No. 05-416

In the Supreme Court of the United States

JEANNE S. WOODFORD, ET AL., PETITIONERS

v.

VIET MIKE NGO

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a prisoner satisfies the exhaustion requirement of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a), by filing an untimely or otherwise procedurally defective administrative appeal.

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INTEREST OF THE UNITED STATES

This case presents the question whether a prisoner satisfies the exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(a), by filing an untimely or otherwise procedurally defective administrative appeal. The United States has a substantial interest in the resolution of that question. Pursuant to its authority to manage federal prisons, the Bureau of Prisons (BOP) has adopted an administrative remedy program through which inmates may seek review of issues relating to their confinement. See 28 C.F.R. 542.10 *et seq.* That program imposes time limitations and other procedural requirements on the filing of administrative claims. See 28 C.F.R. 542.14, 542.15. Inmates frequently name BOP officials as defendants in actions arising from conditions of confinement in federal correctional institutions, and the PLRA's exhaustion requirement applies to those suits. See *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). The Court's decision in this case will therefore affect both the efficacy of the BOP's administrative remedy program and the

conduct of litigation against BOP officials. The United States participated as an amicus curiae in each of this Court's prior cases addressing the proper interpretation of the PLRA's exhaustion provision. *Porter*, *supra*; *Booth* v. *Churner*, 532 U.S. 731 (2001).

STATEMENT

1. "Litigation challenging the conditions and practices in prisons * * * is a relatively recent phenomenon. Until the 1960s, courts adopted a 'hands-off' approach to prison cases." Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. Pa. L. Rev. 639, 659 (1993). When prisoner litigation first began to proliferate, state prisoners alleging constitutional violations were not required to exhaust administrative remedies before filing suit in federal court. See *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971) (per curiam). That rule was changed in 1980, when Congress enacted the Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, 94 Stat. 349, which included a "limited exhaustion requirement" for prisoner suits, *McCarthy* v. *Madigan*, 503 U.S. 140, 150 (1992). The CRIPA authorized a district court to stay an action under 42 U.S.C. 1983 for a specified period while the prisoner exhausted "such plain, speedy, and effective administrative remedies as are available," but only if the administrative remedies met certain federal standards and the court believed that exhaustion was "appropriate and in the interests of justice." CRIPA § 7(a), 94 Stat. 352. The rule was changed again in 1996, when Congress enacted the PLRA, which "address[ed] the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners." 141 Cong. Rec. 26,548 (1995) (statement of Sen. Dole). The PLRA addressed that problem in a number of

ways, including by "invigorat[ing] the exhaustion prescription." *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002).[1]

The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, 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). That exhaustion provision "differs markedly" from the CRIPA's. *Porter*, 534 U.S. at 524. Exhaustion is now mandatory rather than discretionary; a prisoner must now exhaust all available remedies, not just those that meet federal standards and are "plain, speedy, and effective"; and the requirement now applies to federal as well as state prisoners. See *ibid.* This Court has interpreted the PLRA's exhaustion provision in two recent cases, unanimously rejecting, on both occasions, narrow interpretations of that provision as inconsistent with Congress's intent. See *Booth* v. *Churner*, 532 U.S. 731 (2001) (prisoner seeking only money damages must exhaust administrative remedies that provide some form of relief, even if they do not provide monetary relief); *Porter*, *supra* (exhaustion requirement applies to all suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong).

2. Respondent is a California prisoner who is serving a life sentence. In October 2000, while incarcerated at San Quentin State Prison, he was placed in administrative segre-

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[1] See H.R. Rep. No. 21, 104th Cong., 1st Sess. 7 (1995) (bill "addresses the problem of frivolous [prisoner] lawsuits" by, *inter alia*, "requir[ing] that all administrative remedies be exhausted prior to a prisoner initiating a civil rights action in court"); 141 Cong. Rec. at 4275 (statement of Rep. Canady) (bill "significantly curtail[s] the ability of prisoners to bring frivolous and malicious lawsuits by forcing prisoners to exhaust all administrative remedies before bringing suit in Federal court"); *id.* at 35,624 (statement of Rep. LoBiondo) ("[a]n exhaustion requirement * * * would aid in deterring frivolous claims") (quoting letter from former Attorney General Richard Thornburgh).

gation for engaging in "inappropriate activity" with volunteer priests. In December 2000, he was returned to the general population, but, as a consequence of the "inappropriate activity," his participation in certain programs was limited and he was prohibited from corresponding with a former San Quentin Catholic Chapel volunteer. Approximately six months later, in June 2001, respondent appealed that disciplinary action to prison officials. The prison's appeals coordinator rejected the appeal as untimely, because respondent had not filed it within 15 working days of the action being challenged, as the applicable California regulations require. Approximately one week later, respondent filed a second appeal, which was also rejected as untimely. Pet. App. 2-3, 23.[2]

3. Respondent then sued petitioners and other prison officials under 42 U.S.C. 1983 in the United States District Court for the Northern District of California, challenging the same disciplinary action that was the subject of his untimely administrative grievance. Pet. App. 3, 22-23. Respondent alleged violations of his free-speech, free-exercise, and due-process rights, and also asserted a claim of defamation under state law. *Ibid.* The district court granted the defendants' motion to dismiss. *Id.* at 22-26. It held that respondent had not "fully exhausted his administrative remedies," as the PLRA requires, because there are "several levels of appeal" within the California prison system and respondent had not proceeded beyond the first level. *Id.* at 24-25.[3]

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[2] The regulations provide that a prisoner "must submit [an] appeal within 15 working days of the event or decision being appealed," and that "[a]n appeal may be rejected" when the "[t]ime limits for submitting the appeal are exceeded" and the prisoner "had the opportunity to file within the prescribed time constraints." Cal. Code Regs. tit. 15, §§ 3084.6(c), 3084.3(c)(6) (2002).

[3] The levels of appeal established by the regulations are (1) the "informal level," at which the prisoner and staff involved in the action "attempt to resolve the grievance informally"; (2) the "first formal level," at which the decision is made by other staff; (3) the "second formal level," at which the decision is made by the head of the institution or the regional parole administrator; and (4) the

4. The court of appeals reversed. Pet. App. 1-21.

The court first held that "[t]he PLRA requires prisoners to exhaust all *available* remedies" and that respondent satisfied that requirement, because "he could go no further in the prison's administrative system" and thus "no remedies remained available to him." Pet. App. 9. The court then turned to petitioners' argument that respondent's failure to comply with the administrative filing deadlines constituted a failure to exhaust. The court rejected that argument, on the ground that it "confuses the doctrines of exhaustion and procedural default," *ibid.*, and held, instead, that "an untimely administrative appeal satisfies the PLRA's exhaustion requirement," *id.* at 11.

