No. 08-886

In the Supreme Court of the United States

CHRISTOPHER R. PAVEY,
PETITIONER,
v.
PATRICK CONLEY, *ET AL.*,
RESPONDENTS.

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

BRIEF OF *AMICI CURIAE* UPTOWN PEOPLE'S LAW CENTER, LEGAL AID SOCIETY OF NEW YORK'S PRISONERS' RIGHTS PROJECT, D.C. PRISONERS' PROJECT OF THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, PRISONERS' LEGAL SERVICES OF NEW YORK, PRISON LAW OFFICE, TEXAS CIVIL RIGHTS PROJECT, FLORIDA INSTITUTIONAL LEGAL SERVICES, INC., PRISON LEGAL NEWS, RODERICK MACARTHUR JUSTICE CENTER AT NORTHWESTERN UNIVERSITY SCHOOL OF LAW AND JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF THE YALE LAW SCHOOL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Proposed *amici* are organizations with an interest in prisoner civil rights litigation. Nine of the ten *amici* represent prisoners in a variety of civil legal matters, and the tenth publishes a journal whose censorship in prison is the subject of prisoner First Amendment challenges. Each has a strong interest in ensuring that prisoners have full and fair access to the courts, and that the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, §§801-10, 110 Stat. 1321-66 to -77 (1996) is properly effectuated to enable the efficient litigation of meritorious lawsuits.

The **Uptown People's Law Center**, a non-profit organization since 1975, provides legal representation, advocacy and education for poor and working people in and around Chicago, including direct legal assistance to over 100 prisoners in Illinois.

The **Legal Aid Society of New York's Prisoners' Rights Project**, a non-profit organization, advocates administratively and pursues class action and test case litigation to protect the legal rights of prisoners in New York state prisons and New York City jails.

The **D.C. Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs**, a non-profit organization, has engaged in broad-based class action litigation, improving medical

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[1] Pursuant to Supreme Court Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to this filing. Letters of consent have been filed with the clerk.

and mental health services, reducing overcrowding, and improving overall conditions at correctional facilities wherever D.C. inmates are held.

Prisoners' Legal Services of New York, a non-profit organization, has been providing civil legal services to indigent inmates in New York State prisons for over thirty-two years.

The **Prison Law Office**, a non-profit organization, represents individual prisoners, engages in class action and other impact litigation, educates the public about prison conditions, and provides technical assistance to attorneys throughout the country.

The **Texas Civil Rights Project**, a non-profit organization founded in 1990, promotes racial, social, and economic justice through education and litigation, including litigation of prisoners' claims.

Florida Institutional Legal Services, Inc., a non-profit organization, has been representing indigent institutionalized people in Florida state prisons in individual and class action matters for over 30 years.

Prison Legal News ("PLN"), a non-profit corporation, publishes a nationally distributed monthly journal which reports on news, recent court decisions, and other developments relating to the civil and human rights of prisoners. Approximately sixty-five percent of PLN subscribers are prisoners.

The **Roderick MacArthur Justice Center at Northwestern University School of Law** is a public interest law firm that was founded to fight for human rights and social justice, particularly in the context of the criminal justice system. The fair treatment of prisoners is a particular concern of the Center.

The **Jerome N. Frank Legal Services Organization of the Yale Law School** provides free representation to indigent people in need of legal aid, including legal assistance to persons incarcerated in state and federal prisons in Connecticut and New York since 1970.

SUMMARY OF ARGUMENT

The Seventh Circuit contravened *Jones v. Bock*, 549 U.S. 199 (2007), and stepped outside its constitutional role by inventing a new procedure for reviewing administrative exhaustion defenses that has no basis in either the PLRA or the Federal Rules of Civil Procedure. The invented procedure is unjust and inefficient in practice, burdening the courts with additional procedures and meritorious litigants with numerous practical and legal problems.

The PLRA provides that prior to filing a suit, prisoners must exhaust "such administrative remedies as are available." 42 U.S.C. §1997e(a). In *Jones*, this Court held that the PLRA's exhaustion requirement is an affirmative defense to be pleaded by the defendant and adjudicated like any other. 549 U.S. at 216. This Court observed that while the PLRA requires district courts to screen prisoner cases at an early stage and *sua sponte* dismiss on any of four grounds, *see* 28 U.S.C. §1915A(b), 42 U.S.C. §1997e(c)(1), Congress conspicuously did not list failure to exhaust as one of those grounds. *See* 549 U.S. at 214, 216. This Court held that the statutory screening requirement "does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself" and that any further modifications to the Federal Rules of Civil Procedure

should be made through "established rulemaking procedures" and not "on a case-by-case basis by the courts." *Id.* at 214, 224.

