No. 05-416

In The Supreme Court of the United States

JEANNE S. WOODFORD and ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondent argues that when Congress invigorated the administrative-exhaustion requirement for prisoners under the Prison Litigation Reform Act (PLRA), it nonetheless intended to permit inmates to "exhaust" by ignoring prison filing deadlines, with the inevitable result that many grievances will reach federal court without receiving any prior review on the merits. This argument is not supported by the statute's language, history, or purposes.

ARGUMENT

A. Established Exhaustion Principles Require Compliance With Applicable Procedural Rules, Including Filing Deadlines.

In requiring exhaustion of administrative remedies under § 1997e(a), Congress invoked a principle that has an established legal meaning: under the "ordinary 'exhaustion' or 'waiver' rule" in administrative law, "a reviewing court will not consider arguments that a party failed to raise in a timely fashion" before the administrative agency. *Sims v. Apfel*, 530 U.S. 103, 114-15 (2000) (Breyer, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (holding that, "as a general rule," courts should not disturb administrative decisions "unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice"); *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002) (observing that the concept of exhaustion in administrative law "means using all steps that the agency holds out, and doing so *properly*" (emphasis in original)). While it is true that in the administrative-law realm a federal court reviews an administrative decision rather than deciding a claim *de novo*, Resp. Br. 24, this distinction has no bearing on how Congress would have understood the meaning of the term "exhaust" in § 1997e(a). As the court of appeals itself noted, proponents of the PLRA

sought to bring § 1997e's exhaustion requirement "'more into line with administrative exhaustion rules that apply in other contexts.'" Pet. App. 6 (quoting *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866, S. 930, H.R. 667 Before the Senate Comm. on the Judiciary*, 104th Cong. 20-21 (1995) (statement of Associate Attorney General John R. Schmidt)). And as Respondent acknowledges, administrative-exhaustion rules in other contexts include an "ordinary waiver principle." Resp. Br. 24. Under the PLRA, Congress mandated exhaustion of administrative remedies without indicating any intent to deviate from the established meaning of exhaustion in the administrative-law context. *See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

Similarly, despite this Court's recognition of the historic, technical distinction in federal habeas between the interrelated concepts of exhaustion and procedural default, Resp. Br. 16-22, the exhaustion doctrine in modern habeas law has nonetheless always been accompanied by a requirement that prisoners comply with state procedural rules. Even before the enactment of the PLRA, this Court consistently held in the habeas context that the necessary consequence of a failure to satisfy state filing deadlines or other procedural rules is that a subsequent federal action is barred. *E.g., Coleman v. Thompson*, 501 U.S. 722, 727, 757 (1991) (holding that action in federal habeas was barred by untimely state notice of appeal); *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977) (barring federal-habeas action for noncompliance with state contemporaneous-objection rule); *Francis v. Henderson*, 425 U.S. 536, 540 (1976) (barring federal-habeas action because state claim of grand jury discrimination was untimely). And more recently, this Court explicitly confirmed the "inseparability" of the exhaustion and procedural-default concepts when it observed that the purposes of the habeas statute's exhaustion requirement would be "utterly defeated" if prisoners were permitted to

obtain federal habeas review simply by letting the time run on state remedies. *Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Indeed, the court of appeals in this case acknowledged the "merger of exhaustion with procedural default," Pet. App. 14, but simply disagreed that the habeas analogy informed the proper interpretation of the PLRA's exhaustion requirement, Pet. App. 14-16. It would be illogical to assume, as Respondent argues, that in enacting the PLRA, Congress adopted a meaning of exhaustion from the federal-habeas context that this Court itself has not relied on to determine the outcome of its habeas decisions.

