No. _____

In the Supreme Court of the United States

SGT. HAYSTINGS; JOHN E. WETZEL, SRC DOC; MIKE CLARK, SUPERINTENDENT ALBION,
Petitioners

v.

ALBERT B. KORB,
Respondents

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Prison Litigation Reform Act (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). Rule of Civil Procedure 15(d) provides that "[o]n motion and reasonable notice" a district court may "permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Courts of Appeals disagree about the relationship between these two provisions and are split as to whether a prisoner's violation of the PLRA's mandatory pre-suit exhaustion requirement can be remedied through a Rule 15(d) supplemental pleading.

The question presented is as follows:

When a prisoner violates the Prison Litigation Reform Act, 42 U.S.C. § 1997e *et seq.*, by initiating litigation without first exhausting administrative remedies, can the prisoner escape that violation by filing a supplemental pleading under Federal Rule of Civil Procedure 15(d)?

PARTIES TO THE PROCEEDING

Petitioners are John Wetzel, Secretary of the Pennsylvania Department of Corrections, Mike Clark, Superintendent of the State Correctional Institution Albion, and Sergeant Scott Haystings, a corrections officer at Albion.

Respondent is Albert B. Korb, a Pennsylvania inmate.

RELATED PROCEEDINGS

Albert B. Korb v. Sgt. Haystings, et al., 1:18-cv-00042, United States District Court for the Western District of Pennsylvania. Judgment was entered on March 18, 2019.

Albert B. Korb v. Sgt. Haystings, et al., 19-2826, United States Court of Appeals for the Third Circuit. Judgment was entered on June 8, 2021.

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INTRODUCTION

The Prison Litigation Reform Act, 42 U.S.C. § 1997e *et seq.*, has a straightforward textual mandate: "[n]o action shall be brought with respect to prison conditions * * * until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Congress wrote that provision to reduce the quantity and improve the quality of inmate filings by making exhaustion a mandatory pre-condition to suit in all prisoner cases. This Court described the PLRA's pre-suit exhaustion provision as a "centerpiece" of Congress's effort to stem the disruptive tide of frivolous inmate litigation, and has consistently admonished courts not to manufacture exceptions to its clear textual dictate.

In contrast to the mandatory language in the PLRA's exhaustion provision, Federal Rule of Civil Procedure 15(d) gives district courts discretion, though no obligation, to permit parties to file supplemental pleadings setting out events occurring after the plaintiff filed suit. Rule 15(d) is silent as to the effect a supplemental fact has on any particular claim or defense, and "does not attempt to deal with such questions as the relation of the statute of limitations to supplemental pleadings, the operation of the doctrine of laches, or the availability of other defenses." *See* Fed.R.Civ.P. 15(d), Advisory Committee Comment to 1963 Amendment.

This Court has never addressed the interplay between these two provisions. And Courts of Appeals are sharply divided as to whether a supplemental complaint can be employed to allege new facts that purport to "cure" an inmate's violation of the PLRA's pre-suit exhaustion requirement.

The Fifth, Seventh, Tenth, and Eleventh Circuits agree that Rule 15 does not override the statutory prefiling requirements of the PLRA. In contrast, the Third and Ninth Circuits have held that Rule 15(d)'s discretionary pleading mechanism overrides the substantive requirements of the PLRA. That holding turns these two provisions on their heads, making exhaustion before suit optional, but *requiring* district courts to employ the once-discretionary Rule 15(d) as a panacea for all wrongs. This sprawling exception to the prefiling exhaustion requirement is without limiting principle and exemplifies the danger with allowing court-made exceptions to mandatory requirements. If that exception is allowed to stand, it will eventually swallow the rule that Congress created. By reducing the centerpiece of the PLRA to an empty formality that can be easily circumvented, the Third and Ninth Circuits handed inmates a tool to manipulate the system Congress established.

Review is necessary to resolve this irreconcilable conflict and to prevent further erosion of the PLRA's pre-suit exhaustion requirement. At least one Justice has already acknowledged that the circuits are split on the interplay between the PLRA and Rule 15, and that this split implicates an important and unresolved question that is worthy of this Court's review "because its resolution will have significant ramifications for not only prisoners and prison officials but also federal courts." *Wexford Health v. Garrett*, 140 S.Ct. 1611, 1612 (2020) (Thomas, J., dissenting from the denial of certiorari). This case presents an ideal opportunity to resolve that circuit split and address that unanswered question.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported, and is appended to this petition at 1a. The decision of the District Court is not reported, and is appended at 13a.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331, and the Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The Court of Appeals' judgment was entered on June 8, 2021. This petition is being filed within 150 days of that judgment, as authorized by this Court's March 19, 2020 and July 19, 2021 Orders regarding filing deadlines. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT PROVISIONS

Subsection 1997e(a) of 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).

Federal Rule of Civil Procedure 15(d) provides:

> On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may

> permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Fed.R.Civ.P. 15(d).

STATEMENT OF THE CASE

A. The Prison Litigation Reform Act

In 1996, Congress enacted the PLRA amidst a sharp rise in prisoner litigation in the federal courts. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (citing *Alexander v. Hawk*, 159 F.3d 1321, 1324-25 (11th Cir. 1998)). By 1995, more than a quarter of all suits filed in federal district courts were brought by prisoners. *Alexander*, *supra* (citing, *inter alia*, *Administrative Office of the United States Courts*, 1995 Federal Court Management Statistics, 167). Through the PLRA, Congress endeavored to stem the "disruptive tide of frivolous prisoner litigation" by decreasing the quantity and improving the quality of inmate cases. *Woodford*, 548 U.S. at 84; *see also Jones v. Bock*, 549 U.S. 199, 203 (2007) ("What this country needs, Congress decided, is fewer and better prisoner suits") (citation omitted).

