No. 05-416

IN THE

Supreme Court of the United States

JEANNE S. WOODFORD, ET AL.,
Petitioners,

v.

VIET MIKE NGO,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*[1]

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession, dedicated to the promotion of a fair system of justice. The ABA's more than 407,000 members include prosecutors, public defenders, private attorneys, state and federal trial and appellate judges,[2] legislators, law professors, law enforcement and corrections personnel, law students, and nonlawyer "associates" in allied fields. Since its inception, the ABA has actively promoted improving the administration of justice and increasing the availability and quality of legal counseling to those who need it.

The ABA respectfully submits this brief *amicus curiae* because of its longstanding commitment to ensure that prisoners are afforded meaningful access to the courts so that their constitutional rights are protected. More specifically, the question presented by this case implicates matters addressed by the ABA Standards for Criminal Justice, which have been widely relied upon, including by this Court, as a guide to criminal justice administration. *See, e.g., Town of*

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[1] The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* represents that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2805-06 (2005); *Rompilla v. Beard*, 125 S. Ct. 2456, 2465-66 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522-24 (2003); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 n.48 (2001); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984). The Standards have been developed, refined, and approved over more than thirty years by task forces of the ABA comprised of prosecutors, judges, defense lawyers, academics, and others, as well as by the wider and diverse membership of the ABA.

The ABA has a long history of supporting the general principle that, subject to several specific exceptions, prisoners have certain basic constitutional rights. 4 ABA Standards for Criminal Justice 23-1.1 (2d ed. 1983). The ABA reaffirmed its commitment to this core principle in 1995 when it adopted a resolution that provides in part as follows:

> [A]s a general principle, prisoners retain the constitutional rights of free citizens. Exceptions to the foregoing are when restrictions are necessary to assure orderly confinement and interaction, when restrictions are necessary to provide reasonable protection for the rights and physical safety of all members of the prison system and the general public, and when Association policy or standards specifically provide to the contrary.

Report of the American Bar Association 120B (1995 Annual Meeting).

Several of the ABA Standards speak directly to the issue in this case and support the Respondent's position. Most directly, Standard 23-2.1, entitled "Access to the judicial process," states:

> Prisoners should have free and *meaningful access to the judicial process*; governmental authorities should assure such access. *Regulations or actions should not* unduly delay or *adversely affect the outcome of a prisoner's claim for relief or discourage prisoners from seeking judicial consideration for their grievances*. Interests of institutional security and scheduling may justify regulations that affect the manner in which access is provided.

4 ABA Standards for Criminal Justice 23-2.1 (2d ed. 1983) (emphasis added).

SUMMARY OF ARGUMENT

1. "[P]risoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). The Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321 (1996) ("PLRA"), provides that a prisoner who brings a claim under 42 U.S.C. § 1983 must first exhaust the administrative remedies available in the prison system. Some courts have broadened this statutory requirement by demanding that prisoners also comply to the letter with all procedural requirements crafted by prison officials, including time limits, or be "procedurally defaulted" and barred from bringing their federal lawsuits. This case presents the question whether this judicially-created "procedural default rule" should be upheld, notwithstanding the fact that it is not mentioned in the text of the PLRA, inhibits a prisoner's constitutional right of access to the courts, and does not further the congressional policies underlying the PLRA.

2. Because prison grievance procedures typically provide short deadlines to file a grievance, sometimes as little as a few days, the rule proposed by Petitioners would create

enormous practical barriers to the ability of prisoners—including juveniles and illiterate prisoners—to pursue meritorious civil rights claims. Nothing in the text or legislative history of the PLRA suggests that Congress intended such a drastic interference with a prisoner's constitutional right of access to the courts.

The creation of a procedural default rule unsupported by statutory language is inconsistent with this Court's decisions with respect to other statutory schemes that include administrative exhaustion requirements. Most notably, in cases brought under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, this Court has held that a petitioner's failure to meet a state-imposed statute of limitations for filing an administrative grievance does not constitute failure to exhaust administrative remedies and does not bar the petitioner from pursuing the claim in federal court. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124 (1988); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 762-63 (1979).

3. Circuits that have imposed a procedural default rule in prisoner civil rights litigation have improperly imported the rule from *Coleman v. Thompson*, 501 U.S. 722 (1991), with respect to habeas corpus petitions. This Court explained that a procedural default rule furthers the purposes underlying the requirement in the habeas context that state judicial remedies be exhausted: "'to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" *Id.* at 731-32 (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)).

