No. 15-339

In the Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent Shaidon Blake was beaten by two prison guards: petitioner Michael Ross and his colleague James Madigan. That same day, Blake lodged a complaint that triggered a year-long investigation by Maryland's Internal Investigative Unit, the entity responsible for investigating claims that prison guards used excessive force. The investigation confirmed Blake's claim that the guards beat him. In lieu of termination, Madigan resigned. Blake subsequently won a $50,000 jury verdict against Madigan.

The district court dismissed Blake's claims against Ross on the basis of the PLRA exhaustion requirement. The court of appeals reversed and remanded for further proceedings. The following questions are presented:

(1) Whether petitioner, who failed to raise the exhaustion defense until nearly two years after the filing of this suit, waived the defense.

(2) Whether respondent complied with Maryland's administrative remedy scheme by triggering an investigation by the state entity that has express jurisdiction over claims of excessive force.

(3) Whether, if respondent did not comply with the technical requirements of Maryland's administrative scheme, he nonetheless satisfied the PLRA exhaustion requirement by reporting the incident in a manner that an objectively reasonable observer would have believed satisfied his state law obligations and that caused an investigation that fulfilled the substantive purposes of PLRA exhaustion.

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BRIEF IN OPPOSITION

STATEMENT

This case is a clear example of a meritorious prisoner lawsuit. Respondent Shaidon Blake was restrained and beaten by prison guards. That is not a mere allegation: the prison conducted a year-long investigation, and the warden himself ultimately found that the use of force was "excessive." Maryland thus brought formal charges against one of the prison guards, Madigan, who resigned in lieu of being fired. Once armed with a thorough administrative record substantiating his claims, respondent filed this suit. The clarity of the record led the district court to appoint private counsel. Ultimately, a jury returned a $50,000 verdict against Madigan.

There can be no dispute: this is the kind of meritorious prisoner lawsuit that *should* be brought.

Petitioner Michael Ross, the other prison guard involved in the incident, sought to avoid suit by claiming that respondent failed to exhaust his administrative remedies. The court of appeals properly rejected his contention. Certiorari should be denied.

To begin with, this case requires the Court to confront two issues before it can reach the question presented by petitioner. *First*, petitioner waived his exhaustion defense by failing to assert it in his answer or his initial dispositive motion. It was far too late when petitioner first asserted the defense nearly two years after respondent filed suit. This question does not warrant the Court's review.

Second, petitioner's question assumes, wrongly, that respondent did not properly comply with the

technical requirements of Maryland's administrative remedy scheme. In fact, respondent did precisely what Maryland law instructed him to do. Such a narrow question of state law does not warrant this Court's attention, all the more so because Maryland has since amended its law to resolve any prior confusion.

Even as framed by petitioner, the question presented does not warrant further review. The facts of this case are unusual, and the holding below is narrow. There is, moreover, no conflict in the lower courts—petitioner has not identified a single decision from a court of appeals that has confronted the same limited factors the court here found controlling. Nor can petitioner demonstrate that the decision here has any prospective significance. Since the decision below issued, scores of district courts in the Fourth Circuit have dismissed prisoner complaints for run-of-the-mill failures to exhaust; petitioner, by contrast, does not point to even one case that he believes, but for the decision here, should have been decided differently. Finally, the decision below is correct. If respondent did not in fact comply with the technicalities of Maryland state law, his objectively reasonable belief that he had done so, coupled with an internal prison investigation that satisfied the substantive purposes of administrative exhaustion, render respondent in compliance with the PLRA exhaustion obligation.

A. Factual background.

Respondent is an inmate at the Maryland Reception and Classification Center. Pet. App. 3. Petitioner, Michael Ross, is a guard at the facility. *Ibid.*

On June 21, 2007, petitioner and another guard, James Madigan, set out to move Blake to a different cell block. Pet. App. 3. Petitioner handcuffed Blake's hands behind his back (*ibid.*); Blake did not resist (*id*. at 47). While they were walking down concrete stairs, Madigan shoved Blake from behind, forcing Blake to push his elbows against the railing to avoid falling down the concrete stairs. *Id*. at 3. At the bottom of the stairs, Madigan shoved Blake again. *Id*. at 4. Blake cursed at Madigan following the second shove. *Ibid*.

Petitioner subsequently held Blake against a wall while Madigan "wrapped a key ring around his fingers and then punched Blake at least four times in the face in quick succession." Pet. App. 4. Petitioner did nothing to intervene and, after a brief pause, Madigan punched Blake again while petitioner continued to hold him. *Ibid*. Petitioner and Madigan then lifted Blake from the ground and dropped him, slamming his head. *Id*. at 48. Petitioner "dropped his knee onto Blake's chest." *Id*. at 4.

Other guards subsequently took Blake to the medical unit. Pet. App. 4. Blake was later diagnosed with nerve damage. *Ibid*. He continues to suffer from persistent headaches, for which he is treated with Neurontin, a nerve pain medication. JA73-74.

B. Respondent's administrative grievance.

1. The Maryland Department of Public Safety and Correctional Services (the "Department") "provides inmates with a number of administrative avenues for addressing complaints and problems." Pet. App. 7. The "Administrative Remedy Procedure" ("ARP") permits a broad range of complaints. Pet. App. 7-8. This process has three steps: an inmate

may request a remedy from the prison warden, if denied, he may appeal to the Commissioner of Corrections, and, finally, he may further appeal to the Inmate Grievance Office. *Id*. at 8.

Additionally and separately, the Department administers the Internal Investigative Unit ("IIU"). Pet. App. 8. The IIU has mandatory jurisdiction over claims that a prison guard used "excessive force." Md. Code Regs. § 12.11.01.05(A)(3). The IIU is a well-established administrative scheme within the Department, governed by extensive regulations. See *Id*. § 12.11.01.00 to .12. IIU investigators are required to, among other things:

> (1) Conduct an investigation in an impartial and reasonable manner according to the oath of office and law of the United States and the State.
>
> * * *
>
> (3) Ensure the safety and chain of custody for items and evidence received;
>
> (4) Maintain confidentiality of all matters related to investigations; and
>
> (5) Prepare an investigative report that, at a minimum, contains: (a) Complete and detailed information regarding the complaint or incident; (b) A clear account of investigative actions; and (c) All relative information supporting the finding.