Congress was not writing on a blank slate. Under the PLRA's precursor, the Civil Rights of Institutionalized Persons Act (CRIPA), district courts had broad discretion, though no obligation, to require inmates to exhaust administrative remedies before initiating litigation. *Booth v. Churner*, 532 U.S. 731, 739 (2001); *see also Woodford*, 548 U.S. at 84 (describing CRIPA's exhaustion provision as "weak"). Congress deemed this discretion under CRIPA problematic and replaced it with an "invigorated" exhaustion provision, which

stripped district courts of their discretion by making exhaustion mandatory in all cases challenging prison conditions. *See Porter v. Nussle*, 534 U.S. 516, 524-29 (2002). This mandatory exhaustion requirement became a "centerpiece" of the PLRA. *Woodford*, 548 U.S. at 84.

B. The Circuit Courts Split on Whether the PLRA's Prefiling Requirements Displace Federal Rule of Civil Procedure 15.

Twenty-one years ago, the Eleventh Circuit, sitting *en banc,* examined the interplay between the PLRA and Federal Rule of Civil Procedure 15. *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (*en banc*). In that case, the Eleventh Circuit faced whether to apply the PLRA's restrictions to plaintiffs who were incarcerated at the time of filing their complaint, but who were released *pendente lite*. *Id.* at 972. That court concluded that a plaintiff's status when he commenced the lawsuit was a historical fact that could not be changed through a Rule 15 amendment. *Id.* at 975, 982. The Eleventh Circuit later extended its holding in *Harris* to the PLRA's mandatory exhaustion provision, concluding that "courts lack discretion to waive the exhaustion requirement." *Smith v. Terry*, 491 Fed. Appx. 81, 83 (11th Cir. 2012). Thus, the PLRA's mandates displaced Rule 15.

The Fifth Circuit joined with the Eleventh, holding that a prisoner's "release during the pendency of the suit does not relieve him the obligation to comply with 42 U.S.C. § 1997e." *Williams v. Henagan*, 595 F.3d 610, 619 (5th Cir. 2010). *See also*, *Bargher v. White*, 928 F.3d 439, 447 (5th Cir. 2019), as revised (July 2, 2019) (reaffirming its holding in *Williams*). And a panel of the Sixth Circuit agreed with the Eleventh Circuit in

dicta. *See Cox v. Mayer*, 332 F.3d 422, 428 (6th Cir. 2003).

In 2017, however, the Ninth Circuit split with the Eleventh and Fifth Circuits when it held that plaintiffs released during the pendency of their litigation "can cure deficiencies through later filings, regardless of when [they] filed the original 'action.'" *Jackson v. Fong*, 870 F.3d 928, 934 (9th Cir. 2017). That decision relied upon dicta contained in *Jones v. Bock*, 549 U.S. 199 (2007), that the PLRA's "statutory phrasing—'no action shall be brought'—is boilerplate language." *Jackson*, 870 F.3d at 934 (quoting *Jones*, 549 U.S. at 220).

The other circuits began choosing sides amongst this split. The Tenth Circuit joined the Fifth and Eleventh Circuits, concluding that an "amended complaint * * * supersedes the original complaint's *allegations* but not its *timing*." *May v. Segovia*, 929 F.3d 1223, 1229 (10th Cir. 2019) (emphasis in original). A plaintiff's status as prisoner, therefore, is fixed when the unexhausted claim is first alleged and that status is not cured through an amended complaint under Rule 15(a). *Id.* at 1228-29.[1]

In contrast, the Third Circuit in *Garrett v. Wexford Health*, 938 F.3d 69 (3d Cir. 2019), joined with the Ninth Circuit. There, an inmate failed to exhaust his administrative remedies but, after successfully delaying the proceedings for over a year, was released from incarceration, at which point he filed an amended pleading. *Id.* at 76, 78-79.

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[1] The Tenth Circuit distinguished, however, a supplemental complaint under Rule 15(d) filed by a plaintiff after release from prison and raising *new* claims that occurred after the date of the pleading to be supplemented. Those new claims would not be subject to the exhaustion requirement. *Id.* at 1232.

Although Garrett never moved to file a supplemental complaint, the Third Circuit *sua sponte* construed Garrett's post-release pleading as both a Rule 15(a) amended complaint and a Rule 15(d) supplemental complaint. 938 F.3d at 81-83. The Court of Appeals concluded that because "[*Jones v.*] *Bock* teaches * * * that the usual procedural rules apply to PLRA cases unless the PLRA specifies otherwise, * * * the PLRA does not override the usual operation of Rule 15 here." *Id.* at 82, 87. Relying on this Court's dicta in *Jones* that the phrase "no action shall be brought" in the PLRA was "boilerplate," 549 U.S. at 220, the Third Circuit determined that Garrett's amended/supplemental pleading cured his failure to exhaust available administrative remedies because he was no longer incarcerated. *Id.* at 87.

