No. 19-867

In the
Supreme Court of the United States

WEXFORD HEALTH, ET AL.,
*Petitioner*s,
v.
KAREEM GARRETT,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Petitioners conceded below that the exhaustion requirement does not apply to former prisoners who have been released from incarceration. Respondent filed his initial complaint before fully exhausting his administrative remedies. While the action was pending, he was released from prison. Respondent filed an amended and supplemental complaint pursuant to Federal Rule of Civil Procedure 15, after his claims were fully exhausted and he had been released. This Court has long held that a party's status at the time of amendment and not at the time of the original filing determines whether a statutory precondition to suit has been satisfied. *Mathews v. Diaz*, 426 U.S. 67, 75, 75 n.8 (1976); *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U.S. 570, 576 (1913). Following those precedents, the lower court held that Respondent's non-prisoner status when he filed his amended and supplemental complaint controlled and thus he was no longer subject to the exhaustion requirement.

The question presented is:

Whether a former prisoner can file an amended or supplemental complaint under Rule 15 after his release from prison to cure an initial filing defect under the PLRA's exhaustion provision.

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INTRODUCTION

This Court should deny certiorari because the Third Circuit's decision faithfully applied this Court's precedents, there is no circuit split on the question presented, and this is an especially poor vehicle for deciding the issue. Rather than creating an "exception" to this Court's precedents, the Third Circuit applied well-settled principles governing Rule 15 to the plain text of the PLRA. Indeed, the crux of the Third Circuit's analysis was its application of this Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), which held that the PLRA does not displace the normal application of the Federal Rules absent clear statutory text to the contrary. There is no arguable circuit split on the question presented post-*Bock*. At the very least, further percolation is warranted. Moreover, none of Petitioners preserved any argument regarding Rule 15's normal operation here, and five of the six Petitioners expressly waived the question presented. And, in all events, Petitioners' arguments would have made no practical difference in this case because, under their own theory, Respondent could have cured any exhaustion defect through the more cumbersome but practically indistinguishable process of dismissing his complaint and filing a new action.

Respondent Kareem Garrett filed this § 1983 action *pro se* asserting claims for the denial of medical care. He filed grievances related to his claims against Petitioners-Defendants but his administrative remedies were not fully exhausted until two months after he filed his original complaint. Respondent was released from prison while the action was pending and

with plenty of time left on the applicable two-year statute of limitations. After his release, Respondent filed an amended and supplemental complaint. Notwithstanding that the PLRA's administrative exhaustion provision does not apply to released prisoners and despite the fact that Respondent's claims against Petitioners were in any event fully exhausted when he filed his operative amended and supplemental complaint, the district court dismissed his claims for failure to exhaust. On appeal, the United States Court of Appeals for the Third Circuit reversed. The court held that the PLRA's exhaustion provision does not displace the normal operation of Federal Rule of Civil Procedure 15 and that under Rule 15 Respondent's non-prisoner status when he filed the operative new complaint controlled and thus the initial filing defect was cured because he was no longer subject to the exhaustion requirement.

Petitioners' complaints about the decision below do not warrant review. Petitioners consistently mischaracterize the Third Circuit's decision as creating an "exception" to the PLRA's exhaustion requirement. But the court did no such thing. Instead, the Third Circuit correctly recognized that the PLRA's plain text does not apply to released prisoners. Petitioners themselves conceded that point below, and the Circuits are unanimously in agreement on this point. Given that Respondent could have simply filed a new action upon his release free of the PLRA's strictures, the issue before the court was whether he could instead accomplish the same result through Rule 15's more efficient mechanism for filing an amended or supplemental complaint. In concluding that he could,

the court faithfully applied this Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), holding that the PLRA does not generally displace the normal pleading practices under the Federal Rules. And the court faithfully applied this Court's longstanding jurisprudence holding the plaintiff's status at the time of amendment determines whether a statutory precondition to suit applies. *E.g.*, *Mathews v. Diaz*, 426 U.S. 67, 75, 75 n.8 (1976); *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U.S. 570, 576 (1913). Nothing about the Third Circuit's straightforward and well-reasoned application of controlling precedent warrants review.

Petitioners' attempt to fabricate a circuit split fares no better. Since *Bock*, only two Courts of Appeals have squarely decided the question presented and both held that a released prisoner's status at the time of amendment is controlling. Relying on cases they never cited below, Petitioners contend that three circuits have gone the other way. But those cases are facially off-point because they did not involve post-release amendments. At the very least, more time is needed to determine how the Courts of Appeals will resolve the question presented in light of *Jones v. Bock* and whether any split will ever emerge. Review now would be premature.

In addition, this case is an especially poor vehicle for deciding the question presented. At oral argument before the Third Circuit, counsel for five of the six Petitioners "absolutely agreed" that a Rule 15 amendment may be used to cure a failure to exhaust. In making that concession, counsel answered the question presented in Respondent's favor. Moreover,

Petitioners *all* failed to respond to Respondent's arguments below regarding the normal operation of Rule 15. Although the Pennsylvania Department of Corrections parties now seek to challenge those arguments, they never moved based on exhaustion *at all*; instead, they argued for dismissal on different grounds. Having failed to ever before make many of the arguments they now present to this Court, Petitioners (and their supporters) waived those arguments. And, further undermining any basis for review, those arguments would have made no practical difference if they had been pressed below. Respondent had fully exhausted his claims and had been released from incarceration by the time he filed the operative complaint. Under Petitioners' own theory, he could have voluntarily dismissed and refiled a new complaint at that time. Instead, he pursued the much more efficient route provided by Rule 15. If this Court is inclined to grant review of the question presented, it should do so in a case where the argument was fully preserved and would have made a difference.

Finally, Petitioners' bald policy arguments are both overblown and irrelevant to this case. Respondent did not circumvent the administrative grievance process, but instead pursued and (eventually) exhausted all available administrative remedies for the claims presented in his original complaint. And there is no gamesmanship on this record, because Respondent could have simply filed a new lawsuit after his release or after a prompt ruling on Petitioners' motions to dismiss for failure to exhaust. In light of those facts, Petitioners' policy arguments amount to little more than the thinly veiled suggestion that the overriding

purpose of the PLRA was to make it harder for claims regarding prison conditions to proceed. But that is both incorrect and indistinguishable from the atextual approach this Court rejected in *Jones v. Bock*.