Id. § .07(C).

To fulfill these obligations, IIU investigators have extensive powers. They may:

> (1) Access Department records; (2) Request assistance from an agency employee; (3) Request assistance from another law enforcement agency; (4) Inspect facilities, vehicles, or equipment; and (5) Require an employee to provide testimonial or physical evidence.

Id. § .07(B).

The court of appeals described the intersection between these two administrative remedies—the ARP and the IIU—as "murky." Pet. App. 15. Reviewing the relevant regulations, directive, and handbook in effect at the time of the assault, the court of appeals found that "there is no basis for an inmate to conclude that the ARP and IIU processes would be permitted to proceed concurrently." *Id.* at 12. And, as the lower court noted, "at least three district court judges have found that an internal investigation removes an inmate's complaint from the ARP process." *Id.* at 14-15 n.8 (citing cases).

Following the incident at issue, the Department amended directive DCD 185-003, which now provides that "an ARP complaint will be dismissed for procedural reasons 'when it has been determined that the basis of the complaint is the same basis of an investigation under the authority of the Internal Investigative Unit (IIU)." Pet. App. 13 & n.5. See also JA437.

2. On June 21, 2007, the day petitioner and Madigan assaulted him, respondent lodged a complaint that triggered an investigation by the IIU. Pet. App. 4. A year-long inquiry ensued (*id.* at 4-5), resulting in an extensive administrative record complete with multiple witness statements and factual findings by the IIU. JA27-67. Petitioner provided a

written statement. Pet. App. 11. So did the respondent, who was interviewed by an internal affairs investigator. *Id.* at 66-68.

The report concluded that "Madigan had used excessive force against Blake by striking him in the face while he was handcuffed." Pet. App. 4-5. In particular, the Security Chief confirmed, in a signed, handwritten note stated that "[t]he amount of force used was not in compliance with the * * * use of force manual." JA56. The prison warden likewise confirmed, in a signed, handwritten note, that "[u]se of force was unnecessary [and] therefore it was excessive." *Ibid.*

As a result of the investigation, the State charged Madigan with "engaging in intentional misconduct, without justification, that seriously threatens the safety of the workplace; wantonly careless conduct in the care and custody of an inmate and excessive use of force which could reasonably be expected to result in serious bodily harm or death." JA385. Madigan entered into "a settlement agreement pursuant to which he resigned in lieu of being fired." Pet. App. 32.

By contrast, the "report did not assign any fault to [respondent]." Pet. App. 5. It therefore "did not recommend any disciplinary action against him." *Ibid.* Respondent, according to the prison's report, was an innocent victim in this incident.

C. Proceedings below.

1. In September 2009, respondent, acting *pro se*, filed this Section 1983 suit against petitioner and Madigan, contending that their excessive use of force violated his constitutionally-protected rights. Pet. App. 5. Petitioner answered the complaint in Nov-

ember 2009, and then filed a motion requesting dismissal or summary judgment in February 2010. *Ibid.* Petitioner did not assert an exhaustion defense at either time. *Ibid.* After denying petitioner's motion, the district court appointed counsel to represent respondent. *Ibid.*

In August 2011, nearly two years after respondent filed suit, petitioner requested consent to file an amended answer. Pet. App. 5. Acknowledging that they intended to amend respondent's handwritten, *pro se* complaint, respondent's court-appointed counsel agreed that an amended answer would be appropriate. *Ibid.* The parties did not discuss the specific aspects of the amendment. *Ibid.*

Petitioner's amended answer asserted, for the first time, an affirmative defense that respondent had failed to adequately exhaust his administrative remedies. *Id.* at 5-6. The district court granted petitioner's consent motion less than a day after it was filed. *Id.* at 6. And, after respondent filed an amended complaint, petitioner filed another answer, again asserting an exhaustion defense. *Ibid.*

Respondent immediately moved to strike petitioner's exhaustion defense from both answers, arguing that it was waived. Pet. App. 6. Petitioner, in contrast, moved for summary judgment on the ground that respondent had failed to adequately exhaust administrative remedies. *Ibid.*

The district court denied respondent's motion to strike, and it granted petitioner's motion for summary judgment. Pet. App. 46-61.

As to waiver, the district court reasoned that respondent should have objected—in the less than 24-hour window—between when petitioner filed his mo-

tion to amend and when the court granted it. Pet. App. 52. Additionally, the court found that, because respondent filed an amended complaint, petitioner was entitled to amend his complaint to add new defenses. *Id*. at 52-53.

As to the question of exhaustion, the court found "that an internal investigation does not relieve prisoners of the PLRA's exhaustion requirement." Pet. App. 60. Thus, the court found that respondent's failure to engage in the ARP process meant he failed to exhaust available administrative remedies. *Id.* at 40-42. The court entered judgment in petitioner's favor. *Id*. at 6.

The case proceeded to a jury trial as to Madigan. The jury concluded that respondent proved, by a preponderance of the evidence, that "Madigan maliciously and sadistically committed an act that violated Plaintiff Shaidon Blake's federal constitutional right not to be subjected to excessive force." JA568. The jury awarded respondent $50,000 in damages. *Ibid*. The district court subsequently denied Madigan's request for a new trial (JA576-579), entered judgment in respondent's favor (JA580), and awarded respondent attorneys' fees (JA572-576).

Madigan did not appeal. Respondent appealed the district court's entry of judgment as to petitioner.

2. The court of appeals reversed. Pet. App. 1-28. Finding petitioner's exhaustion defense "without merit," the court did not address the question of waiver. *Id*. at 6. Nor did the court of appeals determine whether respondent did in fact satisfy Maryland's remedial scheme. *Id*. at 12-13 & n.6.