Directly contradicting *Jones*, the Seventh Circuit held that exhaustion is a matter of "judicial traffic control" that for policy reasons should be decided prior to any merits discovery and pursuant to a newly invented and Byzantine procedure. App.4a-6a.[2] The Circuit's preliminary exhaustion screening "sequence" requires the district judge first to "conduct[] a hearing on exhaustion and permit[] whatever discovery relating to exhaustion [and only to exhaustion] he deems appropriate," App.6a, except that in some "exceptional circumstances" limited merits discovery might also be permitted, App.7a. After the hearing, the judge must determine if the prisoner exhausted his administrative remedies. App.6a. If the prisoner "failed to exhaust … he must go back and exhaust." *Id.* If the prisoner has "no unexhausted remedies," but his failure to exhaust was "innocent (as where prison officials prevent a prisoner from exhausting his remedies)," he is "given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround)." *Id.* If "the failure to exhaust was the prisoner's fault," the action is "over." *Id.*

"If and when the judge determines that the prisoner has properly exhausted his administrative remedies," the case may "proceed to pretrial discovery, and if necessary a trial, on the merits." *Id.* At that

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[2] "App." refers to Appendix to the Petition for Writ of Certiorari.

point, "if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies." *Id.*

Amici, experienced practitioners in prison litigation, agree with Petitioner that the lower court's new exhaustion procedure cannot be reconciled with this Court's decisions.[3] *Amici* particularly wish to highlight the unjustifiable, extra-statutory nature of the Seventh Circuit's invented procedure, and the detrimental practical effects it will have on courts and plaintiffs with meritorious claims. The decision below raises the following legal and practical concerns:

- The Circuit invented this procedure out of whole cloth based on perceived policy concerns with no grounding in the PLRA or the Federal Rules.
- The Circuit focused on only one of Congress's two purposes in passing the PLRA—reducing the quantity of litigation—and failed to assess the impact of its procedure on the second—facilitating adjudication of meritorious claims.
- The Circuit erroneously relied on an outdated assessment of the quantity of prisoner litigation, overlooking the dramatic reduction in prisoner lawsuits that Congress already achieved through the PLRA.

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[3] *Amici* agree with the entire Petition, but focus this brief on *Jones* and practical impact issues.

- The new procedure will squander judicial resources by requiring courts to resolve complex factual disputes over exhaustion even where a case could easily be disposed of on the merits.
- The new procedure ignores practical realities of prison grievance systems and increases the likelihood that prison officials will interfere with exhaustion.
- The new procedure limits prisoners' ability to prepare their claims and obtain timely relief.

This Court should summarily reverse or grant certiorari to prevent further deviations from the PLRA, the Federal Rules, and this Court's precedent.

ARGUMENT

I. THE SEVENTH CIRCUIT'S REASONING IS INCONSISTENT WITH *JONES*, USURPS CONGRESS'S AUTHORITY, AND MISCONSTRUES CONGRESS'S INTENT

A. The Seventh Circuit Contravened This Court's Precedent And Engaged In Judicial Legislation

The Seventh Circuit's invented "judicial traffic control" procedure for administrative exhaustion contravenes this Court's precedent and impermissibly amends the PLRA. The new procedure fails to treat administrative exhaustion like the ordinary affirmative defense that this Court held it to be in *Jones*. Instead the court of appeals wrongly analogized exhaustion to jurisdiction, and erected a preliminary screening procedure akin to the one the PLRA authorizes for

several issues but conspicuously *not* for exhaustion. *See Jones*, 549 U.S. at 214; *see also Woodford v. Ngo*, 548 U.S. 81, 101 (2006) (PLRA's exhaustion requirement is non-jurisdictional).

The Seventh Circuit disregarded this Court's recent directive in *Jones* that courts should follow "the usual practice" under the Federal Rules except insofar as the PLRA explicitly provides otherwise. 549 U.S. at 212. It also ignored this Court's caution against judicial rulemaking based on "a perceived problem with suits by inmates," and its admonition that "[i]f there is a compelling need to frame new rules of law …, presumably Congress either would have dealt with the problem in the [PLRA], or will respond to it in future legislation." *Crawford-El v. Britton*, 523 U.S. 574, 596-97 (1998); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (noting that changes "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation").

