No. 05-7058

IN THE

Supreme Court of the United States

LORENZO JONES,

Petitioner,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. The Prison Litigation Reform Act requires a unique judicial screening to determine whether the inmate has a likelihood of prevailing. The PLRA also mandates exhaustion of administrative remedies prior to bringing suit. Jones's complaint failed to plead and show exhaustion with respect to some claims. Does the PLRA require dismissing Jones's complaint without prejudice and without an opportunity to amend?

2. The Prison Litigation Reform Act requires a unique judicial screening to determine whether the inmate has a likelihood of prevailing. The PLRA also mandates exhaustion of administrative remedies prior to bringing suit. Jones's complaint failed to plead and show exhaustion with respect to some claims. Does the PLRA require "total exhaustion," that is, dismissal of the entire complaint without prejudice where one or more claims remain unexhausted?

PARTIES TO THE PROCEEDINGS BELOW

1. Plaintiff-Petitioner Lorenzo Jones.

2. Defendants-Respondents, referred to collectively as "Prison Officials":

    a. Barbara Bock, Warden of the Saginaw Correctional Facility
    b. Valerie A. Chaplin, Assistant Deputy Warden
    c. Paul Morrison, Classification Director
    d. Michael Opanasenko, Corrections Officer

3. Petitioner erroneously lists the following as Respondents:

    a. Janet Konkle, R.N.
    b. Ahmad Aldabagh, M.D.

While Konkle and Aldabagh were named as Defendants in the complaint, they were not served with process and are not Respondents here. Petitioner recognized this error in a November 2005 letter to this Court.

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STATUTORY AND OTHER PROVISIONS INVOLVED

1. 28 USC § 1915A provides:

> (a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
>
> (b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—
>
> > (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
> >
> > (2) seeks monetary relief from a defendant who is immune from such relief . . .

2. 42 USC § 1997e(a) of the Prison Litigation Reform Act of 1995, Pub L 204-134, 110 Stat 1321 (1996) provides:

> Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

3. 42 USC § 1997e(c)(1) provides:

> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

4. 42 USC § 1997e(g) provides:

> (1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 USC § 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

5. Fed R Civ P 8 provides:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

6. Fed R Civ P 15(a) provides:

Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

REASONS FOR DENYING THE PETITION

I. Because the PLRA provides for a unique pre-service screening for prisoner litigation and mandates exhaustion of administrative remedies, the statue requires pleading and showing exhaustion.

The Prison Litigation Reform Act (PLRA) changed the procedures for processing litigation brought by prisoners with respect to prison conditions. The pre-screening and mandatory exhaustion requirements of the PLRA conflict with and supersede the general procedures embodied in Federal Rules of Civil Procedure 8 and 15.

While the Prison Officials concur that there is conflict among the circuit courts with respect to whether inmates must plead and show exhaustion of administrative remedies in the initial complaint, the Court of Appeals in the case at hand correctly applied the PLRA and dismissed the complaint without prejudice. While Jones claims that 20,000 cases are affected by this issue each year, that is an exaggeration. First, inmates who plead and demonstrate exhaustion of administrative remedies proceed with their actions without interruption in any circuit. Second, inmates in circuits that treat the exhaustion mandate as an affirmative defense are not affected by the Court of Appeals decision at all. And, third, those who bring actions in the circuits that place the burden on the inmates to plead and demonstrate exhaustion, either comply with the requirement or experience a dismissal without prejudice, and can bring their action again. Thus, substantially fewer than all of the approximately 20,000 prisoner cases filed each year are affected by this pleading requirement. Further, inmates whose complaints are dismissed "without prejudice" are obviously not prejudiced. Therefore, under every circuit court's interpretation of the PLRA, inmates are not prejudiced and the split among the circuits is tolerable.

This Court should therefore deny the instant petition for certiorari.

An analysis of the PLRA and Rules 8 and 15 demonstrates that the Court of Appeals properly dismissed this case without prejudice for the following reasons.

A. Because the PLRA provides for a unique pre-service screening for prison litigation, the exhaustion requirement is a pleading requirement that mandates exhausting administrative remedies before filing suit.