Instead, the court reasoned that, even assuming petitioner had not satisfied a technical requirement

of Maryland state law, he nonetheless qualified as having exhausted administrative remedies in the narrow confines of this case. Pet. App. 11-15. This required two showings: (1) that respondent had "an objectively reasonable belief that he had exhausted all available avenues for relief" (*id.* at 12 & n.4), and (2) that respondent's actions caused an investigation by the prison that "exhausted his remedies *in a substantive sense* by affording corrections officials time and opportunity to address complaints internally" (*id.* at 10 (quotations omitted)).

The court concluded that the facts of this case satisfy both requirements. As to the first, the court found that respondent "reasonably interpreted Maryland's murky inmate grievance procedures," particularly insofar as "the grievance system is confusing enough that at least two learned judges" have interpreted state law like respondent. Pet. App. 15 & n.8. As to the second, "[t]he Department conducted a one-year investigation into [respondent's] violent encounter with Madigan and [petitioner], at the conclusion of which it issued Madigan an Unsatisfactory Report of Service and relieved him of his duties as a corrections officer." *Id.* at 11.

Judge Agee dissented. Pet. App. 16-28. In his view, notwithstanding the IIU complaint, respondent failed to exhaust administrative remedies. *Id.* at 20. He additionally suggested, but without actually concluding, that "[t]he PLRA's exhaustion requirement may not even be amenable to any exceptions." *Id.* at 21. Judge Agee mainly quarreled with whether, in light of the facts of this case, it was objectively reasonable for respondent to believe that he complied with state law requirements. *Id.* at 22-27. His principal conclusion, therefore, was that "a reasonable

interpretation exception does not excuse [respondent's] failure to exhaust" in the facts of this case. *Id.* at 27.

The court of appeals denied petitioner's request for rehearing *en banc* without calling for a response. Pet. App. 64. No member of the court of appeals requested a poll. *Ibid.*

REASONS FOR DENYING THE PETITION

This Court's intervention is unwarranted. Before the Court can reach the issue presented by petitioner, there are two prior questions—whether petitioner waived the exhaustion defense and whether respondent complied with the technical requirements of Maryland state law. Neither issue merits review. And the reasons offered by petitioner in support of certiorari each fail: there is no conflict in the circuits; petitioner fails to demonstrate that the narrow holding below has any prospective significance; and the lower court's decision is correct.

A. This case is not an appropriate vehicle to review the question framed by petitioner.

To begin with, there are two, independent grounds, apart from the issue pressed by petitioner, on which respondent wins this case. Because both issues are logically prior to the question framed by petitioner, and because neither warrants review, certiorari should be denied.

1. Petitioner waived the exhaustion defense.

Petitioner waived the defense by failing to include it in his initial answer and dispositive pleading. Petitioner first asserted the exhaustion defense,

by way of an amended answer, nearly two years after respondent filed suit. Pet. App. 5.

It is established that "failure to exhaust is an affirmative defense under the PLRA." *Jones* v. *Bock*, 549 U.S. 199, 216 (2007). And, moreover, "[i]t is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case." 5 Charles Alan Wright et al., Federal Practice & Procedure § 1278 (3d ed. 2004).

The court of appeals did "not reach the issue of whether [petitioner] waived the defense." Pet. App. 6. But, because this is a threshold question to the issue for which petitioner seeks review, that issue would be squarely put to this Court. And there is substantial reason to conclude that the Court would, on the facts of this case, find waiver.

To be sure, the dissenting judge below would have found the exhaustion defense not waived because respondent's counsel consented to petitioner's request to file an amended answer. Pet. App. 27-28. See also Pet. App. 52. But that is incorrect.

Federal Rule of Civil Procedure 15(a)(2) provides that a party may amend his answer (once the time for amending by matter of right has elapsed) only by "the opposing party's written consent or the court's leave." The scope of that consent is measured against an objective reasonableness standard. *Cf. Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness.").

Below, counsel for respondent agreed that petitioner may file an amended answer *because* respondent intended to amend the complaint (to replace respondent's handwritten, *pro se* complaint). JA90. But respondent's counsel never consented to petitioner's assertion of a wholly new defense. Pet. App. 5.

It would be unreasonable to conclude that respondent's consent extended so far: courts have broadly held that "a defendant cannot plead new counterclaims or affirmative defenses as of right unless the amended complaint changes the scope or theory of the case." *Fausset* v. *Mortgage First, LLC*, 2010 WL 1212085, at *4 (N.D. Ind. 2010). See also, *e.g.*, *Regions Bank* v. *Commonwealth Land Title Ins. Co.*, 2012 WL 5410948, at *3 (S.D. Fla. 2012). Otherwise, "[i]f every amendment, no matter how minor or substantive, allowed defendants to assert counterclaims or defenses as of right, claims that would otherwise be barred or precluded could be revived without cause." *E.E.O.C.* v. *Morgan Stanley & Co.*, 211 F.R.D. 225, 227 (S.D.N.Y. 2002).[1]

Here, as the district court put it, "the changes the Amended Complaint makes to the Complaint are largely cosmetic." Pet. App. 52. A reasonable observer would thus conclude that respondent, by agreeing

[1] There is conflict in the lower courts on this point: "District courts across the country have taken several different approaches, which can generally be classified as permissive, moderate or narrow." *Adobe Sys. Inc.* v. *Coffee Cup Partners, Inc.*, 2012 WL 3877783, at *5 (N.D. Cal. 2012). Below, petitioner sought adoption of the contrary approach, arguing that it is the "better reasoned rule." CA4 Dkt. No. 37, at 38. Given that this issue was not addressed below and it arises here obliquely via the question of waiver, this is surely not an appropriate vehicle to resolve this disputed question.