The PLRA's administrative exhaustion requirement, however, was neither designed nor intended to preserve the power of state courts, which have authority and expertise to render decisions regarding the scope of constitutional and other legal rights. Congress's purpose in enacting the

PLRA's administration exhaustion requirement was simply to reduce the quantity and improve the quality of prisoner suits by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). This purpose is met so long as a prisoner pursues a grievance through the grievance process, though perhaps not necessarily in perfect compliance with the short timelines often set by corrections officials. In other words, so long as the grievance has been submitted to corrections officials, they will have been afforded an opportunity contemplated by Congress to resolve the grievance internally, if they so desire.

ARGUMENT

I. Engrafting A Procedural Default Rule Onto The PLRA Would Improperly Interfere With a Prisoner's Right To Pursue Valid Constitutional Claims

1. "[P]risoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). One of the principal means for a prisoner to pursue this constitutional right is to file a complaint under the Civil Rights Act of 1871 (as amended, 42 U.S.C. § 1983). *See Muhammad v. Close*, 540 U.S. 749, 750 (2004).

Before the passage of the PLRA, a prisoner's right to initiate a civil rights lawsuit in federal court was subject to the provisions of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 ("CRIPA"). In interpreting the provisions of the CRIPA against the backdrop of a prisoner's constitutional right of access to the courts, this Court in 1992 explained: "[t]he first of the principles that necessarily frame our analysis of prisoner's constitutional claims is that federal courts must take cognizance of the valid constitutional claims

of prison inmates." *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992).

2. In 1996, Congress passed the PLRA, which included a revised administrative exhaustion provision stating that no action shall be brought by a prisoner under 42 U.S.C. § 1983 or other federal law with respect to prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA did not change the principle that federal courts must take cognizance of the valid constitutional claims of prison inmates. *See United States v. Wells*, 519 U.S. 482, 495 (1997) (stating that the Court "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents"). Rather, as the legislative history reveals, the purpose of the PLRA was to "prevent[] inmates from abusing the judicial system," 141 Cong. Rec. S14611 (1995) (statement of Sen. Hatch), while still "allow[ing] meritorious claims to be filed." 141 Cong. Rec. S14611 (1995) (statement of Sen. Thurmond).

3. Importing a procedural default rule into the PLRA's exhaustion requirement imposes barriers not intended by Congress to prisoners' exercise of the constitutional right of access to courts, particularly given the short time frames allowed for the filing of an administrative grievance. The California Department of Corrections ("CDOC"), which has custody of the Respondent, Viet Mike Ngo, limits this period to fifteen days following "the event or decision being appealed." *See* Cal. Code Regs. tit. 15, § 3084.6(c). In some states, this deadline is as short as 48 hours. *See* Florida Corrections Commission 1999 Report, Appendix 4.3, www.fcc.state.fl.us/fcc/reports/final99/ap4-3.html (last visited December 26, 2005).

As this Court has recognized, many victims of civil rights violations will not recognize their right to legal redress

within even 120 days after a violation. Consequently, in *Felder v. Casey*, 487 U.S. 131 (1988), the Court held that a state's notice-of-claim statute, which required that state and local governmental officials be notified of a claim within 120 days of the event giving rise to it, was unenforceable in a § 1983 suit. Prisoners are even less equipped to recognize, in far shorter periods of time, that their civil rights have been violated, that they have a legal right to redress, and that they must file a grievance as a precondition to obtaining such redress.

While the supposed procedural default at issue in this case is Ngo's alleged failure to file a grievance within fifteen working days of "the event or decision being appealed," the procedures that prisoners are required to navigate are not restricted to compliance with short filing deadlines, but they may encompass a variety of pleading and other formal requirements. *See Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002) (holding that exhaustion has not occurred unless the prisoner files a grievance in the place, at the time, and with the level of detail required by the prison administrative rules). Importing a procedural default rule into the PLRA's exhaustion requirement would contravene the very purpose of § 1983 – to enable federal courts to redress civil rights violations by state actors. *See Monroe v. Pape*, 365 U.S. 167, 180 (1961). A procedural default rule would enable prison, jail, and other correctional officials, typically the defendants in § 1983 suits brought by inmates, to craft their grievance rules in ways that make it difficult or impossible for prisoners to obtain access to the courts and vindicate their constitutional and other civil rights.