Section 1915A provides that district courts shall screen ". . . before docketing, if feasible or, in any event, as soon as is practicable after docketing" prisoner complaints against governmental officials or entities to determine, among other things, whether they state claims on which relief may be granted.[1] As the Court of Appeals noted in *Baxter v Rose,*[2] the PLRA sets up a unique screening process that puts the burden on the courts to determine whether the complaint states a claim upon which relief can be granted, even before the complaint is served on a defendant. The courts would be prevented from efficaciously screening cases if the plaintiffs could, through obscure pleading, circumvent the PLRA requirement to state a claim upon which relief could be granted, or face dismissal without prejudice prior to service of process.[3]

The *Baxter* decision relied on by the Court of Appeals here is supported by opinions of this Court. In *Porter v Nussle,* [4] this Court ruled that exhaustion of administrative remedies is required for all prisoner litigation, stating: ". . . exhaustion is a prerequisite to suit." Further, this Court opined that Congress intended the PLRA to upgrade the caliber of prisoner litigation: "Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and **improve the quality** of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."[5] And this Court

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[1] 28 USC § 1915A.
[2] *Baxter v Rose*, 305 F 3d 486, 490 (CA 6 2002).
[3] *Baxter*, 305 F 3d at 490.
[4] *Porter v Nussle*, 534 US 516, 524 (US 2002).
[5] *Porter*, 534 US at 524-25 (emphasis added).

recognized that: "the PLRA establishes a different regime."[6] This Court further held that one of the PLRA's "dominant concern[s]" is to "foster better prepared litigation of claims aired in court."[7]

B. Rules 8 and 15 do not countenance the pre-service screening aspect of the PLRA.

In discussing Fed R Civ P 8 (a), this Court stated: "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[8] But the statute at issue here does not countenance waiting until discovery to dispose of unmeritorious claims. The general provisions of the Rule 8 are therefore superseded by the specific PLRA statutory provisions.

Similarly, Rule 15 (a)'s direction to freely permit amendment of the complaint when justice requires it appears to be at odds with mandatory exhaustion in combination with the PLRA's judicial screening process. Rule 15 can be interpreted, in light of the PLRA's provisions, to deny amendments because justice requires denial. In the alternative, to the extent there is a conflict between Rule 15(a) and the statute, the statute takes precedence.

C. Where court rules conflict with the later-enacted PLRA, the PLRA controls.

Congress delegated rule-making authority to this Court. But Congress may still enact and has in fact enacted, Rules of Practice and Procedure or Evidence directly.[9] And Congress can enact statutes that supersede pre-existing rules:

> Congress has plenary power to adopt a statute that supersedes an existing rule. If an inconsistent statute is enacted after the effective date of a rule, the statute takes precedence and is deemed to supersede or modify the conflicting rule, provided

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[6] *Porter*, 534 US at 525.
[7] *Porter*, 534 US at 528.
[8] *Swierkiewicz v Sorema N.A.*, 534 US 506, 512 (2002).
[9] *See* the direct Congressional changes to the Federal Rules of Evidence in 1994. Pub L No 103-322, Title XXXII, §§ 320935(a), 320935(e) and Title IV, § 40141(b), 103d Congress, September 13, 1994; *see also* Fed R Evid 412-415.

> that the congressional intent is clear. If it is unclear, the courts will strive to construe the statute in harmony with the rule to the extent possible.[10]

In *Henderson v United States,*[11] this Court addressed a conflict between a Rule and an earlier enacted statute. In *Henderson*, this Court held that a provision of the Suits in Admiralty Act that required service of process "forthwith" had been displaced by the later adoption of Rule 4 that provided for 120 days to serve a complaint, which time could be expanded at the court's discretion. The "forthwith" provision of the statute therefore has no current force or effect. This Court relied on the fact that the Admiralty Act went into effect 18 years before the advent of the Federal Rules. And the Rules Enabling Act[12] that provides that this Court can prescribe rules of practice and procedure in the federal courts, includes a provision indicating that the Rules supersede all previously-enacted laws that conflict with them: "Such rules shall not abridge, enlarge or modify any substantive right. All law in conflict with such rules shall be of no further force or effect after such rules have taken effect."[13]

In *Radzanower v Touche Ross & Co*, this Court also addressed repeals by implication:

> "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *United States v United Continental Tuna Corp,* 425 US 164, 168 n9. There are, however, "two well-settled categories of repeals by implication - (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier

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[10] *Moore's Federal Practice* §1.06. *See e.g., Traverse Bay Area Intermediate School Dist v Hitco, Inc*, 762 F Supp 1298, 1301 (WD Mich 1991) and *United States v Sharon Steel Corp,* 681 F Supp 1492, 1495-96 (D Utah 1987), holding that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC § 9601, *et seq*, provision that defines "corporation" supersedes Fed R Civ P 17(b) for purposes of a CERCLA action against a dissolved corporation. *But see e.g., United States v Gustin-Bacon Div Certain-Teed Prod Corp.,* 426 F 2d 539, 542 (CA 10), *cert denied*, 400 US 832 (1970) (holding that the Civil Rights Act of 1964 did not supersede Fed R Civ P 8 on pleadings).