that petitioner could file an amended answer in light of respondent's intent to file a cosmetically-improved complaint, did not consent to petitioner's late assertion of an entirely new defense, far outside the scope of the amendments to the complaint. Indeed, upon first learning that petitioner sought to add a new affirmative defense, respondent objected and moved to strike. Pet. App. 6.[2]

Because late assertion of the exhaustion defense creates prejudice to respondent, the district court could not have granted petitioner leave to assert the defense late. Respondent was assaulted on July 13, 2007 (Pet. App. 3), and the statute of limitations for such a claim is three years. See *Nasim* v. *Warden, Maryland House of Correction*, 64 F.3d 951, 955 (4th Cir. 1995). Petitioner answered the complaint on November 19, 2009. Pet. App. 5. If petitioner had asserted an exhaustion defense at that time, respondent could have pursued any state remedies he believed appropriate. By waiting until August 2011 to raise his exhaustion argument, petitioner foreclosed respondent from any such opportunity. Such delay is necessarily prejudicial. See *S. Wallace Edwards &*

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[2] The authority cited by the dissenting judge is not to the contrary. See Pet. App. 28. In *Corwin* v. *Marney*, *Orton Invs.*, 843 F.2d 194, 199 (5th Cir. 1988), the parties did not dispute the scope of consent. And the sort of "implied consent" at issue in *Mooney* v. *City of New York*, 219 F.3d 123, 127 n.2 (2d Cir. 2000), is lacking here, where respondent specifically objected once he learned the scope of the proposed amendment. That the objection came by way of a Rule 12(f) motion to strike—rather than an opposition to petitioner's motion to amend—was occasioned solely by the fact that the district court granted petitioner's motion within a day of its filing. Pet. App. 6. The form of respondent's objection makes no substantive or practical difference.

Sons, Inc. v. *Cincinnati Ins. Co.*, 353 F.3d 367, 373-374 (4th Cir. 2003). Even petitioner acknowledged that "there may be prejudice to the plaintiff in that the statute of limitations has run." JA489.

2. Petitioner has not proven that respondent failed to exhaust administrative remedies as a matter of Maryland state law.

Certiorari is also unwarranted because the question presented rests on an incorrect assumption concerning Maryland law. Petitioner asserts that "[n]o one disputes that [respondent] failed to exhaust his available administrative remedies before filing suit in federal court." Pet. 4-5.[3] Not so. Respondent's IIU complaint *did* satisfy his exhaustion obligation as a matter of Maryland law. At the very least, petitioner has failed to carry his burden of proving otherwise.

Because "[n]onexhaustion is an affirmative defense," "defendants have the burden of raising and proving the absence of exhaustion." *Porter* v. *Sturm*, 781 F.3d 448, 451 (8th Cir. 2015) (citing *Jones,* 549 U.S. at 211-212). See also, *e.g.*, *Moore* v. *Bennette*, 517 F.3d 717, 725 (4th Cir. 2008).

Here, as the court of appeals explained, on the same day as the incident, respondent "reported the

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[3] Petitioner's representation of the record is somewhat mystifying. Below, one of respondent's central arguments was that "because no further 'administrative remedies' were 'available' to Blake once the internal investigation was completed, * * * the internal investigation exhausted Blake's administrative remedies and fully satisfied the PLRA's exhaustion requirement." CA4 Dkt. No. 27, at 39. See also, *e.g.*, *id*. at 16 ("[U]nder the Maryland inmate-grievance system in place at the time Blake was assaulted, completion of an internal investigation exhausts all administrative remedies.").

incident to senior corrections officers and provided a written account." Pet. App. 4. As a result, "[t]he Internal Investigative Unit ("IIU") of the Maryland Department of Public Safety and Correctional Services ("Department") undertook a yearlong investigation and issued a formal report." *Ibid.*

Petitioner contends that this was not the appropriate procedure for respondent to exhaust his administrative remedies. Instead, he believes that respondent should have brought a proceeding via Maryland's Administrative Remedy Procedure ("ARP"). See Pet. App. 8; Pet. 5.

But, under the Maryland grievance procedure in force at the time, the IIU investigation was, at the very least, *an* appropriate means for grieving his claim—and it likely was the *only* means for doing so. Either way, it qualified as exhaustion under Maryland law.

To begin with, multiple federal judges have held that, once the IIU begins an investigation, a prisoner may not bring a parallel ARP proceeding. In *Thomas* v. *Bell*, 2010 WL 2779308, at *4 n.2 (D. Md. 2010), the court explained that the Department of Corrections "does not permit prisoners to pursue ARP claims for matters referred to the Internal Investigation Unit." (This case applied Maryland law prior to the recent amendment of DCD 185-003. See Pet. App. 15 n.8.) Another court held likewise in *Thomas* v. *Huff*, 2010 WL 3001992, at *3 n.2 (D. Md. 2010).

It was correct for these courts to hold that the IIU process is an appropriate means for a prisoner to grieve his claim. The governing handbook explained that the ARP process was not available for certain categories of complaints covered by other proceed-

ings, and it provided a non-exhaustive list of examples. Pet. App. 12.; *id.* at 77-78. One of those exceptions is on point—the ARP proceeding does not apply to "disciplinary hearing procedures and decisions." *Id.* at 77. The IIU investigation, as its results proved, *was* a disciplinary hearing for petitioner and Madigan. It led to charges against Madigan and the termination of his employment.

Moreover, the handbook states explicitly that "[i]nmates should try to resolve problems informally by contacting the staff who can help verbally or submit an informal complaint form." Pet. App. 78. The handbook instructs that, "*[w]hen this does not work*, an inmate may submit a formal 'Request for Administrative Remedy' form to the warden." *Ibid.* (emphasis added). The clear precondition to filing an ARP action, according to the handbook, is an ineffective complaint with prison staff.

Here, respondent did *exactly* what the handbook told him to do: he contacted prison staff to lodge his complaint. Pet. App. 4. And, far from "not work[ing]," his report triggered a formal, year-long IIU investigation that resulted in a report substantiating respondent's claim, the Department charging Madigan with offenses, and Madigan's resignation. *Id.* at 4-5. Respondent thus followed the handbook's instructions to the letter—since the IIU complaint was effective, the condition precedent to filing an ARP action was never triggered.