Moreover, Respondent and his *amici* have failed to identify any other context in which the rule of untimely "exhaustion" that they propose is sufficient. Accordingly, if Respondent and his *amici* are correct in their interpretation of § 1997e(a), then the *only* context in which untimely exhaustion would open the door to a federal action would be under the PLRA – a highly implausible result, especially in light of the fact that Congress enacted the PLRA's exhaustion requirement for the specific purpose of putting a stop to abusive lawsuits. Respondent and his *amici* also cannot explain why Congress would have enacted an exhaustion requirement that enables a prisoner to wait nearly two years[1] – or longer if the statute of limitations is longer – to begin "exhausting" administrative remedies, with the virtually certain result that the prison will reject the claims as untimely. In other words, "Congress could not have intended a definition of exhaustion that routinely

[1] In California, the statute of limitations for personal injury actions, and thus for § 1983 actions, is two years. Cal. Code Civ. Proc. § 335.1; *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985). This limitations period, however, may be tolled for an additional two years if, at the time the plaintiff's cause of action accrued, he was serving a prison sentence on a criminal conviction for a term "less than for life." Cal. Code Civ. Proc. § 352.1(a). Therefore, for the majority of prisoners in California, the applicable statute of limitations is four years.

permits claims to reach the federal courts without the benefit of any prior consideration on the merits." *Thomas v. Woolum*, 337 F.3d 720, 750 n.8 (6th Cir. 2003) (Rosen, J., dissenting in part and concurring in judgment). For at least this reason, Respondent's argument that procedurally defective grievances that are properly rejected by prison officials satisfy the PLRA's exhaustion mandate cannot be right.

B. The Statutory Language Does Not Support a Rule of Untimely Exhaustion.

Respondent contends that the temporal nature of the word "until" in § 1997e(a)'s directive that no action shall be brought "until such administrative remedies as are available are exhausted" means that "the question to be answered is simply whether the prisoner can file suit now or must wait until later." Resp. Br. 11. But Congress's use of "until" is entirely consistent with Petitioners' position. As the United States correctly observed, the word "until" – meaning "before the time that," *Webster's Third New International Dictionary* 2513 (1993) – encompasses the possibility that the "time" of exhaustion will never arrive because of an inmate's procedural default. *See* U.S. Br. 13-14; *see also A Dictionary Of Modern Legal Usage* 902 (2d ed. 1995) (stating that "the meaning of *until* swallows that of *unless* in most contexts"). Therefore, the fact that Congress chose "until" rather than "unless" may suggest nothing more than that Congress expected, in light of § 1997e(a)'s express directive, that inmates would properly avail themselves of the prison-administrative-grievance process. Respondent also insists that the present-tense "are exhausted" requires a focus on what, if any, remedies are available at the time the inmate seeks to file suit. Resp. Br. 12. Again, Congress's use of the word "are" is consistent with the rule advocated by Petitioners: that a prisoner may not file suit until administrative remedies

"are" *properly* exhausted. Resp. Br. 12. Furthermore, the force of Respondent's arguments concerning the necessary meaning of "until" and "are" is undercut by Respondent's later contention that, even though the habeas exhaustion requirement employs the words "unless" and "has" rather than "until" and "are," it nonetheless is also only a timing rule. Resp. Br. 16 n.5.

Respondent further argues that § 1997e(c)(2) of the PLRA,[2] which provides that a court may dismiss a prisoner's facially deficient claims without first requiring exhaustion, shows that Congress did not intend to require an inmate's compliance with administrative rules. Resp. Br. 13-14. This provision, however, does nothing to undermine Petitioners' position that the PLRA's exhaustion mandate requires "proper" exhaustion. As an initial matter, § 1997e(c)(2) does not necessarily reflect a judgment by Congress that dismissal without first requiring exhaustion would always save the courts time and resources. Resp. Br. 14. Rather, the provision may reflect only that Congress wished to afford a district court the discretion to choose between which basis for dismissal – either on exhaustion grounds or because of the facial deficiencies of the complaint – it determined would be the best course in a particular case. This option recognizes the strong public policy favoring resolution of cases on their merits.

In addition, Respondent is incorrect that the savings in time and resources contemplated by § 1997e(c)(2) would only be realized if Congress assumed that dismissal for non-exhaustion would permit the inmate to re-invoke prison grievance proceedings, "exhaust" an untimely grievance, and then return to federal court. Resp. Br. 14.

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[2] 42 U.S.C. § 1997e(c)(2) states: "In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies."