In substance, the Seventh Circuit effectively amended the PLRA, usurping Congress's role and "the policymaking and legislative functions of duly elected representatives." *Heckler v. Mathews*, 465 U.S. 728, 741 (1984); *see also United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897) ("[C]ongress is the body to amend [a statute] and not this court, by a process of judicial legislation wholly unjustifiable."). "It is well established that 'when the statute's language is plain, the sole function of the courts … is to enforce it according to its terms.'" *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (citations omitted). Even a "desirable statutory addition," does not justify "judicial legislation." *Int'l Union, Union Auto. Aerospace &*

Agric. Implement Workers of Am., AFL-CIO v. Hoosier Cardinal Corp., 383 U.S. 696, 702-03 (1966).

When Congress chooses to amend a statute or the Federal Rules, it does so only after engaging in "an extensive deliberative process involving many reviewers." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Courts are not free to amend a [Federal Rule of Civil Procedure] …."); *INS v. Chadha*, 462 U.S. 919, 959 (1983) ("[L]egislation by the national Congress [is] a step-by-step, deliberate and deliberative process."). That process draws views from all stakeholders and ensures that important considerations are fully aired. Judges considering individual cases often lack the information or perspective necessary to understand how a procedural modification will affect the administration of justice as a whole. *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice ….").

The Circuit's original and amended decisions illustrate the practical problems that arise when a court embarks on freelance policymaking under the guise of interpretation. After the original opinion issued, plaintiff petitioned for rehearing or rehearing *en banc*. *See* App.36a. *Amici* filed a brief in support of that petition highlighting certain detrimental consequences of the panel's absolute bar on merits discovery and its requirement that even "innocent" prisoners must "go back and exhaust." The Circuit denied the petition for rehearing, but tacitly admitted flaws in its procedure by amending the opinion that same day. App.1a.

First, it exempted from the absolute bar on merits discovery "exceptional cases in which expeditious resolution of the litigation requires that some discovery be permitted before the issue of exhaustion is resolved." App.7a. Second, the amendment added an escape hatch where prison officials prevented the initial attempt at exhaustion:

> [A]lthough [the prisoner] has no unexhausted administrative remedies, the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), and so he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround).

App.6a.

Requiring a prisoner whose failure to exhaust was "innocent" to try to exhaust again conflicts with the statutory command that "no action shall be brought" until "such remedies as are available are exhausted." 42 U.S.C. §1997e(a). Courts applying §1997e(a) have assessed the availability of remedies at the time the prisoner "brought" the action or tried initially to exhaust. *See Johnson v. Jones*, 340 F.3d 624, 627-28 (8th Cir. 2003) (measuring compliance with exhaustion requirement at time suit filed). Where remedies were unavailable, courts permitted the prisoner's case to proceed. *See, e.g.*, *Kaba v. Stepp*, 458 F.3d 678, 683-86 (7th Cir. 2006) (if inmate was prevented from filing grievance, he lacked available remedies and suit could proceed). Those decisions are consistent with the

PLRA, which requires exhaustion of administrative remedies that are available rather than compelling prisoners to wait until such remedies become available. By requiring a second attempt at exhaustion, the Circuit shifts the exhaustion inquiry from institutional availability at the time the prisoner "brought" suit to the availability of such remedies at whatever later point a court might choose to address the issue. New exhaustion requirements that spring into existence midway through the litigation make no sense and find no support in the language of the PLRA.

Additionally, the court's amended decision tree is deeply confusing on its face. For instance, the new provision applying to "innocent" prisoners appears to subsume the prior clause, which instructs a plaintiff who has "failed to exhaust" to "go back and exhaust." App.6a. Presumably, a plaintiff who failed to exhaust and must "go back" to exhaust falls into the "innocent" category of prisoners who must also "be given another chance to exhaust"—or else he would belong in the third category of prisoners, at fault for their own failure to exhaust (for whom the case is "over"). *Id.* The Seventh Circuit failed to clarify the relationship between these overlapping categories, and yet the lower courts and litigants must attempt to make sense of them.

