No. 25-350

IN THE

Supreme Court of the United States

CHARLES BROOKS, *et al.*,

Petitioners,

v.

JEREMY JAMES ALLEN,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This case presents the Court with a clean vehicle to resolve a clear and deepening split about whether a post-release amended complaint on can override a prisoner's failure to have exhausted remedies when he "brought" his action, as required by the Prison Litigation Reform Act (PLRA). 42 U.S.C. § 1997e(a). Respondent ignores lower courts' own recognition of the circuit split and misreads this Court's case law. He also manufactures vehicle problems that do not exist. And he (tellingly) devotes much of his Brief in Opposition to the merits, arguing that the Eighth Circuit was right. Even if that matters at this stage, this argument fails because the Eighth Circuit made the same analytical mistakes as the Ninth and Third Circuits in excusing Respondent's admitted failure to exhaust. The Court should grant certiorari to resolve an important question that has divided the lower courts.

ARGUMENT

I. The Eighth Circuit Deepened A Circuit Split That This Court Should Resolve.

Respondent's suggestion that the lower courts are not actually divided is impossible to square with the decisions of those courts, which have themselves identified the circuit split highlighted in the Petition. Indeed, when different circuits look at the same statutory text, disagree with each other about what it means, and acknowledge that the circuits are divided, there is a split in authority by any definition. Before the Eighth Circuit decision here, the Third and Ninth Circuits broke with the Sixth, Tenth, Eleventh Circuits, and recognized the divergence. *See*

Garrett v. Wexford Health, 938 F.3d 69, 84, n. 21; 90-91 (3d Cir. 2019) (describing different approaches within the circuits); *Jackson v. Fong*, 870 F.3d 928, 935 (9th Cir. 2017) (disagreeing with Sixth Circuit's decision in *Cox v. Mayer* and Eleventh Circuit's en banc decision in *Harris v. Garner*, 216 F.3d 970 (11th Cir.2000)). And though *Stites v. Mahoney*, is not precedential within the Seventh Circuit, it nonetheless reflects a different outcome than would be reached under Third, Ninth, and now Eighth Circuit precedent. 594 F. App'x 303, 304 (7th Cir. 2015).[1] The circuits see themselves diverging in their approaches to the question presented here.

Take *Garrett*, the Third Circuit case that this Court declined to hear in 2020, over the dissent of Justice Thomas. *Wexford Health v. Garrett*, 140 S. Ct. 1611, 1612 (2020) (Thomas, J., dissenting from the denial of certiorari). The Third Circuit "decline[d] to adopt the Eleventh Circuit's analysis" in *Harris*, noting that the panel "[did] not share the Eleventh Circuit's view [. . .] that the PLRA expressly overrides Rule 15 with regard to the administrative exhaustion requirement." *Garrett*, 938 F.3d at 91 n. 25. The Ninth Circuit, for its part, found *Harris* "unpersuasive" and speculated that the Sixth and Eleventh Circuits might revisit their holdings in light of this Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007). *Jackson*, 870 F.3d at 935 (noting that *Harris* predated *Jones*).

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1. As Justice Thomas has noted, the Fifth Circuit decision in *Bargher v. White*, 928 F.3d 439, 447–448 (2019), also conflicts with the Third Circuit's reasoning in *Garrett*, although *Bargher* does not involve an amended complaint. *Wexford Health v. Garrett*, 140 S. Ct. 1611, 1611-1612 (2020) (Thomas, J., dissenting from denial of certiorari.

Both *Harris* and *Cox* remain good law in their respective circuits post-*Jones*, with those circuits having specifically rejected arguments to the contrary. *See*, *e.g.*, *McDowell v. Bowman*, No. 21-10840, 2022 WL 4140331, at *2 (11th Cir. Sept. 13, 2022) (affirming dismissal for failure to exhaust and rejecting argument that *Harris* was no longer good law). Similarly, the Sixth Circuit has also declined to revisit *Cox*. *Mattox v. Edelman*, 851 F.3d 583, 593 (6th Cir. 2017) (noting that the PLRA exhaustion analysis of *Cox* was "likely correct" but distinguishing it). Suffice to say, the circuits do not share Respondent's view that there is no split in authority. Nor does the Eighth Circuit, which split 7-4 in denying rehearing en banc. Appx. 42a.

As further proof of the split, lower courts in circuits on both sides of the split continue apply the law in their respective circuits to reach different results. For example, a federal district court in California held that a former prisoner was not subject to PLRA exhaustion, even though the post-release amended complaint was basically the same as the unexhausted one he filed while incarcerated. *Ricker v. Salas*, No. 19-CV-807 TWR (LL), 2020 WL 6484639, at *2 (S.D. Cal. Nov. 3, 2020). Noting that the Tenth and Eleventh Circuits took different approaches to post-release amended complaints, the court applied Ninth Circuit law because that circuit had "clearly spoken to the contrary." *Id*. at *7, n.3; *see also Raja v. Kim*, No. 1:19-CV-00817-HBK, 2021 WL 3032813, at *2 (E.D. Cal. July 19, 2021) (identifying split in authority).