[11] *Henderson v United States,* 517 US 654 (1996).

[12] Rules Enabling Act, 28 USC § 2071, *et seq*.

[13] *Id* at § 2072(b).

> act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . ." *Posadas v National City Bank,* 296 US 497, 503. [14]

Courts have consistently ruled that the Rules Enabling Act's supersession clause provides that subsequent procedural statutes passed by Congress supersede any prior, conflicting Federal Rule. And specifically that PLRA provisions supersede conflicting earlier-adopted court rules.[15] Here, where the later-enacted PLRA sets forth a unique procedure for screening prisoner litigation prior to service of process, the PLRA conflicts with the generally applicable provisions of the earlier-adopted Rule 8 and Rule 15, the PLRA controls as the Court of Appeals, in its *Baxter* decision, recognized:

> Unlike in typical civil litigation, courts discharging their screening duties under the PLRA must not wait until the complementary rules of civil procedure, such as civil discovery or responsive motions, are implemented by the defendant. While the Federal Rules of Civil Procedure shift the burden of obtaining clarity to the defendant, the PLRA shifts that burden to the courts. The heightened pleading requirement, in cases to which the PLRA applies, effectuates the PLRA's screening requirement.[16]

In *Baxter* the Court of Appeals also appropriately distinguished *Swierkiewicz v Sorema*. Unlike the **judicially-created** heightened pleading requirements that this Court struck down in *Swierkiewicz v Sorema,*[17] the PLRA's heightened pleading requirement is inherent in the **statute**. *Swierkiewicz* involved plaintiff's claim for employment discrimination. In *Swierkiewicz,* this Court noted that the complaint stated claims upon which relief could be granted.[18] But that is not the case here, where the PLRA provides that "no action shall be brought" absent exhaustion

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[14] *Radzanower v Touche Ross & Co,* 426 US 148, 154 (1976).
[15] For example: *Callihan v Schneider,* 178 F 3d 800, 802-03 (CA 6 1999) (holding the PLRA repealed earlier-enacted provisions of Fed R Civ P 24(a)); *Floyd v United States Postal Service,* 105 F 3d 274, 277-78 (CA 6 1997) (holding that where the PLRA conflicts with the earlier-adopted Fed R Civ P 24(a), the statute controls); and *Jackson v Stinnett,* 102 F 3d 132, 135-36 (CA 5 1996) (holding the PLRA repeals Fed R Civ P 24(a) to the extent of the conflict between the two).
[16] *Baxter,* 305 F 3d at 490.
[17] *Swierkiewicz v Sorema,* 534 US 506 (2002).
[18] *Swierkiewicz,* 534 US at 514.

of administrative remedies.[19] In prison litigation regarding conditions of confinement, where the plaintiff does not allege exhaustion, no claim upon which relief can be granted is stated, and the PLRA requires dismissal without prejudice. Further, the analogy to employment discrimination cases which require exhaustion of administrative remedies does not fit the instant case, because employment discrimination cases are not subject to pre-service screening as PLRA cases are.

This Court noted in *Swierkiewicz* that: "The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement."[20] Further, in *Swierkiewicz*, this Court relied on the fact that not every employment discrimination case required proof of all elements of the prima facie case:

> Under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case.[21]

But this is not true in the instant case, where the requirement to exhaust administrative remedies does apply to every suit that the PLRA encompasses, and where exhaustion of administrative remedies is a pleading requirement.

Unlike in an employment discrimination case, the unique PLRA screening process does require a prisoner to state a claim upon which relief can be granted in the initial complaint, or experience dismissal without prejudice. The *Swierkiewicz* decision is not controlling here. The Court of Appeals application of the PLRA in the instant case comports with a premier purpose of that act: to decrease the quantity and increase the quality of prisoner litigation. As this Court is well aware, prisoner complaints are frequently lengthy, rambling, and are devoid of any editorial judgment with respect to inclusion of claims ranging from valid to marginal to meritless. The

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[19] 42 USC § 1997e(a).
[20] *Swierkiewicz*, 534 US at 510.
[21] *Swierkiewicz*, 534 US at 511.

