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, ET AL.,
Respondents.

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

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 corporate disclosure statement included in the petition for writ of certiorari remains accurate.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

The Third Circuit's decision invokes Rule 15's liberal amendment policy to override the Prison Litigation Reform Act's (PLRA's) unambiguous, pre-suit exhaustion requirement. 42 U.S.C. § 1997e(a) ("No action shall be brought . . . by a prisoner . . . until such administrative remedies as are available are exhausted."). The decision widens a circuit split on the question of whether prisoners who file suit on unexhausted claims may "cure" their failure to exhaust by amending their complaint after being released. Resolving the split and restoring the efficacy of Congress's pre-suit exhaustion mandate is critically important to state and federal corrections officials, prison medical providers, and local jails in the twelve states (in the Third and Ninth Circuits) that are now under a regime that permits released prisoners to pursue unexhausted claims that would be dismissed in other states and other circuits.

Respondent Kareem Garrett does not deny the importance of the question presented, and Garrett's attempt to diminish the disagreement among lower courts is unavailing. And contrary to his claims of waiver, Petitioners preserved the question at every stage of this suit and the Third Circuit resolved the question on the merits after specifically identifying it as an important issue that required supplemental briefing by appointed counsel for Garrett. The question presented is fully preserved, implicates a key aspect of prison administration, and should be answered by this Court.

ARGUMENT

I. This Case Presents an Ideal Vehicle to Resolve Lower Court Confusion Over the PLRA's Mandatory Exhaustion Provision.

Garrett does not contest the importance of the question presented to the dozen state correctional systems, not to mention the federal prisons and innumerable local jails and detention facilities, within the Third and Ninth Circuits. The corrections officials, medical providers, and sheriffs in those 12 states now confront prisoner cases that should be dismissed—and would be dismissed in at least 10 other states in the Fifth, Sixth, and Eleventh Circuits—but which will continue on the theory that prisoners may "cure" their failure to exhaust administrative remedies by filing an amended complaint upon release. *See* Pet. 23-26; Pa. Dep't of Corr. ("PDOC") Br. 6-8, 17-20, Sheriffs' Amicus Br. 10-15. The Third Circuit's rule discourages use of internal prison grievance systems and imposes additional litigation costs on financially strained prisons and jails. *See* PDOC Br. 17-20; Sheriffs' Amicus Br. 10-15.

This case is an ideal vehicle for resolving the disagreement in the lower courts for several reasons. First, there is no dispute over the essential facts: Garrett was a prisoner when he filed suit and he failed to fully exhaust his administrative remedies before filing suit; Garrett was released from custody and then filed amended complaints; and the Third Circuit held that Garrett's status at the time of his "operative" amended complaint—not his status when he filed suit—is determinative for purposes of the

PLRA's exhaustion requirement. *Compare* Pet. 3-8 *with* Opp. 8-13. Second, unlike the vast majority of prisoner cases in which this issue will arise, Garrett was represented by counsel on appeal, ensuring that the legal issues were fully presented and analyzed by the Third Circuit in a published opinion. It is difficult to imagine a case that could present this PLRA-exhaustion issue more cleanly.

Petitioners preserved the issue and their legal position from the outset of this case. As a result, the district court addressed the issue in multiple orders, App. 51-68 & 69-84; the Third Circuit identified it as an important issue requiring supplemental briefing by appointed counsel for Garrett, Pet. 7; the parties filed supplemental briefs addressing the issue, *id.*, which was discussed at oral argument; and the Third Circuit decided it on the merits, App. 3-38. The Third Circuit's opinion analyzes the PLRA's text and Rule 15's liberal amendment policy, distinguishes its own precedent (that the district court viewed as favorable to Petitioners), disagrees with a contrary decision by the Eleventh Circuit and follows Ninth Circuit precedent instead, recognizes and rejects Petitioners' arguments, and answers the legal question that Petitioners now present to this Court. App. 15-38. The opinion makes no mention of waivers or concessions by Petitioners because there were none.

Having obtained a favorable decision on the merits in the Third Circuit with the assistance of talented counsel appointed to aid the court of appeals in resolving this unsettled question under the PLRA, Garrett now opposes certiorari on the theory that Petitioners waived or conceded their position on the

question presented. Opp. 3-4, 27-30. Not only is Garrett's suggestion of waiver refuted by the course of proceedings that produced the merits decision, it rests on cherry-picked record citations and his own interpretation of Petitioners' lower court briefing, which was not shared by the Third Circuit.