STATEMENT OF THE CASE

A. The Prison Litigation Reform Act

The PLRA's administrative exhaustion provision states that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). As with any statute, the touchstone for construing the provision is the statutory text. *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). The Court has made clear that "adherence to the PLRA's text runs both ways: The same principle applies regardless of whether it benefits the inmate or the prison." *Id.* at 1857 n.1.

The statute is limited in several key respects relevant here. *First*, it applies only to "a prisoner confined in any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(a). A "prisoner" is defined as "any person incarcerated or detained in any facility." *Id.* § 1997e(h). Accordingly, plaintiffs who "file prison condition actions after release from confinement are no longer 'prisoners' for purposes of § 1997e(a) and, therefore, need not satisfy the exhaustion requirements of this provision." *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999).

Second, the remedy when a prisoner prematurely files claims before fully exhausting administrative

remedies is dismissal without prejudice of those claims. *See, e.g.*, *Bargher v. White*, 928 F.3d 439, 447 (5th Cir. 2019); *Fluker v. Cty. of Kankakee*, 741 F.3d 787, 791 (7th Cir. 2013); *Bell v. Konteh*, 450 F.3d 651, 653 n.4 (6th Cir. 2006) *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199 (2007). Dismissal without prejudice "permits the litigant to refile if he exhausts or is otherwise no longer barred by the PLRA requirements." *Bargher*, 928 F.3d at 447.

Third, in *Jones v. Bock*, the Court examined the PLRA's interplay with the Federal Rules of Civil Procedure and held that the PLRA generally does not displace normal pleading practices under the Federal Rules. 549 U.S. at 212. Instead, any "departures" must be "specified by the PLRA itself" while "silen[ce]" is "strong evidence that the usual practice should be followed." *Id.* at 212, 214. And the Court strongly cautioned that "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Id.* at 212.

B. Rule 15 of the Federal Rules of Civil Procedure

Rule 15 governs amended and supplemental pleadings. Fed. R. Civ. P. 15. The Rule embodies a "liberal amendment policy," *Kontrick v. Ryan*, 540 U.S. 443, 459 (2004), which "ensures that a particular claim will be decided on the merits rather than on technicalities," *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d Cir. 1990). *See also* 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1474 (3d ed. 2019) ("A liberal policy toward allowing amendments to correct errors in the pleadings clearly is desirable and furthers

one of the basic objectives of the federal rules—the determination of cases on their merits."); Fed. R. Civ. P. 1 ("[The Federal Rules of Civil Procedure] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

Under ordinary pleading rules, amended and supplemental complaints supersede the original complaint. *See W. Run Student Hous. Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 171-72 (3d Cir. 2013); *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 289-90 (8th Cir. 1988); *Rhodes v. Robinson*, 621 F.3d 1002, 1005-07 (9th Cir. 2010); 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1476 (3d ed. 2019). This Court and the Courts of Appeals have consistently held that a litigant's status at the time of amendment or supplementation—as opposed to the time of an original complaint—determines whether a statutory precondition to suit applies. The Court established this principle over 100 years ago in a case involving § 954, a precursor to Rule 15.[1] *Wulf*, 226 U.S. at 576 (holding that it was "clearly within" the permissible scope of § 954 to allow a plaintiff to cure a

[1] *Compare* Fed. R. Civ. P. 15(d) ("The court may, on just terms . . . permit supplementation even though the original pleading is defective in stating a claim.") *with* Rev. Stat. Sec. 954, Title 13 (1901) (providing that a court "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe"). *See also* 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1471 n.11 (3d ed. 2019) (citing § 954 as one of the factors allowing pre-Federal Rules courts to "follow a comparatively liberal pleading amendment practice").

defective complaint when she "indicated the [changed] capacity in which [she] was to prosecute the action"). And it has consistently applied the principle since. *See Diaz*, 426 U.S. at 75, 75 n.8 (determining that a plaintiff who failed to file a social security claim before filing suit could submit a social security claim and then cure using Rule 15(d)); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) (explaining that when "a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction"); *see also T Mobile Ne. LLC v. City of Wilmington*, 913 F.3d 311, 330 (3d Cir. 2019); *Gateway KGMP Dev., Inc. v. Tecumseh Prods.*, 731 F.3d 586, 589 (6th Cir. 2013); *Pintando v. Miami-Dade Hous. Agency*, 501 F.3d 1241, 1243-44 (11th Cir. 2007).

C. Factual Background

On February 14, 2014, Respondent Kareem Garrett filed a *pro se* § 1983 complaint asserting claims for the denial of medical care, arising out of events beginning in January 2014, while he was incarcerated at a state correctional institution in Pennsylvania. App. 4. Respondent had filed several grievances related to the conduct alleged in his § 1983 suit, but the face of the complaint noted that the grievances were not yet completely exhausted. App. 5. Eventually, those grievances were fully exhausted on April 17, 2014. App. 6.[2]

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[2] Petitioners Naji, Cutshall, Thornley, and Nagel conceded below that Garrett "had properly exhausted the grievance process" by April 17, 2014 and further conceded that had he "voluntarily withdrawn his Complaint and refiled it a day later, [they] would

Respondent amended his complaint as of right on March 14, 2014 and again with leave of court on June 3, 2014. App. 5, 7, 59-60. On December 8, 2014, Respondent notified the district court that he had been granted parole and expected a March 2015 release. App. 7-8; *see also Garrett v. Wexford Health, et al.*, No. 14-cv-031 (W.D. Pa.) Docket Entry ("Dkt.") 130 at 1-2. The magistrate judge assigned to handle all pre-trial proceedings stayed the case pending his release. App. 8. Respondent was released on May 19, 2015 Dkt. 155 well within the two-year statute of limitations applicable to his claims. App. 22 n.19.

