No. 99-1964

IN THE

Supreme Court of the United States

TIMOTHY BOOTH,

Petitioner,

v.

C.O. CHURNER; SERGEANT WORKENSHER;
LIEUTENANT RIKUS; and CAPTAIN GARDENER,

Respondents.

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

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER, SUGGESTING REVERSAL

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INTEREST OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK[1]

The Association of the Bar of the City of New York ("the Association") was formed in 1870. Its more than 21,000 members are dedicated to the promotion of ethical standards and civic duty and to political, legal, and social reform in the local, state, national, and international arenas. Through its more than 180 committees, the Association strives to serve the bar and the public in shaping public policy and law reform. On the national level, the Association regularly addresses issues facing Congress and the Executive Branch and submits *amicus* briefs in the federal courts.

The Association has a special interest in assuring legal redress for underserved segments of society, including the civil rights of prisoners, and the removal of obstacles that prevent prisoners from obtaining judicial remedies for legitimate, non-frivolous claims. Over the years, the Association has produced numerous reports and recommendations regarding the constitutional rights of inmates in prisons and jails and the efficient and effective means of resolving inmate disputes when they arise.

The issues in this case affect the rights of incarcerated persons in New York and throughout this country and the development of civil rights jurisprudence in our courts. Through its committees, the Association has broad familiarity

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1. Pursuant to Supreme Court Rule 37.6, *amicus* states that attorney members of the Association authored this brief and that no one other than *amicus* or its members made any financial contribution to the preparation or submission of the brief.

with prisons and jails in New York and elsewhere and the mechanisms that do and do not exist for settling inmate complaints without litigation.

Consistent with its goal of advancing public policy and in the hope of decreasing the human suffering caused by unconstitutional conditions in our nation's correctional facilities, the Association submits this brief. The written consent of all parties of record is filed herewith.

SUMMARY OF ARGUMENT

The Association joins Petitioner in asking the Court to reverse *Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000). In that decision, the Third Circuit held that under 42 U.S.C. § 1997e(a), a prisoner who seeks only money damages in federal court must first exhaust prison administrative remedies even though those remedies do not include money damages.

The Association submits this brief to inform the Court of important policy reasons why it should reverse this decision. First, a ruling by this Court that the exhaustion requirement of 42 U.S.C. § 1997e(a) does not apply to cases such as this will encourage states to provide meaningful money-damages relief in their prisons' administrative grievance procedures. For example, in New York, the legislature has authorized the prison system to award up to $5,000 in money damages for wrongs done to prisoners by state employees. But prison authorities have thus far refused to implement this authority to establish a grievance system that provides such compensation.

Second, the exhaustion requirement imposes upon a prisoner an unnecessary risk of retaliation from prison staff angry that the prisoner has complained against one of their number. The risk is unnecessary because even if a prisoner files a grievance, he or she will receive no relief from a prison system that does not provide compensation. It is one thing to require a prisoner to go through an empty but harmless formality, quite another to require a formality that may put him or her in danger. That is to say, the Association believes an exhaustion requirement makes sense when the prison grievance system at issue is capable of providing meaningful relief. The exhaustion requirement should therefore be interpreted in such a way as to encourage states to establish such meaningful relief.

These issues have long been important to the Association, and it therefore focuses on these points here and leaves to petitioner and other *amici* the bulk of the arguments addressing statutory construction, legislative history, and the like.

ARGUMENT

"Who rang that bell?" snapped the gatekeeper to the Emerald City in response to Dorothy's pulling the bell cord just before he slammed the door shut. *"Can't you read the notice?"*: **BELL OUT OF ORDER, PLEASE KNOCK.** *"Well, that's more like it,"* he retorted when she knocked, *"Now state your business."*

The Wizard of Oz
Metro-Goldwyn-Mayer (1939)

The satirization of the foibles of twentieth century bureaucracy in L. Frank Baum's timeless fairytale would remain lighthearted were it not for the odyssey facing prisoners attempting to navigate the Prison Litigation Reform Act's labyrinth in order to obtain an audience with the Court. For those seeking only money damages from their custodians, exhaustion of administrative remedies after enactment of the Prison Litigation Reform Act ("PLRA") under the guise that they are "available" is far more than just a pointless bureaucratic exercise. It can jeopardize their welfare, their health, and sometimes even their lives.