Garrett first plucks a single response from a 40-minute oral argument to argue that "counsel for five of the six Petitioners" supposedly conceded the central issue in this case. Opp. 28. That is not an accurate representation of the record. (In any event, Garrett agrees that the lead petitioner, Dr. Shella Khatri, preserved the issue). In response to a judge's question, counsel for five Petitioners acknowledged that "under the appropriate circumstances" an amendment might be allowed to "remedy a problem like failure to exhaust." Opp. 28. Immediately after that, counsel preserved his clients' position by responding to a case-specific question: "Q. What about in these circumstances? A. "In these circumstances, I think not . . . ." Oral Arg. at 26:52-26:56. Had this exchange amounted to a concession, the Third Circuit would have said so. But the Third Circuit did not deem anything to have been waived or conceded.

Next, Garrett argues that Petitioners "failed to respond to [his] arguments below regarding the normal operation of Rule 15." Opp. 29. Again, this claim is refuted by the Third Circuit's opinion, which acknowledges Petitioners' argument that the PLRA's plain language controls this case and prohibits reliance on Rule 15, declines Petitioners' call to adopt the Eleventh Circuit's position that Rule 15 cannot alter the PLRA's exhaustion requirement, and rejects

Petitioners' argument that the Ninth Circuit incorrectly applied Rule 15 to override the PLRA's exhaustion requirement. App. 16 n.17, 33-38. Even if Garrett missed these arguments, the Third Circuit clearly understood (and rejected) them.[1]

Finally, Garrett suggests that this is a poor vehicle for deciding the question presented because dismissal "would have made no practical difference in this case, " as Garrett could have filed a new civil rights suit. Opp. 29-30. This argument assumes that a *released* prisoner will refile a potentially frivolous or meritless pro se lawsuit that has been dismissed by a federal court. There is no basis for indulging such an assumption. Congress premised its PLRA reforms on the opposite view—that dismissals would deter pro se litigation that had become "a recreational activity for state prisoners . . . ." *Carson v. Johnson*, 112 F.3d 818, 822-23 (5th Cir. 1997); *see also Cox v. Mayer*, 332 F.3d 422, 426-27 (6th Cir. 2003) (explaining that dismissals for failure to exhaust discourage other prisoners from pursuing frivolous claims). If such dismissals are presumed to deter incarcerated prisoners from pursuing recreational litigation, then they are even more likely to deter released prisoners who have activities other than pro se litigation to occupy their time.

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[1] Garrett chastises the Pennsylvania Attorney General for filing a response brief providing the PDOC's position on the PLRA exhaustion issue presented by the petition. Opp. 29. The PDOC response brief is not "gamesmanship," as Garrett claims; it is a proper filing by a respondent that explains why the Third Circuit's decision is wrong and how it will adversely impact PDOC in pending and future cases. *See* Sup. Ct. R. 12.6.

Had this suit been dismissed for failure to exhaust, as Congress intended and as other circuits require, the litigation likely would have ended long ago. But the Third Circuit allowed Garrett to "cure" the exhaustion defect. Petitioners' challenge to this disruptive and atextual rule is fully preserved, and this Court should grant certiorari to clarify that a prisoner cannot cure his failure to obey the PLRA's exhaustion mandate by filing an amended complaint after his release.

II. The Third Circuit's Interpretation of the PLRA is Incorrect.

Garret argues that the Third Circuit's decision to permit unexhausted claims to proceed was faithful to this Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007). Under Garrett's expansive reading of *Jones*, this Court instructed lower courts to apply normal pleading rules—including, in Garrett's view, "Rule 15's policy of liberal pleading amendment"—to permit a prisoner to "cure" an admitted failure to obey the PLRA's pre-suit exhaustion requirement by filing an amended complaint if he happens to be released while his suit is pending. Opp. 19-20. That is, *Jones* requires courts to ignore the prisoner's status at the time of filing and, instead, adjudicate an exhaustion defense based on a prisoner's status whenever he files his "operative" amended complaint—even if that is almost two years after the suit was filed, as in Garret's case. *See* Opp. 8-9, 16-22.