On January 22, 2016, while no longer incarcerated, Respondent moved to amend his second amended complaint. Dkt. 169. The motion cited Rule 15(a)(2) of the Federal Rules of Civil Procedure, and also stated that the proposed amendment would include "Supplemental pleadings." Dkt. 169 ¶7. Over the objections of Petitioners and the Pennsylvania Department of Corrections Respondents ("PA DOC"),[3]

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not have had an exhaustion defense." Wexford Health CA3 Br. at 10, 15, 22. Petitioner Khatri inaccurately argued below that Garrett never identified her in any grievance and "never exhausted his administrative remedies" against her. Khatri CA3 Br. at 14-15 n.7. In fact, in a January 22, 2014 grievance (No. 494481), Garrett wrote that "Dr. Kathri [sic] . . . [took] me off my psych medication . . . I been on for over 60 days." Dkt. 186-2 at 42. That grievance was fully exhausted on April 17, 2014. *Id.* at 20.

[3] The PA DOC are Debra Younkin, Janet Pearson, Steven Glunt, Nurse Lori, Nurse Debbie, Nurse Rodger, Nurse John, Nurse Hanna, Superintendent Cameron, Deputy Superintendent David Close, Deputy Superintendent Hollinbaugh, Doretta Chencharick, Joel Barrows, James Morris, Peggy Bauchman, Tracey Hamer, Captain Brumbaugh, Captain Miller, Lt. Shea, Lt. Horton, Lt.

the magistrate judge granted Respondent's motion on February 4, 2016, Dkt. 173-79, and the clerk filed his proposed amendment the next day. App. 8-9. In addition to his original claims for denial of medical care, Respondent's third amended complaint ("TAC") raised new claims against prison officials and guards arising from events that occurred after he filed the lawsuit. App. 9.[4]

Respondent brought claims against two groups: Petitioners[5] and the PA DOC. Both groups moved to dismiss the TAC. App. 10. Petitioners raised a PLRA exhaustion defense, whereas the PA DOC requested dismissal solely under Rules 8 and 12. *Id.* On September 9, 2016, the district court granted summary judgment to Petitioners on exhaustion grounds and gave Respondent a chance to file a final amended

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Lewis, Lt. Glass, L.S. Kerns-Barr, F. Nunez, Jack Walmer, M.J. Barber, Mr. Shetler, Ms. Cogan, Mr. Little, Sgt. Snipes, Sgt. James, Sgt. Young, Medical Officer London, Medical Officer Owens, Officer Garvey, and Officer Uncles. Despite not filing an exhaustion motion below, they have filed a brief in support of the petition.

[4] Respondent's claims in the TAC were timely, without regard to relation back principles under Rule 15 and whether measured against the time he filed his motion to amend or when the TAC was eventually docketed, because the two-year statute of limitations was tolled while Respondent pursued his administrative remedies. *See, e.g., Jones v. Unknown D.O.C. Bus Driver & Transportation Crew*, 944 F.3d 478, 481 (3d Cir. 2019).

[5] All six Petitioners were categorized "Medical Defendants" below. Because Khatri was represented by different counsel below, Wexford Health, Naji, Cutshall, Thornley, and Nagel will be referred to as the "Wexford Health Petitioners" where arguments apply only to them.

complaint against the PA DOC complying with Rule 8. App. 69-70. The district court adopted the magistrate judge's report and recommendation, which concluded that Respondent's "prisoner" status for PLRA purposes "is judged as of the time he files his original complaint," and that "[t]he exhaustion requirement will continue to apply, even after a prisoner has been released, when the former prisoner amends a complaint filed while he was in prison." App. 77. Respondent filed a fourth amended complaint ("FAC") on November 21, 2016. Dkt. 218. On October 11, 2017, the district court granted PA DOC's motion to dismiss the FAC under Rule 8. App. 57. Respondent filed a notice of appeal, and the Third Circuit appointed counsel. Dkt. 254, 256.

D. The Decision Below

The Third Circuit vacated the district court's decision on both PLRA exhaustion and Rule 8 grounds, and remanded for further proceedings, in a thorough and carefully reasoned opinion authored by Chief Judge Smith. App. 3-4. The court held that the TAC, the operative complaint against Petitioners, was both an amended and supplemental complaint under Fed. R. Civ. P. 15(a) and 15(d). App. 16. The TAC was an amended complaint because it "presented additional claims arising out of the events described in the original complaint, but which [Respondent] had not set forth in prior pleadings" and a supplemental complaint because "[i]t also presented new facts and claims that arose only after the filing of the original complaint." *Id.*

The court then explained that the case law applying Rule 15 makes clear that the Rule exists to prevent an error or defect in the original pleading from barring a party "from securing relief on the merits of his claim." App. 17. Consistent with that understanding, the court further explained that the effect of an amended complaint under Rule 15(a) is that it "becomes the operative pleading." *Id.* Therefore, it is the "status at the time of the amendment and not at the time of the original filing that determines whether a statutory precondition to suit has been satisfied." App. 18 (citing *Wulf*, 226 U.S. at 575). Turning to Rule 15(d), the court explained that supplementation "can be employed to allege subsequent facts to cure a deficient pleading." App. 19. Applying these settled principles, the court held that the TAC, an amended and supplemental complaint under Rule 15, was the operative complaint and served to "cure the original filing defect" because it was filed after Respondent was released from incarceration and no longer subject to the PLRA's exhaustion requirement. App. 30.

Finally, the court held that the PLRA's administrative exhaustion requirement does not override the usual operation of Rule 15. Turning to this Court's decision in *Jones v. Bock* for guidance, the court explained "that the usual procedural rules apply to PLRA cases unless the PLRA specifies otherwise" and that "a decision whether to apply the usual procedural rules should not be guided by 'perceived policy concerns.'" App. 28-29 (quoting *Bock*, 549 U.S. at 212). The court also considered *Bock*'s determination that the "boilerplate" language, "[n]o action shall be brought," in the exhaustion provision "does not compel

a conclusion that the usual procedural rules do not apply." App. 35 (citing *Bock*, 549 U.S. at 220). Following these teachings from *Bock*, the Third Circuit correctly concluded that "the PLRA does not override the usual operation of Rule 15" because "[t]here is nothing in the language of § 1997e(a) implicitly or explicitly mandating a contrary approach." App. 30.