By contrast, a federal district court in Tennessee (Sixth Circuit) applied *Cox* in rejecting a former prisoner's argument the exhaustion no longer applied to him, stating

"a party once released cannot evade PLRA exhaustion by simply restating previously made allegations in a subsequent complaint." *Delk v. Hardeman Cnty. Corr. Facility*, No. 1:16-CV-01275, 2022 WL 891229, at *5 (W.D. Tenn. Mar. 25, 2022). In the Fifth Circuit, at least one federal district court has applied *Bargher* in the context of a post-release amended complaint. *Scott v. Hearne*, No. CV 19-0911, 2023 WL 3138000, at *3 (W.D. La. Apr. 27, 2023). Meanwhile, federal district courts from circuits that have yet to weigh in have identified the split and struggled to resolve the issue. *Sanchez v. Nassau Cnty.*, 662 F. Supp. 3d 369, 397 (E.D.N.Y. 2023) (surveying case law from inside and outside the Second Circuit and noting widespread disagreement among federal courts); *Makell v. Cnty. of Nassau*, 599 F. Supp. 3d 101, 109 (E.D.N.Y. 2022) (same, and reaching a different outcome than *Sanchez*).

These lower court decisions confirm that the split on PLRA exhaustion is not a "mirage." Resp. Br. Opp. At 2. The split is real. Eighth Circuit's decision below deepens it. This Court should resolve it.

II. The Decision Below Is Wrong.

The Eighth Circuit joined the wrong side of this split. Respondent's contrary argument misreads *Jones v. Bock* and draws a series of mistaken interferences from inapposite cases.

Jones held that the PLRA's silence on pleading exhaustion is strong evidence that "the usual practice" should be followed, meaning that exhaustion is an affirmative defense to be pleaded and proved by the defendant. 549 U.S. 199, 212 (2007). But the PLRA is

"not truly silent" on amendments to complaints, which necessarily happen after a lawsuit is "brought." Appx. 15a. "Brought" is the key term, and Congress' use of the past tense is significant because it unambiguously refers to the beginning of a case. *Gundy v. United States*, 588 U.S. 128, 143, (2019) (noting significance of past-tense verb in determining Congress' intent). Congress' use of "boilerplate" statutory language does not mean the language does not reflect Congressional judgment. *See Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 235 (2020) (noting that Congress uses so-called boilerplate "because it offers tried-and-true language to ensure a precise and predictable result"). Here, Congress used "brought" to establish that a prisoner's exhaustion obligation is determined when they start the case. "Brought," after all, has a settled and fixed meaning throughout the federal code, and that settled and fixed meaning refers to the beginning of a case. *Harris*, 216 F.3d at 973-74 (describing "settled legal definition" of "brought").

Respondent also relies on *Ramirez* and *Perttu*, but neither case informs how the Court should decide this one. Resp. Br. Opp. 8-10, 19-23. *Ramirez* addressed a different question: whether a prisoner lawsuit filed after a grievance was filed—but before the grievance is decided—could be "cured" by a supplemental pleading. *Ramirez v. Collier*, 595 U.S. 411, 422-423 (2022). That question is not at issue here because it is undisputed that Respondent ignored the grievance process during his four years of incarceration. Appx. 37a. Second, and more importantly, Respondent concedes that the language he highlights from *Ramirez* was dicta. Resp. Br. Opp. at i. *Ramirez* merely observed that the failure to complete the exhaustion process was

"arguably cured" by a post-exhaustion supplemental pleading. *Id.* at 423. But the Court expressly declined to decide even that issue because the case was in a preliminary posture and because it had not been raised in any of the courts below. *Id.* at 422-423. *Ramirez*'s dicta on a different PLRA issue that it didn't purport to resolve is no barrier to review here.

Perttu also does not speak to the issue here. *Perttu* decided the narrow issue of whether a party has a jury-trial right on a PLRA exhaustion claim when exhaustion is "intertwined" with the merits. *Perttu v. Richards*, 605 U.S. 460, 469 (2025); *see also id.* at 489-90 (Barrett, J., dissenting) (describing narrow circumstances in which the *Perttu* rule would apply). Even if *Perttu* were relevant, it would only confirm that the Eighth Circuit was wrong. *Perttu* held that a party had a jury-trial right on a PLRA exhaustion claim that is intertwined with the merits, and it reached that conclusion because the PLRA was silent on the issue. *Id.* at 469. Here, by contrast, the PLRA is "not truly silent" about when Respondent "brought" this lawsuit. Appx. 15a.