The court of appeals acknowledged that, under 28 U.S.C. 2254(b)(1)(A), a state prisoner petitioning for a writ of habeas corpus must exhaust available state-court remedies, and that this Court has interpreted that exhaustion requirement to encompass a procedural-default element that bars a state prisoner from filing a habeas corpus petition "even though he has technically exhausted his claims with an untimely habeas petition filed in state court." Pet. App. 14. The court of appeals concluded, however, that the PLRA's exhaustion provision should be interpreted differently. The court reasoned that a State's sovereignty is "less threatened" when a federal court reviews an action taken by a state prison than when it reviews a state court's criminal judgment. *Ibid.* The court also relied (*id.* at 15) on the fact that, whereas a state prisoner may not file a habeas corpus petition "unless" state-court remedies have been exhausted, 28 U.S.C. 2254(b)(1), a state prisoner may not file a Section 1983 action "until" administrative remedies have been exhausted, 42 U.S.C. 1997e(a). Finally, the court observed that, unlike the habeas corpus statute, which provides a standard for reviewing "state

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"third formal level," at which the decision is made by the Director of the Department of Corrections. Cal. Code Regs. tit. 15, § 3084.5(a)-(e) (2002).

court rulings on issues of fact and law," the PLRA "has no language instructing courts how to treat administrative findings." Pet. App. 15 (citing 28 U.S.C. 2254(d)).

The court of appeals rejected the contention that allowing a lawsuit to proceed despite the failure to make a timely request for administrative relief would remove the incentive for prisoners to file timely administrative claims, and thereby defeat the PLRA's objective of giving prison officials the first opportunity to resolve inmate grievances. The court believed that prisoners would continue to file timely claims, because administrative claims provide them with "an additional attempt to win a favorable ruling" and "the fastest route to a remedy." Pet. App. 16-17. The court also believed that, even if prisoners did not file timely claims, prison officials would still have the opportunity to resolve inmate grievances if they chose to consider the untimely claims.

Instead of construing the PLRA in the same manner that this Court has construed the habeas corpus statute, the court of appeals looked to cases involving claims in the employment context. See Pet. App. 18 (discussing *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979) (Age Discrimination in Employment Act of 1967), and *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107 (1988) (Title VII of the Civil Rights Act of 1964)). The court believed that those cases stand for the proposition that "administrative exhaustion does not include a procedural default component." Pet. App. 18. The court also believed that requiring timely exhaustion of administrative remedies would "penalize the less sophisticated and less informed" (*id.* at 19) and give prison administrators "an incentive to fashion grievance procedures which prevent or even defeat prisoners' meritorious claims" (*id.* at 21).

SUMMARY OF ARGUMENT

A prisoner does not satisfy the PLRA's exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal.

The Ninth Circuit's contrary decision is inconsistent with the PLRA's text. In the contexts in which the term "exhaustion" is most commonly employed—administrative law and habeas corpus—it is well-settled that the exhaustion of remedies means the *proper* exhaustion of remedies, including compliance with applicable filing deadlines. For example, this Court has made clear that an administrative decision should not be overturned unless the agency "erred against objection made at the time appropriate under its practice." *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). The Court has likewise made clear that, to "protect the integrity of the federal exhaustion rule" in habeas corpus cases, a court asks "not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 848 (1999) (internal quotation marks and citation omitted). The settled meaning of "exhaustion" in the contexts most analogous to the one here is therefore *proper* exhaustion, and under established principles of statutory construction, that is the meaning that Congress should be presumed to have intended when it used the term in the PLRA.

The Ninth Circuit's decision is also inconsistent with the PLRA's history. In *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), a pre-PLRA case, this Court declined to adopt an exhaustion requirement for suits by federal prisoners. The exhaustion rule in effect at the time was "limited," *id.* at 150, and applied only to state prisoners. In declining to adopt a requirement that was both stricter and applicable to federal as well as state prisoners, the Court in *McCarthy* assumed that, if either Congress or the Court *were* to adopt such a requirement (as Congress subsequently did in enacting the PLRA), it would not be satisfied if an inmate's administrative claim was denied as untimely. See *id.* at 150, 152-153. As this Court has recognized, the PLRA's exhaustion provision must be read in light of *McCarthy*, see *Booth* v. *Churner*, 532 U.S.

731, 739-741 (2001), and Congress should therefore be understood to have enacted the exhaustion requirement that this Court identified, but declined to adopt, in that case, cf. *id.* at 740.

Finally, the Ninth Circuit's decision is inconsistent with the PLRA's purposes. As this Court has recognized, Congress had three principal objectives in mind when it enacted the exhaustion requirement: enabling prisoners to obtain relief in the administrative process, thereby obviating the need for litigation; filtering out frivolous claims; and creating an administrative record. *Porter* v. *Nussle*, 534 U.S. 516, 525 (2002). The Ninth Circuit's rule frustrates each of those objectives. Cf. *id.* at 528. If the untimely filing of an administrative claim is not a bar to suit, prisoners will have little incentive to comply with limitation periods, the number of untimely claims will increase, and fewer administrative claims will be decided on the merits. In addition, allowing claims to reach federal court without having been timely presented to prison officials will increase the number of cases in which courts are acting as "the front-line agencies" for the resolution of prisoner complaints, a task for which they are "ill suited," *Procunier* v. *Martinez*, 416 U.S. 396, 405 n.9 (1974), overruled in part on other grounds by *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989); it will reduce inmates' incentive to bring dangerous conditions and abusive practices to the immediate attention of prison authorities; it will result in prisoners' naming their guards as defendants in more lawsuits, thereby exacerbating the tension that already exists in prisons; and it will damage the integrity of prison administration by allowing prisoners to ignore the requirements of grievance systems.

