250, 2019 WL 2448810, at *4–6 (E.D. Pa. June 10, 2019) (dismissing a prisoner's claims for failure to exhaust administrative remedies approximately one year after the case was initiated); *Diehl v. Burlew*, No. 06-1305, 2007 WL 1217975, at *8 (D.N.J. Apr. 23, 2007) (same). And this general rule translates to jurisdictions outside the Third Circuit. *E.g.*, *Barrett v. Cate*, No. 1:09-cv-01741, at *28 (E.D. Cal. Dec. 22, 2011) (recommending that a prisoner's claims be dismissed for failure to exhaust administrative remedies appropriately two years after the case was initiated); *Toomer v. Cty. of Nassau*, No. 07-01495, 2009 WL 1269946, at *34–35 (E.D.N.Y. May 5, 2009) (dismissing a prisoner's claims for failure to exhaust administrative remedies approximately two years after the case was initiated); *Richardson v. Darden*, No. 07-6594, 2009 WL 414045, at *6–7 (S.D.N.Y. Feb. 16, 2009) (same).

Requiring a district court to reserve judgment on the issue of administrative exhaustion risks prolonging litigation, particularly where the plaintiff-inmate's release from custody is impending. It also impairs the district court's ability to dismiss cases that lack a fully developed administrative record. Under the Third Circuit's approach, prisoners have incentive to delay litigation until their release in an effort to keep their unexhausted claims viable. This is enormously burdensome to the district courts and cannot be justified under the plain text of the PLRA, which prohibits any claim from being "brought . . . until such administrative remedies as are available are

exhausted." 42 U.S.C. § 1997e(a). The Petition should be granted.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari to fully consider the policy implications of the Third Circuit's erroneous decision. Both state and local correctional facilities and the federal district courts are now facing possibilities that the PLRA was designed to prevent—namely, a massive influx of frivolous prisoner litigation, and the unnecessary accumulation of costs all around.

Respectfully submitted,

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