That is not all. State regulations provide the IIU with *mandatory* jurisdiction over claims that a prison guard uses "excessive force." Md. Code Regs. § 12.11.01.05(A)(3). When an employee is made aware of such an incident, he or she "shall immediately" report it to the IIU. *Id.* § .05(A). Indeed, if such

a claim is made in the course of an ARP proceeding, it must be reported to the IIU, too. *Id.* § .05(B). And once a complaint is made, the IIU *must* investigate and render a disposition. *Id.* § .04. It follows that the IIU *is* the proper grievance mechanism in Maryland for claims of excessive force, as Maryland law requires it to investigate such allegations, prepare a report, and then pursue appropriate remedies.

Petitioner's contrary argument appears to be that the IIU proceeding does not "provide any remedy to the inmate," and thus cannot be the proper means to exhaust respondent's claim. Pet. 6. But the IIU *did* provide respondent remedies: the investigation resulted in an administrative determination that his rights were violated, leading to the effective termination of one of the guards who attacked him. It is irrelevant that the IIU could not provide him *money*; "an inmate seeking only money damages must complete a prison administrative process that could provide some sort of relief on the complaint stated, but no money." *Booth* v. *Churner*, 532 U.S. 731, 734 (2001). Just so here: the IIU could and indeed *did* provide respondent non-monetary relief.

As the court of appeals concluded, "[petitioner] has proffered no evidence that would contradict [respondent's] belief that the IIU's investigation removed his complaint from the typical ARP process." Pet. App. 13. It is not just that respondent's belief was objectively reasonable in this case—respondent's conduct was *correct*.

Indeed, since the incident here, Maryland has amended directive 185-003 to specify that a warden should dismiss an ARP action that overlaps with an IIU investigation. See Pet. App. 13 & n.5; JA437. This confirms that the IIU is—and always has

been—the proper administrative mechanism to investigate excessive force claims in Maryland prisons. The proper interpretation of this technical question of Maryland law is not a question warranting this Court's attention under any circumstance; that is especially so where, as here, Maryland has since amended its law to itself resolve the confusion.

B. Review of the question posed by petitioner is nonetheless unwarranted.

Setting aside these two, substantial prior questions, the issue that petitioner presents does not merit further review. There is no conflict among the circuits; petitioner fails to demonstrate that the decision below has any significance outside the narrow factual confines of this case; and the decision below is correct.

At the outset, petitioner relies on a caricature of what the court of appeals actually held. He suggests that, under the decision below, a prisoner can "circumvent a prison's grievance process by making self-serving claims that they misunderstood the grievance procedure." Pet. 18-19. Not so.

The conclusion below that respondent satisfied the PLRA exhaustion requirement rested on two necessary factors.

First, the court of appeals held that it is essential for a prisoner to show that he possessed an *objectively reasonable* belief that he had, in fact, satisfied the state-law requirements. This "ensures that an uncounseled inmate attempting to navigate the grievance system will not be penalized for making a reasonable, albeit flawed, attempt to comply with the relevant administrative procedures." Pet. App. 10.

That condition was satisfied in this case—as we have explained, multiple federal judges had interpreted Maryland's administrative exhaustion requirements in precisely the same way as respondent did. Pet. App. 14-15 n.8. That is rare and undeniable evidence that respondent "reasonably interpreted Maryland's murky inmate grievance procedures." *Id.* at 15.

Second, the prisoner's actions must trigger a response or investigation by the prison that satisfies the *substantive purpose* of the PLRA exhaustion requirement. That is, the prisoner must "afford[] corrections officials time and opportunity to address complaints internally." Pet. App. 10 (quotation omitted).

That, too, occurred here: respondent instituted an official prison investigation, which lasted more than a year and resulted in an employee's termination. Pet. App. 11.

Petitioner and his *amici* invoke the old chestnut that the PLRA is designed to decrease the frequency, while improving the quality, of prisoner litigation. See, *e.g.*, Pet. 2-4, 17-20; States *Amicus* 1, 3, 7-14. Of course this is true. But it says nothing about this case: this is just the kind of prison litigation that the PLRA is designed to permit.

- Petitioner contends that exhaustion "provide[s] 'prisons with a fair opportunity to correct their own errors.'" Pet. 3. Here, the prison *did* have the opportunity to correct its own error; its lengthy investigation substantiated respondent's claim of excessive force, led to charges against Madigan, and caused Madigan's termination. Pet. App. 4-5, 11.

- Petitioner contends that exhaustion improves the aggregate quality of prisoner suits by "'persuading' some prisoners 'not to file an action.'" Pet. 3. But this is the sort of action that *should* be brought; respondent has *already* won a $50,000 jury verdict. Pet. App. 6; JA570.
- Petitioner contends that exhaustion "creat[es] an administrative record that would assist courts in evaluating the merits of the cases." Pet. 3-4. Here, respondent's administrative complaint created a lengthy record, including an official report that substantiated his claim. Pet. App. 4-5; JA27-67. The clear record caused the district court to appoint private counsel. Pet. App. 5.

As the court of appeals put it, "[t]he Department certainly had notice of Blake's complaint, as well as an opportunity to develop an extensive record and address the issue internally." Pet. App. 11.

Against this backdrop, further review is unwarranted.

1. There is no conflict among the circuits.

As we just explained, the holding below turned on two necessary conditions—that respondent demonstrated it was *objectively reasonable* for him to believe that he had exhausted Maryland's administrative remedies, *and* that he showed *substantive compliance* with the purposes of the exhaustion requirement. Those conditions will rarely be satisfied. It thus comes as little surprise that petitioner has failed to identify any court of appeals that was presented with those same conditions and reached a contrary result.