Garrett's reading of *Jones* contravenes the PLRA's text, which focuses on the prisoner's status when he brings suit, and extends *Jones* far beyond its holding. *See* Pet. 16-23; PDOC Br. at 8-15.

First, *Jones* did not involve the specific circumstance presented here—a prisoner who fails to obey the PLRA's pre-suit exhaustion requirement but argues that his release cures that failure. Nothing in *Jones* suggests that a prisoner's obligation to exhaust his claims depends on his status *after* suit is filed. To the contrary, *Jones* stressed the mandatory nature of the PLRA's pre-suit exhaustion requirement and noted Congress's bar on reaching the merits of unexhausted claims. 549 U.S. at 211 ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court."); *id.* at 219–20 ("All agree that no unexhausted claim may be considered.").

Second, Garrett's absolutist view of *Jones* as having established that the "PLRA's exhaustion provision does not displace the normal pleading practice under Rule 15," Opp. 18, ignores the consensus among the circuits—both before and after *Jones*—that the PLRA's pre-suit exhaustion mandate *does displace* normal pleading practice for prisoners who fail to exhaust their administrative remedies. The circuits agree that a prisoner who brings suit before exhausting his administrative remedies—and who remains in prison while his suit is pending—may not cure the defect by completing the administrative remedies process after filing suit. *Bonga v. Abdellatif*, 2019 WL 4580389, *3 (6th Cir. Apr. 26, 2019); *Jenkins v. Dancha*, 723 F. App'x 174, 175 (3d Cir. 2018); *Amaker v. Bradt*, 745 F. App'x 412, 413 (2d Cir. 2018); *Pavao v. Sims*, 679 F. App'x 819, 825 (11th Cir. 2017); *Germain v. Shearin*, 653 F. App'x 231, 234 (4th Cir. 2016); *Lee v. Benuelos*, 595 F. App'x 743, 747-48 (10th Cir. 2014); *Gonzalez v. Seal*, 702 F. 3d 785, 788 (5th

Cir. 2012); *Boulware v. Dunstan*, 334 F. App'x 61, 62 (9th Cir. 2009); *see also Oriakhi v. United States*, 165 F. App'x 991, 993 (3d Cir. 2006) ("Indeed, there appears to be unanimous circuit court consensus that a prisoner may not fulfill the PLRA's exhaustion requirement by exhausting administrative remedies after the filing of the complaint in federal court."). That rule is consistent with this Court's decision in *Woodford v. Ngo*, decided in the term before *Jones*, which rejected an interpretation of the PLRA that would permit prisoners to exhaust remedies after filing suit. 548 U.S. 81, 100-101 (2006).

Garrett's only basis for urging a different, more lenient rule in his case is an arbitrary one: Garrett happened to be released before the district court could rule on Petitioners' meritorious exhaustion defense. But that fact does not change the statutory analysis. Applying the PLRA's unambiguous text in Garrett's case is a straightforward exercise: A "prisoner" is "any person incarcerated or detained in any facility," 42 U.S.C. § 1997e(h), and the PLRA provides that "[n]o action shall be brought . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted," § 1997e(a). Garrett was a prisoner when he *brought suit* on unexhausted claims, and the PLRA requires dismissal of those claims. There is no textual basis—much less, a principled policy reason—for the Third Circuit's exception to this rule for prisoners who happened to be released after filing a defective suit. Such a rule depends on avoiding the PLRA's textual command, rather than following it. *See Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 534-35 (7th Cir. 1999) ("Congress could have written a statute

making exhaustion a precondition to judgment, but it did not. The actual statute makes exhaustion a precondition to *suit*. (emphasis in original)).

Jones does not answer the question presented in this case. *Jones* begs the question by explaining that the PLRA does not "justify deviating from the usual procedural practice *beyond the departures specified by the PLRA itself*." 549 U.S. at 214 (emphasis added). The PLRA's unambiguous pre-suit exhaustion requirement, which was a centerpiece of Congress's effort to curb frivolous prisoner suits, specifically departs from Rule 15's liberal post-suit amendment procedure in suits "brought . . . by a prisoner." A prisoner may not evade the PLRA's plain command by exhausting his remedies after filing a defective suit or by being released after filing a defective suit.