ARGUMENT

A PRISONER DOES NOT SATISFY THE PLRA'S EXHAUSTION REQUIREMENT BY FILING AN UNTIMELY OR OTHERWISE PROCEDURALLY DEFECTIVE ADMINISTRATIVE APPEAL

The PLRA prohibits an inmate from bringing an action that challenges prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). In two recent decisions, this Court has recognized the breadth of that provision. See *Porter* v. *Nussle*, 534 U.S. 516 (2002); *Booth* v. *Churner*, 532 U.S. 731 (2001). The question presented in this case is whether a prisoner satisfies the PLRA's exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal. As the majority of the courts of appeals to consider the question have held, the answer is no.[4] The Ninth Circuit's contrary conclusion is inconsistent with the PLRA's text, history, and purposes, and the policy considerations on which the Ninth Circuit relied cannot justify its decision.

A. The Ninth Circuit's Decision Is Inconsistent With The Text Of The PLRA

The legal contexts in which the term "exhaustion" of remedies is most commonly employed, and which are closest to the context of prison litigation, are (1) administrative law and (2) habeas corpus. As explained below, the term in those contexts refers to the *proper* exhaustion of remedies. That is

[4] See *Williams* v. *Comstock*, 425 F.3d 175 (2d Cir. 2005) (per curiam); *Johnson* v. *Meadows*, 418 F.3d 1152 (11th Cir. 2005), petition for cert. pending, No. 05-6336 (filed Sept. 8, 2005); *Spruill* v. *Gillis*, 372 F.3d 218 (3d Cir. 2004) (Becker, J.); *Ross* v. *County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004); *Pozo* v. *McCaughtry*, 286 F.3d 1022 (7th Cir.) (Easterbrook, J.), cert. denied, 537 U.S. 949 (2002). Only the Ninth Circuit, in this case, and the Sixth Circuit, in *Thomas* v. *Woolum*, 337 F.3d 720 (2003), have reached a contrary conclusion, and the Sixth Circuit did so over a forceful dissent, *id*. at 737-757 (opinion of Rosen, J.).

therefore the meaning that Congress should be presumed to have intended when it enacted the PLRA. "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Evans* v. *United States*, 504 U.S. 255, 260 n.3 (1992) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

1. The PLRA provision at issue requires the exhaustion of "administrative remedies." 42 U.S.C. 1997e(a). As the court of appeals recognized (Pet. App. 6), Congress enacted the provision to bring the exhaustion requirement for prisoner suits "into line with administrative exhaustion rules that apply in other contexts." *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 20 (1995) (statement of John R. Schmidt, Associate Attorney General). In "a variety" of other contexts analogous to this one, "untimely filings with administrative agencies do not constitute exhaustion of administrative remedies." *Galvez Piñeda* v. *Gonzales*, 427 F.3d 833, 838 (10th Cir. 2005). As Judge Easterbrook has explained, the concept of "exhaustion" in administrative law "means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Pozo* v. *McCaughtry*, 286 F.3d 1022, 1024 (7th Cir.), cert. denied, 537 U.S. 949 (2002).

That description of the law is consistent with decisions of this Court going back more than half a century. In *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952), for example, the Court stated a "general rule" of administrative procedure that has been frequently quoted since. "[C]ourts should not topple over administrative decisions," this Court said, "unless the administrative body not only has erred but has erred *against objection made at the time appropriate under its practice*." *Id.* at 37 (emphasis added). See also *Unemployment Comp. Comm'n* v. *Aragon*, 329 U.S. 143, 155 (1946); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).

That "waiver principle"—the "ordinary principle[] of administrative law" that "a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency"—has been described as an "ordinary 'exhaustion' or 'waiver' rule" and as one of "the basic 'exhaustion of remedies' rules." *Sims* v. *Apfel*, 530 U.S. 103, 114, 115, 118 (2000) (Breyer, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting).[5] Indeed, the language in *L.A. Tucker Lines* quoted above has been described as a statement of the exhaustion requirement itself. See, *e.g.*, *NLRB* v. *Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 458-459 (1st Cir. 2005); *Petroleum Communications, Inc.* v. *FCC*, 22 F.3d 1164, 1169 (D.C. Cir. 1994).

Consistent with that principle, statutes that require "administrative remedies" to be "exhausted" have been interpreted to require the *timely* presentation of claims to the agency. For example, 45 U.S.C. 355(f) provides that a benefits claimant may obtain judicial review of a final decision of the Railroad Retirement Board "only after all administrative remedies within the Board will have been availed of and exhausted," and the courts of appeals have uniformly concluded that that requirement is not satisfied if an administrative claim is rejected as untimely, see *Cunningham* v. *Railroad Ret. Bd.*, 392 F.3d 567, 572 (3d Cir. 2004); *Gutierrez* v. *Railroad Ret. Bd.*, 918 F.2d 567, 570 (6th Cir. 1990); *Mahoney* v. *Railroad Ret. Bd.*, 194 F.2d 752, 754-755 (7th Cir. 1952). Likewise, 8 U.S.C. 1252(d)(1) provides that a court may review a final order of removal "only if * * * the alien has exhausted all administrative remedies available to the alien as of right," and the courts of appeals have uniformly concluded that that requirement is not satisfied if an administrative claim is rejected as untimely, see, *e.g.*, *Galvez Piñeda*, 427 F.3d at 838; *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246,

[5] While the quoted language appeared in the dissenting opinion in *Sims*, "the Court [was] unanimous" on that "principle of administrative law." 530 U.S. at 112 (O'Connor, J., concurring in part and concurring in the judgment).

248 (5th Cir. 2004); *Sswajje* v. *Ashcroft*, 350 F.3d 528, 532 (6th Cir. 2003); *Bejar* v. *Ashcroft*, 324 F.3d 127, 132 (3d Cir. 2003).

2. a. The habeas corpus statute also has an exhaustion provision. It states, in relevant part, that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that * * * the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. 2254(b)(1)(A). As the court of appeals recognized, while "the habeas exhaustion requirement under § 2254 does not specifically mention procedural default," this Court has "grafted procedural default onto § 2254's exhaustion requirement"; there has, in effect, been a "merger of exhaustion with procedural default." Pet. App. 14. Accord *Spruill* v. *Gillis*, 372 F.3d 218, 228-229 (3d Cir. 2004); *Ross* v. *County of Bernalillo*, 365 F.3d 1185-1186 (10th Cir. 2004); *Thomas* v. *Woolum*, 337 F.3d 720, 745-751 (6th Cir. 2003) (Rosen, J., dissenting in part); *Pozo*, 286 F.3d at 1024.