First, it is possible that at the time a district court rules on a complaint the prisoner would still be able to properly exhaust – either because the administrative filing deadline has not yet expired, or because the prisoner is able to receive an extension of time to submit his grievance. Second, assessing the exhaustion question is almost always a more onerous task for the courts than reviewing the face of the complaint for merit. This is because courts dismiss facially invalid claims based solely on a review of the allegations of the complaint, whereas in order to determine whether exhaustion has been accomplished they must often evaluate and weigh evidence. For example, in the Ninth Circuit, non-exhaustion is an affirmative defense that the defendants must plead and prove. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). Unless the plaintiff concedes a failure to exhaust, the defendants must produce evidence in support of their affirmative defense. *Id.* at 1120 (holding from a review of the record that defendants failed to meet burden of showing that plaintiff did not exhaust administrative remedies). Moreover, when a district court looks beyond the pleadings to decide exhaustion – a procedure that the Ninth Circuit recognizes is "closely analogous to summary judgment" – it must further afford the plaintiff an opportunity to "develop a record." *Id.* at 1120 n.14. Non-exhaustion is also an affirmative defense in at least five other circuits. *See id.* at 1117 (citing decisions out of the Second, Third, Seventh, Eighth, and D.C. Circuits). Therefore, even if an inmate's failure to exhaust bars him from proceeding with his federal action because he defaulted on administrative remedies, it is still frequently far less burdensome and time-consuming for a court to review the face of the complaint for meritless allegations than to evaluate and weigh evidence in a summary-judgment-like proceeding to determine non-exhaustion.

C. Section 1997e's Legislative History Supports the Conclusion that Congress Intended the PLRA's Exhaustion Mandate to Require "Proper" Exhaustion.

Respondent also accuses Petitioners and the United States of "attempting to incorporate" into the PLRA's legislative history this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992) (holding that a federal prisoner suing federal prison officials for money damages did not have to exhaust administrative remedies). Resp. Br. 37. However, in *Booth v. Churner,* 532 U.S. 731, 739 (2001), this Court itself treated *McCarthy* as a part of the "statutory history" of the PLRA's exhaustion requirement. In holding that the PLRA mandates exhaustion regardless of the relief offered through prison grievance procedures, this Court presumed that Congress had *McCarthy* in mind when it invigorated § 1997e(a). *Id.* at 740-41. Indeed, Representative LoBiondo's express reference to *McCarthy* during the congressional debates on the PLRA confirms this fact. 141 Cong. Rec. H14078-02, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo). Accordingly, what this Court said in *McCarthy* is highly relevant to congressional intent behind the PLRA's exhaustion provision. And the Court observed in *McCarthy* as one of the two grounds for its conclusion that it would not understand the former § 1997e (part of the Civil Rights of Institutionalized Persons Act, or CRIPA) to require exhaustion in the absence of a clear congressional mandate, that an exhaustion requirement would create a "risk of forfeiture" of the prisoner's claims for failure to comply with administrative deadlines. *McCarthy v. Madigan*, 503 U.S. 140, 152 (1992). Because of this risk of forfeiture, the Court held that such deadlines counsel against "exhaustion as a prerequisite to the filing of a federal-court action." *Id.* at 153. With the enactment of the PLRA, however, Congress removed from § 1997e the discretionary language upon which this Court expressly relied to hold in *McCarthy* that exhaustion was not automatically required, and could thus

be dispensed with even "if an inmate fails to meet filing deadlines under an administrative scheme," *id*. at 150, and replaced that language with a firm exhaustion directive, 42 U.S.C. § 1997e(a) (2000). In so doing, Congress "presumably understood" that under *McCarthy* such an express exhaustion requirement would necessitate compliance with administrative filing deadlines. *Booth*, 532 U.S. at 740.