THE PRISON LITIGATION REFORM ACT DOES NOT REQUIRE INMATES SEEKING ONLY DAMAGES TO EXHAUST ADMINISTRATIVE REMEDIES THAT ARE NOT AVAILABLE.

The PLRA's exhaustion requirement represents, in effect, a passing of the baton to corrections officials . . . [who] now have the opportunity to play the role for which they have clamored — resolving problems in correctional operations and conditions of confinement that would otherwise wind up on a judge's desk.[2]

This Court should rule that the exhaustion requirement of 42 U.S.C. § 1997e(a) does not apply to cases such as this in order to encourage New York and other states to provide meaningful money-damages remedies in their prisons' grievance systems.

In fact, New York's legislature has already empowered its prison system, as with any department or agency, to establish a system of money damages for prison grievances. The State Comptroller can, without litigation, pay "any claim . . . for injuries to personal property, real property, or for personal injuries caused by the tort of an officer or employee of the state while acting as such officer or employee" upon certification "by the head of the department or agency having supervision of such officer or employee" up to $5,000. State Finance Law, § 8(12-a) (McKinney 2000).[3]

Despite this authority, New York prison authorities do not provide money damages through their grievance system

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2. Lynn S. Branham, "The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What it Means and What Congress, Courts, and Correctional Officials Can Learn from It," 86 Cornell L. Rev. 101, 140 n.10 (2001) (in press) ("Branham" hereafter).

3. Under existing law claims exceeding $5,000 cannot be resolved administratively but must proceed in the New York State Court of Claims.

to prisoners injured by personal injury, other torts, or constitutional violations.[4] Rather, prison policy authorizes compensation for personal property claims, such as lost or destroyed possessions[5] or for what are essentially back wages for wrongful disciplinary confinement.[6]

Thus, in New York when a prisoner seeks monetary compensation for an injury that has been completed and is not ongoing, there are no administrative remedies to exhaust. As Justice Harlan stated in his concurrence in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971), in reference to an analogous situation, it is "damages or nothing." Moreover, this is not just a problem in New York. Professor Branham's exhaustive study of inmate grievance systems revealed that *none* of the forty-five state correction departments surveyed provided in their grievance systems for actual damages for tort-type claims, although some corrections departments maintain they offer some type of alternative non-monetary relief.[7]

4. *See Lee v. Artuz*, 2000 WL 231083 at *3 (S.D.N.Y. 2000) (defendants admit "that monetary damages are unavailable in the administrative grievance procedures established by 7 N.Y.C.R.R. § 701"); *see also* Stipulation in *Rowe & Myers v. Lilly*, 99 Civ. 4317 (JSM) (S.D.N.Y. 2000) ("there has never been a grievance in which an inmate seeking money damages for personal injuries has been resolved by the payment of money").

5. New York Department of Correctional Services Directive No. 2733, "Inmate Personal Property Claim" (1998).

6. New York Department of Correctional Services Directive No. 4802, "Inmate Payroll Standards," Section III-C-4-d (1995).

7. Branham, *supra* Note 2, at 127-28.

Worse, prison authorities in New York argue in case after case that federal courts should dismiss inmate claims that are solely for money damages on the grounds that those inmates must first seek compensation in a prison administrative system that withholds any monetary compensation.[8] Affirmance here would foster continuance of a cynical set of circumstances in which a state refuses to make available a legal state administrative remedy and then seeks dismissal of federal cases on the ground that inmates who file lawsuits did not ask for it. The Court should not ratify state agencies' decisions to ignore their own laws, nor should it remit inmates to exhaustion of remedies that are made useless by the state's own actions or are statutorily barred. If the Court takes a more positive course of action and reverses the Third Circuit decision, it will encourage states to provide money damages in their prison grievance systems. This will reduce unnecessary litigation and advance what the Association believes to be Congress' intent behind the PLRA: to give prison and jail officials the first chance to correct their own mistakes.