As this Court has explained, the exhaustion requirement for habeas corpus cases "is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 845 (1999). The Court has made clear that that purpose would be "utterly defeated" if a state prisoner could obtain federal habeas corpus review either by "'letting the time run' so that state remedies were no longer available" or by "*present[ing]* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it." *Edwards* v. *Carpenter*, 529 U.S. 446, 453 (2000) (quoting *Boerckel*, 526 U.S. at 848). In either circumstance, "habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims." *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991). "To avoid this result, and thus protect the integrity of the federal exhaustion rule," this Court "ask[s] not only whether a prisoner has exhausted

his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts." *Boerckel*, 526 U.S. at 848 (internal quotation marks and citation omitted). In requiring the *proper* exhaustion of state-court remedies, the Court has made clear that the procedural-default rule "accompanies" the habeas corpus statute's exhaustion requirement, and that the two are "inseparab[le]." *Carpenter*, 529 U.S. at 452.

b. Except insofar as one requires exhaustion of administrative remedies, while the other requires exhaustion of state-court remedies, the PLRA's exhaustion provision is essentially identical to that of the habeas corpus statute. The Ninth Circuit nevertheless believed that the two provisions should be interpreted differently. That was error.

The court of appeals relied on the fact that, unlike the habeas corpus statute, which precludes relief "unless" other remedies have been exhausted, the PLRA precludes suit "until" other remedies have been exhausted. Pet. App. 15. But this Court has never suggested that the "inseparability of the exhaustion rule and the procedural-default doctrine," *Carpenter*, 529 U.S. at 452, is dependent on the conjunction "unless." Instead, the Court has relied on the fact that the purpose of the exhaustion requirement—giving state courts "a full and fair opportunity" to resolve federal claims, *Boerckel*, 526 U.S. at 845—would be "utterly defeated," *Carpenter*, 529 U.S. at 453, if exhaustion did not mean *proper* exhaustion.

In any event, the PLRA's use of "until," rather than "unless," does not support the Ninth Circuit's view that the PLRA's exhaustion provision merely "defers," and cannot "bar[]," a federal suit. Pet. App. 15. "Until" means "before the time that," *Webster's Third New International Dictionary* 2513 (1993); "unless" means "except on the condition that," *id.* at 2503. That a suit may not be filed "before the time that" other remedies are exhausted encompasses the possibility that the time of exhaustion will never arrive. That is the same as saying that "the condition" of exhaustion will

not be satisfied. There is therefore no basis for concluding that Congress meant to depart from the background rule of exhaustion in the administrative law and habeas corpus contexts simply because it used "until" rather than "unless."

The Ninth Circuit also thought it relevant that, unlike the habeas corpus statute, which provides "a standard of review for collateral re-examination of state court rulings on issues of fact and law," the PLRA has "no language instructing courts how to treat administrative findings." Pet. App. 15. But that distinction has no bearing on the issue of exhaustion. The provision of the habeas corpus statute relied upon by the court of appeals—28 U.S.C. 2254(d)—presumes that the federal claim has been "adjudicated on the merits in State court," and requires federal courts to accord deference to that adjudication unless the state court's decision was unreasonable. The habeas corpus statute contains no provision addressing the deference due to a state court's determination that a claim was untimely (which, in any event, will usually be undisputed). Thus, even assuming that, in determining that respondent's appeal was untimely, the prison's appeals coordinator resolved a "difficult legal issue," Pet. App. 15, the fact that "nothing in the PLRA directs federal courts to defer to such a legal conclusion," *ibid.*, does not distinguish the PLRA from the habeas corpus statute.[6]

The question whether a federal court must defer to a prison's interpretation of its regulations, moreover, is likely to arise even under the Ninth Circuit's interpretation of the PLRA. Timeliness aside, it is undisputed that *all* available administrative remedies must be exhausted, see Pet. App. 17, and there are likely to be cases in which an administrative claim is denied because the prisoner skipped a step in the process, see, *e.g.*, *Brewer* v. *Mullin*, 130 Fed. Appx. 264, 265-

[6] There is no reason for the PLRA to have a provision, like 28 U.S.C. 2254(d), that addresses the deference due to a prison administrator's decision on the *merits* of a grievance claim, because, as in other *Bivens* and Section 1983 actions, constitutional claims in prisoner suits are decided *de novo*.

266 (10th Cir. 2005); *Flakes* v. *Frank*, No. 04-C-189-C, 2005 WL 1276370, at *3 (W.D. Wis. May 26, 2005), and the federal court must decide how much deference, if any, should be given to the prison's determination of what the grievance procedure required. For example, California's regulations provide that an inmate need not seek relief at the "informal level" when the matter involves a "[s]erious disciplinary infraction[]" (Cal. Code Regs. tit. 15, § 3084.5(a)(3)(B)), and prison officials may deny relief to an inmate who did not seek relief at the informal level based on the conclusion that the matter at issue was not a serious disciplinary infraction.

Finally, the Ninth Circuit believed that the exhaustion provisions of the PLRA and habeas corpus statute should be interpreted differently because "[a] state's sovereignty" is "less threatened" when a federal court reviews an action taken by a state prison than when it reviews a criminal judgment of a state court. Pet. App. 14. Indeed, the court of appeals went so far as to say that interpreting the PLRA's exhaustion provision to require the timely presentation of administrative claims would serve "neither the interests of federalism nor comity." *Id.* at 19. That view is flatly contradicted by *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), where this Court explained that it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Id.* at 491-492. For that reason, the Court stressed that States "have an important interest in not being bypassed in the correction of [the internal] problems" of their prisons, and that "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors * * * also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Id.* at 492. Accord, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 362 (1996).

3. In holding that the PLRA authorizes untimely exhaustion, the Ninth Circuit, like the Sixth Circuit, see *Thomas*, 337 F.3d at 727-730, relied principally (Pet. App. 18) on this Court's decisions in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), and *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107 (1988). Those cases arose in the employment context and thus are far removed from the concerns that Congress was addressing in the PLRA. They provide no basis for concluding that Congress intended to depart from the background rule in the contexts of administrative law and habeas corpus—*i.e.*, that exhaustion means *proper* exhaustion.