The new procedure also creates confusion with its undefined, non-statutory terms. For example, while a prisoner must be "innocent" in his failure to exhaust to get another chance, the Circuit does not explain what constitutes "innocen[ce]." That concept may or may not correspond to the actual statutory language, which focuses on whether a remedy was practically *available* to the prisoner, and simply introduces needless

confusion. Nor does the procedure explain how or when a court determines that the undefined "runaround" exists (thus excusing the prisoner from a second attempt at exhaustion). Because courts typically dismiss without prejudice, rather than stay, unexhausted claims, *see*, *e.g.*, *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004); *accord Morales v. Mackalm*, 278 F.3d 126, 128, 131 (2d Cir. 2002) (per curiam), *abrogated on other grounds by Porter v. Nussle*, 534 U.S. 516, 532 (2002), no court will have jurisdiction during a prisoner's second attempt at exhaustion to consider whether he is getting the "runaround" or to put a stop to it. Will prisoners be permitted to prove prior to dismissal that they likely *will* get a "runaround?" Or must they go through the "runaround," re-file their lawsuits, pass the initial screening again, and prove it in a second exhaustion hearing?

The Seventh Circuit's efforts to remedy its flawed procedure with additional extra-statutory terms and requirements only layered more confusion onto its already complicated structure, and illustrates why the formulation of complex new procedural devices should be left to the proper legislative and rulemaking process. No matter how lower courts interpret and apply it, the invented procedure violates this Court's prohibition against creating new rules or judicially amending statutes. This Court should summarily reverse in favor of the procedures already established under the PLRA and Federal Rules or grant certiorari to consider it.

B. The Seventh Circuit Misconstrued Congress's Intent Underlying the PLRA

1. The Seventh Circuit Ignored One Of The PLRA's Two Purposes—To Facilitate Consideration Of Meritorious Litigation

The Seventh Circuit justified its invented procedure by citing "the statutory goal of sparing federal courts the burden of prisoner litigation," App.6a, but ignored the second, equally important goal: facilitating consideration of meritorious litigation. *See Jones*, 549 U.S. at 204. The one-sided nature of the Seventh Circuit's analysis underscores why public policy is best left to Congress rather than the courts.

Congress recognized (and the Seventh Circuit overlooked) that meritorious prisoner litigation serves an important role. *See, e.g.*, 141 Cong. Rec. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) (citing need to "free up judicial resources for claims with merit by both prisoners and nonprisoners"); *id.* at S14,627 (statement of Sen. Hatch) ("I do not want to prevent inmates from raising legitimate claims."). Prison litigation is sometimes the only check on serious abuses that occur in prisons. *See* Margo Schlanger, *The Political Economy of Prison and Jail Litigation*, Prison Legal News, June 2007, at 1 ("[A]t least in many states, litigation is about the only reform tool available."). It is especially important when the prison system itself is corrupt.[4] Violence is common in prison,

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[4] John Eligon, *Correction Officers Accused of Letting Inmates Run Rikers Island Jail*, N.Y. Times, Jan. 23, 2009, at A20 (guards indicted for using inmates "to intimidate, threaten and silence uncooperative prisoners with brute force" and

and guards may ignore inmate-on-inmate abuse or participate in abuse themselves.[5] Moreover, litigation frequently implicates systemic issues, such as conditions of a prison or jail.[6]

The Seventh Circuit's decision will have significant negative consequences for litigants with meritorious claims. Those consequences are discussed in greater

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orchestrating cover-ups); Ashwin Verghese, *4 Graterford Guards Face Charges*, Philadelphia Inquirer, Sept. 22, 2007, at B3 (guards charged with extortion and conspiracy to distribute drugs to inmates).

5 *See, e.g.*, *Daskalea v. District of Columbia*, 227 F.3d 433, 436-37, 439 (D.C. Cir. 2000) (frequent sexual harassment culminated in officer inciting inmates to drag prisoner from her cell and "forc[ing] her to dance naked on a table before more than a hundred chanting, jeering guards and inmates"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1166-67 (N.D. Cal. 1995) (officers bathed mentally ill prisoner in scalding water resulting in second and third degree burns over one-third of his body, after which "skin … peeled off and was hanging in large clumps around his legs"); Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* 114 (2001), *available at* http://www.hrw.org/legacy/reports/2001/prison/report8.html#_1_50 (officer refused to investigate Texas inmate's abuse allegations, telling inmate he must be gay for being victim of multiple rapes).