In light of the presumption that Congress legislated with a full awareness of *McCarthy*, the ACLU's argument that Congress did not contemplate a default-inducing exhaustion rule under the CRIPA misses the point. ACLU Br. 12-29. When Congress enacted the PLRA, it was not revising the exhaustion provision in a vacuum, but was *responding to* the *McCarthy* decision. Moreover, contrary to Respondent's contention, there is no suggestion in either *McCarthy* or the government's brief in that case (including the portion of the brief cited by the ACLU) that the rule of exhaustion "proposed" by the government was anything other than a general rule that federal prisoners must exhaust administrative remedies. Resp. Br. 37-38; ACLU Br. 10 & n.2. In other words, it was not the government, but rather the Court itself that introduced the concept of "forfeiture," *McCarthy*, 503 U.S. at 152, into the discussion of the "doctrine of exhaustion of administrative remedies," *id.* at 144.

Furthermore, the CRIPA's express limitation on the exhaustion obligation under § 1997e(a)(1) instructing the courts to merely "continue" a case for a limited time to permit exhaustion – even if filing deadlines have passed – suggests that Congress has always understood that, under a *normal definition* of exhaustion, a failure to comply with filing deadlines would require dismissal of the case. Although under the CRIPA Congress may have concluded that "untimely exhaustion would suffice," ACLU Br. 13 n.5, the CRIPA scheme is "now a thing of the past," *Booth*, 532 U.S. at 739. That is, it was the CRIPA's limiting

language in § 1997e(a)(1) that converted a normal exhaustion regime into one in which the forfeiture of a claim for non-exhaustion was precluded. With the enactment of the PLRA, however, Congress removed that limiting language, replacing the CRIPA's qualified exhaustion provision with an ordinary exhaustion rule.

Finally, contrary to Respondent's and his *amici*'s contentions, statements by congressional proponents of the PLRA that they did not want to prevent inmates from raising legitimate claims in court are consistent with an intent to require "proper" exhaustion. *See* Resp. Br. 36-37; ACLU Br. 24. First, that these legislators understood that the PLRA would not preclude certain claims – those that are *meritorious* – suggests that they simultaneously contemplated that other claims – those that are unmeritorious – would, in fact, be barred. And second, under a rule of "proper" exhaustion, meritorious claims *will* reach the federal courts, as long as prisoners file their grievances in conformity with prison administrative rules.

D. Congress's Purposes in Enacting § 1997e(a) Are Evidence of Congress's Intent to Require Proper Exhaustion.

Respondent argues that "in the absence of evidence that Congress actually *intended* a particular provision, this Court cannot add the provision on the theory that the statute's purposes would be better served" thereby. Resp. Br. 39. But a statute's purpose is evidence of congressional intent, and the purposes of the PLRA's exhaustion provision are undisputed. This Court identified § 1997e(a)'s purposes in both *Booth* and *Porter*, and expressly relied on them in *Porter* in interpreting the meaning of the provision. *Booth v. Churner*, 532 U.S. 731, 737 (2001); *Porter v. Nussle*, 534 U.S. 516, 524-25, 528 (2002). Those purposes are to enable prison officials to: investigate and respond to inmate complaints, and thereby potentially obviate the

need for litigation; screen out claims that are frivolous or do not rise to the level of a constitutional violation; and create a factual record that would be beneficial in the event that litigation ultimately ensues. *Porter*, 534 U.S. at 524-25. Accordingly, contrary to Respondent's assertion, there is ample evidence in these objectives to support the conclusion that Congress intended the PLRA's exhaustion requirement to compel compliance with available administrative procedures, including filing deadlines.

Moreover, Respondent's contention that the statute's lack of an express reference to a procedural-default mechanism constitutes an "omission" rests on the assumption that Congress did not understand the term exhaustion to mean "proper" exhaustion in the first instance. Resp. Br. 40. As previously noted, however, this assumption is insupportable in light of: (1) the fact that established exhaustion principles in the administrative law and federal habeas contexts require "proper" exhaustion; (2) the fact that Congress sought under the PLRA to bring exhaustion for prisoner suits "more into line with administrative exhaustion rules that apply in other contexts," Pet. App. 6; (3) the absence of any other context in which untimely "exhaustion" is sufficient; and (4) and the legislative history of § 1997e demonstrating that Congress was aware of this Court's assumption that an exhaustion requirement for prisoner suits would entail "proper" exhaustion.