REASONS FOR DENYING THE PETITION

The decision below is not worthy of review and the petition should be denied for four essential reasons. *First*, the Third Circuit's holding that a released prisoner can use Rule 15 to cure an initial pleading defect faithfully applied the PLRA's text and this Court's precedents. *Second*, following this Court's decision in *Jones v. Bock,* there is no disagreement among the Courts of Appeals on this issue. At the very least, the question warrants further percolation. *Third*, this case is an especially poor vehicle for deciding the question presented because Petitioners waived critical arguments by failing to raise them below, and the rule they propose would not have made any difference here. *Fourth*, Petitioners' naked policy arguments are both overblown and irrelevant here, where it is undisputed that even on Petitioners' own theory Respondent could have voluntarily dismissed his complaint and re-filed his claims. Thus, even if this Court were inclined to decide the question presented at some future time, it should do so in a case where the arguments were preserved and the decision would make a practical difference in the case.

I. The Third Circuit Faithfully Applied The PLRA's Text And This Court's Precedents.

Petitioners' core contention, repeated throughout their petition, is that the Third Circuit supposedly created an extra-statutory "exception" to the PLRA's exhaustion provision. *See, e.g.,* Pet. i, 1, 2, 16, 19-21, 25. The court did no such thing. Instead, the court anchored its analysis in settled law—which Petitioners did not challenge below—that the PLRA's exhaustion provision, on its face, does not apply to released prisoners. Next, faithfully applying this Court's decision in *Bock,* the court properly concluded that the PLRA's exhaustion provision does not displace normal practice under Rule 15. Finally, consistent with this Court's longstanding amendment jurisprudence, the court correctly held that Respondent's non-prisoner status when he filed his operative amended and supplemental complaint was controlling. Far from creating an unwritten "exception" to the exhaustion provision, the Third Circuit applied the statute exactly as written and dutifully followed this Court's precedents. None of this warrants review by the Court.

A. The petition is infected with the patently false premise that the decision below created an "exception" to the PLRA's exhaustion requirement. Petitioners argue that this Court has consistently held "that there are no exceptions to the requirement that a prisoner exhaust remedies before filing a federal lawsuit" aside from the "one textual exception" that "remedies need not be exhausted if they are not available." Pet. at 16-17, 20 (*citing Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016); *Woodford v. Ngo*, 548 U.S. 81, 84-85, 93-95

(2006); *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Booth v. Churner*, 532 U.S. 731, 739 (2001)). But the cases Petitioners cite all involved the application of the exhaustion provision to *confined* prisoners. By contrast, Respondent was *released* from prison when he filed the operative amended and supplemental complaint. That distinction was critical to the Third Circuit's analysis.

By its terms, the PLRA's exhaustion requirement applies only to a "prisoner confined in any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(a). The PLRA defines "prisoner" as "any person incarcerated or detained in any facility." *Id.* § 1997e(h). There is no disagreement in the lower courts on that basic statutory point. On the contrary, the Courts of Appeals have *uniformly* held that a "plaintiff who seeks to bring suit about prison life after he has been released and is no longer a prisoner does not have to satisfy the PLRA's exhaustion requirements before bringing suit." *Norton v. City of Marietta*, 432 F.3d 1145, 1150 (10th Cir. 2005); *see also Bargher v. White*, 928 F.3d 439, 447 (5th Cir. 2019); *Lesene v. Doe*, 712 F.3d 584, 589 (D.C. Cir. 2013); *Talamantes v. Leyva*, 575 F.3d 1021, 1023 (9th Cir. 2009); *Cofield v. Bowser*, 247 F. App'x 413, 414 (4th Cir. 2007); *Nerness v. Johnson*, 401 F.3d 874, 876 (8th Cir. 2005); *Ahmed v. Dragovich*, 297 F.3d 201, 210 (3d Cir. 2002); *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999); *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998).

Petitioners themselves conceded this point below. *See* Khatri CA3 Br. at 18 n.10; Medical Defs. CA3 Br. at 24. And they further conceded that Respondent could have simply filed a new lawsuit once he was released from custody. Oral Arg. at 26:58-27:15. Thus, contrary to Petitioners' central contention, the court of appeals did not engraft an "exception" on to the statute. Just the opposite, the court faithfully applied the bright line Congress drew in the statute itself between a confined prisoner, who is required to exhaust administrative remedies, and a released prisoner, who is not. Because Respondent was no longer a "prisoner" after his release, he was no longer subject to the exhaustion provision.

B. Instead of filing a new lawsuit after his release, Respondent followed the more judicially efficient course of filing an amended and supplemental complaint under Rule 15. The Third Circuit was thus called upon to decide whether the PLRA's exhaustion provision prevented Respondent from using Rule 15 rather than filing anew. Following this Court's teachings in *Bock*, the court correctly held that the PLRA's exhaustion provision does not displace the normal operation of Rule 15 where, as here, the plaintiff has been released.

In *Bock*, this Court specifically addressed the PLRA's interplay with the Federal Rules of Civil Procedures in striking down certain procedural rules lower courts had adopted to implement the PLRA's exhaustion and judicial screening provisions. 549 U.S. at 203, 212. The first issue in *Bock* was whether the PLRA's exhaustion provision required a plaintiff to plead exhaustion or instead operated in accordance

with the "usual practice under the Federal Rules," which makes exhaustion an affirmative defense. *Id.* at 212-17. The Court held that the usual practice must prevail. Rejecting the argument that this would defeat the PLRA's purpose, the Court explained that "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Id.* at 212. Notwithstanding that "exhaustion was a 'centerpiece' of the PLRA," the Court explained that the statute's "silen[ce]" on the issue of whether exhaustion must be affirmatively pled was "strong evidence that the usual practice should be followed." *Id.* at 212, 214. And absent a departure specified in the PLRA itself, the Court concluded that there is "no reason to suppose that the normal pleading rules have been altered." *Id.* at 214.