Respondent's remaining cases—*Royal Canin* and *Polansky*—have nothing to do with the PLRA or exhaustion. Resp. Br. Opp. at 9-10. Together they stand for the unremarkable proposition that the Federal Rules of Civil Procedure are the default unless Congress displaces them. But here, Congress did create a special rule: strict and mandatory exhaustion for prisoners, determined by the prisoner's incarceration status at the time a lawsuit is "brought." *Royal Canin* and *Polansky* support, and do not undermine, the rule Petitioners seek here.

III. This Case Is An Ideal Vehicle To Resolve A Split On An Important Issue.

Contrary to Respondent's assertions, this case is an ideal vehicle because the question presented is the only issue; a reversal by this Court will end the case. Pet. 15-16. This Court often decides case-dispositive issues in an interlocutory posture "where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Steven Shapiro, et al., *Supreme Court Practice*, 4-57 (11th Ed. 2019) (citing examples). That is exactly the situation here.

Indeed, 1292(b) certification exists for this very purpose. *See* 28 U.S.C. 1292(b) (authorizing the district court to certify an interlocutory appeal when "an immediate appeal from the order may materially advance the ultimate termination of the litigation"). Both the district court and court of appeals found this case met all three criteria, and Respondents did not oppose certification below. Appx. 21a-31a.

That leaves Respondent's judicial estoppel argument, raised for the first time in this litigation. This Court normally declines to entertain arguments that were not raised in the courts below. *E.g.*, *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 173 (2016). And here, Respondent failed to raise judicial estoppel at every stage of the case before his Brief in Opposition. Respondent did not raise estoppel when Petitioners moved for early summary judgment, or when they moved for 1292(b) certification. Likewise, Respondent did not raise estoppel before the Eighth Circuit. Respondent's judicial estoppel argument is thus forfeited.

Even if not forfeited, Respondent's newly-discovered judicial estoppel argument is wrong for at least two reasons. First, there is no tension between Petitioner's statute of limitations argument and its PLRA exhaustion argument and therefore no occasion to apply judicial estoppel. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010). To apply judicial estoppel, the estopped party's positions must be irreconcilable. *See New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (requiring the estopped party's positions to be "clearly inconsistent"). That high bar is not met here. At the district court, Petitioners argued that the state law malpractice claim was commenced outside the four-year limitations period and should be dismissed for that reason. ECF Doc. 30 at 13-16. Petitioners later argued that Respondent was incarcerated at the time his lawsuit was "brought" and was therefore subject mandatory PLRA exhaustion. ECF Doc. 81 at 6-10. These arguments are not inconsistent because one argument deals with timeliness of a state-law claim, and the other deals with Congressionally-mandated pre-condition to suit.

Second, judicial estoppel "typically applies when, among other things, a party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Reed Elsevier*, 559 U.S. at 170. But here, Respondent voluntarily dismissed his state law medical malpractice claim. ECF Doc. 38 at 1. Petitioners thus did not succeed in persuading a court about the limitations period on the malpractice claim. *See Landry v. Dep't of Child & Fam. Servs.*, No. CV 21-794, 2021 WL 2374798, at *4 (E.D. La. June 10, 2021) (declining to apply judicial estoppel when party voluntarily dismissed their claims).

Respondent also points out that he and other similarly-situated individuals could have simply refiled their complaints after they were released from incarceration, making it judicially uneconomical to dismiss them in the first place. Resp. Br. Opp. At 32. Maybe so. *See Harris*, 216 F.3d at 980 (discussing possibility of refiling). But their judicial economy argument cuts both ways, as the Sixth Circuit recognized:

> [T]hough dismissal without prejudice may well be judicially uneconomical *in the instant case*, to excuse 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 courts.

Cox v. Mayer, 332 F.3d 422, 427 (6th Cir. 2003) (emphasis original). That, in turn, would discourage use of prison grievance processes, increase the courts' overall litigation burden, and deny prison officials a chance to resolve inmates' concerns, all in frustration of Congress' purpose in enacting the PLRA. *Porter v. Nussle*, 534 U.S. 516, 525 (2002). Moreover, the circuits have recognized that the opportunity costs of litigation change post-release, when inmates are likely to have less time on their hands than they do while incarcerated. *Harris*, 216 F.3d at 978; *Witzke v. Femal*, 376 F.3d 744, 750 (7th Cir. 2004). So it is not a foregone conclusion that such cases will simply be refiled. *See Harris*, 216 F.3d at 980.

In any event, the exhaustion analysis should operate in a uniform manner in every circuit. It does not, as the cases discussed above and in the Petition demonstrate. The issue presented in this case will continue to divide the lower courts until this Court resolves the issue.

CONCLUSION

For the reasons discussed above and in the Petition, the Court should grant the petition and reverse the Eighth Circuit.

Respectfully submitted,

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Dated: November 14, 2025