6 *See, e.g.*, *Coleman v. Schwarzenegger*, Tentative Ruling, Nos. CIV S-90-0520 LKK JFM P & C01-1351 THE, at 2 (E.D. Cal. & N.D. Cal. Feb. 9, 2009) (population reduction required because California prisons are operating near double capacity causing "'substantial risk to the health and safety of … the inmates'") (citation omitted); *Sheppard v. Phoenix*, 210 F. Supp. 2d 450, 458-60 (S.D.N.Y. 2002) (terminating injunction that cured problem of excessive force, noting drastic reduction in injury to inmates and staff); *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1122-23 (W.D. Wis. 2001) (ordering mentally ill prisoners removed from Wisconsin's Supermax facility due to "increased depression, hallucination, derealization and acute suicidality").

depth below, *see infra* at 20-25, and in the Petition, and include *at a minimum* a new and quite substantial delay in the adjudication of claims. By foregoing any analysis of how its procedure would affect meritorious litigation, the Seventh Circuit demonstrated why courts should leave policy decisions to Congress. *See License Tax Cases*, 72 U.S. (5 Wall.) 462, 469 (1867) ("This court can know nothing of public policy except from the Constitution and the laws …. Considerations of that sort must, in general, be addressed to the legislature.").

2. The PLRA Has Already Achieved Its Other Purpose—To Reduce The Quantity Of Prisoner Litigation

The Seventh Circuit's concern about the "burden" of prison litigation is outdated. App. 6a-7a; *see also* 141 Cong. Rec. S14,627 (statement of Sen. Hatch). The perceived "burden" that the PLRA's supporters cited in 1995 has been significantly mitigated by the PLRA's dramatic success in reducing the number of prisoner civil rights and prison conditions cases brought in federal court. In 1995—the year preceding implementation of the PLRA—41,679 such petitions were filed.[7] Within three years, the number filed had dropped by over 30% to 26,462 cases.[8] Between 1999 and 2006, the number of prisoner petitions leveled off

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7 *See* Administrative Office of United States Courts, *Judicial Business: 1998 Annual Report of Director*, U.S. Courts—Civil Cases Commenced, During Twelve-Month Ended Sept. 30, 1994 through 1998 (1998) 146, *available at* http://www.uscourts.gov/dirrpt98/c2asep98.pdf.

8 *See id.*

at approximately 24,500, declining to 24,025 in 2007.[9] Because the inmate population grew by over 15% between 1999 and 2007, the steady rate in total filings reflects a continued decline in the number of petitions filed per inmate.[10]

The PLRA has also significantly cut down on the number of prisoner cases that go to trial. Between 1994 and 1996, approximately 1000 prisoner civil rights cases per year went to trial in the federal district courts. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1643 (2003). In 2001, there were fewer than 500. *Id.* In the 12-month period ending March 31, 2007, fewer than 300 reached trial.[11]

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[9] *See* Tracey Kyckelhahn & Thomas H. Cohen, U.S. DOJ, Bureau of Justice Statistics, *Civil Rights Complaints in U.S. District Courts, 1990-2006* 8 (2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/crcusdc06.pdf; Administrative Office of United States Courts, *Judicial Business: 2007 Annual Report of Director*, U.S. District Courts—Civil Cases Commenced, During the 12-Month Ending Sept. 30, 2006 and 2007 146 (2008), *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf.

[10] *See* Allen J. Beck, U.S. DOJ, Bureau of Justice Statistics, *Prisoners in 1999* 1 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p99.pdf (1999 total incarcerated population: 2,026,596); Heather C. West & William J. Sabol, U.S. DOJ, Bureau of Justice Statistics, *Prisoners in 2007* 7 (2008), *available at* http://www.ojp.gov/bjs/pub/pdf/p07.pdf (2007 total incarcerated population: 2,413,112).

[11] *See* Administrative Office of United States Courts, *Federal Judicial Caseload Statistics*, U.S. District Courts—Civil Cases Terminated, During 12-Month Period Ending Mar. 31, 2007 52-53 (2007), *available at* http://www.uscourts.gov/caseload2007/tables/C04Mar07.pdf.

The Circuit's reliance on an outdated policy concern to invent an unnecessary remedy further demonstrates why legislation is best left to Congress.

II. THE SEVENTH CIRCUIT'S PROCEDURE IS INEFFICIENT, UNJUST, AND HINDERS PLAINTIFFS' ABILITY TO OBTAIN TIMELY RELIEF FOR MERITORIOUS CLAIMS

The Seventh Circuit's invented procedure creates inefficiencies and inequities not present under the PLRA or the Federal Rules. *Amici* believe that the new exhaustion procedure increases, rather than reduces, inefficiencies for the courts, while hampering meritorious prisoners' already limited ability to pursue their claims.