II. A Procedural Default Rule Goes Beyond The Text And Purpose Of The PLRA's Exhaustion Requirement

1. The procedural default rule that Petitioners ask this Court to impose would require dismissal of a prisoner's civil rights claim where the prisoner sought to invoke the prison grievance system, but the grievance was rejected as "procedurally defective." This rule goes beyond the express language of 42 U.S.C. § 1997e(a). The PLRA mandates exhaustion of available administrative remedies, but says nothing about procedural default. The statute reads: "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). A procedural default rule goes far beyond the plain language of the PLRA.

2. Judicial engrafting of a procedural default rule onto the exhaustion provision would also usurp Congress's authority in amending the exhaustion provision found in the Civil Rights of Institutionalized Persons Act. As this Court explained in *Porter v. Nussle*, 534 U.S. 516 (2002), the purpose of the PLRA's administrative exhaustion requirement was to reduce the quantity and improve the quality of prisoner suits by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Id.* at 524-25. As long as a prisoner pursues a grievance through all levels of the grievance process, thereby giving prison officials a chance to address the claim and "exhausting" whatever administrative remedies may exist, the statutory exhaustion requirement is satisfied even though the prisoner does not meet the time constraints imposed by prison officials. Prison officials thus are afforded the opportunity to resolve a dispute internally, if they so desire, before a court adjudicates the

legal merits of the claim. Encouraging prison administrators instead to rely on procedural "defects" to decline to address prison grievances would be antithetical to the primary purpose underlying the PLRA's exhaustion requirement—to afford corrections officials time and opportunity to address complaints internally.

3. The judicial implanting of a procedural default rule in the PLRA's exhaustion requirement, as a practical matter, operates to shorten the statute of limitations significantly for a prisoner plaintiff pursuing a § 1983 claim. "The statute of limitations for a § 1983 claim is generally the applicable state-law period for personal-injury torts." *City of Rancho Palos Verdes, Calif. v. Abrams*, 125 S. Ct. 1453, 1540 n.5 (2005). For example, Ngo's § 1983 claim arising in California would have a two-year statute of limitations. *See* Cal. Code Civ. Proc. § 335.1 (providing a two-year statute of limitations for personal-injury torts). But if a procedural default rule were imposed by this Court, a prisoner's claim would be barred if he or she failed to meet the fifteen-day requirement imposed by CDOC.

Neither the text of the PLRA nor its legislative history reflects any intent by Congress to alter the statute of limitations otherwise applicable to § 1983 claims. Absent express statutory authority, adopting a rule that would subordinate the statute of limitations for a § 1983 claim to the varying time limitations adopted by grievance processes in a wide gamut of correctional facilities, including jails, juvenile detention centers, and juvenile training schools, is inconsistent with prior decisions of this Court.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), an involuntarily retired employee brought suit against his former employer under the Age Discrimination in Employment Act ("ADEA"). *Id.* at 754. After recognizing that the ADEA required claimants to utilize state

administrative procedures prior to filing a federal claim, the plaintiff sought to file an administrative claim with the Iowa State Civil Rights Commission. The defendant employer sought dismissal of the federal lawsuit on the ground that Iowa's 120-day statute of limitations already had run. *Id.* at 758-59. This Court rejected the employer's argument. *Id.* at 761-62. The Court noted that the ADEA's exhaustion requirement does not expressly alter the statute of limitations for claims brought under the ADEA. *Id.* at 759 ("In particular, there is no requirement that, in order to commence state proceedings and thereby preserve federal rights, the grievant must file with the State within whatever time limits are specified by state law."). Absent statutory authority, the Court refused to impose a rule that would alter the statute of limitations, explaining:

> Congress could not have intended to consign federal lawsuits to the "vagaries of diverse state limitations statutes," particularly since, in many States, including Iowa, the limitations periods are considerably shorter than the 180-day period allowed grievants in nondeferral States.

Id. at 763 (citation omitted). More recently, the Court reached the same conclusion in the Title VII context. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 122-23 (1988) ("[S]tate time limits for filing discrimination claims do not determine the applicable federal time limit."). *See also Burnett v. Grattan*, 468 U.S. 42, 52-53 (1984) (quoting *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367 (1977)). ("'State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.'")

