No. 21-692

In the Supreme Court of the United States

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

v.

ALBERT B. KORB,
Respondent

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

REPLY BRIEF FOR PETITIONERS

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

J. BART DELONE
Chief Deputy Attorney General,

SEAN A. KIRKPATRICK
Senior Deputy Attorney General
Counsel of Record

DANIEL B. MULLEN
Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-2331

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REASONS FOR GRANTING THE PETITION

One Justice has already acknowledged that Courts of Appeals are sharply divided on the interplay between the Prison Litigation Reform Act (PLRA) and Federal Rule of Civil Procedure 15(d), and that this important, unresolved issue is worthy of this Court's review. Instead of addressing these concerns, Respondent Albert Korb spills much ink arguing that his interpretation of this unresolved issue is the correct one, and admonishing Petitioners for not addressing certain arguments from his merits brief below.

Far from undermining the petition, Korb's arguments underscore the divergent interpretations of this important legal issue among the Courts of Appeals. The Court should resolve that divergence now.

I. The Split Between the Circuits Is Deep and Entrenched.

Contrary to Korb's assertion, the split among Courts of Appeals is deep, entrenched, and ever-widening on an issue of tremendous importance to the Nation's prison administrators. A split exists where "conflicting courts would actually reach different results given the same set of facts." Timothy S. Bishop, *et al.*, "Considering Supreme Court Review," Federal Appellate Practice, 648 (ed. 2008). That is this case.

In at least the Fifth, Seventh, and Eighth Circuits, a prisoner cannot initiate a federal lawsuit about prison conditions and then exhaust available administrative remedies *pendente lite*. *See*, *e.g.*, *Johnson v. Jones*, 340 F.3d 624, 627 (8th Cir. 2003); *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012);

Chambers v. Sood, 956 F.3d 979, 984 (7th Cir. 2020). Such claims would be dismissed without prejudice. In the Third Circuit, by contrast, a prisoner may initiate a federal lawsuit on unexhausted claims so long as the prisoner exhausts those claims before the district court dismisses them. Pet. Appx. 7a-8a. A prisoner's decision to sue first and exhaust later has markedly different results depending upon where they are incarcerated. This is a classic example of a circuit split.

Korb acknowledges, as he must, that the Third Circuit's ruling conflicts with the Seventh Circuit's ruling in *Chambers*, 956 F.3d at 984. Response at 27. But Korb belittles the reasoning of the Seventh Circuit, arguing that the decision is somehow faulty because it did not discuss *Jones v. Bock*, 549 U.S. 199 (2007). His argument presupposes that the Seventh Circuit's ruling in *Chambers* is somehow inconsistent with *Jones*. It is not.

Korb insists that the Third Circuit properly interpreted *Jones* as holding that the PLRA's prefiling requirements do not displace Rule 15. Response at 14-15. What this Court actually stated was 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*." *Jones*, 549 U.S. at 214 (emphasis added). As Justice Thomas observed in his dissent from the denial of certiorari in *Wexford Health v. Garrett, Jones* "actually confirms that the PLRA's prefiling requirements displace the Federal Rules of Civil Procedure, including Rule 15," because presuit exhaustion is a departure from the usual procedural practice. 140 S.Ct. 1611, 1612 (2020) (Thomas, J., dissenting).

Likewise, Korb and the Third Circuit make much of this Court's description of the PLRA's exhaustion requirement as "boilerplate." Response at 15-16; *Garrett v. Wexford Health,* 938 F.3d 69, 87, 90-91 (3d Cir. 2019). They read *Jones*'s "'boilerplate' dicta for far more than it is worth." *Wexford Health*, 140 S.Ct. at 1612 (Thomas, J., dissenting).

The Fifth Circuit, citing *Jones*, held that a prisoner cannot cure a failure to exhaust a claim *pendente lite*. *Gonzalez*, 702 F.3d at 788. Korb argues that this decision should be ignored because it did not discuss Rule 15. Response at 26. But understanding that court's decision is not a matter of searching for specific words. The Fifth Circuit in *Gonzalez* announced:

> 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.* Pre-filing exhaustion is mandatory, and the case must be dismissed if available administrative remedies were not exhausted.

702 F.3d at 788 (emphasis added). That court did not discuss Rule 15 because "[i]t is irrelevant" how prisoners attempt to cure their failure to exhaust before initiating suit. *Ibid.* The Fifth Circuit's holding directly conflicts with the Third Circuit's ruling. Only this Court can resolve this disagreement between the circuits on the meaning of *Jones*.