This salutary principle, that prison administrative procedures reduce litigation and give prison authorities a first crack at solving their own problems, dates at least to the

8. *Rowe v. Lilly*, 2000 WL 1677710 (S.D.N.Y. 2000); *Cuoco v. United States Bureau of Prisons*, 2000 WL 347155 (S.D.N.Y.); *Petit v. Bender*, 2000 WL 303280 (S.D.N.Y. 2000); *Castillo v. Buday*, 85 F. Supp. 2d 309, 312-13 (S.D.N.Y. 2000); *Lee v. Artuz*, 2000 WL 231083 (S.D.N.Y. 2000); *Royster v. United States*, 91 F. Supp. 2d 626, 628 (S.D.N.Y. 2000); *Santiago v. Meinsen*, 89 F. Supp. 2d 435, 440 (S.D.N.Y. 2000); *Beeson v. Fishkill Correctional Facility*, 28 F. Supp. 2d 884, 892-96 (S.D.N.Y. 1998); *but see Polite v. Barvarin*, 1998 WL 146687 (S.D.N.Y. 1998) (rejecting dismissal).

aftermath of the Attica uprising in western New York in 1971. The McKay Commission, appointed to investigate the causes of the uprising, concluded that a major contributor to inmate tension was the lack of procedures to resolve inmate complaints in a non-violent manner. Robert B. McKay, Attica: The Official Report of the New York State Special Commission on Attica (1972). New York's prison grievance procedure therefore was enacted as "an alternative to burdening the courts with matters which can and should be resolved administratively" and a way to "place the responsibility where it ought to be" by giving the Department an "opportunity to correct [a department procedure or practice] before the grievance is referred for outside review." Memorandum of State Executive Department, McKinney's Session Laws of N.Y., 1975, pp. 1705-1706.

This principle applies equally to money damages: a prison system that systematically denies compensation for injuries to its inmates fosters tension, distrust, and animosity, along with, of course, federal litigation. A system that provides such money damages can, at least in some cases, reduce both prisoner animosity and the number of lawsuits. It is notable that Pennsylvania, following the incidents giving rise to this lawsuit, modified its grievance procedures to allow for damages.

But if correction departments choose to drop the baton by refusing to provide for damages in appropriate cases to injured inmates, the Court should not excuse their failure. As the Fifth Circuit noted in its review of PLRA exhaustion in damages cases: "[T]here is nothing to prevent . . . enacting regulations that would permit the recovery of monetary relief." *Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1998).

A critical lesson of Attica is that a meaningful grievance system can head off trouble before it happens. This lesson cannot fairly be extended to justify a grievance system that does not provide meaningful remedies. Yet in *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000), the case upon which the decision below rests, the Third Circuit tries to do just that. It states that even where the grievance system does not provide for money damages, it may nevertheless lead to "something of a cooperative ethos . . . between inmate and jailer." *Id.* at 76. The Court envisions a system in which inmates who file grievances are rewarded with "a letter of apology, transfer to a more favorable cell block, or disciplining the prison official who wronged the inmate. . . ." *Id.* at 77. As the Third Circuit recognized, this scenario will not occur unless prison officials take seriously the grievance procedure. *Id.*

In New York, prison officials do not always do so. First, as noted above, prison authorities in New York have declined to implement their legislative authority to provide money damages. Second, it has been the experience of the lawyer-members of the Association who regularly represent inmates that an inmate who files a grievance can sometimes expect to be rewarded with retaliation and abuse rather than a letter of apology. Prisons and jails are "total institutions" that, by design and in practice, are removed from the community and operated to emphasize their separation from all aspects of the outside world, including the oversight protection of the courts, in most of their day-to-day activities.[9] The notion that

9. *See* Andrew C. Twaddle, "Utilization of Medical Services by a Captive Population: An Analysis of Sick Call in a State Prison," 17 J. of Health & Soc. Beh. 236, 237 (1976); *see also* Erving Goffman, Asylums at 4 (1961); *Ingraham v. Wright*, 431 U.S. 651, 669-70 (1977). The peculiarities of the status of prisoner-patients

(Cont'd)

one has a right to complain to the government without retaliation, which unincarcerated individuals in varying degrees take for granted, is often absent in corrections.

This experience is borne out in the cases. The findings of judges and juries reflect a persistent pattern of prison staff retaliation against inmates. For example, in *Lowrance v. Coughlin*, 862 F. Supp. 1090 (S.D.N.Y. 1994), the plaintiff was a leader of the prison Muslim community and also an inmate grievance representative aiding other inmates who had complaints. The court found that he had been transferred *nine* times and put into segregation (solitary confinement) *four* times in retaliation for his activities. *Id.* at 1102. *See also Goff v. Burton*, 91 F.3d 1188 (8th Cir. 1996) (court found prison staff unlawfully retaliated against inmate by transferring him to segregated confinement); *Meriwether*, 879 F.2d 1037 at 1040, 1046 (2d Cir. 1989) (prisoners transferred for being "outspoken critics of administration" and "corresponding with state officials and public interest organizations about the problems" at the prison); *Alnutt v. Cleary*, 27 F. Supp. 2d 295, 397 (W.D.N.Y. 1998) (false disciplinary charges, assault and faked positive drug test in retaliation for First Amendment exercise).