In petitioner's leading case, *Chelette* v. *Harris*, 229 F.3d 684 (8th Cir. 2000), the plaintiff could prove neither element. It was accepted that the prisoner "likely could have filed a separate grievance over the alleged lack of medical care." *Id*. at 686. The prisoner admitted as much—in response to the question "Did you present the facts relating to your complaint in the state prisoner grievance procedure?" printed on the form complaint, "Chelette placed a check next to 'No.'" *Id*. It was not, therefore, objectively reasonable for him to believe that he had exhausted his administrative remedies. *Id*. Additionally, there was no indication that *any* investigation actually occurred, much less one that satisfied the substantive purpose of the exhaustion requirement. *Id*. There is therefore nothing inconsistent about the outcome in *Chelette* and the outcome here.[4]

Petitioner next points to the Fifth Circuit's per curiam decision in *Gonzalez* v. *Seal*, 702 F.3d 785, 787 (5th Cir. 2012). But *Gonzalez* addressed an entirely different question: whether a prisoner can complete the exhaustion requirement *during* the pendency of the federal suit. *Id*. at 788. The Fifth Circuit's holding that pre-suit exhaustion is required says absolutely nothing as to the very different question posed here. Nothing in the decision below would suggest, much less compel, a different outcome to the question present in *Gonzalez*.

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[4] *Chelette* rejected a prisoner's ignorance of the administrative remedy system as an insufficient basis to set aside the requirement. 229 F.3d at 688. The court below agrees: "an inmate's ignorance of available procedures is not sufficient to excuse a failure to exhaust remedies." Pet. App. 12 n.4.

Petitioner briefly addresses "decisions of the Sixth, Seventh, and Ninth Circuits" regarding internal investigations, but he admits that they also did not confront the issue posed here—they "did not consider the applicability of a reasonable belief exception." Pet. 13-14. Instead, each case arose against a state law backdrop where, unlike here, it was clear that the internal investigation process was distinct from the proper mechanism for administrative relief.

The Seventh Circuit's decision in *Pavey* v. *Conley*, 663 F.3d 899, 905 (7th Cir. 2011), establishes the uncontroversial proposition that "*[w]hen* administrative procedures are *clearly laid out*, * * * an inmate must comply with them in order to exhaust his remedies." Emphasis added. One of our central points is that the administrative procedures in this case were far from "clearly laid out." See, *infra*, 14-18. In fact, *Pavey* actually *supports* our position: "what if," the Seventh Circuit considered, "prison officials misled Pavey into thinking that by participating in the internal-affairs investigation, he had done all he needed to initiate the grievance process?" *Id.* at 906. In such circumstances, an "administrative remedy is not 'available,' and therefore need not be exhausted." *Ibid.* That is strong support for the outcome here. See, *infra*, 30-32.

The Ninth Circuit's decision in *Panaro* v. *City of North Las Vegas*, 432 F.3d 949, 950 (9th Cir. 2005), is more of the same. There, the prisoner did "not take[] advantage of an internal grievance procedure." *Ibid.* After he filed an initial grievance, the matter was decided adversely to him, he was informed of his "right to appeal the decision," but he declined to appeal. *Id.* at 951. A prisoner who initiates the appropriate grievance process, but fails to complete it, can

hardly suggest that he had an objectively reasonable belief that he had properly exhausted his remedies. Once again, the result in *Panaro* is not at odds with the decision below.

And *Thomas* v. *Woolum*, 337 F.3d 720, 723 (6th Cir. 2003), to which petitioner dedicates a mere sentence (Pet. 14), is not in conflict, either. There, the prisoner "invoked the formal grievance procedure," but his "grievance did not contain the necessary information" to qualify as exhaustion. *Id.* at 723, 735. He also filed it out-of-time. *Id.* at 724. For both of these reasons, the prisoner there could demonstrate neither an objectively reasonable belief that he had in fact exhausted available remedies nor that the state had actually investigated the claims at issue.

Finally, despite earlier contending that the lower court aligned with the Second Circuit (Pet. 11-12), petitioner backtracks and contends (*id.* at 14) that the decision here is in tension with *Ruggiero* v. *County of Orange*, 467 F.3d 170 (2d Cir. 2006). That is wrong. Rather, the court expressly held that a prisoner's argument that he invoked an internal investigation proceeding is distinct from the issue here—"special circumstances, such as a reasonable misunderstanding of the grievance procedures, [that] justify the prisoner's failure to comply with the exhaustion requirement." *Id.* at 175. *Ruggiero* is thus proof that the decisions in *Pavey*, *Panaro*, and *Thomas* do not conflict with the result here: the Second Circuit holds that a prisoner with an objectively reasonable belief, like respondent here, may not be barred from a claim, but it also holds that a prisoner's initiation of an internal investigation, standing alone, does not suffice.

2. This case—particularly in light of Maryland's newly amended DCD 185-003—is of little practical significance.

Petitioner and his *amici* fail to demonstrate that this case presents a question of exceptional importance that warrants this Court's intervention. That is especially so because recent changes in Maryland law make the circumstances here unlikely to arise again.

a. Petitioner's primary argument—that review is warranted because prisoners file lots of lawsuits and the "decision below eviscerates the PLRA's exhaustion requirement"—is clearly wrong. Pet. 17 (capitalization omitted). See also State *Amicus* 7-14. Petitioner arrives at that hyperbolic contention by arguing that, under the decision below, a prisoner can "circumvent a prison's grievance process by making self-serving claims that they misunderstood the grievance procedures." Pet. 18-19. But that is not what the court below held—a prisoner's "self-serving" *subjective* belief has nothing to do with it. Instead, the court below requires both an *objectively reasonable* belief as well as *substantive compliance* with the purposes of exhaustion. See, *supra*, 18-19.

These elements are found in only the rarest of cases, and district courts readily understand the distinction. Recognizing, for example, that the decision below requires an *objectively* reasonable belief, one district court flatly rejected a prisoner's argument that turned on her subjective belief. Citing this case, the court held that a prisoner's "subjective belief that the ARP process would be unavailing to her complaints is not a valid basis for declining to participate in the established grievance procedure." *McBride* v.