III. There is a Substantial Split Among the Circuits Over the Question Presented.

Despite Garrett's claim to the contrary, there are two well-developed and conflicting positions in the circuit courts on the question presented. The Third and Ninth Circuits follow an "operative complaint" rule, which focuses on the prisoner's status when he files his operative amended complaint sometime after filing suit. Pet. 9-16; PDOC Br. 8-17. Other circuits, including the Fifth, Sixth, and Eleventh Circuits, follow a "time of filing" rule, which focuses only on the prisoner's status at the time that he files the initial complaint no matter what supplemental or amended pleadings may be filed after that date. Pet. 9-16.

The split is arguably wider than the Petitioners have conservatively estimated. The PDOC counts the Tenth Circuit among those that apply the majority "time of filing" rule. PDOC Br. 15-17. A district court in the Eight Circuit, where there is no clear guidance, recently examined the circuit split and determined that "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." *Jefferson v. Roy*, 2019 WL 4013960, **2-3 (D. Minn. Aug. 26, 2019) (citing the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits as the majority).

Garrett attempts to diminish the circuit split by claiming that there is no disagreement among the circuits that have addressed the issue since *Jones* was decided in 2007. Whatever nuance Garrett detects in the Fifth, Sixth, and Eleventh Circuit decisions, those holdings have not lost their force in the 12 years since *Jones* was decided. Those circuit courts of appeals—and district courts within those circuits—continue to apply the bright line "time of filing" rule today. And nothing occurring in those circuits suggests that they will (or should) revisit their reasoned holdings at any other point in the future.

The Fifth Circuit reiterated its adherence to the "time of filing" rule just last year. *Bargher v. White*, 928 F.3d 439, 447 (5th Cir. 2019) ("Bargher's subsequent release does not relieve him of the requirement to exhaust administrative remedies for this current legal action that he initiated while in prison."). The Eleventh Circuit has also reinforced its "time of filing" rule post-*Jones*, explaining that "[t]he

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." *Smith v. Terry*, 491 F. App'x 81, 83 (11th Cir. 2012) (citing *Harris v. Garner*, 216 F.3d 970, 981 (11th Cir. 2000) (en banc)). District courts in the Eleventh Circuit continue to apply *Harris* to hold that a prisoner cannot cure his failure to exhaust by filing an amended complaint after his release. *See Thompson v. Adkinson*, 2020 WL 592343, at *3 (N.D. Fla. Jan. 15, 2020), report and recommendation adopted, 2020 WL 586864 (N.D. Fla. Feb. 6, 2020).

District courts in the Sixth Circuit continue to apply the "time of filing" rule from *Cox v. Mayer*, 332 F.3d 422 (6th Cir. 2003), to dismiss unexhausted claims by prisoners who are released after filing defective suits. *E.g.*, *Jamison v. Bureau of Prisons*, 2020 WL 95187, *3 (N.D. Ohio Jan. 8, 2020); *Surgenor v. Moore*, 2019 WL 502031, *3 (S.D. Ohio Feb. 8, 2019), report and recommendation adopted, 2019 WL 1227941 (S.D. Ohio Mar. 15, 2019); *Range v. Eagen*, 2018 WL 4016969, *2 (E.D. Mich. July 24, 2018), report and recommendation adopted 2018 WL 4005776 (E.D. Mich. Aug. 22, 2018). Accordingly, Garrett is mistaken when he suggests that the Sixth Circuit's decision in *Mattox v. Edelman*, 851 F.3d 595 (6th Cir. 2017), abrogated this established rule. *Mattox* outlined the circumstances in which a still-incarcerated prisoner may file an amended complaint to add new claims that arose only after the suit was filed. *Id.* at 591-95; *see also Dahms v. Correct Care Solutions, LLC*, 2019 WL 4544350, **3-4 (W.D. Ky. Sept. 19, 2019) (explaining that *Mattox* applies to "a narrow set of circumstances" in which a prisoner adds

entirely new claims against additional defendants through an amended complaint). The prisoner in *Mattox* did not argue (as Garrett does) that the bare fact of his post-filing release excused the failure to exhaust his original claims.

The circuit split is not an illusion, and there is no reason to believe that further examination of the question by the circuits will cure the split. This Court should grant certiorari, resolve the confusion in the lower courts, and announce a uniform rule for applying the PLRA's mandatory exhaustion provision to prisoners who are released after filing suit on unexhausted claims.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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