A petition for a writ of certiorari was filed from the Third Circuit's decision in *Garrett* and at least one Justice would have granted certiorari. *See Wexford Health v. Garrett,* 140 S.Ct. 1611, 1611-12 (2020) (Thomas, J. dissenting from the denial of certiorari). Justice Thomas acknowledged that this Court had never addressed the important question presented, which had divided the Circuits, and criticized the Third Circuit's reading of the Court's "'boilerplate' dicta" in *Jones* "for far more than it is worth." *Ibid.* Justice Thomas explained that the Third Circuit misunderstood the Court's holding in *Jones*, which "actually confirms that the PLRA's prefiling requirements displace the Federal Rules of Civil Procedure, including Rule 15." *Ibid.*

C. Proceedings Below

1. Respondent Albert Korb is a Pennsylvania inmate serving a life sentence for murdering his estranged wife. *Commonwealth v. Korb*, 617 A.2d 715

(Pa. Super 1992). Since entering the Pennsylvania Department of Corrections (DOC), Korb has been no stranger to federal litigation. In *Korb v. Gilmore*, for example, after fully exhausting his prison administrative remedies as required by the PLRA, Korb alleged that prison staff were performing "illegal experiment[s]" on him. *See* 2:16-CV-01630, 2017 WL 2972254, *3 (W.D. Pa. June 14, 2017), report and recommendation adopted, 2017 WL 2957890 (W.D. Pa. July 11, 2017). That claim was ultimately dismissed. *Ibid.*

2. In 2018, Korb initiated the present case *pro se* against DOC corrections officers, Sgt. Scott Haystings. Korb's four-page handwritten complaint did not reference 42 U.S.C. § 1983 or any specific provision of the Constitution. Dist. Ct. Docket, ECF No. 1. Korb acknowledged that after he was summoned to Sgt. Haystings's office to discuss the cleanliness of his prison cell, he attempted to flee. *Ibid.* Korb alleged that Sgt. Haystings assaulted him while attempting to prevent him from fleeing. *Ibid.*

Korb later filed an amended complaint, adding the prison's warden, Mike Clark, and the DOC's former secretary, John Wetzel, as defendants. Pet. App. 3a n.2. Korb acknowledged on the face of his amended complaint that he had not yet exhausted his administrative remedies. Pet. App. 3a.[2]

Korb then went through the DOC's three-step administrative grievance process. The DOC denied Korb's

[2] The caption of Korb's amended complaint added two additional defendants, the Secretary of the DOC John Wetzel and the Superintendent of the prison in which he was housed Mike Clark. But the body of the amended complaint contained no specific allegations against Secretary Wetzel or Superintendent Clark.

grievance, explaining that video evidence of the incident directly contradicted his contention that he was assaulted. Dist. Ct. Docket, ECF No. 43-1 at 4; *see also* Dist. Ct. Docket, ECF No. 43-3 at 1. The prison also admonished Korb for attempting to flee Sgt. Haysting's office. *Ibid.*

Undeterred, Korb returned to litigating his already-pending suit in court. Korb never filed a motion for leave to file a supplemental complaint. Instead, he submitted a series of letters with the District Court stating that he completed the prison's grievance process. Pet. App. 3a. None of those filings were styled as a motion for leave to file a supplemental complaint under Fed.R.Civ.P. 15(d).

The DOC officials then moved to dismiss pursuant to Fed.R.Civ.P. 12 (b)(6) based on Korb's acknowledgment that he initiated litigation before exhausting. Pet. App. 3a. The District Court granted that motion and dismissed Korb's amended complaint.[3]

3. After Korb filed his notice of appeal, the Court of Appeals appointed pro bono counsel to represent him. Pet. App. 10a-12a. It then issued an hand-picking four non-jurisdictional issues for the parties to address in their briefs, including whether its 2019 decision in *Garrett* governed.[4] *Ibid.* Another issue raised by the Court

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[3] The District Court dismissed Korb's complaint with prejudice. On appeal, the parties agreed that, if dismissal was appropriate, it should have been without prejudice.

[4] The Court of Appeals *sua sponte* inserted these issues into this case after and despite this Court express prohibition of such a "takeover of the appeal[.]" *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1581-82 (2020). "Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." *Id.* at 1579. And yet, the Third Circuit

of Appeals seemingly acknowledged tension between its holding in *Garrett*, that an inmate can cure a violation of the PLRA through a Rule 15(d) supplemental complaint, and its 2015 holding in *Pearson v. Sec'y Dep't of Corr.*, 775 F.3d 598, 603 (3d Cir. 2015), that mandatory administrative exhaustion under the PLRA is a statutory prohibition that tolls the statute of limitations. Pet. App. 11a-12a.

But the Court of Appeals did not address that tension. Instead, that court simply extended its prior decision in *Garrett* and determined that the District Court should have construed Korb's post-exhaustion letters as supplemental complaints under Rule 15(d), excusing his violation of Subsection 1997e(a). The Court of Appeals vacated the District Court's judgment and remanded for further proceedings.

REASONS FOR GRANTING THE PETITION

The PLRA's mandatory exhaustion provision is clear and unambiguous; it prohibits an inmate from bringing any action—*i.e.*, invoking or commencing judicial proceedings—before fully and properly exhausting administrative remedies. 42 U.S.C. § 1997e(a). Nevertheless, because no precedent from this Court has squarely answered whether a Rule 15(d) supplemental pleading can be employed to disregard the text of the PLRA, the circuits are split on this important unsettled federal question. *See Wexford Health,* 140 S.Ct. at 1611-12 (Thomas, J. dissenting from the denial of certiorari).

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has a penchant for directing the parties to brief specific non-jurisdictional issues it wishes to address. For example, that court issued a similar order raising non-jurisdictional issues in *Garrett v. Wexford Health*. *See Garrett*, 3d Cir. Docket 17-3480 (6/18/19 order)

The Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits hold that the PLRA's mandates displace Rule 15. In holding the opposite, the Third and Ninth Circuits have rewritten both the PLRA and Rule 15 to require district courts to excuse undisputed violations of the mandatory exhaustion provision. The exception recognized in those later circuits is contrary to the text and purpose of the PLRA, and is built on a flawed interpretation of Rule 15 and crabbed reading of dicta in *Jones*. The Third and Ninth Circuits have created a disincentive for inmates to seek administrative redress before filing suit, effectively undoing the restraints enacted by Congress to combat frivolous inmate suits. This, in turn, will make prison administration inherently more difficult.