Oscar Mayer involved a provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, that precludes the filing of suit "before the expiration of sixty days after proceedings have been commenced under [a] State law" prohibiting discrimination in employment. 29 U.S.C. 633(b). The Court held that a plaintiff's failure to comply with the statute of limitations for the state claim does not bar the federal suit. 441 U.S. at 758-765. *Commercial Office Products* involved a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, that requires the filing of a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the challenged employment practice, except that, when proceedings have been instituted with a state or local agency with authority to grant or seek relief from an unlawful employment practice, a charge must be filed with the EEOC within 300 days of the challenged employment practice. 42 U.S.C. 2000e-5(e)(1). The Court held that the 300-day period is applicable even if the state or local proceedings were not timely commenced. 486 U.S. at 122-124.

Contrary to the Ninth Circuit's assertion, this Court did not state in either *Oscar Mayer* or *Commercial Office Products* that "administrative exhaustion does not include a procedural default component." Pet. App. 18. Nor does either case support the view that a statute requiring that remedies be

"exhausted" should not be interpreted to require the timely presentation of claims to the agency (or state court), because the statutory provisions at issue in those cases do not require exhaustion of state remedies. In *Oscar Mayer*, the Court explicitly stated that the ADEA provision at issue "does not stipulate an exhaustion requirement," 441 U.S. at 761, and in *Commercial Office Products*, which involved a provision of Title VII that bears even less resemblance to an exhaustion-of-state-remedies requirement, the Court largely relied on *Oscar Mayer*, see 486 U.S. at 123-124.[7] The decision in *Oscar Mayer* rested, not on an interpretation of the term "exhausted," or even on general principles of exhaustion, but mainly on specific features of the ADEA provision that do not appear in the PLRA.[8]

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[7] Insofar as the provision at issue in *Commercial Office Products* is an exhaustion provision, it requires the exhaustion of federal (not state) remedies, and, consistent with the ordinary rule, it requires their exhaustion to be *timely*. "In general, the filing of an untimely charge [with the EEOC] will not suffice for purposes of the exhaustion requirement." *Gilmore* v. *University of Rochester Strong Mem'l Hosp. Div.*, 384 F. Supp. 2d 602, 607 (W.D.N.Y. 2005) (citing cases).

[8] The first feature is the word "commenced," which, the Court explained, "strongly implies * * * that state limitations periods are irrelevant," since, "by way of analogy, under the Federal Rules of Civil Procedure even a time-barred action may be 'commenced' by the filing of a complaint." *Oscar Mayer*, 441 U.S. at 759 (citing Fed. R. Civ. P. 3). The second feature is the last sentence of the provision, which states that, if any requirement for the commencement of proceedings is imposed by a State "other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based," the proceeding shall be deemed to have been commenced at the time the statement is mailed to the appropriate state authority. 29 U.S.C. 633(b). The Court reasoned that a limitation period is a requirement "other than a requirement of the filing of a written and signed statement," and that a state proceeding must therefore be "deemed commenced * * * as soon as the complaint is filed," without regard to whether the filing was timely. 441 U.S. at 760.

B. The Ninth Circuit's Decision Is Inconsistent With The History Of The PLRA

Four years before Congress enacted the PLRA, this Court decided *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), which addressed the question whether a federal prisoner must exhaust administrative remedies before filing suit under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court answered that question no. The basis for the decision was that Congress had not required exhaustion—the CRIPA imposed only a "limited" exhaustion requirement, *McCarthy*, 503 U.S. at 150, and did not reach *Bivens* suits at all—and that it would be inappropriate for the Court to impose such a requirement. *Id.* at 149-156. The Court stressed, however, that Congress was free to do so. See *id*. at 156.

While the Court did not adopt an exhaustion requirement in *McCarthy*, it assumed that, if there were a general exhaustion requirement, it would not be satisfied if an inmate's administrative claim was denied as untimely. Indeed, that was one of the grounds for the Court's decision. The Court explained that the CRIPA required exhaustion only if it was "in the interests of justice," and that the CRIPA therefore gave a court discretion to allow an inmate's suit to proceed even if he "fail[ed] to meet filing deadlines under an administrative scheme." 503 U.S. at 150 (quoting CRIPA § 7(a)(1), 94 Stat. 352). A more typical exhaustion rule would not allow for such discretion, and the Court found it "difficult to see why a stricter rule of exhaustion than Congress itself ha[d] required in the state prison context should apply in the federal prison context." *Id*. at 150-151. Then, in evaluating "the individual and institutional interests" implicated by a stricter rule of exhaustion (and determining that the former outweighed the latter), the Court observed that prison filing deadlines "create a high risk of forfeiture of a claim for failure to comply," and

that the deadlines "require a good deal of an inmate at the peril of forfeiting his claim." *Id.* at 152-153.

McCarthy thus assumed that a general exhaustion requirement—as opposed to the CRIPA's "limited" requirement, 503 U.S. at 150—would incorporate a procedural-default rule and thus bar a federal suit if the administrative claim was denied as untimely. It is presumed that Congress is familiar with this Court's decisions when it legislates, see, *e.g.*, *Conroy* v. *Aniskoff*, 507 U.S. 511, 516 (1993), and that Congress "expects its statutes to be read in conformity with th[e] Court's precedents," *Porter*, 534 U.S. at 528 (quoting *United States* v. *Wells*, 519 U.S. 482, 495 (1997)). That canon has particular force here, because the legislative history of the PLRA confirms that Congress was familiar with *McCarthy*—and, indeed, that it was responding to that decision when it enacted the law. See 141 Cong. Rec. 35,623 (1995) (statement of Rep. LoBiondo). It therefore follows that, when it passed the PLRA, which included an "invigorated" exhaustion requirement, *Porter*, 534 U.S. at 529, applicable to both federal and state prisoners, see *id.* at 524, Congress intended to enact the exhaustion requirement that this Court had identified, but declined to adopt as a matter of judicial discretion, in *McCarthy* just four years earlier.