Maryland Corr. Inst. for Women, 2015 WL 4231682, at *8 (D. Md. 2015).

The additional requirement—the substantive prong—also poses a tall hurdle. As another court recently found, "[t]he exception to the PLRA's exhaustion requirement set forth in *Blake* * * * does not apply here because * * * Mr. Reed made no reasonable attempt to avail himself of the grievance system at issue." *Reed* v. *Jones*, 2015 WL 4460322, at *4 n.5 (M.D.N.C. 2015). When a prisoner does nothing—objectively reasonable belief or not—the substantive requirement is not satisfied.

Petitioner is thus left with nothing more than a naked assertion, claiming that the decision below opens "the floodgates to frivolous prisoner complaints." Pet. 20. And the States speculate as to an "inundation of federal district courts with undeveloped and potentially nonmeritorious prisoner complaints." States *Amicus* 11. Yet no deluge has come. Neither petitioner nor his *amici* have identified a *single* case where they believe that, based on the decision below, a court wrongly denied an exhaustion defense. This is not for a lack of opportunities: more than two dozen cases have cited the decision below, and an online search reveals that, in the five months since the decision below, district courts within the Fourth Circuit have decided at least five dozen cases addressing PLRA exhaustion.

Instead, the evidence is that district courts in the Fourth Circuit, while expressly addressing the decision below, have little trouble identifying run-of-the-mill failures to exhaust.

- "Plaintiff's claims are unexhausted and subject to dismissal." *Henson* v. *Graham*, 2015 WL 3456778, at *4 (D. Md. 2015).
- "[P]laintiff's complaint is subject to dismissal for non-exhaustion." *Bishop* v. *Johnson*, 2015 WL 4377957, at *5 (D. Md. 2015).
- The plaintiff "failed properly to exhaust available remedies" as to certain claims. *Kitchen* v. *Ickes*, 2015 WL 4378159, at *8 (D. Md. 2015).
- "Plaintiff's claims are unexhausted and subject to dismissal." *Henson* v. *Bishop*, 2015 WL 4639623, at *6 (D. Md. 2015).
- "Tuell failed to exhaust available administrative remedies as to all the claims presented in his Complaint." *Tuell* v. *Comm'r of Corr.*, 2015 WL 4994022, at *6 (D. Md. 2015).
- "Defendant's Motion to Dismiss for failure to exhaust administrative remedies will be granted." *Brown* v. *Lawhorne*, 2015 WL 3464141, at *6 (D. Md. 2015).
- Dismissal for failure to exhaust. *Watkins* v. *Foxwell*, 2015 WL 3464138, at *2 (D. Md. 2015).
- Summary judgment for failure to exhaust. *Bailey* v. *Hershberger*, 2015 WL 4396580, at *4 (D. Md. 2015).
- "Atkins's claims regarding the denial of his kosher diet while at the west compound is unexhausted and is dismissed." *Atkins* v. *Md. Div. of Corr.*, 2015 WL 5124103, at *8 (D. Md. 2015).

Contrary to the unsupported assertions of petitioner and his *amici*, the exhaustion defense remains alive and well in the Fourth Circuit. Recent litigation proves that the narrow decision here is confined to the rare and exceptional facts of this case.

b. There is an additional reason to think that the circumstances here are unlikely to arise again. The court below found petitioner's belief that he had satisfied the administrative remedies requirement objectively reasonable because of the "murky" intersection between Maryland's two administrative procedures, the ARP and IIU processes. Pet. App. 12-15.

But Maryland has since fixed this problem—and it did so in a way that confirms the propriety of respondent's conduct. As recently amended, DCD 185-003 provides that, when the IIU is investigating an incident, it is the *exclusive* avenue for relief. Pet. App. 13 & n.5; JA437. A warden is now directed to dismiss an ARP complaint if "the basis of the complaint is the same basis of an investigation under the authority of the Internal Investigative Unit." Pet. App. 13 & n.5; JA437.

Carmichael v. *Hershberger*, 2015 WL 5832401 (D. Md. 2015), is illustrative of the new regime. There, the prisoner initiated both an ARP and an IIU investigation.[5] The warden dismissed the ARP because it was directed to the same incident as the IIU investigation; the prisoner did not appeal that dismissal. *Id.* at *6. The completion of the IIU investigation nonetheless qualified as proper administra-

[5] Maryland renamed the IIU as the "Intelligence and Investigative Division" or IID. *Carmichael*, 2015 WL 5832401, at *1 & n.1. We refer to it as the "IIU" for consistency.

tive exhaustion of the prisoner's claims that it addressed. *Ibid.*

Because DCD 185-003 corrects the previous, persistent confusion in Maryland as to proper avenue to pursue an administrative remedy for excessive force claims, the circumstances that gave rise to this case cannot recur. This Court need not address a situation that is now nothing more than a historical footnote.

3. The decision below is correct.

Finally, the decision below is correct. If, contrary to our submission (*supra*, 14-18), respondent did not comply with the technical formalities of Maryland state law, his conduct nonetheless qualifies as exhaustion for purposes of the PLRA. Respondent can hardly be faulted for complying with an interpretation of state law adopted by two federal judges. Pet. App. 14-15 n.8.

