No. 15-339

In The
Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

REPLY BRIEF FOR THE PETITIONER

Maryland and 22 *amici* States respectfully submit that the decision of the Fourth Circuit is wrong and warrants this Court's review. The Prisoner Litigation Reform Act's ("PLRA") "mandatory" exhaustion requirement was intended to "eliminat[e] . . . judicial discretion to dispense with exhaustion." *Porter v. Nussle*, 534 U.S. 516, 524, 529-30 (2002). Accordingly, this Court has rejected every attempt to incorporate common law exceptions, emphasizing that it will "not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001); *see also Woodford v. Ngo*, 548 U.S. 81, 91 n.2 (2006).

The Fourth Circuit nonetheless fashioned an exception that violates the mandatory exhaustion regime established by Congress, has no basis in statutory text or this Court's precedents, and conflicts with the decisions of several other federal courts of appeals. Most notably, in *Chelette v. Harris*, the Eighth Circuit expressly rejected the same exception because, the court explained, it was "not free to engraft upon the statute an exception that Congress did not place there." 229 F.3d 684, 688 (8th Cir. 2000), *cert. denied*, 531 U.S. 1156 (2001) (internal quotation omitted).

Rather than mount a full-throated defense of the Fourth Circuit's decision, Mr. Blake primarily dwells on three arguments that he raised in the courts below—which no court has accepted—that would have resolved the matter without resort to a court-engrafted exception to the PLRA.

First, Mr. Blake claims that Mr. Ross waived his exhaustion defense, but neither the district court nor the court of appeals adopted this view, and the district court in fact expressly rejected it. Second, neither the district court nor the court of appeals found that Mr. Blake exhausted his administrative remedies under state law, and it is clear on the record that he did not. Finally, neither the district court nor the court of appeals held that Mr. Blake's administrative remedies were not "available" within the meaning of the PLRA. Administrative remedies were available to prisoners like Mr. Blake; he simply failed to pursue them.

These reprised arguments are no stronger now than they were when the courts below consciously declined to adopt them, and hence they do not render this case a poor vehicle to resolve the conflict created by the Fourth Circuit's decision.

In recognizing an exception for Mr. Blake, the Fourth Circuit produced a conflict with five other circuits and an inviting route by which to circumvent the PLRA's exhaustion requirement. As Maryland and 22 *amici* States now request, this Court should grant certiorari to resolve the conflict among the circuits and protect federal courts from a new wave of frivolous prisoner claims.

I. THIS COURT SHOULD REJECT ATTEMPTS TO INVENT OBSTACLES TO REVIEW.

1. Mr. Blake resurrects a waiver issue that the district court rejected out of hand. *See* Pet. App. 52-54. The Fourth Circuit also did not rely on this ground, which is "easily resolved." Pet. App. 27. Although Mr. Ross did not include the exhaustion defense in his original answer, he obtained consent from Mr. Blake's counsel to file an amended answer raising the defense. Pet. App. 52. Mr. Blake now protests that he did not intend to consent to that amendment. Opp. 12-13. But Mr. Blake "did not condition his consent in any relevant way or even ask to review the proposed answer before it was filed. He cannot now complain about untimeliness when he blindly approved [the amended answer]." Pet. App. 27-28.

In return for his consent, Mr. Blake's counsel asked for blanket consent from Mr. Ross's counsel to file an untimely amended complaint, which added significant new factual allegations against Ross. Dist. Ct. Doc. No. 75 Ex. 1; *see also* JA480, 482. Mr. Blake, having received the benefit of this quid pro quo, cannot retract the blanket consent that served as the basis for the deal. Under these circumstances, it is no surprise that neither the district court nor the court of appeals accepted Blake's waiver argument below.

2. Mr. Blake next claims that the Fourth Circuit should have found that he exhausted his available remedies as a matter of state law. In this respect, Mr. Blake recites an unmeritorious argument that the district court and court of appeals declined to adopt. Maryland's administrative remedy procedure is available for "all types of complaints except" those in

four limited categories. Pet. App. 77-78. Nothing in the handbook or directives implies that these four enumerated exceptions are somehow "non-exhaustive." Opp. 16. To the contrary, as the handbook plainly states, the procedure applies to "all" other complaints. Pet. App. 77.