Like the exhaustion provisions of the ADEA and Title VII, the exhaustion provision of the PLRA says nothing about the applicable statute of limitations. In fact, no provision of the PLRA mentions the statute of limitations.[3] As with the ADEA and Title VII, there is no basis to infer that Congress intended to subject prisoners' § 1983 lawsuits to the shorter time limitations imposed by the various prison grievance procedures. *Cf. Crawford-El v. Britton*, 523 U.S. 574, 596-97 (1998) ("If there is a compelling need to frame new rules of law [for prisoner lawsuits], presumably Congress either would have dealt with the problem in the [Prison Litigation] Reform Act, or will respond to it in future legislation.").

The reasoning underlying this Court's refusal to subordinate the ADEA and Title VII statutes of limitations to the state-imposed deadlines applies with even greater force in prisoner civil rights litigation. In the ADEA context, this Court reiterated that additional judicially-created procedural technicalities "are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Oscar Mayer*, 441 U.S. at 765 n.13 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972)). The short deadlines at issue here would be a substantial problem in any administrative remedy system. They are especially problematic for the prison population, which is generally unknowledgeable about legal rights and procedures, poorly educated, and often functionally illiterate.

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[3] Also, like the statute at issue in *Oscar Mayer*, the PLRA contemplates the possibility that a state may not have an administrative procedure for a prisoner to exhaust before filing a § 1983 claim. *See* 42 U.S.C. § 1997e(b) ("The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act.").

See U.S. Department of Education, *Literacy Behind Prison Walls* (1994), http://nces.ed.gov/pubs94/94102.pdf (last visited December 26, 2005) (reporting that seven out of ten prisoners perform at the lowest literacy levels). In addition, prisoners often must decide, under very tight timelines and in an environment that is fraught with explicit or implicit threats of retaliation and recriminations, whether to submit a grievance about the conduct of prison officials to those officials' cohorts on the grievance committee. These impediments only enhance the difficulty of navigating the short filing deadlines, which this Court recognized to be "a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim." *McCarthy*, 503 U.S. at 153.

The PLRA applies to juveniles. *See Christina A. v. Bloomberg*, 315 F.3d 990, 994 (8th Cir. 2003) (holding that PLRA applies to juveniles detained in a state training school); *Lewis v. Gagne*, 281 F. Supp. 2d 429, 433 (N.D.N.Y. 2003) (holding that PLRA applies to juveniles adjudicated delinquent and confined to residential facility). Therefore, the short deadlines apply not only to adult prisoners, but also to juveniles. The impediments that adult prisoners face in navigating short filing deadlines—illiteracy, inexperience, lack of legal training and knowledge, and fear—would be magnified in the case of juvenile prisoners.

4. A procedural default rule significantly interferes with a prisoner's constitutional right of access to the courts, and places a particularly heavy burden on inmates who are underage, unsophisticated, illiterate, and/or inexperienced in filing prison grievances and lawsuits. Congress has not suggested that it intended such a result. In fact, such a result contradicts the stated intent of the PLRA. The legislative history of the PLRA vividly illustrates that the PLRA was intended to "prevent[] inmates from abusing the judicial system," but was not intended "to prevent inmates from

raising legitimate claims." 141 Cong. Rec. S14611 (1995) (statements of Sen. Hatch). While a procedural default rule may reduce the total number of prisoner lawsuits adjudicated in federal court, it is no more likely to eliminate frivolous suits than to eliminate meritorious constitutional claims.

III. The Court Should Not Import A Procedural Default Rule From Habeas Corpus Jurisprudence

1. The procedural default rule in the PLRA context is based on the inappropriate importation of habeas corpus principles into civil rights litigation. *See, e.g., Spruill v. Gillis*, 372 F.3d 218, 228-29 (3d Cir. 2004) (analogizing the habeas corpus exhaustion requirement to the PLRA exhaustion requirement). The importation of habeas corpus principles into the PLRA based on "the analogy" between habeas petitions and § 1983 actions, *see id.* at 228-29, belies the fact that the distinctions between the two areas of law are important and complex enough to have merited this Court's attention in no fewer than four opinions over the preceding seven years. *See Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005); *Nelson v. Campbell*, 541 U.S. 637 (2004); *Muhammad v. Close*, 540 U.S. 749 (2004); *Edwards v. Balisok*, 520 U.S. 641 (1997). While the Court has not specifically addressed the exhaustion requirements in these cases, the Court has suggested that the exhaustion requirements for habeas petitions are more stringent than the exhaustion requirements for PLRA actions. *See Muhammad*, 540 U.S. at 751 ("Federal petitions for habeas corpus may be granted only after other avenues of relief have been exhausted. Prisoners suing under § 1983, in contrast, generally face a substantially lower gate, even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted first.") (citations omitted).