Korb attempts to dismiss the Eight Circuit's ruling in *Johnson* because it was decided prior to *Jones*. Response at 25-26. He asserts that "the Eighth Circuit has not yet reconsidered *Johnson* after *Jones*." *Id.* at

26. This is incorrect. In *Mosley v. Corr. Care Sols.*, 671 Fed. Appx. 401, 402 (8th Cir. 2016) (per curiam), the Eighth Circuit—citing *Johnson*—held that the district court correctly dismissed claims the prisoner "ultimately exhausted after he initiated this action." The holding in *Johnson* has repeatedly been upheld in *per curiam* decisions in that circuit. *See*, *e.g.*, *Miller v. Wachtendorf*, 806 Fed. Appx. 500 (8th Cir. 2020); *Schuett v. LaRiva*, 697 Fed. Appx. 475 (8th Cir. 2017). This Court's ruling in *Jones* does not call into question *Johnson* because, as the Fifth, Seventh, and Eighth Circuits recognize, *Jones* does not render meaningless the pre-filing requirements of Subsection 1997e(a). The Eighth Circuit has no reason to issue a published decision on a question that has already been conclusively answered in that circuit.[1]

Korb's attempt to distinguish cases where prisoners did not move to supplement their complaints ignores the facts of his own case. Korb also never moved to supplement his complaint; he wrote letters informing the district court that he had exhausted certain claims after initiating his case. Pet. App. 7a. The Third Circuit

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[1] Korb cites two district court cases and a Sixth Circuit case in a misguided attempt to suggest that the Fifth, Sixth, and Tenth Circuits are unresolved about the issue presented. *See Hamlet v. Hoxie*, 2021 WL 2384516 (S.D. Fla. 2021); *Rogers v. Colorado Dept. of Corr.*, 2019 WL 4464036 (D. Col. 2019); *Mattox v. Edelman*, 851 F.3d 583 (6th Cir. 2017). Two of those cases involved a prisoner who sought to supplement his complaint with new claims that arose *after* filing the suit. *Mattox*, 851 F.3d at 594-595; *Hamlet*, 2021 WL 2384516, *4. The other involved two consolidated actions where the prisoner had "properly exhausted his administrative remedies in 2015, long before both the [consolidated] matters were filed." *Rogers*, 2019 WL 4464036, *12 n.10. Those inapposite cases did not involve the question presented here. And they do nothing to heal the significant circuit split present here.

established a categorical rule that such letters must be accepted as "Rule 15(d) supplemental pleadings." *Id.* 7a-8a. Had Korb been incarcerated in Iowa, Texas, or Wisconsin, his claims would have been dismissed.

Finally, as discussed in our petition, the Third Circuit's ruling below widened a split begun by the Ninth Circuit in *Jackson v. Fong*, 870 F.3d 928, 934 (9th Cir. 2017), where that court misread this Court's decision in *Jones*. Petition at 5-6. The circuits are deeply divided as to whether a failure to comply with the PLRA's pre-filing exhaustion mandate can be overridden by post-filing events. Five courts of appeals hold that the PLRA means what it says: "[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). If a prisoner exhausts or is released *pendente lite*, his or her unexhausted claims must be dismissed. *See*, *e.g., Williams v. Henagan*, 595 F.3d 610, 619 (5th Cir. 2010); *Bargher v. White*, 928 F.3d 439, 447 (5th Cir. 2019); *Gonzalez*, 702 F.3d at 788 (5th Cir. 2012); *Chambers*, 956 F.3d at 984 (7th Cir. 2020); *Johnson*, 340 F.3d at 627 (8th Cir. 2003); *May v. Segovia*, 929 F.3d 1223, 1229 (10th Cir. 2019); *Smith v. Terry*, 491 Fed. Appx. 81 (11th Cir. 2012).

The Third and Ninth Circuits have held the opposite: Rule 15 permits an inmate to overcome PLRA's exhaustion requirements. *See* Pet. Appx. 5a-8a; *Garrett*, 938 F.3d at 76, 78-79; *Jackson*, 870 F.3d at 934 (9th Cir. 2017). Prisoners in two circuits are permitted to litigate "unencumbered by the PLRA's exhaustion requirement" while those in five circuits are required to comply. *Wexford Health*, 140 S.Ct. at 1612 (Thomas, J. dissenting). Again, this is a classic example of a circuit split.