A. The New Procedure Will Introduce Delay And Waste Judicial Resources Through Mandatory Preliminary Resolution Of Complex Exhaustion Factual Disputes

The Seventh Circuit's procedure will needlessly delay the resolution of prisoner claims and squander rather than conserve judicial resources. Once exhaustion is "contested" by the defendant, it triggers the mandatory "sequence." In *amici*'s experience, defendants routinely assert a failure to exhaust as a boilerplate affirmative defense to PLRA claims, and therefore the sequence will almost always be triggered. As a result, the Seventh Circuit has effectively created an automatic (and protracted) stay on litigating the merits of most, if not all, prisoner actions where a colorable defense is raised, to permit a whole new threshold round of discovery and hearings not previously known in federal litigation. Requiring

resolution of these disputes at the outset of virtually every PLRA case (that has passed initial screening) will unjustifiably delay the resolution of these claims. It also imposes a substantial burden on the district courts and severely limits their discretion to manage their caseloads.

The Seventh Circuit's apparent belief that mandatory threshold exhaustion determinations will conserve judicial resources is excessively simplistic. While the invented procedure may screen out some claims that would otherwise have proceeded a bit further, it also greatly increases the attention and resources devoted to litigating the issue where the prisoner properly exhausted. Furthermore, the premise that it is always easier to dispose of a PLRA case on exhaustion grounds than on the merits is seriously flawed. Often the merits are *less* complicated than the exhaustion question, and can be disposed of relatively quickly and easily on a motion for summary judgment.[12] By transforming exhaustion into a quasi-jurisdictional threshold issue, the new procedure deprives courts of a valuable and efficient tool. *Compare, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (courts cannot bypass jurisdictional issues to dismiss on easier merits grounds).

In a typical federal agency case, exhaustion may turn on a simple question, such as whether a certified mailing was sent by the deadline. But PLRA exhaustion generates a large number of sharp factual

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12 *See, e.g., Klebanowski v. Sheahan*, 540 F.3d 633, 639-40 (7th Cir. 2008) ("[B]ypass[ing]" complicated availability-of-exhaustion issues to affirm summary judgment on merits).

disputes due to the chaotic nature of prison administrative systems. The complex rules governing prison grievance systems are not standardized like federal agency administrative remedy systems. They are specific to each jurisdiction and vary greatly from state to state, in privately-run prisons, and in the federal system.[13] The same correctional staff who are likely the subjects of the complaints (or their co-workers) administer these rules, rather than the trained, independent hearing officers who typically run administrative agencies. Many prison grievance rules are also ambiguous, leaving considerable room for interpretation by the staff.

PLRA exhaustion disputes therefore frequently involve questions of whether institutions were functioning according to their rules, whether prison staff members were acting lawfully and whether prisoners or prison staff are telling the truth. For example, in the cases where the grievance system that exists on paper does not reflect how the institution actually administers it, disputes may arise regarding the nature of the grievance system and whether it even exists, not just whether the prisoner used it.[14]

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[13] The prison grievance policies of the federal prison system, the states, the District of Columbia, and privately-run prisons are available at http://law.wustl.edu/Faculty/index.asp?id=6430 (Wash. Univ. Law, *Prison and Jail Grievance Policies*) (last visited Feb. 9, 2009).

[14] *See, e.g.*, *Frost v. McCaughtry*, No. 99-2061, 2000 WL 767841, at *1 (7th Cir. June 12, 2000) (prison's administrative changes raised factual question on availability of grievance appeal); *Martin v. Sizemore*, No. Civ.A. 05-CV-105-KKC, 2005 WL 1491210, at *1, *3 (E.D. Ky. June 22, 2005) (plaintiff alleged "'[t]here is no grievance committee here, your grievances are

Similarly, because prison staff administer the grievance process, prisoners must depend on them both to provide the remedy and for instructions on how to proceed. As a result, disputes often arise because prison staff made remedies *de facto* unavailable through misinformation, threats, retaliation, or failure to pick up or deliver grievances.[15] The extensive factual disputes about the availability of remedies in this case vividly illustrate this point.

Forcing judges to resolve these complex factual disputes at the outset, in a procedure separate from (and sometimes duplicative of) resolution of the merits, will hinder courts' ability to efficiently dispose of prisoner cases on summary judgment where the merits are more simple than exhaustion.

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simply turned over to the person you file on and you get threatened'").