Mr. Blake also posits, apparently for the first time, that he did not need to exhaust the remedies process because he was allowed to "resolve problems informally" through an internal investigation. Opp. 16. But in fact his complaint was not resolved, and could not have been resolved, in this way, formally or informally. Unlike the administrative remedies available to Mr. Blake, internal affairs investigations serve the prison's own purposes. They are no substitute for the established procedures that Mr. Blake was required to follow. The prison directives explicitly provide that the administrative remedy procedure applies to "[u]se of force" complaints. Pet. App. 17; *see also* JA405. Mr. Blake would have known this if he had read the relevant directives or asked for assistance, but he did neither. Pet. App. 71, 78. He is not free to do nothing and now claim that he misunderstood the process.

Mr. Blake is also wrong that "multiple" federal judges have agreed with his mistaken interpretation. Opp. 15. Both cases cited for this proposition were decided by Judge Williams, who also presided over this case; in the other cases, Judge Williams relied on "a new department directive that went into effect . . . long after the time when Blake needed to file his

administrative complaint."[1] Pet. App. 26. When presented with the directives that applied in *this* case, Judge Williams had no difficulty interpreting them. He instead found "very little, if any, ambiguity in Maryland's inmate grievance procedures" and specifically held that Mr. Blake failed to exhaust them. Pet. App. 41-42. Thus, contrary to Mr. Blake's representation, the 2008 amendments to the directives did not codify pre-existing practice.

3. Finally, Mr. Blake strains to justify the court of appeals' decision by arguing that the prison's remedy procedure was not "available" within the language of the PLRA. Opp. at 30-31. The Fourth Circuit did not rely on this ground, and for good reason. A remedy is not unavailable merely because a prisoner claims to have misunderstood the process. Rather, as Mr. Blake's own cases show, a remedy is only unavailable when prison officials affirmatively mislead an inmate by providing inaccurate information or affirmatively refuse to provide any information about the process to an inmate.

For example, in *Goebert v. Lee County*, 510 F.3d 1312, 1321-23 (11th Cir. 2007), "no inmate was ever permitted to see th[e] procedures," and the prison made no attempt to explain them. Mr. Blake received an

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[1] Although Mr. Blake points out that one of these cases was filed before the amended directive went into effect, *see* Opp. 15, Judge Williams did not actually interpret the old directive that applies here but instead mistakenly looked to the new directive. As Judge Agee explained, Judge Williams accidently relied on "an exhibit in another case that prove[d] to be an administrative decision dismissing a complaint under the 2008 policy," not the one that applied to Mr. Blake. Pet. App. 27.

orientation on grievance procedures, was provided an accompanying handbook, and could have sought guidance if needed from the prison's administrative remedy coordinator. Pet. App. 70-71, 74-75, 78. All the cases cited by Mr. Blake uniformly involve affirmative misinformation or misconduct by prison officials.[2] That is not the case here. Mr. Blake's failure to follow the process was the result of his own inaction, not any misstatements by prison officials.

II. THIS COURT'S INTERVENTION IS NECESSARY TO RESOLVE DISAGREEMENT AMONG THE CIRCUITS.

The Fourth Circuit's decision conflicts with the decisions of five other circuits. *Chelette*, 229 F.3d at 688; *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) (per curiam); *Pavey v. Conley*, 663 F.3d 899, 905 (7th Cir. 2011); *Panaro v. City of N. Las Vegas*, 432 F.3d 949, 953-54 (9th Cir. 2005); *Thomas v. Woolum*, 337 F.3d 720, 734 (6th Cir. 2003), *abrogated on other grounds by Woodford*, 548 U.S. at 87. Mr. Blake's attempt to distinguish these cases on factual grounds is unpersuasive because the factual differences among the cases do not bear on the fundamental legal questions on which six circuits now disagree.

In *Chelette*, for example, the Eighth Circuit rejected an exception that would have applied to inmates who

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[2] *See Davis v. Fernandez*, 798 F.3d 290, 295 (5th Cir. 2015) (prison staff told inmate that process did not have a second step, even though it did); *DeBrew v. Atwood*, 792 F.3d 118, 128 (D.C. Cir. 2015) (prison officials refused to provide the inmate with necessary documents to lodge his complaint); *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) (warden sent inmate on a "wild goose chase" by referring inmate to the wrong regulation).

"logical[ly] believed" they had exhausted their remedies. *See* 229 F.3d at 688. Mr. Blake argues that *Chelette* is distinguishable because the inmate's belief in that case was not objectively reasonable. Opp. 21. But the Eighth Circuit did not reject the plaintiff's claim on the ground that his particular belief was unreasonable or illogical, but held that a prisoner's beliefs about the process are irrelevant under the PLRA, whether they were "logical or otherwise," because Congress did not provide for any logical belief exception. *Chelette*, 229 F.3d at 688. This holding directly conflicts with the Fourth Circuit's decision adopting such an exception.