Neither Petitioners nor their *amici* contend that the *sole* purpose of the PLRA's exhaustion mandate is "to reduce the volume of frivolous prisoner litigation." Resp. Br. 40. As noted above, the main purposes of the statute are to afford correctional officials the "time and opportunity" to fully investigate and respond to prisoner complaints internally so as to obviate the need for litigation, screen out frivolous claims, and develop an administrative record that would be useful in litigation that is not precluded. *Porter*, 534 U.S. at 525. Those are the purposes that are undermined by the interpretation proposed by Respondent.

Moreover, Respondent's attempts to explain away the inadequacy of a rule permitting an inmate to file a grievance at any time – even if months or years after the event – fall short in light of Congress's statutory objectives. First, Respondent's suggestion that an inmate who is deliberately waiting out the expiration of the applicable filing deadline would miraculously change his mind and decide not to "file suit" rings hollow. Resp. Br. 43. The inmate intent on manipulating the appeals process is the one invariably most determined to get into federal court regardless of whether his claims have any merit. Second, the argument that the discretion afforded to prison officials in some states to hear untimely grievances translates into a remedy that is "available" to the inmate is misconceived – such a remedy is only available *after* prison officials have chosen to exercise that discretion, a result that is largely the exception rather than the rule. Resp. Br. 43-44. Furthermore, prison officials are unlikely in most instances to have the time and resources to hear an untimely grievance. This is especially true if the grievance is submitted so late that evidence, witnesses, and recollections are no longer available. In addition, an "opportunity" to hear a grievance presented months after the filing deadline is, in many instances, not the least bit meaningful. In this case, for instance, Mr. Ngo's untimely filing wholly deprived prison officials of *any* opportunity to provide "redress" for his contested placement in administrative segregation because that confinement had ended six months earlier. Resp. Br. 44. Moreover, this "some opportunity" argument depends on state regulations actually permitting prison officials the option of waiving filing deadlines, something that not all state regulations do. *See* States' Br. 9-10. Third, the "effort of . . . proceeding through the system" following the rejection of an untimely grievance that Respondent cites as a "cost" to the prisoner that may dissuade him from filing suit is largely illusory. Resp. Br. 44. For example, in this case, the court of appeals held that Mr. Ngo had exhausted under the PLRA by filing a second appeal at the first formal level of review

that was rejected as untimely. Pet. App. 9; J.A. 31-35. That is, Mr. Ngo was found to have exhausted following an effort far more minimal than proceeding through all four levels of review mandated under California regulations.[3] Furthermore, Congress "believed there would be benefit to requiring the filing of a grievance" even when the specific relief sought by the inmate would not be granted, Resp. Br. 44, presumably because of the inherent value in the "fact of being heard" *on the merits* and "prompting administrative change" – neither of which results from the pro forma task of appealing the rejection of a grievance that was screened out on procedural grounds, *Booth*, 532 U.S. at 737.

E. The Habeas Analogy Favors Petitioners' Position Because the Policy Reasons Underlying this Court's Conclusion that the Federal-Habeas Exhaustion Requirement Compels Compliance With State Procedural Rules Are Similarly Present Here.

Petitioners do not suggest that the law of federal habeas is analogous in every respect to the present context, nor could they. *See* Resp. Br. 46. The habeas analogy supports Petitioners' position because this Court has found in that context that an exhaustion requirement, in order to have any force or effect, must be understood to require compliance with state filing deadlines and other procedural requirements. *Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Moreover, it is ultimately because state procedural rules serve "important interests" that would be undermined if prisoners were permitted to routinely bypass

[3] If prison rules had not permitted Mr. Ngo to contest the rejection of his first grievance by filing a second appeal, presumably the Ninth Circuit would have held that Mr. Ngo had exhausted following the rejection of the initial appeal since he would have been able to "go no further in the prison's administrative system." Pet. App. 9.

them that this Court has held that the habeas exhaustion requirement compels compliance with those rules. *Coleman v. Thompson*, 501 U.S. 722, 745 (1991); *see also O'Sullivan*, 526 U.S. at 848; *Edwards*, 529 U.S. at 453. As in the habeas context, Congress enacted the PLRA's exhaustion mandate in order to protect what, in its judgment, are the important interests to be served by prison administrative procedures. *See Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). And as with the habeas exhaustion requirement, both this mandate and the interests that it is designed to serve would be wholly frustrated if inmates were permitted to "'exhaust' state remedies by spurning them." *Pozo v. McCaughtry*, 286 F.3d 1022, 1023 (7th Cir. 2002).