The Third Circuit's decision widened an irreconcilable split among the Courts of Appeals. Into that chasm now falls an inmate's obligation to fully exhaust administrative remedies prior to initiating a federal lawsuit. As discussed in our petition, this holding will have significant negative impact on prisoners' incentive to use the administrative process and prison officials' ability to safely maintain their institutions. Petition at 27-29. The circuit split should be resolved now before it widens further and degrades additional aspects of the PLRA.

II. Korb's Reliance on *Mathews v. Diaz* Underscores the Need for this Court to Resolve the Question Presented.

In arguing that the Court need not resolve this PLRA case, Korb places a heavy (and misplaced) reliance on *Mathews v. Diaz*, 426 U.S. 75 (1976), a Social Security case. That reliance only serves to demonstrate the need for this Court to resolve the question presented.

Although Korb acknowledges that "this Court has not directly addressed the interplay between Rule 15(d) and the PLRA," he maintains that this Court squarely resolved the question presented in 1976—two decades before the PLRA was enacted—when it interpreted Subsection 405(g) of the Social Security Act[2] in *Mathews*. Response at 2, 18-20.

Consistent with his general view that statutory language can be rewritten to suit his purpose, Korb begins his analysis of *Mathews* by reconstructing the

[2] 42 U.S.C. § 405(g).

statute in that case. Korb plucks isolated words from Subsection 405(g), and then reorders and splices those words together in an effort to make it appear "indistinguishable from the PLRA's exhaustion provision." Response at 18. But the PLRA's exhaustion provision bears little resemblance to the actual text of Subsection 405(g), which provides, in relevant part:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

42 U.S.C. § 405(g).

Subsection 405(g) makes filing an administrative application a non-waivable condition of district court jurisdiction in Social Security cases. *Mathews*, 426 U.S. at 75-76. Like all jurisdictional prerequisites, that statute imposes a pleading requirement, which must be satisfied through specific allegations in the complaint. *Ibid.*; *see also May*, 929 F.3d at 1229. That provision also includes a requirement that civil actions be commenced within sixty days, which "is obviously intended to do what all filing deadlines do—ensure that the action is promptly filed[.]" *Harris v. Garner*, 216 F.3d 970, 983 (11th Cir. 2000).[3]

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[3] In *Mathews*, this Court also distinguished the application requirement—a nonwaivable condition of jurisdiction—from the complete exhaustion requirement—which can be waived by the agency. 426 U.S. at 75-76.

By contrast, the PLRA's exhaustion provision confers an affirmative defense and provides that "[n]o action shall be brought * * * until such administrative remedies as are available are exhausted," 42 U.S.C. § 1997e(a). This is a centerpiece of Congress's effort to stem "the disruptive tide of frivolous prisoner litigation" flooding the federal courts. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). Thus, the objectives of the PLRA's exhaustion requirement are different: Far from promoting prompt judicial review, the PLRA's exhaustion prerequisite delays review in hopes of encouraging settlement between the prisoner and prison, thereby rendering judicial intervention unnecessary.

More fundamentally, Korb's simplistic reasoning—that Subsection 405(g) of the Social Security Act and Subsection 1997e(a) of the PLRA must yield identical results on the same legal issue merely because both statutes contain exhaustion provisions—has been rejected by this Court. In *Ross v. Blake*, when the Court held that the PLRA is not amenable to judge-made exceptions, it stated that "an exhaustion provision with a different text and history from § 1997e(a)" might yield a different result on the same legal question. 578 U.S. 632, 642 n.2 (2016). "The question in all cases is one of statutory construction, which must be resolved using ordinary interpretive techniques." *Ibid.* Because the PLRA's text, history, and purpose are distinct from the Social Security Act's, its interaction with Rule 15(d) is also distinct.

To avoid engaging in any real statutory construction of the PLRA, Korb seeks refuge in *Mathews's* discussion of supplemental complaints in a wholly unrelated context. Korb's heavy reliance on *Mathews* is telling: If the only guidance Courts of

Appeals have when resolving the interplay between the PLRA and Rule 15(d) is a 1976 Social Security Act case that predates the PLRA by twenty years, then clarity from this Court on the question presented is sorely needed. Indeed, Courts of Appeals have come to different conclusions about the import of *Mathew*s on the question presented. *Compare May*, 929 F.3d at 1229 (rejecting plaintiff's reliance on *Mathews* in PLRA case involving Rule 15(d)) *and Harris*, 216 F.3d at 970 (distinguishing *Mathews* in case involving the applicability of the PLRA to an inmate released from incarceration during the pendency of litigation), *with Garrett*, 938 F.3d at 83 (citing *Mathews*).[4]

The Courts of Appeals are divided on the import of this aspect of *Mathews*, and Korb's myopic focus on the side of that split that he favors further highlights the need for this Court to take up the issue.

