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 OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 21 OTHER STATES IN SUPPORT OF PETITIONER

PATRICK MORRISEY
ATTORNEY GENERAL

OFFICE OF THE
ATTORNEY GENERAL
STATE CAPITOL
BUILDING 1, ROOM E-26
CHARLESTON, WV 25305
ELBERT.LIN@WVAGO.GOV
(304) 558-2021

ELBERT LIN
Solicitor General
Counsel of Record

JULIE WARREN
ERICA N. PETERSON
Assistant Attorneys General

Counsel for Amicus Curiae *State of West Virginia*
[additional counsel listed at end]

QUESTION PRESENTED

Did the Fourth Circuit misapply this Court's precedents in holding, in conflict with several other federal courts of appeals, that there is a common law "special circumstances" exception to the Prison Litigation Reform Act that relieves an inmate of his mandatory obligation to exhaust administrative remedies when the inmate erroneously believes that he has satisfied exhaustion by participating in an internal investigation?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE* [1]

Amici curiae—the States of West Virginia, North Carolina, South Carolina, Virginia, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Maine, Michigan, Montana, Nevada, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, and Washington—submit this brief because the Fourth Circuit's decision to adopt a common-law exception to the exhaustion requirement of the Prison Litigation Reform Act ("PLRA") will burden States with increased and lower quality litigation by prisoners. As this Court has recognized, the PLRA was "intended to 'reduce the quantity and improve the quality of prisoner suits,'" *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006) (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)), and the exhaustion requirement was a "centerpiece" of that effort, *id.* at 84. In finding that the exhaustion requirement is "not absolute" and adopting an exception for circumstances where a prisoner reasonably believes he or she has exhausted all administrative remedies, the Fourth Circuit has necessarily exposed States not only to a greater number of federal filings by state inmates, but to more filings that have not been developed through the administrative process. This risk is particularly

[1] Pursuant to Supreme Court Rule 37.2(a), the amici have timely notified counsel of record of their intent to file an amicus brief in support of Petitioner.

acute for those States in the Fourth Circuit, all of which other than Maryland (which is the real party in interest to the Petition) have joined this brief.

SUMMARY OF ARGUMENT

This Court's intervention is needed for two reasons.

First, the Fourth Circuit's judicially created exception to the PLRA's exhaustion requirement is squarely at odds with decisions of this Court and several sister Circuits. Petitioner has well explained many of the inconsistencies, but *amici* focus in this brief on two additional ways in which the opinion below directly contravenes this Court's controlling decisions. Specifically, this Court has noted that the PLRA amended federal law to remove the condition that a prison's administrative remedies be "'plain, speedy, and effective' before exhaustion could be required." *Booth v. Churner*, 532 U.S. 731, 739 (2001). But the Fourth Circuit's new exception, which focuses on a reviewing court's perception of the clarity of a prison's administrative procedures, effectively reinstates the requirement that such remedies be "plain." In addition, by creating a new exception by judicial fiat, the Fourth Circuit failed to follow this Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), which makes clear that courts are not to "read in" to the PLRA new requirements or exceptions that they think might "make it better." *Id.* at 216.

Second, the Fourth Circuit's decision will burden States and federal district courts with increased and lower quality prisoner litigation. Like the exception this Court rejected in *Woodford*, the Fourth Circuit's exception here "w[ill] make the PLRA exhaustion scheme wholly ineffective." 548 U.S. at 95. Now every prisoner with a grievance who has failed to exhaust, or does not wish to exhaust, has an incentive simply to file in court and take a chance on arguing that he or she found the State's administrative grievance procedures to be confusing. There will be many more petitions, and they will lack the benefit of having had a record developed through an administrative process. Moreover, a greater number of prisoner petitions will survive dismissal for failure to exhaust and proceed to summary judgment or trial.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Exception to the PLRA's Exhaustion Requirement Conflicts with Precedent of Other Circuits and of This Court.

A. In the decision below, the Fourth Circuit adopted a new common-law exception to the PLRA's exhaustion requirement. Relying on Justice Breyer's concurrence in *Woodford v. Ngo*, 548 U.S. 81 (2006), the Fourth Circuit concluded that the exhaustion requirement is "strict[]" but "not absolute." *Blake v. Ross*, 787 F.3d 693, 698 (4th Cir. 2015). The appeals court found it permissible to "read[] longstanding

administrative law exceptions into the PLRA's exhaustion requirement." *Id.*

Based on decisions from the Second Circuit, the Fourth Circuit adopted a two-pronged inquiry for determining whether to excuse a prisoner's failure to exhaust in light of the inmate's "reasonable belief that no further remedies were available." *Id.* (internal quotations omitted). *First*, was the prisoner "justified in believing that his complaints in the disciplinary appeal procedurally exhausted his administrative remedies because the prison's remedial system was confusing"? *Id.* *Second*, did "the prisoner's submissions in the disciplinary appeals process exhaust[] his remedies in a substantive sense by affording corrections officials time and opportunity to address complaints internally." *Id.*

B. This judicially created exception to the PLRA is at odds with the prevailing case law. As Petitioner has well explained, the Fourth Circuit's decision is inconsistent with decisions of several sister Circuits, Pet. at 11-14, and precedent of this Court, *id.* at 15-17. *Amici* will not repeat those arguments, but rather note two additional ways in which the opinion below directly contravenes this Court's controlling decisions.