This Court's review is necessary to resolve this intractable conflict, clarify the contours of Rule 15(d), prevent further erosion of the PLRA's mandatory exhaustion provision, and reinstate an important penological tool relied upon by prison officials to maintain the safety of their institutions. *See* Sup. Ct. R. 10(a), (c). As Justice Thomas recently acknowledged in his dissent in *Wexford Health*, this Court has never considered the interplay between the PLRA and Rule 15(d). 140 S.Ct. at 1611-12. Now is the time to bring clarity to this important issue dividing the circuits.

I. This Court Should Resolve the Circuit Split Over Whether an Inmate's Unexhausted Claims Are Cured by Filing a Supplemental Pleading.

As described in the Statement of the Case, a split amongst the circuits arose after this Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007). There, this Court reversed the Sixth Circuit's attempt to impose court-

made pleading rules upon inmates, explaining that 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." 549 U.S. at 214. The Court admonished that creating new procedural rules beyond the strictures of the PLRA itself "exceeds the proper limits on the judicial role." 549 U.S. at 203. But, in dicta, this Court described the "statutory phrasing—'no action shall be brought'" in Section 1997e(a) of the PLRA as "boilerplate language." *Id.* at 220. The meaning of that decision split the circuits.

The PLRA's exhaustion mandate is clear: "*No action shall be brought* * * * by a prisoner * * * until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). But after *Jones*, the question arose whether inmates could cure a failure to exhaust administrative remedies so long as they were released *pendente lite* and amended or supplemented their complaint? Essentially, does Rule 15 override the exhaustion mandate in Subsection 1997e(a)?

The Fifth, Tenth, and Eleventh Circuits answered these questions with a no. *See Bargher*, 928 F.3d at 447-448 (5th Cir. 2019); *May*, 929 F.3d at 1229 (10th Cir. 2019); *Smith*, 491 Fed. Appx. at 83 (11th Cir. 2012). And the Ninth and Third Circuits answered these same questions with a yes. *See Jackson* , 870 F.3d at 934 (9th Cir. 2017); *Garrett*, 938 F.3d at 87-90 (3d Cir. 2019). A clear split among the circuits had arisen, allowing "certain prisoners in the Third and Ninth Circuits to proceed unencumbered by the PLRA's exhaustion requirement while those in the Fifth and Eleventh Circuits are required to comply." *Wexford Health*, 140 S.Ct. at 1612 (Thomas, J., dissenting).

A new split among the Courts of Appeals has now formed from that initial fissure. In the proceedings below, the Third Circuit extended its holding in *Garrett* to permit prisoners to bring a federal action *without* first exhausting, so long as they exhaust the prison's administrative remedies at any point during the litigation. Pet. App. 5a-8a. Relying extensively upon its earlier decision in *Garrett*, the Court of Appeals held that "Rule 15(d) permits a PLRA plaintiff to cure a deficiency based on subsequent exhaustion by filing a supplemental pleading, and such facts are deemed to be part of the complaint that the plaintiff initially presented to the court." Pet. App. 6a. This turns the prefiling requirements of the PLRA on its head, and downgrades the "[n]o action shall be brought" command of Subsection 1997e(a) from boilerplate language to a nullity.

The Third Circuit's holding below that a prisoner can cure a failure to exhaust *pendente lite* directly conflicts with the holdings of the Fifth, Seventh, and Eighth Circuits. *See Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) ("District courts have no discretion to excuse a prisoner's failure to properly exhaust the prison grievance process before filing their complaint. It is irrelevant whether exhaustion is achieved during the federal proceeding."); *Chambers v. Sood*, 956 F.3d 979, 984 (7th Cir. 2020) ("By its plain terms, the PLRA requires prisoners to exhaust administrative remedies before filing suit; a "sue first, exhaust later" approach is not acceptable."); *Johnson v. Jones*, 340 F.3d 624, 627 (8th Cir. 2003) ("Under the plain language of section 1997e(a), an inmate must exhaust administrative remedies before filing suit in federal court."). The original split created by *Jackson* and *Garrett* has now widened and deepened.

The divergent paths taken by the Courts of Appeals are based upon a fundamental disagreement in interpreting this Court's holding in *Jones* and in whether the PLRA's explicit prefiling requirements displace the Federal Rules of Civil Procedure. Review by this Court is necessary to resolve this intractable split and clarify an important federal law. *See* Sup. Ct. R. 10(c).

II. This Court Should Settle Whether an Inmate Cures His Failure to Comply with the PLRA's Mandatory Exhaustion Provision by Filing a Rule 15(d) Supplemental Pleading.

A. The text of PLRA's mandatory exhaustion provision unambiguously requires inmates to exhaust administrative remedies before invoking the judicial process.