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[4] In a footnote, Korb makes the argument—bordering on frivolous—that Petitioners waived the ability to distinguish *Mathews* by not addressing it in the petition for certiorari. Response at 20 n.11. Korb's argument reveals his misapprehension of the waiver doctrine, of the function of a petition for a writ of certiorari, and of the substance of *Mathews* itself. Petitioners had no obligation to address every case cited below simply because Korb has the mistaken belief that it carries the day on the merits. Indeed, Justice Thomas found it unnecessary to address *Mathews* in this dissent from the denial of certiorari in *Wexford Health* despite the respondent's reliance on that case. 140 S.Ct. at 1611-1612 (Thomas, J. dissenting). And while Korb may be ensorcelled by his own reliance on *Mathews*, the Third Circuit's opinion relegated *Mathews* to a single citation in a footnote. Pet. Appx. at 7a. Korb's naked attempt to avoid this Court's review by asserting a meritless waiver issue should be rejected.

III. This Case Presents the Appropriate Vehicle to Address the Question Presented.

Towards the back of his brief, Korb *sub silentio* acknowledges that the question presented is worthy of review, but argues that this case is not the proper vehicle for doing so. These arguments ring hollow.

Korb emphasizes that the Third Circuit's opinion was unpublished, as though this precludes the Court's review. It does not. *See*, *e.g.*, *Dunn v. Reeves*, 141 S.Ct. 2405, 2407 (2021) (granting certiorari of an unpublished, *per curiam* decision); *Andrus v. Texas*, 140 S.Ct. 1875, 1881 (2020) (same). And the decision's unpublished status has not diminished its impact on the district courts within the Third Circuit. Those courts are implementing the ruling as binding precedent. *See*, *e.g.*, *Winter v. Richman*, 2021 WL 3618048, *3 (D. Del. 2021).

Though the PLRA requires exhaustion before suit, within the Third Circuit exhaustion can now occur post-suit any time before a motion to dismiss is granted—encouraging a rush to seek dismissal. *Ibid.* And in the Third and Ninth Circuits, exhaustion need not happen where an inmate can successfully delay a ruling on a dispositive motion until they are released from incarceration. *See Garrett*, 938 F.3d at 76, 78-79; *Jackson*, 870 F.3d at 931-32. The PLRA was not designed to encourage this sort of gamesmanship. Rather, the PLRA uses clear language to foreclose it.

Korb also maintains that a ruling in Petitioners' favor would have no meaningful consequence in this case because Korb could re-file his complaint under a new docket. Contrary to Korb's assertion, dismissal without prejudice is not an empty formality. As the Seventh Circuit observed, "keeping the courthouse

doors closed" until the administrative process concludes effectuates the PLRA's goal of encouraging inmates and prisons to resolve matters out of court. *Ford v. Johnson*, 361 F.3d 395, 398 (7th Cir. 2004). Allowing inmates to initiate litigation before exhausting subverts that goal. *Ibid.*[5]

Korb encourages the Court to "allow further development" before resolving the question presented. But this issue has been percolating among Courts of Appeals for more than twenty years, *see Harris*, 216 F.3d at 981-84, and seven Courts of Appeals have weighed in, *see supra* at 5-6. Further, because of the Third and Ninth Circuits rulings, inmates in 12 states can game the system Congress created. This Court should not wait for Courts of Appeals to fashion new methods of circumventing the PLRA before resolving this issue.

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[5] Korb dismisses this interest as the sort of "perceived policy concerns" that this Court discussed in *Jones*. Response at 3 (quoting *Jones*, 549 U.S. at 212). By stripping that quote of its context, Korb demonstrates the risks of dissecting judicial opinions word-by-word as if they were statutes. *See Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting). In *Jones*, this Court discussed a series of judicially-crafted burdens placed on inmates that had no grounding in the text of the PLRA. *Jones*, 549 U.S. at 222-23. But here, Petitioners seek to have the text of the PLRA enforced, and in a manner that effectuates the purpose behind that language.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

J. BART DELONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section

SEAN A. KIRKPATRICK
Senior Deputy Attorney General
Counsel of Record

DANIEL B. MULLEN
Deputy Attorney General

January 21, 2022 COUNSEL FOR PETITIONERS