1. Relying on the statutory history of the PLRA, this Court in *Booth v. Churner*, 532 U.S. 731 (2001), required a prisoner to exhaust administrative remedies even though the administrative process

"could not award him the monetary relief he sought." *Id.* at 735. Among other arguments, this Court stressed that the PLRA "amendments [had] eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be 'plain, speedy, and effective' before exhaustion could be required." *Id.* at 739. By eliminating the requirement that an administrative remedy be "effective," this Court reasoned, Congress enacted a "broader exhaustion requirement" and made clear that it wanted prisoners to go through the administrative process even if they cannot obtain the relief they desire. *Id.* at 740-41.

In *Woodford v. Ngo*, 548 U.S. 81 (2006), this Court again emphasized the statutory changes made by the PLRA. Prior to the PLRA, this Court explained, federal law included "a weak exhaustion provision." *Id.* at 84. Exhaustion was "in large part discretionary" and "could be ordered only if the State's prison grievance system met specified federal standards." *Id.* The PLRA "strengthened" the exhaustion requirement. *Id.* at 85. "Exhaustion is no longer left to the discretion of the district court, but is mandatory." *Id.* Moreover, "[p]risoners must now exhaust all 'available' remedies, not just those that meet federal standards." *Id.* The Fourth Circuit's decision cannot be squared with this Court's repeated emphasis on the statutory history of the PLRA. As this Court has found time and again, with the PLRA Congress eliminated the condition that an administrative remedy be "plain." *Booth*, 532 U.S. at

739; *Woodford*, 548 U.S. at 84-85; see also *Porter v. Nussle*, 534 U.S. at 524. ("All 'available' remedies must now be exhausted; those remedies need not meet federal standards, nor must they be 'plain, speedy, and effective.'"). But the Fourth Circuit's new exception, which focuses on a court's perception of the clarity of a prison's administrative procedures, reinstates that requirement. *Blake*, 787 F.3d at 698. Indeed, this new exception not only mandates that a prison's administrative process be "plain," but also requires that the prison have provided materials that affirmatively "contradict [an inmate's] belief that he had exhausted his administrative remedies." *Id.* at 700. As Judge Agee explained in dissent, "jail officials [now] must anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." *Id.* at 705 (Agee, J., dissenting). That is not simply "a substantial new burden on state corrections officials," *id.*; it is completely contrary to this Court's precedent. *Cf. Ackerman v. Ritter*, No. CIV04CV02605 2006 WL 346790, at *3 (D. Colo. Feb. 14, 2006) ("Even if the prisoner was confused with regard to the prison grievance system, and understood his claim to be non-grievable, exhaustion is required . . . . Congress has eliminated the courts' discretion to dispense with administrative exhaustion and to impose any condition that administrative remedies be plain, speedy, and effective.") (citations omitted).

2. The Fourth Circuit's decision also contravenes *Jones v. Bock*, 549 U.S. 199 (2007). In that case, this Court rejected the Sixth Circuit's attempt to require that a prisoner plead exhaustion in his or her complaint in order to effectuate the PLRA's screening requirement for unexhausted cases. *Id.* at 216-17. Acknowledging that there may be reasonable policy interests behind that judicially created requirement, this Court stressed that "the judge's job is to construe the statute—not to make it better." *Id.* at 216. What the PLRA does not expressly include the courts "must not read in by way of creation." *Id.* (internal quotations omitted)

But that is precisely what the Fourth Circuit has done here. There is no exception in the PLRA to the exhaustion requirement for a prisoner's "reasonable" failure to exhaust. Under *Bock*, the Fourth Circuit had no authority to "read in" such an exception "by way of creation." The Fourth Circuit ignored this Court's express command that "a judge's job is to construe the [PLRA]," not to append to the statute what he or she thinks might "make it better." See *Id.*

II. The Fourth Circuit's Decision Will Burden States and Federal District Courts With Increased and Lower Quality Prisoner Litigation.