Furthermore, on a more particularized level, the habeas analogy is favorable to Petitioners' position because this Court's recognition that the exhaustion and procedural-default concepts are "inseparab[le]," *Edwards*, 529 U.S. at 452, is based in part on the comity considerations that counsel that the federal courts should afford the state courts a "full and fair opportunity" to address a prisoner's federal claim, *O'Sullivan*, 526 U.S. at 845 – considerations that similarly animate the PLRA's exhaustion requirement. Just as the states have a compelling interest in being afforded the chance to correct their own errors in the administration of justice, they similarly have an interest in not being bypassed in the correction of the internal problems of their prisons since those problems "involve issues so peculiarly within state authority and expertise." *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). Moreover, to the extent that this Court has located the procedural-default bar in the adequate-and-independent state ground doctrine, it has further explained that the doctrine's application in federal habeas is not jurisdictional, but is grounded in the same "concerns of comity and federalism" that underlie the statute's exhaustion requirement. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991); *see also Dretke v. Haley*, 541 U.S. 386, 392-93

(2004). Thus, the type of policy considerations that justify the rule that the federal-habeas-exhaustion mandate compels compliance with state procedural requirements are largely present under § 1997e(a).

By contrast, the statutory schemes at issue in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), and *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988), are not analogous to the PLRA's exhaustion provision. Resp. Br. 45-46. The commencement requirements of the ADEA and Title VII statutes, distinctly *unlike* the exhaustion requirement of § 1997e(a), have the circumscribed purpose of providing "state agencies a limited opportunity to settle . . . grievances . . . in a voluntary and localized manner." *Oscar Mayer*, 441 U.S. at 761. By contrast, Congress "set the bar a good deal higher in § 1997e(a)." *Thomas v. Woolum*, 337 F.3d 720, 756 (2003) (Rosen, J., dissenting in part and concurring in judgment). Section 1997e(a) *does* "stipulate an exhaustion requirement," *Oscar Mayer*, 441 U.S. at 761, and Congress intended to do much more with that mandate than give prison officials a "limited opportunity" to address inmate grievances on what is otherwise their inevitable path to federal court. Rather, Congress intended to alleviate the crushing burden of prisoner litigation on the federal courts by funneling prisoner complaints back into the administrative-review process, where they could be thoroughly investigated by prison officials with the goal that they would either be rectified or screened out.

F. Respondent's Various Policy Concerns Cannot Overcome Congress's Intent Under the PLRA's Exhaustion Requirement.

Respondent's reliance on "the long-standing principle that statutes should not be construed to give state authorities the ability to defeat federal civil rights claims by controlling statutes of limitations or procedural rules" is misplaced. Resp. Br. 28. The caselaw Respondent cites for this principle concerns *state* statutes that are "inconsistent with *Congress'* . . . aims." *Felder v. Casey*, 487 U.S. 131,

140 (1988) (emphasis added); Resp. Br. 28-29 (citing *Felder*, 487 U.S. at 138 (state notice-of-claim statute); *Wilson v. Garcia*, 471 U.S. 261, 279 (1985) (state limitations periods); *Burnett v. Grattan*, 468 U.S. 42, 50 (1984) (state administrative limitations period); and *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (state immunity defense)). In this case, however, the PLRA is a statute that was enacted by *Congress*, and therefore it is Congress's aims with the PLRA that are dispositive. With the enactment of the PLRA, Congress has clearly manifested its intent to "place conditions on the vindication of a federal right," *Felder*, 487 U.S. at 147, by replacing the general rule of non-exhaustion under § 1983 with a general rule of exhaustion for all federal prisoner suits, including § 1983 actions. *See Porter v. Nussle*, 534 U.S. 516, 525 n.4 (2002). Therefore, unlike in *Felder*, where this Court held that the state-law requirement in question violated Congress's purposes in enacting § 1983, *Felder*, 487 U.S. at 147, the position advocated by Petitioners in this case is entirely consistent with Congress's separate purposes under § 1997e(a).