The exception to pre-suit exhaustion recognized by the Third and Ninth Circuits runs afoul of the plain text of the PLRA. In *Ross v. Blake*, this Court clarified that the PLRA's exhaustion provision contains only one textual exception—where administrative remedies are unavailable to the inmate. 587 U.S. 632, 639 (2016) ("But aside from that one exception, the PLRA's text suggests no limits on an inmate's obligation to exhaust"). In reaching that conclusion, this Court distinguished between judicially developed exhaustion doctrines, which are inherently amenable to judge-made exceptions, and mandatory exhaustion regimes established by statute, which foreclose judicial discretion. *Id.* at 639-42 (citing, *inter alia*, *McNeil v. United States*, 508 U.S. 106, 111, 113 (1993)). The Court emphasized that when Congress creates an exhaustion provision through legislation, "courts have a role in creating exceptions only if Congress wants them to." *Id.* at 639. Applying that principle to the case in *Ross*, the Court

invalidated the "special circumstances" exception crafted by the Fourth Circuit as unsupported by the text of the PLRA and criticized that court's "freewheeling approach to exhaustion as inconsistent with the PLRA." *Id.* at 635.

As the Court observed in *Ross*, it has rejected every effort by a lower court to curtail the PLRA's mandatory exhaustion provision. *Id.* at 640-41 (collecting cases); *see also Booth*, 532 U.S. at 741 n.6 (rejecting "futility" exception to Subsection 1997e(a), stating "we will not read futility or other exceptions into statutory exhaustion where Congress has provided otherwise"); *Porter*, 534 U.S. at 520 (holding that the PLRA does not contain an exception for excessive force claims, stating the PLRA's "exhaustion requirement applies to all prisoners seeking redress for prison circumstances or occurrences"); *Woodford*, 548 U.S. at 91-92 (holding that the PLRA does not include an exception for constitutional claims). Therefore, the plain and ordinary meaning of the PLRA's mandatory exhaustion provision must be given force and effect, while judicially crafted exceptions to this requirement are prohibited. Full and proper exhaustion must occur *prior* to invoking judicial process.

The Eleventh and Seventh Circuits' analyses of this issue accords with this Court's recognition of Congressional authority. *See Harris*, 216 F.3d at 972-76; *Ford v. Johnson*, 362 F.3d 395 (7th Cir. 2004). In *Harris*, the Eleventh Circuit considered the applicability of the PLRA when a plaintiff files a lawsuit while still confined in prison, but files a supplemental pleading upon being released. The specific PLRA provision at issue in that case, 42 U.S.C. § 1997e(e), provides that "[n]o Federal civil action may be brought by a prisoner * * * for mental or emotional injury suffered while in custody

without a prior showing of physical injury." *Ibid.* *Harris* thus hinged upon the meaning of the word "brought" in the PLRA. *Id.* at 973 ("The dispositive question is whether 'bring' means to commence or start a lawsuit, or instead means to maintain or continue it to conclusion").

In the Eleventh Circuit's view, the concept of "bringing an action" has a well-established meaning at law and refers to the filing or commencement of a lawsuit, not to its continuation. *Id.* at 973-74 (citing, *inter alia*, *Black's Law Dictionary* 192 (6th ed. 1990)). It is a longstanding principle that "[a] suit is *brought* when in law it is *commenced*[.]" *Goldenberg v. Murphy*, 108 U.S. 162, 163 (1883) (emphasis added). Relying on the precept that Congress knows the settled legal definition of the words it uses, and intends to use those words in the accepted sense, the Eleventh Circuit applied the plain and ordinary meaning of the phrase "brought" and determined that the inmate could not obtain relief for mental or emotional injuries without first showing physical injury. *Harris*, 216 F.3d at 973-74. The Eleventh Circuit emphasized that "Congress could have written the statute to focus on the opportunity costs of *prosecuting* actions, but it did not. Instead, Congress aimed at the opportunity costs of *filing* actions." *Id.* at 982 (emphasis added).

Likewise, in *Ford*, the Seventh Circuit held that an inmate's claim had to be dismissed where he exhausted the prison's administrative remedies a few days after mailing the district court his complaint. 362 F.3d at 398. The Seventh Circuit reasoned that a suit is "brought" under Subsection 1997e(a) when the district court receives a prisoner's complaint, not when some future action—such as paying the filing fee—occurs. *Id.* at 399 ("What sense would it make to allow a prisoner

to initiate litigation before exhausting his intra-prison remedies, provided the prisoner takes care not to pay the filing fee until later?")

That court noted that prefiling requirements "are common: no suit under the Federal Tort Claims Act until the agency has had time to rule on a claim for damages, no suit under the employment-discrimination laws until the parties have had time for administrative conciliation." *Id.* at 398. "And these rules routinely are enforced * * * by dismissing a suit that begins too soon, even if the plaintiff exhausts his administrative remedies while the litigation is pending." *Ibid.* (citing *McNeil v. United States*, 508 U.S. 106 (1993); *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989)).

The Seventh Circuit recognized that "[r]ules of the form * * * 'administrative remedies first, litigation second' reflect a belief that postponing suits induces people to concentrate their attention on negotiation or alternative dispute resolution, so that some fraction of the time parties will not need to litigate at all." *Ibid.* "Once litigation commences, however, that casts a pall over negotiation or the administrative process, because it commits both resources and mental energies to court." *Ibid.* "To prevent this subversion of efforts to resolve matters out of court, it is essential to keep the courthouse doors closed until those efforts have run their course." *Ibid.*

The Eleventh and Seventh Circuits' sound reasoning comport with well-settled precepts of statutory construction, the text of the PLRA, and this Court's decisions in *Ross* and *McNeil*.