A. As this Court has explained, the PLRA's exhaustion requirement was a "centerpiece" of

Congress's effort to bring "a sharp rise in prisoner litigation" "under control." *Woodford*, 548 U.S. at 84. At the time of the PLRA's enactment, "an ever-growing number of prison-condition lawsuits . . . were threatening to overwhelm the capacity of the federal judiciary." *Anderson v. XYZ Corr. Health Servs.. Inc.*, 407 F.3d 674, 676 (4th Cir. 2005). The PLRA was "intended to 'reduce the quantity and improve the quality of prisoner suits.'" *Woodford*, 548 U.S. at 93-94 (quoting *Nussle*, 534 U.S. at 524).

A strong exhausation requirement was critical for several reasons. *First*, "exhaustion requirements are designed to deal with parties who do not want to exhaust," which tends to be the case with prisoners. *Id.* at 90; see also *id.* at 89 ("Statutes requiring exhaustion serve a purpose when a significant number of aggrieved parties, if given the choice, would not voluntarily exhaust."); *Doe v. Washington County*, 150 F.3d 920, 924 (8th Cir. 1998) ("The PLRA was designed to discourage the initiation of litigation by a certain class of individuals—prisoners—that is otherwise motivated to bring frivolous complaints as a means of gaining a short sabbatical in the nearest Federal courthouse." (internal quotation marks omitted)).

Second, if followed, exhaustion requirements will reduce the number of prisoner lawsuits. "Proper exhaustion reduces the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by

the proceedings not to file an action in federal court." *Woodford*, 548 U.S. at 94. Thus, as Petitioner notes, "the PLRA had an immediate remedial effect when it was enacted in 1996, with the number of [prisoner] suits returning to and remaining at more manageable levels." Pet. at4.

Finally, exhaustion requirements also improve the quality of prisoner litigation. "[P]roper exhaustion improves the quality of those prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the court." *Woodford*, 548 U.S. at 94-95. Specifically, "[w]hen a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved." *Id.* Moreover, an exhaustion requirement will "filter out the bad claims and facilitate consideration of the good." *Jones*, 549 U.S. at 204. It "affor[ds] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case," providing "prisons with a fair opportunity to correct their own errors." *Woodford*, 548 U.S. at 93-94 (internal quotations omitted). Exhaustion requirements thus help address "the challenge [of] ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones*, 549 U.S. at 203.

B. 1. It stands to reason that a weakened exhaustion requirement—indeed, one that reinstates one of the pre-PLRA qualifiers that Congress eliminated to strengthen the exhaustion requirement —will trigger an increased number of prisoner complaints in court that have not been vetted or developed through the administrative process. Like the exception this Court rejected in *Woodford*, the Fourth Circuit's exception here "would make the PLRA exhaustion scheme wholly ineffective." 548 U.S. at 95. As this Court observed in *Woodford*, "[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, and under [the Fourth Circuit's] interpretation of the PLRA noncompliance carries no significant sanction." *Id.*

In the case below, the Fourth Circuit turned the exhaustion requirement into "a largely useless appendage." *Id.* at 93. The court excused Blake's failure to exhaust the prison's administrative process, even though Blake admitted that he had not read all of the prison's materials relating to the administrative process. The court found that the prison's materials were confusing simply because they did not *specifically* contradict Blake's particular, alleged misunderstanding.[2] And the court

[2] Contrary to the majority's conclusion, Maryland's grievance procedures were not ambiguous or otherwise confusing. *Blake*, 787 F.3d at 702 (Agee, J., dissenting). As Judge Agee explained in his dissent, "[o]ne can hardly imagine a plainer provision

determined that the prison administrators had sufficient opportunity to develop an administrative record, even though Blake did not initiate any procedures with the prison, requested at one point that the investigation be closed, and expressly disavowed any intent to sue anyone. 787 F.3d at 704-05. (Agee, J., dissenting).

There can be no doubt that prisoners—especially those in the Fourth Circuit—will see this decision as an invitation to file suit in court even where they have clearly failed to follow their prisons' administrative procedures. Though the case below involved Maryland's administrative review procedures, nothing in the opinion suggests that the Fourth Circuit's new exception will not apply to other States. In adopting the exception from the Second Circuit, the Fourth Circuit described the test broadly as an "appropriate balance between statutory purpose and our administrative jurisprudence." *Id.* at 698. The inevitable result of the Fourth Circuit's broad exception will be the very scenario the PLRA was meant to prevent—the inundation of federal district courts with undeveloped and potentially nonmeritorious prisoner complaints. Now every prisoner with a grievance who has failed to exhaust, or does not wish to exhaust, has an incentive simply to file in court and

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that more directly applies to Blake's present claim," as Maryland's procedures "specifically instruct[] prisoners to use the [administrative remedy procedure] to 'seek relief ... for issues that include ... [u]se of force.'" *Id.* at 702.

take a chance on arguing that his or her state's administrative grievance procedures are confusing.