PLRA, as applied by the Court of Appeals here, requires the inmate to at least give enough thought to the allegations to assure that exhaustion of administrative remedies is complete for all claims, before requiring a defendant to respond to the complaint. The PLRA provision that relieves the defendant from the general requirement to promptly file an answer after service of a complaint and provides that "[t]he court may require any defendant to reply to a complaint . . . if it finds that the plaintiff has a reasonable opportunity to prevail on the merits"[22] support the Court of Appeals interpretation of the PLRA requiring plaintiffs to plead and demonstrate exhaustion. Where exhaustion is mandatory, but the plaintiff has not alleged exhaustion, a district court could not find that the plaintiff had a reasonable chance to prevail on the merits. Again, this aspect of the judicial screening requirement in combination with the mandatory exhaustion requirement supports the Court of Appeals decision in this case.

Similarly, as the Court of Appeals recognized in *Baxter*, there is tension between Rule 15(a)'s provision that leave to amend a complaint should be freely given and the PLRA's initial screening requirement.[23] But *Baxter* held that "A plaintiff who fails to allege exhaustion of administrative remedies though 'particularized averments' does not state a claim on which relief may be granted, and his complaint must be dismissed *sua sponte*."[24] The Court of Appeals recognized that the possibility of amendment would subvert the screening process, keeping the courts from efficiently determining whether the plaintiff complied with the exhaustion requirement.[25] Again, to the extent there is a conflict between Rule 15(a) and the later-enacted PLRA, the Court of Appeals correctly applied the provision of the superseding statute. The

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[22] 42 USC § 1997e(g)(2) (emphasis added).
[23] *Baxter*, 305 F 3d at 489 n 3.
[24] *Baxter*, 305 F 3d at 489 (citing *Knuckles El v Toombs*, 215 F 3d 640, 642 (CA 6 2001); *Brown v Toombs*, 139 F 3d 1102, 1104 (CA 6 1998)).
[25] *Baxter*, 305 F 3d at 490.

Court of Appeals appropriately affirmed the district court's dismissal of this case without prejudice. The petition for certiorari should be denied.

D. The dismissal without prejudice does not implicate the statute of limitations.

The statute of limitations is not a concern because the statute is tolled while the inmate exhausts administrative remedies.[26] Further, from the date of service on the defendant, until the dismissal without prejudice, the statute of limitations is also tolled. Once the case is dismissed, the statute resumes running.[27] So Jones is not disadvantaged by the dismissal without prejudice.

E. Where the Court of Appeals did not err, this petition should be denied.

In deciding that prisoner litigation covered by the PLRA must be dismissed where the initial complaint did not plead and show exhaustion of administrative remedies, the Court of Appeals appropriately considered the PLRA provisions in light of Federal Rules of Civil Procedure 8 and 15. The PLRA's mandatory exhaustion provision, in combination with its requiring the courts to screen PLRA litigation before service of the complaint to determine whether the plaintiff has failed to state a claim upon which relief can be granted, require dismissal without prejudice. The instant petition should therefore be denied.

II. This Court should deny the Petition because the Court of Appeals decision pursuant to the Prison Litigation Reform Act, requiring "total exhaustion" of all administrative remedies against all parties, is consistent with the plain language of the statute and the intent of Congress.

As with question one, the Respondents acknowledge that the federal courts of appeals are split on the issue of whether a prisoner must totally exhaust all of his administrative remedies against all parties or face dismissal of the entire complaint without prejudice. But the split is not

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[26] *Brown v Morgan*, 209 F 3d 595 (CA 6 2000).
[27] *Federal Kemper Ins Co v Isaacson*, 145 Mich App 179 (1985).

as wide as Petitioner suggests. Currently, two Circuits (the Sixth and Tenth) have adopted a total exhaustion rule.[28] In addition, the Third Circuit implemented total exhaustion in an unpublished decision.[29] Two Circuits (the Second and Ninth) have adopted a partial exhaustion rule which allows prisoners to proceed forward on their exhausted claims while their unexhausted claims will be dismissed.[30]

Two Circuits (the "Fifth and the Seventh) have not squarely addressed total exhaustion but indicated an exhausted claim might proceed despite the complaints including an unexhausted claim that is subject to dismissal. The Fifth Circuit in *Johnson v Johnson* allowed exhausted claims to be litigated, while dismissing unexhausted claims. But the Court did not directly address total exhaustion, specifically noting that Defendants had not argued for implementation of total exhaustion.[31] Thus, it appears total exhaustion is an open question in the Fifth Circuit.