The Court also struck down a court-imposed "total exhaustion rule" providing that an entire complaint must be dismissed if any single claim was not properly exhausted. *Id.* at 209, 219-224. The Court explained that, under normal pleading practice, "'[o]nly the bad claims are dismissed; the complaint as a whole is not.'" *Id.* at 221 (quoting *Robinson v. Page*, 170 F.3d 747, 748-49) (9th Cir. 1999)). Defendants there pointed to the exhaustion provision's language stating that "no action shall be brought" as support for a total exhaustion rule, but the Court held that this "boilerplate language" was insufficient textual evidence that "Congress meant to depart from the norm." *Id.* 220-21. The Court further rejected the policy argument that absent a total exhaustion rule, "inmates will have little incentive to ensure that they have exhausted all available administrative remedies before proceeding to

court." *Id.* at 223. Instead, the Court found the potential consequences were open to debate, as a rule requiring dismissal of an entire complaint could increase litigation if prisoners split claims across multiple lawsuits and undermine judicial economy by imposing duplicative work on courts to address nearly identical complaints refiled post-exhaustion. *Id.* at 223-24.

The Third Circuit carefully analyzed and correctly applied *Bock* to conclude that the PLRA's exhaustion provision does not displace the normal pleading practice under Rule 15. The court explained that "*Bock* teaches . . . that the usual procedural rules apply to PLRA cases unless the PLRA specifies otherwise, and that a decision about whether to apply the usual procedural rules should not be guided by 'perceived policy concerns.'" App. at 29-30 (quoting *Bock*, 549 U.S. at 212). Turning to the statutory text, the court concluded that "nothing in the PLRA's administrative exhaustion provision mentions Rule 15, much less alters the text or operation of the rule." App. at 31. Finally, rejecting Petitioners' reliance on the "no action shall be brought" language, the Court explained that *Bock* already held that "this language is 'boilerplate' and does not compel a conclusion that the usual procedural rules no longer apply." App. at 35 (quoting *Bock*, 549 U.S. at 220).

Petitioners' contention that the Third Circuit misread *Bock* is incorrect. They argue that *Bock* struck down "pleading rules for *pro se* prisoners that were more 'onerous' than the normal pleading rules," Pet. at 22, while ignoring that the rule they propose—

overriding Rule 15—similarly tilts the playing field against prisoners. The core holding in *Bock* is that normal pleading practices apply absent clear statutory evidence that Congress intended otherwise. Here, Petitioners again fail to point to any statutory evidence—let alone *clear* evidence—that Congress intended to deprive released prisoners of access to Rule 15. Their best effort is to grasp onto the language "no action shall be brought," which *Bock* declared is "boilerplate" and insufficient "to depart from the norm." *Bock*, at 549 U.S. at 221.[6] Nor is there any textual evidence that Congress intended to displace the normal pleading practices under Rule 15 for released prisoners when the PLRA exhaustion provision, on its face, does not even apply to them.

C. Having correctly determined that the PLRA's exhaustion provision does not displace Rule 15, the Court was simply left to apply the Rule. Although Respondent's opening brief below devoted six pages to the operation of Rule 15, Garrett CA3 Br. at 25-30, Petitioners chose not to present any argument on how

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[6] Moreover, Petitioners' logic that "brought" means "initiates" and thus displaces Rule 15 conflicts with cases construing other statutes creating preconditions to suit. *See, e.g., T Mobile Ne., LLC v. City of Wilmington*, 913 F.3d 311, 315, 329-30 (holding that Rule 15(d) allowed a plaintiff to cure a failure to comply with a statutory precondition that plaintiffs could only "commence an action" in the thirty days *after* a zoning board decision); *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 289-91 (8th Cir. 1988) (holding that a plaintiff who prematurely sued in violation of a statute providing that "[n]o civil action may be commenced" before a 60-day post-grievance waiting period could use Rule 15(d) to cure his mistake, despite arguments that doing so would undermine the purpose behind the precondition).

Rule 15's normal principles apply in these circumstances. Rather, their opposition briefs focused solely on the threshold issue of whether the PLRA's exhaustion provision displaced Rule 15, making mostly policy arguments.

The Third Circuit's decision was a straightforward application of Rule 15. *See* App. at 16-23. The court explained that Rule 15(a) "embodies the federal courts' policy of liberal pleading amendment by ensuring that an inadvertent error in, or omission from, an original pleading will not preclude a party from securing relief on the merits of his claim." App. at 17. Under Rule 15(a), amended complaints render the original complaint non-functional. 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1476 (3d ed. 2019). Separately, Rule 15(d) allows a party to "serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). The Rule itself provides that supplementation may be permitted "even though the original pleading is defective in stating a claim or defense." *Id.*

Consistent with those fundamental principles and well-established law, the Third Circuit explained that "[i]t has long been the rule that where a party's status determines a statute's applicability, it is his status at the time of the amendment and not at the time of the original filing that determines whether a statutory precondition to suit has been satisfied." App. at 18. Likewise, as the court further explained, "[s]upplementation under Rule 15(d) . . . can be employed to allege subsequent facts to cure a pleading

deficiency." App. at 19 (citing *Mathews v. Diaz*, 426 U.S. 67, 75, 75 n.8 (1976)).