The Court drew a similar conclusion based on *McCarthy* in *Booth*, *supra*, which holds that exhaustion is required under the PLRA even if the inmate seeks only money damages and the administrative procedure does not provide such a remedy. The Court noted that the CRIPA had required exhaustion only of "effective" administrative remedies and that *McCarthy* had indicated that "only a procedure able to provide money damages would be 'effective'" when money damages was all that a prisoner sought. 532 U.S. at 740 (quoting CRIPA § 7(a)(1), 94 Stat. 352). The Court then reasoned that the PLRA required a different result than *McCarthy* because Congress "removed the very term"—"effective"—that the Court had "previously emphasized." *Ibid.* So too here. The

CRIPA required exhaustion only if it was "in the interests of justice," CRIPA § 7(a)(1), 94 Stat. 352, and *McCarthy* indicated that that language gave district courts discretion to hear an inmate's suit even if he "fail[ed] to meet filing deadlines under an administrative scheme," 503 U.S. at 150. The PLRA then removed the very term—"interests of justice"—that the Court had previously emphasized. The "statutory history," *Booth*, 532 U.S. at 739, thus bolsters the conclusion that the PLRA requires *proper* exhaustion, including compliance with applicable filing deadlines.

C. The Ninth Circuit's Decision Is Inconsistent With The Purposes Of The PLRA

1. a. It is "[b]eyond doubt" that "Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524. This Court has recognized that, in requiring prisoners to "afford[] corrections officials time and opportunity to address complaints internally before * * * the initiation of a federal case," *id.* at 525, Congress had three principal objectives in mind. First, exhaustion might enable a prisoner to obtain relief in the administrative process, "thereby obviating the need for litigation." *Ibid.* Even relief that is different from (or less than) that requested will "satisfy at least some inmates." *Booth*, 532 U.S. at 737. Second, "internal review might 'filter out some frivolous claims.'" *Porter*, 534 U.S. at 525 (quoting *Booth*, 532 U.S. at 737). When an administrative decisionmaker rejects a claim and explains the reasons for doing so, the inmate may be persuaded that it is not worth pursuing the claim in court, particularly since the PLRA's "three strikes" provision precludes the filing of an *in forma pauperis* suit after the inmate has had at least three prior cases dismissed on the ground that they were "frivolous" or "malicious," or "fail[ed] to state a claim upon which relief may be granted." 28 U.S.C. 1915(g). Third, "for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies

the contours of the controversy," *Porter*, 534 U.S. at 525, and thereby "foster[s] better-prepared litigation," *Booth*, 532 U.S. at 737. In general, complaints filed by inmates are notoriously difficult to decipher, and the development of an administrative record can help inmates refine them, or at least illuminate the nature of the claims. The administrative process may also put the parties in a better position to move for summary judgment, and reduce the need for burdensome and costly discovery.

If the untimely filing of an administrative claim is not a bar to suit, as the Ninth Circuit held, the incentive of prisoners to comply with limitation periods will be substantially reduced, and the number of untimely claims will inevitably increase. When a claim is not timely filed, the administrative decisionmaker will almost always resolve it without reaching the merits, particularly when, as in this case, the claim is filed long after the deadline has passed. See *Pozo*, 286 F.3d at 1025. And to the extent that decisionmakers resolve administrative claims without reaching the merits, the principal purposes of the PLRA's exhaustion requirement will be defeated. The need for litigation will not be obviated (since the inmate will not be granted relief); frivolous claims will not be filtered out (since there will be no explanation of why the claim lacks merit); and an administrative record will not be created (since there is no factual development when a claim is rejected on procedural grounds). Because those congressional objectives will be furthered only if prison administrators routinely decide inmate grievances on the merits, Congress "could not have intended a definition of exhaustion that routinely permits claims to reach the federal courts without the benefit of any prior consideration on the merits." *Thomas*, 337 F.3d at 750 n.8 (Rosen, J., dissenting in part).

In resolving the interpretive question presented in *Porter*, this Court relied, in part, on "the PLRA's dominant concern to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in

court." 534 U.S. at 528. As a number of courts of appeals have recognized, the same "dominant concern" requires a conclusion that the term "exhaustion" in Section 1997e(a) means *proper* exhaustion.[9]

b. In addition to the three principal objectives identified by this Court, other purposes served by the PLRA's exhaustion requirement would be undermined if a prisoner could exhaust remedies by filing untimely administrative claims. First, the exhaustion requirement reflects a recognition that prison officials are in the best position to investigate and evaluate complaints in the first instance and decide what corrective action, if any, should be taken. If a substantial proportion of prisoner claims are allowed to proceed to federal court without having been previously addressed on the merits, the courts, in effect, will be "act[ing] as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints," a task for which they are "ill suited." *Procunier* v. *Martinez*, 416 U.S. 396, 405 n.9 (1974), overruled in part on other grounds by *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989). Second, the exhaustion requirement helps to ensure that inmates bring dangerous conditions and abusive practices to the attention of prison authorities as soon as possible, so they can take appropriate corrective action. Under the Ninth Circuit's decision, prisoners have a greatly diminished incentive to report such matters immediately, and thus prison officials may not be promptly apprised of dangerous

[9] See *Johnson*, 418 F.3d at 1159 ("none of the aims of § 1997e(a) has been achieved here because prison officials did not review the merits of Johnson's complaint"); *Spruill*, 372 F.3d at 230 ("[a]ll three goals [of Section 1997e(a)] are obviously served by a procedural default rule"); *Ross*, 365 F.3d at 1186 ("[a]llowing prisoners to proceed to federal court simply because they have filed a time-barred grievance would frustrate the PLRA's intent"); *Pozo*, 286 F.3d at 1023-1024 ("allow[ing] a prisoner to 'exhaust' state remedies by spurning them * * * would defeat the statutory objective"). See also *Thomas*, 337 F.3d at 742 (Rosen, J., dissenting in part) (because inmate's grievance was rejected as untimely, his complaint was not reviewed on the merits and "none of the aims of § 1997e(a) has been achieved").

conditions and abusive practices. Third, a prison grievance process has the potential to be a far less adversarial and far more cooperative means of resolving inmate complaints than litigation in federal court. When inmates deprive themselves of the opportunity for administrative relief by filing untimely claims, and then name their guards as defendants in federal lawsuits, the tensions that already exist in prison may be exacerbated. Finally, the exhaustion requirement helps "avoid the possibility that frequent * * * flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Johnson* v. *Meadows*, 418 F.3d 1152, 1156 (11th Cir. 2005) (quoting *Alexander* v. *Hawk*, 159 F.3d 1321, 1327 (11th Cir. 1998)), petition for cert. pending, No. 05-6336 (filed Sept. 8, 2005). As Judge Becker has observed, one of the "subtler benefits" of requiring *proper* exhaustion is that it "enhances the integrity of prison administration" by "ensur[ing] prisoner compliance with the specific requirements of the grievance system." *Spruill*, 372 F.3d at 230.[10]