[15] *See, e.g.*, *Dole v. Chandler*, 438 F.3d 804, 807-08 (7th Cir. 2006) (guard took prisoner's grievance for mailing, but prison had no record of it); *Brown v. Croak*, 312 F.3d 109, 113 (3d Cir. 2002) (remedies "unavailable" if prison officials misinformed prisoner about them); *Barndt v. Pucci*, No. 3:CV-05-2666, 2007 WL 1031509, at *2-3 (M.D. Pa. Mar. 30, 2007) (factual dispute over exhaustion where prisoner alleged he could not grieve because he was deprived of writing materials and legal paperwork); *Snyder v. Goord*, No. 9: 05-CV-01284, 2007 WL 957530, at *9-10 (N.D.N.Y. Mar. 29, 2007) (dispute as to whether official's threats deterred inmate from filing grievance).

B. Requiring Prisoners To Go Back And Exhaust Ignores The Realities Of Prison Grievance Systems And May Prevent Plaintiffs From Litigating Meritorious Claims

1. Many Prisoners Will Not Be Able To Exhaust

Given the realities of the prison systems, the Seventh Circuit's mandate that prisoners who are "innocent" concerning any initial failure to exhaust nonetheless must be "given another chance to exhaust," for reasons explained above, is inconsistent with the statutory language. It is also impractical and may be impossible. Prison grievance systems are only designed to review complaints within a short period of time (anywhere from less than one week to one month) after the complained-of conduct occurred.[16] Federal and state prisons in the Seventh Circuit require that prisoners file grievances within 14 to 60 days after the complained-of conduct occurred.[17] While some prisons

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16 *See, e.g.*, 28 C.F.R. §542.14(a) (20 days); Ky. Dep't of Corrections, *Policies and Procedures: Inmate Grievance Procedure*, No. 14.6 8, 13 (2008), *available at* http://www.corrections.ky.gov/NR/rdonlyres/EFF984A4-958F-4DA2-96E8-4CD391BFCD75/160608/14992.pdf (5 days); 06-070-002 R.I. Code R. §10 (Weil 2008) (3 days).

17 *See, e.g.*, 28 C.F.R. §542.14(a) (20 days); Wis. Admin. Code DOC §310.09(6) (2008) (14 days); Ill. Admin. Code tit. 20, §504.810(a) (2008) (60 days); Ind. Dep't of Correction, *Policy and Administrative Procedures: Offender Grievance Process*, No. 00-02-301 22 (2005), *available at* http://www.law.yale.edu/documents/pdf/Indiana_Grievance_Policy.pdf (20 days).

allow extensions for "good cause," such determinations are completely discretionary.[18]

In all likelihood, therefore, prisons will routinely refuse to entertain such renewed exhaustion attempts—even when the court has determined that the initial failure to exhaust was "innocent." A subsequent reviewing court will then presumably be called upon to evaluate whether administrative remedies were ever genuinely made available or whether the prisoner instead got "a runaround" from prison officials. In the end, either such "innocent" prisoners will get to proceed with their claims anyway (in which case the Seventh Circuit's detour was a waste of time), or they will somehow be barred by exhaustion even though the administrative process was effectively unavailable to them (which is directly contrary to the statutory language).[19]

2. The New Procedure Will Likely Subject Prisoners To Increased Interference and Retaliation From Prison Officials

Prisoners trying to exhaust their administrative remedies may face increased interference by and retaliation from prison officials under the new procedure.

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[18] *See, e.g.*, 28 C.F.R. §542.14(b) (extension "may be allowed" for "a valid reason"); Ill. Admin. Code tit. 20, §504.810(a) (untimely filing excused for "good cause").

[19] *See supra* at 9-10; *compare, e.g.*, *Dole*, 438 F.3d at 809 (prisons' refusal to hear grievances can render claims "indefinitely unexhausted"); *Ford*, 362 F.3d at 400-01 ("If it is too late to pursue administrative remedies, then exhaustion will prove impossible and §1997e(a) will permanently block litigation.").

Prison officials or staff often cause prisoners' initial failure to exhaust.[20] Courts previously refused to "reward" prison officials' interference with the grievance system, *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004), and allowed prisoners to proceed on their claims where administrative remedies were thus rendered "unavailable."[21] The Seventh Circuit's invented procedure, however, effectively excuses prisons for interfering with exhaustion in the first instance and requires prisoners to attempt exhaustion again. By removing any detrimental consequences for interfering with the availability of administrative remedies, the Circuit removed any incentive for prison officials to ensure that grievance systems operate properly. Moreover, knowing they get (at least) one free pass for misconduct creates a perverse incentive for officials to frustrate prisoners' attempts to access the grievance system.