Indeed, this Court has recognized, that even outside prison, government officials may retaliate against citizens for lawfully exercising their rights. *See Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

(Cont'd)
in custody and concern over past abuses has resulted in federal restrictions on using prisoners as subjects in behavioral and biomedical research. *See* 21 C.F.R. §§ 50.40-.48 (1987); 28 C.F.R. §§ 512.10-.22 (1987); 45 C.F.R. §§ 46.301-.306 (1985).

In the correctional setting, given the enormous imbalance of power between the keepers and the kept, the risk is not only greater, but pervasive.

The Association recognizes that Section 1997e(a) requires that prisoners exhaust claims that are not for money damages and that these claims also have the potential to lead to retaliation. But in the case of inmates required to exhaust their claims for money damages in a prison grievance procedure such as New York's, the inmates must run this risk of retaliation *without any possible benefit*, since the grievance system will not provide what they seek: compensation for their injuries. Prisoners have "everything to lose and nothing to gain" from useless administrative exhaustion of damages claims. *See McCarthy v. Madigan*, 503 U.S. 140, 152 (1992). Such a set-up contradicts the principal lesson of Attica: to provide grievance remedies that are meaningful enough to give some satisfaction to the inmates who file them.

The case under review illustrates this point. Mr. Booth alleges *four* separate, escalating, and retaliatory episodes of excessive and brutal use of force. To argue that he should (or must) have brought this matter before institutional authorities, who would almost certainly have conveyed the complaint to the officers involved, is to ignore the reality of the setting in which Mr. Booth found himself.

In *Nyhuis*, the Third Circuit described prison as a benign environment in which disagreements between inmates and officers can be resolved amicably. This view is not without foundation, and many prison officials are dedicated to the safety and well being of the prisoners under their control. Nevertheless, there are sufficient instances of abuse,

intimidation and neglect of prisoners by staff to make inmates think twice about filing a grievance, particularly when they know they stand nothing to gain. New York has seen several particularly brutal cases in recent years that deserve mention in this regard.

Maurice Mathie was a detainee at a Long Island jail who was repeatedly stalked by a male sergeant in charge of facility security who made sexual advances toward him over his objections, culminating in the sergeant's handcuffing Mathie to pipes and anally raping him. *Mathie v. Fries*, 121 F.3d 808, 810-11 (2d Cir. 1997). The district court found that the security chief "used his position . . . to victimize and forcibly sodomize an inmate under his total control in an outrageous abuse of power and authority." 935 F. Supp. 1284, 1306 (S.D.N.Y. 1996), *aff'd*, 121 F.3d 808 (2d Cir. 1997).

In *Blissett v. Coughlin*, 66 F.3d 531, 537 (2d Cir. 1995), the plaintiff was kicked and beaten by correctional officers and then confined naked in a feces-smeared cell. In *Williams v. United States*, 747 F. Supp. 967, 971-82 (S.D.N.Y. 1990), a diabetic inmate repeatedly sought medical care for an infected foot. Eventually, gangrene set in. By the time doctors treated him, all they could do was amputate his leg below the knee. The court awarded substantial damages, as it did in the cases of Mathie and Blissett.

The Association cites these cases to demonstrate that for *some* prisoners at least, prison staff can be sufficiently negligent or abusive to deter their filing a grievance. When that grievance cannot provide the relief sought, the inmate might reasonably decide to drop the issue entirely, even though he could have prevailed in court.

Thus, applying the exhaustion requirement to require prisoners to seek non-existent remedies could in effect return prison jurisprudence to the discredited "hands-off" doctrine of thirty years ago, that the acts of prison officials are beyond judicial review.[10] The Association urges the Court not to take that step.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the United States Court of Appeals for the Third Circuit and remand the case for further proceedings.

Respectfully submitted,

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10. *See* Note, "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Hear the Complaints of Convicts," 72 Yale L.J. 506, 520-24 (1963); *but see Thornberg v. Abbott*, 490 U.S. 401, 407 (1989) ("[p]rison walls do not form a barrier separating inmates from the protections of the Constitution").