2. a. Respondent contends that "a prisoner has no strategic incentive to 'disregard[]' the prison grievance process, because the result of that process * * * receives no deference in and has no effect on the subsequent § 1983 suit." Br. in Opp. 15 (quoting Pet. 8). That contention is wrong and ultimately misses the point. An inmate seeking to tie up prison officials in litigation may well have incentives to bypass the administrative process and its salutary benefits of focusing the lawsuit. In addition, a failure to file a timely administrative claim may put a prisoner in federal court more quickly than if he properly exhausts the appellate process. In any event, the major concern is less that the Ninth Circuit's deci-

[10] When an administrative claim has been adjudicated on the merits, the statutory purposes have been served, and the PLRA's exhaustion requirement has been satisfied. That is true even if the claim was untimely and could have been rejected on that ground, but prison officials nevertheless exercised their discretion to consider it. See *Ross*, 365 F.3d at 1186; *Pozo*, 286 F.3d at 1025.

sion creates an incentive to file untimely claims than that it undermines the incentive to file *timely* claims. The rule applied by the majority of circuits, in contrast, "creates an overwhelming incentive" to do so. *Spruill*, 372 F.3d at 230.

The Ninth Circuit believed that, under its approach, prisoners *will* have a strong incentive to file timely administrative claims, because such claims provide "an additional attempt to win a favorable ruling" and "the fastest route to a remedy." Pet. App. 16-17. That assertion is at odds with the record before Congress when it enacted the PLRA, which established that "[t]he vast majority of [prisoner] suits are completely without merit." 141 Cong. Rec. at 26,553 (statement of Sen. Hatch). Congress passed the PLRA because, in the words of one of its sponsors, suing had become a "recreational activity for [many] long-term residents of our prisons," who recognize that "a courtroom is * * * a more hospitable place to spend an afternoon than a prison cell" and therefore "churn[ed] out" suits "in response to almost any perceived slight or inconvenience" and "with no regard to * * * their legal merit." *Id.* at 26,553-26,554 (statement of Sen. Kyl). Such prisoners "would have nothing to lose in flouting prison procedures, because they would have no legitimate expectation of obtaining any remedy through the prison's grievance process." *Thomas*, 337 F.3d at 752 (Rosen, J., dissenting in part). For them, "it matters only that they reach the finish line of th[e] process and secure their ticket to federal court." *Ibid.*

b. The Ninth Circuit also expressed the view that, even if its decision had the effect of increasing the number of untimely administrative filings, it would "in no way obstruct the goal of allowing prison officials first crack at resolving prisoners' grievances," because the prison "decide[s] whether to exercise its discretion and accept or refuse the opportunity to hear the case on the merits regardless whether the grievance is timely filed." Pet. App. 17. In this case, the court of appeals observed, the appeals coordinator "*could* have consid-

ered [respondent's] appeal; she was authorized to do so by the grievance regulations, but elected not to." *Ibid*. The Ninth Circuit thus endorsed the Sixth Circuit's view that the purposes of the PLRA's exhaustion requirement would be defeated only if prison administrators were not given "*any* opportunity to review the claim." *Thomas*, 337 F.3d at 727. That view is mistaken.

The notion that prison administrators need only be given "some opportunity" to decide a claim on the merits cannot be reconciled with the fact, acknowledged by the Ninth Circuit, that an inmate does not exhaust administrative remedies unless he "submit[s] his * * * grievance to the prison and appeal[s] all denials of his claims completely through the prisons' administrative process." Pet. App. 17. A prisoner who files a timely claim at one or more but not all administrative levels has given the prison *some* opportunity to address his claim on the merits, but he has nevertheless failed to comply with the PLRA's exhaustion requirement. Under the Ninth Circuit's decision, a prisoner who makes a *timely* filing at three levels but does not file any claim at the fourth has *not* satisfied the exhaustion requirement, but a prisoner who makes an *untimely* filing at all four levels *has*. The Ninth Circuit made no effort to explain why Congress would have intended such an anomalous result.

Congress did not intend such a result. There has been no exhaustion in either circumstance, because it is never sufficient that prison administrators be given *some* opportunity to decide a claim on the merits. The exhaustion doctrine requires that the decisionmaker be given a "full and fair opportunity," *Boerckel*, 526 U.S. at 845, and thus a "meaningful opportunity," *Vasquez* v. *Hillery*, 474 U.S. 254, 257 (1986), to decide the claim, and prison officials do not have a full, fair, and meaningful opportunity to decide claims denied as untimely. Indeed, under the Ninth Circuit's decision, an inmate satisfies the PLRA's exhaustion requirement as long as he files his administrative claims, which are ordinarily due within

days or weeks of the challenged action or decision, see Br. of Amici New York et al. in Support of Pet. 3 n.2, before the expiration of the applicable statute of limitations for a *Bivens* or 1983 suit, which is ordinarily two years, see, *e.g.*, *Johnson*, 418 F.3d at 1154 (Georgia); Pet. App. 20 n.4 (California); *Thomas*, 337 F.3d at 754 & n.14 (Rosen, J., dissenting in part) (Ohio), but could be as long as six, see *Wudtke* v. *Davel*, 128 F.3d 1057, 1061 (7th Cir. 1997) (Wisconsin).

At bottom, the Ninth Circuit's decision minimizes the harm to prison officials caused by late or otherwise defective filings, because they can always waive their deadlines or adopt longer ones. That view ignores the fact that there are "good reasons for establishing deadlines for the filing of grievances." *Thomas*, 337 F.3d at 753 (Rosen, J., dissenting in part). They include (1) "the inherent benefit of prompt investigation, while memories are still fresh and all involved inmates and prison employees remain at the facility"; (2) "the desire to bring the entire matter, including all available internal appeals, to a conclusion within a reasonable time period"; and (3) "the greater likelihood that a prisoner might be satisfied by swift action against any transgressors." *Ibid.* Those benefits "accrue to prisoners and prison officials alike." *Ibid.* See also *McCarthy*, 503 U.S. at 157 (Rehnquist, C.J., concurring in the judgment) ("short filing deadlines will almost always promote quick decisionmaking by an agency").