2. The potential increased burden on federal district courts and the States that face such lawsuits is enormous. As the statistics below from several Fourth Circuit States show, the PLRA's exhaustion requirement has clearly been effective in limiting the number of suits filed by prisoners in federal court. The number of suits filed in federal court has been small compared to the number of administrative grievances, which in turn has been small compared to the total number of state prisoners. The flipside of this effectiveness, however, is the potential for a significantly greater number of filings in court as prisoners learn of the Fourth Circuit's decision.

In West Virginia, for example, the number of prisoner petitions filed in fiscal year 2013-14 in federal court alleging civil rights or prison condition issues was 2.4% of the number of total inmates housed in state prisons. According to the West Virginia Division of Corrections ("WV DOC"), there were aproximately 6,973 inmates housed in its facilities on December 31, 2013. That same year, there were approximately 1,505 prisoner grievances and disciplinary actions appealed to the Commissioner in accordance with the WV DOC administrative review procedures, and only 164 prisoner petitions alleging civil rights or prison condition issues filed in the Northern and Southern Districts of West Virginia by WV DOC inmates. App.

at 2.

In Maryland, the ratio of similar prisoner petitions filed in federal court over that same time period to the total number of inmates was only 2.3%. Maryland reports that its Department of Corrections ("MD DOC") housed approximately 21,500 inmates in its correctional facilities. In calendar year 2013, the MD DOC received approximately 20,193 formal prisoner complaints through its Administrative Remedy Procedure, which are reviewed and resolved by the warden. See also Pet. App. 77-81. Of these formal complaints, approximately 2,452 were appealed to the Commissioner, and then aproximately 2,321 were appealed to the Inmate Grievance Office, which is the final step in the administrative review process. The Administrative Office of the U.S. Courts reports that in fiscal year 2013-2014, MD DOC inmates ultimately filed 489 prisoner petitions in the District of Maryland alleging civil rights or prison condition issues. App. at 2.

Finally, over the same time period in North Carolina, the number of prisoner petitions filed in federal court alleging civil rights or prison condition issues was 1.9% of the number of total inmates housed in state prisons. According to the North Carolina Department of Public Safety ("NCDPS"), there were aproximately 37,319 inmates as of January 1, 2014. That year, the NCDPS Inmate Grievance Resolution Board, which oversees the final

step in the State's administrative review procedures, received approximately 14,654 grievances. And ultimately, the federal courts report that there were 697 prisoner petitions from NCDPS inmates pending in the U.S. District Courts for the Eastern, Middle, and Western Districts of North Carolina that alleged civil rights or prison condition issues. App. at 2.

C. The increased burden on the system will come not only from a greater number of filings in court, but also from a greater number of prisoner petitions that survive dismissal for failure to exhaust and proceed to summary judgment or trial. From January 1, 2014 through September 2015, according to Maryland's internal database, the District of Maryland dismissed in whole or in part for failure to exhaust approximately 53% of the prisoner civil rights suits in which the court addressed the exhaustion defense raised by Office of the Attorney General of Maryland.

Under the Fourth Circuit's new exception, at least some of these petitions would have survived dismissal and proceeded to summary judgment or trial, creating an additional burden on both the District of Maryland and the Maryland Attorney General's Office.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Patrick Morrisey
Attorney General

Elbert Lin
Solicitor General
Counsel of Record

Julie Warren
Erica N. Peterson
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
State Capitol
Building 1, Room E-26
Charleston, WV 25305
Elbert.Lin@wvago.gov
(304) 558-2021

Counsel for Amicus Curiae
State of West Virginia

OCTOBER 19, 2015

ROY COOPER
Attorney General
State of North
Carolina

ALAN WILSON
Attorney General
State of South
Carolina

MARK R. HERRING
Attorney General
Commonwealth of
Virginia

LUTHER STRANGE
Attorney General
State of Alabama

LESLIE RUTLEDGE
Attorney General
State of Arkansas

MARK BRNOVICH
Attorney General
State of Arizona

PAMELA JO BONDI
Attorney General
State of Florida

CYNTHIA COFFMAN
Attorney General
State of Colorado

SAMUEL S. OLENS
Attorney General
State of Georgia

LAWRENCE WASDEN
Attorney General
State of Idaho

JAMES D. "BUDDY"
CALDWELL
Attorney General
State of Lousiana

JANET T. MILLS
Attorney General
State of Maine

BILL SCHUETTE
Attorney General
State of Michigan

TIM FOX
Attorney General
State of Montana

ADAM PAUL LAXALT
Attorney General
State of Nevada

BRUCE R. BEEMER
First Deputy Attorney
General
Commonwealth of
Pennsylvania

E. SCOTT PRUITT
Attorney General
State of Oklahoma

PETER F. KILMARTIN
Attorney General
State of Rhode Island

HERBERT H. SLATERY,
III
Attorney General
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

ROBERT W. FERGUSON
Attorney General
State of Washington