Similarly, the Seventh Circuit in *Lewis v Washington*[32] upheld the trial court's dismissing one claim for lack of exhaustion and remanded the remaining claim to determine whether Plaintiff had exhausted that claim. But the Seventh Circuit did not explicitly address the total exhaustion concept. From the decision which never refers to any arguments by Defendants, it appears that the district court probably dismissed the case prior to service. It appears that the Seventh Circuit was not presented with a total exhaustion argument. The Seventh Circuit has not expressly accepted or rejected total exhaustion. The Eighth Circuit has taken a position

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[28] *Jones Bey v Johnson*, 407 F 3d 801, 809 (CA 6 2005); *Ross v City of Bernalillo*, 365 F 3d 1181, 1190 (CA 10 2004).

[29] *Vazquez v Ragonese*, unpublished per curiam opinion, No. 05-1203, 2005 US App LEXIS 16118 (CA 3 August 4, 2005).

[30] *Ortiz v McBride*, 380 F 3d 649 (CA 2 2004); *Lira v Herrera*, 427 F 3d 1164 (CA 9 2005).

[31] *Johnson v Johnson*, 385 F 3d 503 at 523 n 15 (CA 5 2004).

[32] *Lewis v Washington*, 300 F 3d 829 (CA 7 2002).

somewhere in the middle whereby a prisoner is allowed to amend the complaint to include only the exhausted claims.[33]

This Court should deny the petition in this case because the Sixth Circuit's adoption of the total exhaustion rule is correct and should not be over-turned. And, the conflict among the Circuit is not as stark as Petitioner suggests. Many Circuits have not directly addressed total exhaustion.

The Sixth Circuit's decision in *Jones Bey*, along with decisions of the Third and Tenth Circuits is correct because it is consistent with the text of the statute and supported by its legislative history.[34] In adopting the total exhaustion rule, the Court of Appeals for the Sixth Circuit held, "We adopt the total exhaustion rule, in large part, because the plain language of the statute dictates such a result."[35] The PLRA specifically states that:

> No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prison confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.[36]

Thus, the plain language of the Act prohibits any entire action from even going forward absent total exhaustion. Congress distinguished between the term "actions" and "claims" in 42 USC § 1997e(c)(1) and (2). Congress indicated that courts shall dismiss "[A]ny action that is frivolous, malicious or fails to state a claim."[37] The very next section provides that a court may dismiss a claim if it is frivolous, malicious, or fails to state a claim.[38] Congress clearly drew a distinction between a claim, which is an individual allegation, and an action, which is an entire

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[33] *Graves v Norris*, 218 F 3d 884 (CA 8 2000); *Kozohorsky v Harmon*, 332 F 3d 1141, 1144 (CA 8 2003).
[34] *Ross*, 365 F3d at 1190.
[35] *Jones Bey*, 407 F 3d at 807.
[36] 42 USC § 1997e(a).
[37] 42 USC § 1997e(c)(1).
[38] 42 USC § 1997e(c)(2).

lawsuit. The use of the word "claims" in the Act indicates that claims are individual allegations while actions are entire lawsuits.

As the Sixth Circuit noted in making the distinction between the terms "action" and "claim":

> If a district court is presented with a "mixed" petition, it has the power under subsection (c)(2) to dismiss any frivolous claim, exhausted or not, *with prejudice*. However, dismissal under subsection (a) allows the court to dismiss the entire action *without prejudice*. The *Smeltzer* court recognized that Congress must have intended that courts could use subsection (c)(2) to dismiss unexhausted claims as frivolous to keep them from "holding up" the others. *Smeltzer v Hook*, 235 F Supp 736, 744 (WD Mich 2002). In the alternative the court could dismiss the entire action without prejudice and allow the prisoner to refile only exhausted claims.[39]

A rule requiring total exhaustion is consistent with this Court's habeas corpus jurisprudence.[40] In *Jones Bey*, the Sixth Circuit drew an analogy between the PLRA and the rule requiring total exhaustion in the habeas corpus context.

> Additionally, adopting the total exhaustion rule creates comity between § 1983 claims and habeas corpus claims. The Supreme Court requires total exhaustion in habeas cases to allow the state courts the first opportunity to solve prisoners' cases because they are arguably in a better position to analyze and solve the problems. See *Preiser v Rodriguez*, 411 US 475 492; 36 L Ed 2d 439; 93 S Ct 1827 (1973). The PLRA, too, was enacted to allow state prison systems the first chance to solve problems relating to prison conditions. Because both bodies of law were created for similar reasons, their exhaustion rules should be interpreted in a similar manner.[41]

Moreover, the total exhaustion rule is consistent with the overall policy of the PLRA. As this Court recognized, "Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits."[42] A total exhaustion requirement satisfies the policy objectives in the Act in several ways.