These precepts are deeply embedded in this Court's jurisprudence. Over 100 years ago, in *Missouri, K. & T. Ry. Co. v. Wulf*, the Court held that where a statute permitted claims only by the personal representative of an estate, the plaintiff's amendment, adding the fact that she had been named personal representative, cured the defect in her initial complaint, which was brought in her individual capacity. 226 U.S. 570, 574-76 (1913). The Court again applied this principle in *Mathews v. Diaz*, holding that a plaintiff who failed to file a social security claim before suing—a "nonwaivable" statutory precondition—could cure the mistake by submitting a post-filing social security claim and then using Rule 15(d) to show compliance. 426 U.S. 67, 75, 75 n.8 (1976). As the Court explained, "[w]e have little difficulty" finding that a Rule 15(d) supplement "would have eliminated [plaintiff's] jurisdictional issue." *Id.* at 75.[7]

These principles are also reflected in the Rule itself. As the advisory committee explained, the language permitting "supplementation even though the original pleading is defective in stating a claim or defense" was

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[7] PA DOC cite *McNeil v. United States*, 508 U.S. 106 (1993), to suggest that Rule 15 cannot cure a PLRA exhaustion defect. PA DOC Br. at 9-10. But *McNeil* is not a PLRA case. Rather, *McNeil* involved the Federal Tort Claims Act, which includes an exhaustion requirement that applies irrespective of a plaintiff's status. 508 U.S. at 107. That is materially different from the PLRA's exhaustion requirement, which applies only if the plaintiff is confined in prison, and can thus be cured through an amended or supplemental complaint under Rule 15.

added to reject a "rigid and formalistic view" that "needlessly remitted [plaintiffs] to the difficulties of commencing a new action even though [subsequent events] have made clear the right to relief." Fed. R. Civ. P. 15(d) advisory committee's note to 1963 amendment.

Applying these settled principles, the Third Circuit correctly concluded that the "TAC, as the operative amended pleading, superseded [Respondent's] prior complaints." App. at 22. At that time, "Garrett was no longer a prisoner and therefore was not subject to the PLRA's administrative exhaustion requirement." *Id.* Accordingly, "his change in status (*i.e.*, his release) operates to cure the original filing defect (*i.e.*, his failure to exhaust administrative remedies)." App. at 30. The Third Circuit's analysis is correct, faithful to the statutory text, and entirely consistent with this Court's longstanding precedents. Nothing about the court's decision warrants review.

II. The Split Alleged By Petitioners Is Illusory.

Petitioners' argument for a circuit split is similarly overstated. Petitioners contend that "[f]ederal courts are deeply divided over whether the PLRA requires dismissal of unexhausted claims if a prisoner is released while his suit is pending." Pet. at 16. In fact, since this Court's decision in *Bock* clarifying the legal framework for analyzing the PLRA's interplay with the Federal Rule of Civil Procedure, only two Courts of Appeals—the Third Circuit (in this case) and the Ninth Circuit—have squarely addressed whether a released prisoner's status at the time of amendment controls for exhaustion purposes. And both courts correctly held

that the plaintiff's status at the time of amendment is controlling. Although Petitioners attempt to fabricate a post-*Bock* split, none of the cases they cite analyzed the normal operation of Rule 15 to a post-release amendment, or whether that operation is somehow displaced by the PLRA's exhaustion provision. Because it remains to be seen whether any split will emerge, review by this Court would be premature.

A. Like the Third Circuit below, the Ninth Circuit, in *Jackson v. Fong*, held that a "plaintiff who was in custody at the time he initiated his suit but was free when he filed his amended operative complaint is not a 'prisoner' subject to a PLRA exhaustion defense." 870 F.3d 928, 931 (9th Cir. 2017). The Ninth's Circuit's reasoning closely tracks the analysis below. Relying on *Bock*, the Ninth Circuit concluded that (i) the PLRA's exhaustion provision does not displace Rule 15(d), (ii) the supplemental complaint was the operative pleading, and (iii) the plaintiff's non-prisoner status when he filed the operative complaint controlled. *Id.* at 933-35. And, like the court below, the Ninth Circuit questioned the continued vitality of the handful of pre-*Bock* decisions touching on this issue, specifically noting that "[o]ur sister circuits might well decide these cases differently today." *Id.* at 935 n.3; *see also* App. at 37-38 (distinguishing pre-*Bock* decision).

B. Attempting to manufacture a split, Petitioners argue that the Fifth, Sixth, and Eleventh Circuits "hold that a prisoner's subsequent release does not relieve him of the statutory requirement to exhaust administrative remedies before filing suit." *See Bargher v. White*, 928 F.3d 439, 447-48 (5th Cir. 2019);

Smith v. Terry, 491 F. App'x 81, 83-84 (11th Cir. 2012); *Cox v. Mayer*, 332 F.3d 422, 427-28 (6th Cir. 2003)." Pet. at 2. But Petitioners tellingly never cited *any* of those cases below, and for good reason: none involved a plaintiff who actually filed a post-release amendment. The courts therefore neither confronted nor decided the question presented.

Petitioners' outsized reliance on *Smith* is especially misplaced because it is an unreported, non-precedential decision. Petitioners also misstate the facts. Contrary to Petitioners' argument, the plaintiff did not file his supplemental complaint after his release, Pet. at 12; rather, he was still confined when he filed it.[8] The court thus had no occasion to decide the question presented in this case.

In any event, *Smith* relied exclusively on a pre-*Bock* decision, *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000). The issue in *Harris* was whether the PLRA's physical injury requirement in Section 1997e(e) applied to a plaintiff's post-release amended complaint. A sharply divided court, sitting *en banc*, held that the language "[n]o Federal civil action may be brought" overrode the normal pleading practice under Rule 15 as it related to the plaintiffs' change in confinement status. *Id.* at 972, 980-84. *Bock*, however, later reached the opposite conclusion, holding that such "boilerplate" language was insufficient to displace the normal operation of the Federal Rules of Civil Procedure. *Bock*, 549 U.S. at 220-21. Presaging *Bock*'s warnings "that courts should generally not depart from

[8] The Supplemental Complaint continues to reflect a prison address. *Smith v. Terry*, No. 10-cv-024 (M.D. Ga.), Dkt. 17 at 9.

the usual practice under the Federal Rules on the basis of perceived policy concerns," 549 U.S. at 212, the dissent in *Harris* criticized the majority for getting "carried away by considerations of policy," 216 F.3d at 999 n.13. The Eleventh Circuit has yet to revisit *Harris* in light of *Bock*, and its non-precedential decision in *Smith* fails to mention, much less grapple with, *Bock's* impact.