This is so for two reasons. *First*, federal law deems respondent, on account of his conduct, in compliance with the state exhaustion requirement. *Second*, because of the "murk[iness]" of state law (Pet. App. 15), the administrative remedy scheme that petitioner contends was proper was not fairly "available" within the meaning of the PLRA. 42 U.S.C. § 1997e(a).

a. The PLRA exhaustion requirement stems from, and is thus informed by, "the jurisprudence of administrative law." *Woodford* v. *Ngo*, 548 U.S. 81, 88 (2006). In *Woodford*, drawing from principles of agency exhaustion law, the Court concluded that "proper exhaustion of administrative remedies" is necessary—a prisoner must comply with the steps that the relevant agency lays out. *Id.* at 90. The

Court therefore found that a prisoner, who filed his administrative claim after the deadline imposed by the prison had passed, failed to exhaust. *Id.* at 88. The Court rejected the prisoner's argument for "exhaustion *simpliciter*"—his contention that he need merely show that an administrative remedy was unavailable to him, even if its unavailability was entirely of his own making. *Ibid.*

Thus, as the Court put it, "the PLRA uses the term 'exhausted' to mean what the term means in administrative law"—"proper exhaustion." *Woodford*, 548 U.S. at 93. As Justice Breyer explained in concurrence—and the majority did not challenge—part of the administrative law delineating what qualifies as "proper exhaustion" recognizes "traditional exception[s]." *Id.* at 103-104 (Breyer, J., concurring). Justice Breyer pointed (*id.* at 104) to *Giano* v. *Goord*, 380 F.3d 670, 678 (2d Cir. 2004), where the Second Circuit identified that a prisoner's "reasonable belief" that prison regulations foreclosed a certain remedial scheme could demonstrate that a prisoner sufficiently complied with the exhaustion requirement.

This understanding lies at the heart of administrative law's exhaustion jurisprudence: a claimant cannot be required to exhaust an administrative scheme that is either unknown or unavailable. *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 847 (1999) (exhaustion of a remedy is not required when it was "unavailable"). See also *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429-430 (1966); *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (administrative exhaustion is "subject to numerous exceptions").

The holding below, moreover, is consistent with the *Woodford* majority. The Court expressly recog-

nized that its decision there did not "decide" how to "address[]" a situation where a prison "create[s] procedural requirements for the purpose tripping up all but the most skillful prisoners." *Woodford*, 548 U.S. at 102-103. Given that the (since-amended) Maryland law has, as petitioner sees it, tripped up multiple federal judges (Pet. App. 14-15 n.8), *Woodford* surely does not foreclose the rule adopted below.[6]

b. The decision below is correct for a separate reason: the PLRA requires a prisoner to exhaust "such administrative remedies as are *available*." 42 U.S.C. § 1997e(a) (emphasis added). The term "available" means "capable of use; at hand." *Brown* v. *Croak*, 312 F.3d 109, 113 (3d Cir. 2002) (quoting Webster's II, New Riverside University Dictionary 141 (1994 ed.)).

The PLRA is not a license for a state to erect a maze of administrative remedies that punishes a *pro se* inmate if he chooses the wrong option. "[J]ails and prisons" may not "play hide-and-seek with administrative remedies." *Goebert* v. *Lee Cty.*, 510 F.3d 1312, 1323 (11th Cir. 2007).

The Seventh Circuit (see, *supra*, 22), is far from

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[6] Since, in *Woodford*, the Court was careful to note that it did not foreclose the kind of situation at issue here, petitioner is wrong to argue (Pet. 15) that the holding below is inconsistent with the Court's *earlier* decision in *Booth*. In *Booth*, the Court expressly limited its holding to "only" the conclusion that "an inmate must exhaust irrespective of the forms of relief sought and offered through administrative avenues." 532 U.S. at 741 n.6. It reached that result by reasoning that, when Congress enacted the PLRA, it superseded *McCarthy* v. *Madigan*, 503 U.S. 140 (1992). See *Booth*, 532 U.S. at 740-741. Petitioner does not, and cannot, make any such comparable argument here.

alone in concluding that "[a]n administrative remedy is not 'available,' and therefore need not be exhausted, if prison officials * * * inaccurately describe the steps he needs to take to pursue it." *Pavey*, 663 F.3d at 906. The Third,[7] Fifth,[8] Ninth,[9] Eleventh,[10] and D.C.[11] Circuits all agree.

The decision below is an example of this commonplace, well-accepted rule. When an objective observer would conclude that a prisoner has done what state law requires, and when the prisoner's conduct actually triggers the sort of internal investigation the PLRA's exhaustion requirement is designed to instigate, a state cannot seriously contend that some other remedy was "available."

At the time that respondent's claim arose, Maryland's "grievance system [was] confusing enough that at least two learned judges" interpreted it to require

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[7] *Small* v. *Camden Cnty.*, 728 F.3d 265, 271 (3d Cir. 2013) ("Remedies that are not reasonably communicated to inmates may be considered unavailable for exhaustion purposes.").

[8] *Davis* v. *Fernandez*, 798 F.3d 290, 295 (5th Cir. 2015) ("Grievance procedures are unavailable to an inmate if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process.") (emphasis omitted).

[9] *Nunez* v. *Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) ("[T]he Warden's mistake rendered Nunez's administrative remedies effectively unavailable.").

[10] *Goebert*, 510 F.3d at 1323 ("That which is unknown and unknowable is unavailable.").

[11] *DeBrew* v. *Atwood*, 792 F.3d 118, 128 (D.C. Cir. 2015) ("An administrative remedy is actually 'available' to an inmate only if it is 'present or ready for immediate use,' 'accessible,' or 'obtainable.'").

just what respondent did. Pet. App. 15 n.8. With the benefit of hindsight, petitioner now asserts that some other procedure was required, instead. But in these circumstances that alternative procedure was not "available."

Petitioner will likely reply that, in his view, the propriety of the ARP proceeding was sufficiently clear such that it was not objectively reasonable for respondent to rely on the IIU investigation. See, *e.g.*, Pet. 5-6. Indeed, that was the principal argument advanced by the dissenting judge below. Pet. App. 25-27. Since we have demonstrated that respondent in fact complied with Maryland state law (see, *supra*, 14-18), it goes without saying that, as the court of appeals concluded, any mistake he made was an objectively reasonable one. See, *supra*, 18-19. But that application of fact to settled law—determining whether respondent's belief was reasonable in *this* case, on *these* facts, against a legal framework that has since changed—does not warrant this Court's review.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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