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[39] *Jones Bey*, 407 F 3d at 807.
[40] *Rose v Lundy*, 455 US 509, 512 (1982).
[41] *Jones Bey*, 407 F 3d at 807-08.
[42] *Porter v Nussle*, 534 US at 524.

First, the district courts will not have to sort through each often lengthy, rambling complaint to make a determination as to which claims are exhausted and which are unexhausted. A partial exhaustion rule would require courts to spend scarce judicial resources sorting through often voluminous records to determine which, if any, claims could proceed. And the legislative history of the PLRA supports the Court of Appeals' ruling here. Senator Kyl explained[43] the need for the statutory reform of mandatory exhaustion of administrative remedies by referring a comment by Chief Justice Rehnquist in his dissent in *Cleavinger v Saxner*[44]: "With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population." Inmates have virtually endless time to complain about every perceived wrong, large and small. While this often results in their filing lengthy, rambling complaints, it also means that they have the time to pare it down and sue only for claims they have exhausted. And they also have the time to do it over, if the court dismisses the case due to failure to totally exhaust.

Absent total exhaustion the courts will be mired in the screening process, sorting through piles of documents, trying to determine whether the inmate exhausted his claim in all steps of the grievance process against, for example the warden, or if the inmate mentioned the warden only in step three of the grievance process when the inmate decided he did not like the warden's response at step two. In one complaint, this process could be repeated for dozens of grievances, and tripled for the three-step process. This result would be inconsistent with the intent of the PLRA to improve the quality of the lawsuits. The PLRA was not intended to place the burden of sorting each exhausted claim out of the pile of unexhausted claims. The Court of Appeals interpretation of the statute as requiring the court to dismiss a case where even one claim in a

[43] 141 Cong Rec S7527 (daily ed May 25, 1995).

complaint remains unexhausted is consistent with the legislative intent to place the burden on the inmate to show that the Corrections Officials have been given the opportunity to correct the alleged problem, before bringing the matter to court. Consistent with the PLRA's legislative history, total exhaustion requires the inmate to take the time to sort it out and re-file only exhausted claims, if the complaint contains even a single unexhausted claim.

Second, the total exhaustion rule avoids piecemeal litigation.[45] If a prisoner were allowed to proceed on some claims and not others, the prisoner could subsequently bring a second lawsuit requiring the district court to once again expend scarce judicial resources reviewing each and every claim in the new action to determine which claims, if any, are unexhausted. This could result in a series of lawsuits dealing with the same set of operative facts, pending at different stages of discovery, summary judgment, etc. Total exhaustion, in contrast, promotes judicial efficiency because it is much more likely to result in a single action dealing with all claims arising out of the same set of operative facts. And since the dismissal for failure to comply with total exhaustion is necessarily without prejudice, the inmate has the opportunity to bring the action again, pleading only exhausted claims.

Third, the total exhaustion rule has collateral effects that support the policy objectives of the statute by encouraging prisoners and prison officials to make full use of the prison grievance procedure.[46] Congress intended that prison officials, not the Federal courts, have the first opportunity to resolve a prisoner's complaints. The Federal courts must be the last step, not the first step, when a prisoner has a conflict with prison officials. The total exhaustion rule maximizes the incentive for prisoners to make use of the grievance process.

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[44] *Cleavinger v Saxner*, 474 US 193, 211 (1985) (Rehnquist, J. dissenting) (emphasis added).
[45] *Jones Bey*, 407 F 3d at 808; *Ross*, 365 F 3d at 1190.
[46] *Jones Bey*, 407 F 3d at 807; *Ross*, 365 F 3d at 1190.

Finally, this rule aids the Federal courts by ensuring that there is a full administrative record to review for each of the prisoner's claims.[47]

The PLRA requirement that no action shall be brought absent exhaustion of administrative remedies, and its provision for judicial screening, requires that a complaint that alleges some exhausted claims as well as some unexhausted claims must be dismissed without prejudice in its entirety.

[47] *Jones Bey*, 407 F 3d at 807; *Ross*, 365 F 3d at 1190.

CONCLUSION

Since the Court of Appeals did not err in dismissing Jones's complaint without prejudice, this Court should deny the petition for certiorari.

Respectfully submitted

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