B. *Jones v. Bock* does not support, and indeed undermines, the Court of Appeals' new exception.

In contrast to the Eleventh and Seventh Circuits' fidelity to the PLRA's text, the Third Circuit ignored what this Court said in *Ross* and *McNeil*, and rewrote the PLRA and Rule 15 to allow inmates to circumvent the prefiling exhaustion requirement. In the decision below, the Third Circuit relied almost exclusively upon its prior decision in *Garrett* to hold that "Rule 15(d) permits a PLRA plaintiff to cure" his or her failure to exhaust administrative remedies prior to bringing a lawsuit. Pet. App. 5a-6a, n.4. In *Garrett*, the Court of Appeals justified its departure from the plain and ordinary meaning of the statute through a misplaced reliance on this Court's decision in *Jones*. *Garrett*, 938 F.3d at 86.

Unlike this Court's decisions in *Ross*, *Booth*, *Porter*, and *Woodford*, *Jones* did not involve a lower court's attempt to impose a judge-made exception upon the PLRA's exhaustion requirement. Rather, *Jones* involved the exact opposite scenario, namely, the Sixth Circuit's attempt to impose additional hurdles upon inmates beyond the strictures of the PLRA. *See Ross*, 578 U.S. at 640 n.1 (distinguishing *Jones* from *Booth*, *Porter*, and *Woodford*). Specifically, *Jones* involved a trio of post-exhaustion procedural rules constructed by the Sixth Circuit which: (1) required inmates to plead in demonstrate exhaustion in their complaints; (2) permitted suit against those defendants named in the administrative grievance only; and (3) required dismissal of an entire action when an inmate brought a mix of exhausted and non-exhausted claims. 549 U.S. at 203. This Court invalidated all three of those post-exhaustion procedural rules and admonished that creating

new procedural rules beyond the strictures of the PRA "exceeds the proper limits on the judicial role." *Ibid.*

The Third Circuit seized on dicta in this Court's discussion of the third issue in *Jones*. But, in *Jones*, the Sixth Circuit had interpreted the phrase "[n]o action shall be brought" in Subsection 1997e(a) to require dismissal of an entire inmate suit that included a mix of exhausted and non-exhausted claims. 549 U.S. at 219. The Sixth Circuit reasoned that if Congress had intended to enable courts to dismiss unexhausted claims only, while retaining the balance of the lawsuit, it would have used the word "claim" rather than "action" in the PLRA. *Ibid. Jones* thus turned on the meaning of the word "action" as used in the PLRA, not "brought."

In rejecting the Sixth Circuit's analysis, this Court observed that statutory references to an "action" have never been "read to mean that every claim included in an action must meet the pertinent requirement before the 'action' may proceed." *Id.* at 221 (citations omitted). Rather, statutes must be read in light of the longstanding procedural norm that when a complaint has both good and bad claims "only the bad claims are dismissed; the complaint as a whole is not." *Ibid.* (internal brackets omitted and citation omitted). Concluding that it could not glean Congressional intent to depart from this norm from the simple use of the term "action," a commonly used term that appears in many federal statutes, this Court held that the PLRA did not enable dismissal of an entire case merely because it contained a mix of exhausted and unexhausted claims. *Ibid.* Thus, this Court clarified that the PLRA applies to particular claims, not entire actions.

Overlooking the central principle of this holding, the Third Circuit seized on *Jones's* description of the phrase "[n]o action shall be brought" in the PLRA as

"boilerplate" to justify departing from the ordinary meaning of PLRA's straightforward statutory mandate. *Garrett*, 938 F.3d at 87, 90-91. But, as Justice Thomas observed, that analysis reads this Court's "'boilerplate' dicta for far more than it is worth." *Wexford Health*, 140 S.Ct. at 1612 (Thomas, J., dissenting from the denial of certiorari). That is true for several reasons.

First, *Jones* turned on the meaning of the word "action" in Subsection 1997e(a), *see* 549 U.S. at 220-24, rather than "brought," the operative word at issue in the instant case. As noted *supra*, "brought" refers to the invocation or commencement of a judicial proceeding, not its continuation. *McNeil*, 508 U.S. at 112; *Harris*, 216 F.3d at 973-74.

Second, this Court describing the phrase "[n]o action shall be brought" as "boilerplate" did not render that phrase meaningless. In general, a phrase being "boilerplate" means that it has "[r]eady-made or all-purpose language," not that it has no function at all. *See Black's Law Dictionary* (11th ed. 2019). Indeed, a contract can have boilerplate language yet still be enforceable. In the context of the specific issue in *Jone*s, the phrase being "boilerplate" simply meant that it could not be interpreted as Congressional intent to depart from the longstanding procedural norm that when an action contains a combination of "good and bad claims," the bad claims are dismissed, but the complaint as a whole is not. *Jones*, 549 U.S. at 221; *see also Wexford Health*, 140 S.Ct. at 1612 (Thomas, J., dissenting from the denial of certiorari). As Justice Thomas emphasized, this Court characterized the phrase "[n]o action shall be brought" as "boilerplate" "solely for the

purpose of explaining that the PLRA speaks to the dismissal of defective claims, not necessarily entire complaints." *Ibid*.

Third, *Jones* "actually confirms that the PLRA's prefiling requirements displace the Federal Rules of Civil Procedure, including Rule 15." *Wexford Health*, 140 S.Ct. at 1612 (Thomas, J., dissenting). As *Jones* made clear, "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*." *Jones*, 549 U.S. at 214 (emphasis added). Pre-suit exhaustion *is* a departure from the usual procedural practice, and nothing in *Jones* enables a party to use pleading rules to circumvent a Congressional mandate. *Jones* thus confirmed 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.").