Similarly, the Fifth Circuit's rationale in *Gonzalez v. Seal* rejected all purported common law exceptions, no matter the underlying facts. The court specifically overruled an earlier decision that had allowed the exhaustion requirement to be "excused" in "certain rare instances." *Gonzalez*, 702 F.3d at 787-88.

Finally, the Fourth Circuit's decision also conflicts with decisions of the Sixth, Seventh, and Ninth Circuits. *See Pavey*, 663 F.3d at 905; *Panaro*, 432 F.3d at 953-54; *Thomas*, 337 F.3d at 734. Mr. Blake argues that these cases do not conflict because the procedures in those states were not confusing, Opp. 22-23, but the Fourth Circuit's test has two prongs, the second of which is whether the prisoner's mistaken attempts to exhaust served the same substantive purposes as the exhaustion requirement. Pet. App. 10. These other decisions conflict with that second prong because they hold that internal investigations do not serve the same purposes as grievance procedures.

III. THE FOURTH CIRCUIT ERRED IN ADOPTING A REASONABLE BELIEF EXCEPTION.

1. This Court has "consistently refused to authorize judicially created exceptions to the [PLRA's] exhaustion requirement." *Johnson v. District of Columbia*, 869 F. Supp. 2d 34, 42 (D.D.C. 2012); *see also Booth*, 532 U.S. at 741 n.6; *Woodford*, 548 U.S. at 91 n.2. The Fourth Circuit, however, departed from this consistent precedent and adopted just such an exception. Mr. Blake contends that "administrative exhaustion is 'subject to numerous exceptions,'" Opp. 29 (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)), but he ignores the difference between judicially-created and statutorily-imposed exhaustion.

Although "sound judicial discretion governs" when Congress has not spoken to the issue, *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), the federal judiciary's power to excuse a statutory exhaustion requirement is far more limited. *See Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501 (1982).

Thus, "[w]here Congress specifically mandates, exhaustion is required." *McCarthy*, 503 U.S. at 144. Under this settled principle, federal courts "are not free to rewrite the statutory text" to excuse an "unambiguous" exhaustion requirement like the one at issue here. *McNeil v. United States*, 508 U.S. 106, 111 (1993); *see also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (refusing to import common law exceptions into Social Security Act's statutory exhaustion requirement). A court is "not at liberty to create an exception" to a "mandatory" precondition to suit "where Congress has declined to do

so." *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 27, 31 (1989).

The language of the PLRA does not permit broad common law exceptions from administrative law. To the contrary, as long as administrative remedies are "available," exhaustion is required. 42 U.S.C. § 1997e(a). The PLRA's exhaustion requirement superseded a prior provision that afforded federal judges considerable discretion to excuse an inmate's failure to exhaust. *See Porter*, 534 U.S. at 524. Congress thus intended the PLRA to "eliminat[e] . . . judicial discretion to dispense with exhaustion," *id.* at 529, not to authorize the federal courts to create broad new exceptions.

2. Even if federal courts were permitted to read common law exceptions into the PLRA, there is no support anywhere for a reasonable belief exception. Neither the Fourth Circuit in *Blake*, the Second Circuit in *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004), nor Mr. Blake in his brief identified any case that has ever applied the exception outside the PLRA context. Assuming the exception exists, it conflicts with the requirement of proper exhaustion recognized by this Court in *Woodford*. *See* Pet. 14-16.

Mr. Blake contends that *Woodford* reserved the question of whether there is a reasonable belief exception to the PLRA. Opp. at 29-30. If anything, this only amplifies the need for clarity from this Court in light of the resulting disagreement among the courts of appeals in the wake of *Woodford*.

3. Finally, the Fourth Circuit misapplied its own exception. Mr. Blake's interpretation of Maryland's procedures could not have been "objectively reasonable," both because the procedures were clear and because Mr. Blake did not actually try to interpret them. Similarly, the internal affairs investigation could not have served the same substantive purposes as the prison's grievance process. The inmate is not entitled to learn the outcome of an internal investigation, Pet. App. 70, and even if an inmate could potentially receive some relief, this Court "has rejected any suggestion that prisoners are permitted to pick and choose how to present their concerns to prison officials." *Pavey*, 663 F.3d at 905.