The rationale underlying this Court's adoption of the procedural default rule for habeas corpus petitions is inapplicable to § 1983 actions. In *Coleman v. Thompson,* 501 U.S. 722 (1991), the Court recognized that procedural default is a distinct concept from administrative exhaustion. *Id.* at 732. In that case, the Court noted the purposes of the requirement in the habeas corpus context that state judicial remedies be exhausted: "'to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" *Id.* at 731-32 (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). The Court then explained that a procedural default rule also furthers those purposes in the habeas context.

As this Court has explained, § 1983 challenges to the conditions of confinement do not raise the same concerns about the autonomy of state courts as habeas corpus challenges to the confinement itself. *See Wilkinson v. Dotson*, 125 S. Ct. 1242, 1249 (2005) (rejecting argument that permitting prisoner's § 1983 lawsuit without prior exhaustion of state-court remedies would compromise principles of federal-state comity). Thus, the fact that this Court held that a procedural default rule is necessary to protect state court powers in the habeas context does not spell the need for or justify such a rule in the PLRA context. Unlike state courts, the individuals processing prison grievances do not have "concurrent powers" with federal courts to enforce constitutional rights or the legal expertise to do so. *Id.* at 731 (quoting *Rose v. Lundy*, 455 U.S. at 518). In addition, the correctional officials processing inmates' grievances are not, in contrast to judges, independent adjudicators. *Cf. Cleavinger v. Saxner*, 474 U.S. 193, 203-04 (1985) (holding that members of prison disciplinary committee were not entitled to absolute immunity because "they were not truly independent" and "had no identification

with the judicial process of the kind and depth that has occasioned absolute immunity").

Prison grievance officials, unlike state courts, also lack a full arsenal of remedies, including injunctive relief and damages, with which to vindicate and enforce constitutional and other civil rights. *See* 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. 483, 518 (2001) (reporting survey results revealing that prisoners cannot obtain monetary relief through grievance procedures for most types of legal claims). *See also Booth v. Churner*, 532 U.S. 731, 741 n.5 (2001) (holding that prison grievance procedures do not have to satisfy even "minimum acceptable standards of fairness and effectiveness").

2. In contrast to the exhaustion requirement applicable in habeas corpus actions, the PLRA's administrative exhaustion requirement was neither designed nor intended to preserve the power of state courts, which have parallel authority and expertise to render decisions regarding the scope of constitutional and other legal rights. Rather, the purpose of the PLRA's exhaustion requirement is to improve the quality of prisoner lawsuits or avert the need for such lawsuits by affording prison officials an opportunity to address complaints internally prior to a federal lawsuit. The Court explained this in *Porter*:

> Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration

> and satisfy the inmate, thereby obviating the need for litigation.

Porter, 534 U.S. at 524-25.

The Court's articulation of the rationale for the PLRA's exhaustion requirement echoes the Court's articulation of the rationale for the ADEA's exhaustion requirement. In *Oscar Mayer*, the Court explained:

> The [exhaustion requirement] is intended only to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized matter so that the grievants thereafter have no need or desire for independent federal relief.

Oscar Mayer, 441 U.S. at 761. The rationale for the PLRA's exhaustion requirement, like the rationale for the ADEA's requirement, is to provide state agencies the opportunity to address and perhaps resolve claims in order to eliminate the need for federal litigation. For example, the CDOC may reverse or lift its ban on the Respondent's participation in Bible study, perhaps prompting him to forgo a federal lawsuit. But, as this Court stated in *Oscar Mayer*, "[i]ndividuals should not be penalized if States decline, for whatever reason, to take advantage of these opportunities." *Oscar Mayer*, 441 U.S. at 761.

Because the procedural default rule proposed by Petitioners is not mandated by the language of the PLRA, does not advance the policies underlying the PLRA, is not warranted by an analogy to habeas corpus law, and would interfere significantly with a prisoner's constitutional right of access to the courts, this Court should decline Petitioners' invitation to impose such a rule. Congress, rather than the Court, should consider in the first instance the advisability and constitutionality of importing a procedural default rule

into the Civil Rights of Institutionalized Persons Act's exhaustion provision.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court below.

Respectfully submitted.

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February 2, 2006