Petitioners' reliance on *Bargher v. White*, 928 F.3d 438 (5th Cir. 2019), is similarly misplaced. Although the plaintiff was released from prison in *Bargher*, unlike Respondent, he never filed a post-release amended or supplemental complaint. Also, unlike Respondent, he did not exhaust his administrative remedies. *Id.* at 447. Accordingly, the *Bargher* court did not decide the applicability of Rule 15 in a post-release or post-exhaustion setting.[9]

Petitioners' reliance on *Cox v. Mayer*, 332 F.3d 422 (6th Cir. 2003), also misses the mark. First, *Cox* is a pre-*Bock* decision that relies entirely on the Eleventh Circuit's pre-*Bock* decision in *Harris*. *Cox*, 332 F.3d at

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[9] Petitioners also misplace reliance on *Williams v. Henagan*, 595 F.3d 610 (5th Cir. 2010). There, the plaintiff argued solely that his release from prison rendered prior grievances moot under a particular state's grievance laws and therefore he should be deemed to have fully exhausted his administrative remedies. *Id.* at 618-19. The court rejected this argument based on the language of the applicable state grievance law. *Id.* The court did not analyze, let alone decide, whether the PLRA displaces Rule 15 or whether under Rule 15 a plaintiff's status at the time of amendment or supplementation is controlling because those issues were never raised. After *Bock*, those issues remain unaddressed in the Fifth Circuit.

424 n.1. Second, the court's two sentence discussion of Rule 15(d) is plainly dicta because, as the court observed, the plaintiff never moved to supplement his complaint post-release, he "did not raise the issue before the district court, nor did the district court cite Rule 15(d) as justification for its ruling," and thus the issue "has been waived." *Id.* at 428. And post-*Bock*, the Sixth Circuit specifically stated that "[t]he *Cox* panel's dicta do not bind us." *Mattox v. Edelman*, 851 F.3d 583, 593 (6th Cir. 2017). *Mattox* involved a supplemental complaint filed by a confined prisoner to add new claims. Relying on *Bock*, the Sixth Circuit held that the PLRA's exhaustion provision did *not* displace Rule 15(d). *Id.* at 591-93.[10] Thus, if anything, the case law in the Sixth Circuit only highlights that this issue would benefit from further percolation post-*Bock*.

Finally, the PA DOC, who did not even file an exhaustion motion, suggest that the decision below conflicts with *May v. Segovia*, 929 F.3d 1223 (10th Cir. 2019). But Petitioners themselves make no such claim. *See* Pet. 15 n.4 (noting the Tenth Circuit "suggested without deciding"). The issue decided in *May* was whether an amended complaint—tendered while the plaintiff was still in prison but filed after his release—was subject to the exhaustion requirement. 929 F.3d at 1126. The Tenth Circuit decided that the claims were "brought" for exhaustion purposes when

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[10] Relying on *Bock*, the Sixth Circuit has also overruled a pre-*Bock* decision holding that the language "shall dismiss" in the PLRA's screening requirement displaced Rule 15(a). *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013) (overruling *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997)).

the plaintiff *tendered* his complaint (while still confined). *Id*. at 1232-33. To the extent that the PA DOC argue that *May's* discussion of the normal operation of Rule 15 differs from that of the court below, PA DOC Br. 14-16, Petitioners themselves did not raise those arguments in their petition, and they failed to make any arguments below regarding the normal operation of Rule 15. Thus, they have waived those arguments.[11]

At bottom, Petitioners' alleged split does not exist. The only decisions that arguably conflict with the Third Circuit's decision here were decided pre-*Bock* and relied on reasoning rejected by this Court in *Bock*. And the only other decision to squarely address the question after *Bock* reached the same conclusion as the Third Circuit. There is thus no good reason to grant the petition and every reason to allow the lower courts more time to examine the question in light of *Bock*.

III. This Case Is A Poor Vehicle For Deciding The Question Presented.

Certiorari should be denied for the additional reason that the case, as Petitioners and their supporters present it to this Court, bears no resemblance to their litigation of the case below. Indeed, this is an especially poor vehicle for deciding the question presented in the certiorari petition because Petitioners and PA DOC failed to preserve the very arguments they now present to this Court.

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[11] Petitioners and the PA DOC agree that the Seventh Circuit cases they cite do not squarely decide the question presented. Pet. 13 n.3; PA DOC Br. 15-16.

At oral argument below, counsel for five of the six Petitioners *explicitly* conceded that the PLRA does not bar plaintiffs from curing a failure to exhaust through a later Rule 15 amendment. In response to a question from Judge Greenaway, counsel for the Wexford Health Petitioners expressly stated that he would "absolutely agree . . . that under the appropriate circumstances . . . an amendment could be permitted . . . in the district court's discretion to remedy a problem like failure to exhaust."[12] Oral Arg. at 26:30-26:52.[13] This express concession should bar those Petitioners from presenting precisely the opposite argument to this Court now. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 272–73 (2009). By failing to inform the Court of their waiver, the Wexford Health Petitioners ask that this Court grant merits review in a case with problems that would normally be subject to dismissal as improvidently granted. *See, e.g.*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108-111 (2001).

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[12] Oral argument audio available at https://www2.ca3.uscourts.gov/oralargument/audio/17-3480Garrettv.WexfordHealthetal.mp3.

[13] Counsel's fallback argument was that because Respondent did not seek leave to amend for the *express purpose* of curing his procedural defects—and because his change in status was not expressly stated in his TAC (notwithstanding that the district court and the parties "all knew" of Respondent's release)—the amended complaint could not cure his previous failure to exhaust. Oral Arg. 26:52-27:17. The Third circuit correctly rejected this fallback argument. App. 22 n.20.

Adding to the significant waiver issue is the fact that Petitioners *all* failed to respond to Respondent's arguments below regarding the normal operation of Rule 15. Respondent devoted an entire section of his brief to arguing that an amended complaint supersedes the original complaint and that a plaintiff's status at the time of amendment or supplementation—as opposed to the time of an original complaint—determines whether a statutory precondition to suit applies. *See* Garrett CA3 Br. at 25-30. Petitioners offered no briefing or argument to the Third Circuit on those critical issues. *See* Garrett CA3 Reply at 1-2.