Finally, the Court of Appeals' rule, that failure to exhaust administrative remedies does not bar an inmate from bringing a lawsuit so long as exhaustion occurs sometime during the pendency of the suit, is precisely the kind of court-made rule that *Jones* prohibits. *See Jones*, 549 U.S. at 216-217; *see also Ross*, 578 U.S. at 639-42 ("* * * mandatory exhaustion statues like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion"). This prohibition is for good reason. "The judge 'must not read in by way of creation,' but instead abide by the 'duty of restraint, th[e] humility of function as merely the translator of another's command.'" *Id.* at 216 (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L.Rev. 527, 533-534 (1947)). Because the desire by some judges to "make [a statute] better," *id.* at 216, is

often results-oriented, court-made exceptions to statutory requirements can, as here, result in inconsistencies within the law.

For example, in *Pearson v. Sec'y Dep't Corr.*, 775 F.3d 598 (3d Cir. 2015), the Third Circuit held that, because Subsection 1997e(a) of the PLRA mandates exhaustion before a lawsuit may be brought, this statutory prefiling requirement acts as a statutory prohibition that tolls the statute of limitations. 775 F.3d at 602-04. The rationale for the *Pearson* tolling rule is that a contrary rule would put inmates in "a procedural catch 22," *i.e.*, exhaust administrative remedies and risk dismissal based on timeliness, or file suit before exhausting and risk dismissal based on the PLRA. *Id.* at 602 (quoting *Johnson v. Rivera*, 272 F.3d 519, 521-22 (7th Cir. 2001)). *Pearson* hinged on a recognition that exhaustion is something inmates must accomplish *before* bringing suit.

The Third Circuit's court-made rule below irreconcilably conflicts with the *Pearson* rationale. If exhaustion is no longer a bar for an inmate to initiate a federal action, the rationale for tolling the statute of limitations during the exhaustion process naturally falls. On the Court of Appeals' express direction, the parties addressed *Person* in their briefing. Pet. App. 11a-12a. But the Court of Appeals completely ignored the conflict it was creating within its own caselaw. This has created an untenable situation: the Third Circuit reads a prefiling mandate into Section 1997e when it assists the inmate, but reads no such mandate in the very same section when it frustrates the inmate. Such inconsistencies created by court-made rules are precisely what *Jones* sought to avoid. *Jones*, 549 U.S. at 222-223.

In *Jones*, this Court invalidated the Sixth Circuit's effort to impose burdens on inmates in addition to the

PLRA. In both *Garrett* and the present case, the Third Circuit selectively focused on its favorite passages and phrases from this Court's opinion while ignoring the reasoning, stripping the language of all meaningful context. "[J]udicial opinions are not statutes, and we don't dissect them word-by-word as if they were." *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting). The Court of Appeals' failure to heed this axiom caused it to use dicta from an opinion as a basis to ignore the plain text of a statute, resulting in a holding that directly contravenes *Jones*'s fundamental dictate.

C. Rule 15 does not override the prefiling mandate in the PLRA.

The Court of Appeals' misapprehension of *Jones* was compounded by its strained reading of Rule 15. Relying on this Court's pronouncement in *Jones* that "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns," *see Jones*, 549 U.S. at 212, the Court of Appeals used its own interpretation of the normal operation of Rule 15(d) as a basis for its holding. But the Court of Appeals' interpretation of Rule 15(d) is as flawed as its reading of the PLRA.

The 1963 advisory committee comment to Rule 15 states that subsection (d) gives courts "discretion to permit a supplemental pleading despite the fact that the original pleading is defective" and that courts should do so "in light of the particular circumstances" of each case. Critically, however, that committee goes on to emphasize that Rule 15(d) "does not attempt to deal with such questions as the relation of the statute of limitations to supplemental pleadings, the operation

of the doctrine of laches, or the availability of other defenses." Thus, while Rule 15(d) provides a mechanism to bring post-filing factual developments to a court's attention, and permits litigants to supplement even if the original complaint is defective, Rule 15(d) is silent as to the *effect* the supplemented fact has on that original defect.

As the Eleventh Circuit aptly put it, "[i]n proper circumstances, the rule does permit amendments or supplements to pleadings in order to bring to the attention of the court changes in the facts, but other law—in this instance [the PLRA]—determines whether those changes in the facts make any difference." *Harris*, 216 F.3d at 982-83. Because Rule 15(d) "does not and cannot overrule a substantive requirement or restriction contained in a statute (especially a subsequently enacted one)" it cannot be used as a basis for allowing inmates to circumvent the PLRA's exhaustion requirement. *Ibid.*

Although the Third Circuit in *Garrett* acknowledged the logic of the Eleventh Circuit's reasoning in *Harris*, it sidestepped that logic by relying—yet again—on this Court's "boilerplate" dicta from *Jones*, and concluded that a Rule 15(d) supplemental pleading automatically cures a violation of the PLRA. *Garrett*, 983 F.3d at 91 n.25. *See* Pet. App. 5a-6a, n.4 (extending *Garrett*).

Which side of this circuit split is correct is "an important question" that "deserves [this Court's] review." *Wexford Health*, 140 S.Ct. at 1612 (Thomas, J., dissenting). The PLRA should not apply to prisoners differently simply because they reside in different circuits.

III. Incentivizing Prisoners to Use the Prison Grievance Process is Critical to the Safe Administration of the Nation's Prisons.

This case presents issues of profound importance. As noted by Justice Thomas, "[i]n recent years, nearly 10,000 lawsuits have been filed annually by prisoners challenging prison conditions." *Wexford Health*, 140 S.Ct. at 1612 (Thomas, J., dissenting from the denial of certiorari). "And nearly twice as many lawsuits are filed annually raising other civil rights claims, which are subject to similarly worded prefiling requirements under the PLRA, *see*, *e.g.*, § 1997e(e)." *Ibid.* (internal citation omitted). The desire of inmates to sue their captors is prolific.