Furthermore, the language and history of § 1997e(a) support the conclusion that when Congress imposed the exhaustion mandate, it intended to afford the States discretion to establish governing rules of administrative procedure. Under the former version of § 1997e, Congress mandated that prison administrative remedies be "plain, speedy, and effective," and satisfy specified "minimum standards." 42 U.S.C. § 1997e(a), (b) (1994). By contrast, with the enactment of the PLRA, Congress repealed these federal-standards provisions, conditioning the exhaustion obligation solely on the requirement that administrative remedies be "available." 42 U.S.C. § 1997e(a) (2000). "It would be anomalous, to say the least, to refuse to give effect to the very rules that the PLRA encourages state prison authorities to enact." *Spruill v. Gillis*, 372 F.3d 218, 231 (3d Cir. 2004). It is not surprising that Congress would defer the establishment of administrative-review procedures to state prison officials in light of the "substantial

deference" that this Court itself accords to their "professional judgment" in determining the most appropriate means to accomplish legitimate state correctional goals.[4] *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *see also Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989).

Furthermore, Respondent's equation of an administrative-filing deadline with a statute of limitations is overstatement. Resp. Br. 29. Properly satisfying an administrative-filing deadline is invariably a far less demanding and complex task than filing a legally sufficient complaint. *See Burnett v. Grattan*, 468 U.S. 42, 50-51 (1984) (describing the numerous obligations required in initiating civil-rights litigation). Under California's regulations, for instance, an inmate need only "describe the problem and action requested." Cal. Code Regs. tit. 15, § 3084.2(a). Not surprisingly, therefore, in this case there is no suggestion in the record that Mr. Ngo's many-month delay in submitting an administrative appeal was attributable in any way to difficulties he confronted in complying with this requirement. Indeed, as Justice O'Connor observed in response to a similar argument from the concurrence in *Felder v. Casey*, "it would have been easier to file the required [appeal form] than to file this lawsuit, which [Respondent] proved himself quite capable of doing." 487 U.S. 131, 162 (1988) (O'Connor, J., joined by Rehnquist, C.J., dissenting).

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[4] Respondent's citation to *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 762 (1979), for the proposition that Congress "could not have intended to consign federal lawsuits to the vagaries of diverse state limitations statutes" actually undermines Respondent's position. Resp. Br. 29 n.16. This is because this Court based this assessment of Congress's intent primarily on the fact that the statutory language at issue contained a commencement requirement, and did *not* "stipulate an exhaustion requirement." *Oscar Mayer*, 441 U.S. at 761.

Notwithstanding that Respondent's policy argument concerning the "potential for abuse" by prison administrators in fashioning administrative filing requirements bears no relation to the central question of congressional intent under the PLRA, this concern lacks merit. Resp. Br. 30. First, the assumption that prison officials would seize on the purported opportunity to create draconian filing deadlines ignores the fact that prisons themselves have an inherent interest in ensuring that inmates are able to fully avail themselves of the administrative-grievance process. Prompt notice of improper conditions and practices permits prison officials to take corrective action, thereby improving prison administration and reducing the likelihood of litigation. It also enables them to create factual records that are beneficial in settling claims or defending against them in court. *See Porter*, 534 U.S. at 524-25. The circumstances surrounding the case of *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), to which Respondent and his *amici* point as a "striking example" of prison officials using administrative rules to "torpedo prisoner claims on procedural grounds" in fact show no such thing. Resp. Br. 31; *see also* Law Professors' Br. 16-17. That state prison officials would wish to require factual details in prisoner grievances is eminently reasonable in light of the principal purposes of the administrative-appeals process in affording prison administrators the opportunity to investigate an inmate's claims, to create a factual record, and to obviate the need for litigation. If the requirement of factual specificity in administrative filings were indeed as onerous as Respondent and his *amici* suggest, presumably the Seventh Circuit would not have invited Illinois officials to establish such a requirement. *See Strong*, 297 F.3d at 650. Second, in many states, prison rules of administration are promulgated as state regulations or administrative codes. *See* Jerome N. Frank Br. 7-12 nn.5-13. In California, as state regulations, prison administrative rules are the product of a deliberative and public process that must conform to established legal requirements. *See* California Department of Corrections and Rehabilitation, Regulation and Policy