For their part, PA DOC now belatedly seek to raise arguments challenging the Third Circuit's application of Rule 15. PA DOC Br. at 14-16. But PA DOC did not move on exhaustion grounds at all; instead, they argued for dismissal solely on Rule 8 grounds. In any event, Petitioners themselves do not advance these late-breaking arguments regarding the normal operation of Rule 15 in their petition. Because the "argument was not raised below, it is waived." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 56 n.4 (2002). Rather than reward the gamesmanship of Petitioners and their supporters, this Court should deny certiorari and take up this issue (if at all) in a case where the question was fully litigated below.

Finally, this is an especially poor vehicle for deciding the question presented because a ruling in Petitioners' favor would have made no practical difference in this case. By the time that respondent filed the operative complaint he had fully exhausted his claims against Petitioners and had been released from

prison.[14] As a result, all of the benefits of the grievance process inured before the district court undertook to adjudicate Respondent's claims in the TAC. And, at that point, the statute of limitations on his claims had not run. Thus, Respondent plainly could have taken what Petitioners admit was an available, alternative procedural course: dismiss his complaint without prejudice and refile a new complaint following exhaustion. If this Court wishes to take up the question presented, it should exercise its discretion to do so in a case where the issue was both preserved below and would have made a difference to the result.

IV. Petitioners' Policy Arguments Are Overblown And Irrelevant.

Finally, Petitioners' reliance on bald policy arguments is both overblown and insufficient to warrant certiorari. The certiorari petition and the briefs filed in support of it howl that the Third Circuit's decision will gut the PLRA's exhaustion requirement. But Chief Judge Smith's narrow, carefully reasoned opinion will do nothing of the sort. Many of the policy concerns Petitioners identify exist *independent of* the Third Circuit's decision. And, at bottom, the concerns that Petitioners and their supporters urge on this Court amount to precisely the sort of extra-textual reasoning that this Court rejected in *Jones v. Bock*.

Petitioners complain that Respondent's actions caused delay in reaching the merits of his claims and

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[14] Petitioners' contention that "Garrett has now pursued unexhausted claims for over five years," Pet. 24, is plainly incorrect. *See supra* note 2.

argue that the intent of Congress in passing the PLRA was to reduce the number of prisoner cases "filed." Pet. 19. But Petitioners concede (as they must) that Respondent could have dismissed his claims without prejudice and filed a new complaint once he had exhausted his claims. That course would have only caused *more* delay by requiring the case to be fully re-initiated without any other practical difference to the proceedings. That sort of unnecessary process is precisely what Rule 15 was designed to *prevent*. And there is no merit to Petitioners' thinly veiled innuendo that the PLRA should be applied whenever possible to ensure that plaintiffs lose in prison litigation. "[A]dherence to the PLRA's text runs both ways: The same principle applies regardless of whether it benefits the inmate or the prison." *Ross*, 136 S. Ct. at 1857 n.1.

Indeed, contrary to Petitioners' heated rhetoric, there was no effort to "defeat by delay" on this record. *See* Pet. 24; App. 16 n.16 (admonishing that "this case may have been able to be resolved in a more timely and efficient manner" had the district court simply dismissed the complaint without prejudice in the first instance). In fact, the Wexford Health Petitioners conceded the opposite below. *See* Wexford Health CA3 Br. at 26 ("[T]his list of some of the events which prolonged the settling of the initial pleadings is not provided to suggest that Mr. Garrett was engaged in some extraordinary effort of delay—in fact, just the opposite. For a *pro se* prisoner case, nothing about this development was atypical."). Respondent's use of Rule 15 "did not benefit him strategically, but did promote judicial economy," and "it advances no purpose of the PLRA" to dismiss Respondent's claims solely because

he chose the more efficient route. *Jackson*, 870 F.3d at 936-37.[15]

Finally, many of Petitioners' policy concerns and those of their *amici* are premised on the atextual notion that the PLRA's exhaustion requirement applies to *all suits* related to prison conditions. But, in fact, the law as written applies only to such claims brought by confined prisoners. Thus, Petitioners and *amici* are simply wrong to suggest that the decision below creates a new rule that allows prisoners to avoid the exhaustion requirement by filing suit after they are released. Pet. 23-25; *Amici* 6. As discussed above, long before this case, the lower courts were in unanimous agreement that the PLRA exhaustion requirement—by its plain language—does not apply to released prisoners. Petitioners never challenged those precedents below, and they do not challenge them here. Nor does their policy concern even apply to Respondent who had fully exhausted his administrative remedies with respect to his claims against Petitioners before his release.

Thus, to the extent the Court might in the future entertain an argument that, despite its plain text, the PLRA exhaustion requirement could bar claims

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[15] At oral argument, counsel for the Wexford Health Petitioners acknowledged the deficiencies in the policy arguments Petitioners now attempt to advance—conceding that Garrett's claims against his clients were exhausted prior to the filing of the TAC, and that Garrett would have been able to file a new lawsuit. Oral Arg. 21:55-22:22. Indeed, counsel stated that had Garrett sought leave to amend his complaint for the express purpose of curing his failure to exhaust, counsel would likely not even have objected. Oral Arg. 26:30-27:17.

brought by former prisoners who did not file suit until after their release from custody, that argument is not available on this record. It was not preserved below, and it has not been offered as a question presented in the certiorari petition. On the contrary, Petitioners' briefing before the Third Circuit expressly conceded that the statute does not apply to claims brought by released prisoners. *See* Khatri CA3 Br. at 18 n.10; Medical Defs. CA3 Br. at 24. And that acknowledgement, which is understandable in light of the unanimous view among the Courts of Appeals, makes Petitioners' and *amici*'s arguments that the Third Circuit's decision will encourage prisoners to await release to file their lawsuits instead of pursuing administrative remedies a complete and total non-sequitur.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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