Through the PLRA, Congress sought to stem the "disruptive tide of frivolous prisoner litigation" by decreasing the quantity and improving the quality of inmate cases. *Woodford*, 548 U.S. at 84. The rationale for including a prefiling exhaustion requirement had "a great deal to do with the nature of prison litigation." *Nyhuis v. Reno*, 204 F.3d 65, 73 (3d Cir. 2000). Inmate claims are often "untidy, repetitious, and redolent of legal language" and require courts to expend "significant and scarce judicial resources to review and refine the nature of the legal claims presented." *Id.* at 74; *see also Alexander*, *supra* at 1362 n.11 ("Prisoners' complaints * * * generally contain a lengthy layman's recitation of complaints about the prison without articulating clearly the legal causes of action in issue and necessitating significant expenditure of judicial resources to review and refine the nature of the legal claims"). Mandatory exhaustion addresses this problem in several ways, while elevating the overall goals of the PLRA.

First, mandatory exhaustion ensures that an administrative record is developed in every inmate case. This helps focus and clarify the issues for the court, making it easier to distinguish between frivolous and non-frivolous claims. *Porter v. Nussle*, 534 U.S. 516, 525 (2002); *see also Jones*, 549 U.S. at 203-04.

Second, mandatory exhaustion may prompt corrective action in response to an inmate's grievance and satisfy the inmate, thereby obviating the need for litigation. *Porter*, 534 U.S. at 525 (citing *Booth*, 542 U.S. at 737).

Third, by affording "'corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case,'" exhaustion eliminates "unwarranted federal-court interference with the administration of prisons." *Woodford*, 548 U.S. at 93 (quoting *Porter*, 534 U.S. at 525).

Fourth, the PLRA in general, and the mandatory exhaustion provision in particular, promotes judicial efficiency and economy and improves access to the courts for all litigants, including inmates seeking to bring non-frivolous claims. *Jones*, 549 U.S. at 203 (Congress sought to ensure "that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit"); *see also* 141 Cong. Rec. S14408-01, S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) ("Frivolous lawsuits filed by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens").

In a footnote towards the end of its opinion, the Court of Appeals paid lip service to the PLRA's prefiling requirements, acknowledging that "[t]he need to supplement a complaint to indicate exhaustion can be

avoided if the plaintiff fully exhausts his administrative remedies before bringing suit and so indicates in the pleadings." Pet. App. 7a n.7. However, "[a] prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction[.]" *Woodford*, 548 U.S. at 94. This is why Congress barred courts from conducting case-by-case inquires until after a prisoner had presented his or her claims to a particular administrative remedy program. *Alexander*, 159 F.3d at 1326 n.11.

Inmates within the Third Circuit used to have a clear incentive to participate in their prisons' grievance process—*i.e.*, the ability to file suit. The Court of Appeals' holding eliminates that incentive, degrading the usefulness of the prisons' grievance process and interfering with the safe and efficient operation of the prison.

Requiring inmates to exhaust provides prison officials a "fair opportunity to correct their own errors," *Woodford*, 548 U.S. at 94, thereby "improv[ing] prison administration and satisfy[ing] the inmate" without the need for litigation, *Porter*, 534 U.S. at 525. The Commonwealth's inmate grievance process is not a meaningless exercise. And when prison officials grant inmates some or all of the relief they seek, it obviates the waste of scarce judicial resources. *See Porter*, 534 U.S. at 525.

Even if the substance of the grievances are without merit, the process itself functions as an informal mediation system between officials and inmates. Disgruntled inmates typically file numerous grievances covering a variety of issues. Prison officials use the grievance system as a pacification tool, horse-trading the granting of some grievances for the withdrawal of others.

Such informal negotiations end once a lawsuit is filed and attorneys take over the matter.

Further, the DOC relies on inmates using the grievance process to discover potential problems within its prisons, including employee misdeeds. In fully exhausting the grievance process, inmates air their grievances to both the warden of the prison and the Secretary's Office, which oversees all Commonwealth prisons. *See Spruill v. Gillis*, 372 F.3d 218, 232 (3d Cir. 2004) (explaining the process). Grievances provide notice to senior officials of alleged mistreatment of inmates by guards or problems within a cell block or prison.

By crafting its court-made exception to the PLRA's prefiling requirements, the Court of Appeals removed the incentive for inmates to comply with the DOC's grievance process. This, in turn, makes it more difficult for prison officials to timely discover and correct problems within their institutions. An angry inmate or abusive guard presents obvious safety and security concerns.

Running a prison "is an inordinately difficult undertaking" in the best circumstances. *Turner v. Safley*, 482 U.S. 78, 84–85 (1987). Disincentivizing prisoners from grieving complaints only exacerbates that difficult undertaking. And pushing more unexhausted prisoner litigation into the federal courts will not provide better oversight of our Nation's prisons. As this Court has repeatedly explained, "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *see also Turner*, 482 U.S. at 84. And where, as here, "a state penal system is involved, federal courts have * * * additional reason to

accord deference to the appropriate prison authorities." *Turner*, 482 U.S. at 85. Courts are especially "ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints." *Procunier,* 416 U.S. at 405 n.9. That front-line should be staffed by prison officials, not judges.

The Third Circuit's holding will have a detrimental impact on the States' ability to administer their prisons and timely address prisoner concerns. Review by this Court is necessary to reinstate an important penological tool relied on by prison officials to maintain a safe environment within their institutions.

CONCLUSION

The petition for a writ of certiorari should be granted.

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