Management Branch, Correctional Standards Authority, http://www.cdcr.ca.gov/BudgetRegs/RPMB.html.

Respondent also offers up this case as a purported illustration of prison officials' improper application of procedural rules to eliminate a prisoner's claims by suggesting that Mr. Ngo's grievances were timely under a "continuing" violation theory because Mr. Ngo challenged "ongoing restrictions" on his activities. Resp. Br. 31 (internal quotation marks omitted). However, "normal [legal] principles" in fact demonstrate just the opposite. Resp. Br. 31. This Court has held that the "present effect[s]" of an alleged past illegal act do not prolong the life of a claim. *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (internal quotation marks omitted). Instead, for purposes of determining the commencement of a limitations period, "'[t]he proper focus is upon the time of the [unlawful] *acts*, not upon the time at which the *consequences* of the acts became most painful.'" *Id.* (emphasis in original) (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (9th Cir. 1979)). In this case, the only act Mr. Ngo alleged with respect to the program-exclusion aspect of this action (as opposed to his separate claim that he was improperly placed in administrative segregation for a limited period) was the one-time decision on December 22, 2000 to restrict his access to certain prison programs, J.A. 4-8 – a decision that was made about six months before Mr. Ngo filed his first appeal on June 18, 2001.[5] J.A. 26-28; *see Ricks*, 449 U.S. at 257-58 (holding that the plaintiff's discriminatory-discharge action was untimely

[5] In his second appeal, submitted June 25, 2001, Mr. Ngo contended that he sought "informal resolution" of his program-exclusion claim by "writing to" Defendant Kane on March 20, 2001. J.A. 34. However, even if Defendant Kane's April 13, 2001 response to Mr. Ngo's inquiry were to constitute a separate "act" triggering anew the running of the administrative-filing period, Mr. Ngo's first appeal was still over a month-and-a-half too late. *See* J.A. 30-31.

because the complaint failed to allege any unlawful acts that occurred within the applicable limitations period).

Respondent's additional policy concern that it would be particularly unfair to hold prisoners to procedural requirements because they are laymen in the law, Resp. Br. 32-33, cannot be reconciled with this Court's rule that actions in federal habeas – in which the inmate's liberty, and possibly life, are at stake – may be forfeited by a state procedural default even though there is no constitutional right to counsel in such proceedings. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 727, 757 (1991) (holding that an inmate facing a death sentence had procedurally defaulted his federal-habeas action by missing state appeal deadline by three days). Furthermore, the fact that Congress has mandated exhaustion under the PLRA demonstrates that it was Congress's considered judgment that the objectives to be achieved through such a requirement in the specific context of federal prisoner litigation outweighed any possible competing policy considerations.

Finally, Respondent's argument that Congress must have intended to permit untimely exhaustion under the PLRA because of Congress's previously evidenced concern in the CRIPA for the "fairness and adequacy" of state procedures fails to account for Congress's predominant motivation in enacting the new exhaustion mandate. Resp. Br. 34. Under the PLRA, Congress sought to entirely revamp § 1997e in order to "reduce the quantity and improve the quality of prisoner suits" by redirecting inmate grievances from the courts back into the administrative-review process where prison officials would have the time and opportunity to thoroughly evaluate and respond to those grievances and thereby obviate the need for litigation. *Porter*, 534 U.S. at 524-25. An exhaustion rule requiring compliance with state filing deadlines directly facilitates those objectives, whereas the rule of untimely "exhaustion" advocated by Respondent thwarts them.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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