IV. AS MARYLAND AND 22 *AMICI* STATES EXPLAIN, THIS ISSUE IS OF EXCEPTIONAL IMPORTANCE.

The exhaustion requirement was "a centerpiece" of the PLRA's effort to reduce the number of prisoner suits clogging the federal courts. *Woodford*, 548 U.S. at 84. The Fourth Circuit's rule undermines that requirement by allowing inmates to obtain relief in federal court even if they fail to follow the proper procedures.

If the exception can be satisfied under the factual circumstances of this case, there is a substantial risk that it will be read just as broadly in other cases. Here, the court found that Mr. Blake's supposed interpretation of the directives was reasonable even though he failed to read them. Two district courts in the Fourth Circuit have already relied on *Blake* to

reject an exhaustion defense,[3] and many district judges in the Second Circuit have applied that circuit's identical reasonable belief exception from *Giano*.[4]

While the exception will not apply in every case, the existence of the exception will inevitably increase the number of prisoner suits. Inmates who failed to exhaust their administrative remedies will now file suit hoping that the federal courts will excuse their failure. Inmates will have less incentive to exhaust if they believe they can obtain relief without following the proper procedure, and thus fewer cases will be resolved through the administrative process. Indeed, after the Second Circuit decided *Giano*, the number of prisoner

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[3] *Hernandez v. Vale*, No. DKC–14–1562, 2015 WL 4545184 (D. Md. July 27, 2015); *Thompson-Burke v. Harrison*, No. 5:13-CT-3091-F, 2015 WL 3902066 (E.D.N.C. June 24, 2015).

[4] *E.g.*, *Williams v. Doe*, 2015 WL 1567498, at *3 (W.D.N.Y. Apr. 8, 2015); *Frasier v. McNeil*, 2015 WL 1000047, at *8 (S.D.N.Y. Mar. 5, 2015); *Winfield v. Bishop*, 2013 WL 4736378, at *6 (N.D.N.Y. Sept. 3, 2013); *Tompkins v. Beane*, 2012 WL 3079537, at *4 (N.D.N.Y. July 30, 2012); *Andrews v. Cruz*, 2010 WL 1142010, at *9 (S.D.N.Y. Mar. 9, 2010), report and recommendation adopted, 2010 WL 1141182 (S.D.N.Y. Mar. 24, 2010); *Franklin v. Oneida Corr. Facility*, 2008 WL 2690243, at *7 (N.D.N.Y. July 1, 2008); *Tyree v. Zenk*, 2007 WL 527918, at *8 (E.D.N.Y. Feb. 14, 2007); *Pierre v. County of Broome*, 2007 WL 625978, at *4 (N.D.N.Y. Feb. 23, 2007); *Lawyer v. Gatto*, 2007 WL 549440, at *5 (S.D.N.Y. Feb. 21, 2007); *Partee v. Goord*, 2007 WL 2164529, at *4 (S.D.N.Y. July 25, 2007); *Hairston v. LaMarche*, 2006 WL 2309592, at *11 (S.D.N.Y. Aug. 10, 2006); *Larkins v. Selsky*, 2006 WL 3548959, at *10 (S.D.N.Y. Dec. 6, 2006); *Rivera v. Pataki*, 2005 WL 407710, at *12 (S.D.N.Y. Feb. 7, 2005); *Barad v. Comstock*, 2005 WL 1579794, at *8 (W.D.N.Y. June 30, 2005).

suits filed in that circuit skyrocketed by over 70% from 1,372 in 2004 to 2,308 in 2014.[5]

Finally, Mr. Blake is wrong that this case is merely "a historical footnote." Opp. 28. Nothing in the Fourth Circuit's opinion is limited to Mr. Blake's particular factual circumstance. This is why 22 States have submitted an *amicus* brief urging this Court to grant certiorari. The Fourth Circuit's broad, misguided exception could just as easily apply to any State's grievance procedures or to other provisions of Maryland's regulations.

As Judge Agee explained, "jail officials must [now] anticipate every potential misunderstanding that an inmate might have about a prison's administrative remedies and then foreclose every imaginable misunderstanding in writing." Pet. App. 26. This Court's intervention is therefore necessary to prevent the PLRA's exhaustion requirement from turning "into a largely useless appendage." *Woodford*, 548 U.S. at 93.

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[5] United States Courts, *Statistics & Reports*, Table C-3—U.S. District Courts—Judicial Business Tables (Sept. 30, 2004 and Sept. 30, 2014).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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