The new procedure also will likely subject prisoners to interference or retaliation in their second attempt to exhaust because the parties from whom

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[20] *See, e.g.*, *Kaba*, 458 F.3d at 685-86 (harming or threatening prisoners); *Hemphill v. New York*, 380 F.3d 680, 686-88 (2d Cir. 2004) (threats).

[21] *See, e.g.*, *Turner v. Burnside*, 541 F.3d 1077, 1085 (11th Cir. 2008) (official threats of retaliation may render administrative remedies "unavailable"); *Kaba*, 458 F.3d at 684 ("[W]hen prison officials prevent inmates from using the administrative process …, the process that exists on paper becomes unavailable in reality."); *Dole*, 438 F.3d at 809 (remedy is "unavailable" if prison officials prevent prisoner from exhausting); *Hemphill*, 380 F.3d at 686-88 (threats may render remedies unavailable); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) ("[A] remedy that prison officials prevent a prisoner from 'utilizing' is not an 'available' remedy under §1997e(a) ….").

prisoners must seek their administrative remedies are frequently the staff (or their coworkers) who committed the underlying wrong.[22]

The Seventh Circuit seemed to acknowledge the risk of continued official misconduct by amending its opinion to exempt from the second exhaustion attempt prisoners who are "being given a runaround." App. 6a. But, as previously discussed, *see supra* at 11, it is unclear who determines that the prisoner is being given a "runaround" the second time, when they determine it, or even what a "runaround" is. Put simply, it is impractical and unjust to force "innocent" prisoners to re-navigate a system that already failed them.

3. Requiring A Second Attempt At Exhaustion Will Create Serious Problems With Statutes Of Limitations And Staleness Of Evidence

Previously, courts allowed claims to proceed to the merits where prisoners' failure to exhaust was "innocent" so that those prisoners did not face statute

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[22] *See Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985) (noting pressures on prison hearing officers to act favorably towards fellow employees in disputes with prisoners); *Hines v. Gomez*, 108 F.3d 265, 267-68 (9th Cir. 1997) (retaliation against prisoner for use of the prison grievance system), *cert. denied*, 524 U.S. 936 (1998); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (correction officers performed a "shake down" of a prisoner's cell, confiscating documents and personal property in retaliation for use of grievance process), *cert. denied*, 535 U.S. 1095 (2002); *Trobaugh v. Hall*, 176 F.3d 1087, 1089 (8th Cir. 1999) (deputy placed prisoner in administrative segregation in retaliation for prisoner's grievances).

of limitations concerns. Now, however, after a second exhaustion attempt, prisoners may find their claims time-barred if they attempt to re-file their cases in court. Courts regularly toll the statutory period during the pendency of the grievance process.[23] The same does not necessarily apply where the statute has run during the period that prisoners pursue judicial remedies.[24]

In *Woodford*, this Court recognized that one benefit of administrative remedies is "[w]hen a grievance is filed shortly after the event" at issue, "witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved." 548 U.S. at 95. That benefit is lost when a prisoner who "innocently" failed to exhaust sits on his increasingly stale claims while he awaits completion of the grievance process a second time or waits long enough to satisfy the court that a response is not forthcoming and he is being given a "runaround."[25]

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[23] *See Johnson v. Rivera*, 272 F.3d 519, 522 (7th Cir. 2001) (tolling limitations period during administrative grievance process); *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000) (same); *Harris v. Hegmann*, 198 F.3d 153, 157-59 (5th Cir. 1999) (per curiam) (same).

[24] *See Crump v. Darling*, No. 1:06-cv-20, 2007 WL 851750, at *13-14 (W.D. Mich. Mar. 21, 2007) (limitations period not tolled during pendency of suit dismissed for non-exhaustion). *But see Clifford v. Gibbs*, 298 F.3d 328, 332-33 (5th Cir. 2002) (tolling limitations period during the pendency of lawsuit dismissed for failure to exhaust).

[25] *See Ford*, 362 F.3d at 400 (prisoner who waited six months for a final decision still could not bring claim).

In *amici*'s experience, it is not unusual for exhaustion to take a year or more, even in the absence of official misconduct. Since prisoners and prison staff are frequently transferred, a protracted repeat grievance procedure will impede prisoners' ability to locate and interview witnesses. Prisoners will also face evidentiary problems as witnesses' memories fade over time and prisons discard documents, videotapes, and other evidence. These problems will severely limit prisoners' ability to prepare their (primarily *pro se*) claims and obtain timely relief.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Petitioner, the Petition should be granted.

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