Nor is there any reason to presume that prisons do not ordinarily enforce their deadlines, even when, as here, prison officials have discretion to consider untimely claims. As with other adjudicators that are presented with an untimely claim, see, *e.g.*, *Schacht* v. *United States*, 398 U.S. 58, 64 (1970) (this Court may consider untimely certiorari petition in criminal case "when the ends of justice so require"), it should be presumed that prison administrators will consider an inmate's untimely administrative claim only if there is a satisfactory

excuse for the failure to meet the deadline.[11] And a decisionmaker cannot be said to have had a full, fair, and meaningful opportunity to consider claims that, under the applicable legal regime, are considered only in unusual circumstances.

The Ninth Circuit did not deny that prisons ordinarily enforce their filing deadlines. Instead, it effectively sought to "shift[] * * * from inmates to prison officials," *Thomas*, 337 F.3d at 742 (Rosen, J., dissenting in part), the burden of satisfying the PLRA's objective that inmate grievances be adjudicated on the merits in prison before arriving in federal court. There is no basis to believe, however, that Congress wished to put prison officials to the choice of vindicating the purposes of the PLRA's exhaustion requirement by ignoring their own filing deadlines, on the one hand, or enforcing the deadlines and thereby undermining the exhaustion requirement's purposes, on the other. Indeed, the benefits of exhaustion are largely the benefits of *timely* exhaustion, which enables development of the factual record while memories are fresh.

The "some opportunity" theory rests on the mistaken premise that the PLRA's exhaustion requirement is merely "a benefit accorded to state prisons, an opportunity to satisfy those inmate grievances the state wishes to handle internally." *Thomas*, 337 F.3d at 726. In fact, the exhaustion requirement benefits not only prisons but also (1) the federal-court system, which had been inundated with frivolous prisoner suits; (2) the parties in other federal cases that litigate in good faith and suffer when scarce judicial resources are

[11] Some States' regulations explicitly provide that an untimely claim will be considered only on a showing of "good cause," see, *e.g.*, Md. Regs. Code tit. 12, § 12.07.01.06(F) (2004); Ohio Admin. Code § 5120:9-31(J)(2) and (3) (2002); Wis. Admin. Code DOC §§ 310.09(6), 310.13(2) (2005), and the BOP's regulations allow an extension of the deadline if the inmate demonstrates "a valid reason," 28 C.F.R. 542.14(b), 542.15(a). California's regulations provide that an untimely appeal "may be rejected" if the inmate "had the opportunity to file within the prescribed time constraints," Cal. Code Regs. tit. 15, § 3084.3(c)(6) (2002), but they do not specify the showing necessary for such an appeal to be accepted.

expended on frivolous litigation; and (3) the taxpayers who pay for the court system and the defense of prisoner suits. As one of the PLRA's sponsors observed, "[f]rivolous lawsuits * * * by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens." 141 Cong. Rec. at 26,548 (statement of Sen. Dole). As another sponsor observed, it is precisely "the burden that [prisoners'] cases place on the Federal court system" that makes "[a]n exhaustion requirement * * * appropriate." *Id.* at 14,572-14,573 (statement of Sen. Kyl). By allowing inmates to sue in federal court when prisons enforce their filing deadlines, the Ninth Circuit's decision ignores these other important interests that the PLRA's exhaustion requirement was intended to serve.

D. The Ninth Circuit's Decision Cannot Be Justified By The Policy Considerations On Which It Relied

The Ninth Circuit also relied on "policy concerns" that, in its view, "cut against" interpreting the PLRA to require the timely presentation of administrative claims. Br. in Opp. 16 (emphasis omitted). Those policy considerations cannot overcome the text, history, and purposes of the exhaustion provision, and in any event are misguided.

The Ninth Circuit believed that petitioners' interpretation would penalize "the less sophisticated and less informed," who are unrepresented and thus "unable to satisfy complex and demanding procedural requirements." Pet. App. 19. In support of that view, the court cited (*ibid.*) the portion of *McCarthy* in which this Court expressed a similar view. See 503 U.S. at 153. But the Court expressed that view in the context of explaining why *it* would not fashion an exhaustion requirement for *Bivens* suits by federal prisoners. See *id.* at 152-156. As was made clear in that very section of the opinion, the Court assumed that, if either Congress or this Court *were* to create an exhaustion requirement for prisoner suits, prisoners *would* be obligated to comply with administrative

filing deadlines. See *id.* at 152-153. Insofar as the language on which the Ninth Circuit relied has any significance, therefore, it is that Congress adopted an exhaustion requirement *despite* the contrary policy consideration identified by this Court in *McCarthy* (and reiterated by the Ninth Circuit here). Indeed, this Court acknowledged in *Booth* that Congress "may well have thought" that *McCarthy* was "shortsighted." 532 U.S. at 737.

In any event, this Court has recognized "the inseparability of the exhaustion rule and the procedural-default doctrine" in the habeas corpus context, *Carpenter*, 529 U.S. at 452, such that failure to comply with a filing deadline in state post-conviction proceedings can bar a habeas corpus petition in federal court. That is true even though prisoners in state post-conviction proceedings, like prisoners in administrative proceedings, are "almost inevitably proceeding without the guidance of counsel," Br. in Opp. 16, since there is no constitutional right to counsel at that stage of the case, see *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987).

Like the Sixth Circuit, which believed that interpreting the PLRA to require the timely filing of administrative claims "would likely lead to shorter and shorter limitations periods," *Thomas*, 337 F.3d at 729 n.3, the Ninth Circuit was also concerned that such an interpretation would give prison administrators "an incentive to fashion grievance procedures which prevent or even defeat prisoners' meritorious claims," Pet. App. 21. That concern has not been shown to be justified. Most jurisdictions require the filing of administrative claims within 14 to 30 days of the action being challenged. See Br. of Amici New York et al. in Support of Pet. 3 n.2.[12] And neither the Ninth Circuit nor respondent (who makes the same

[12] Under the BOP's regulations, the filing deadlines are 20 calendar days for submission of an "Administrative Remedy Request" to the Warden; 20 calendar days for appeal of an adverse decision by the Warden to the Regional Director; and 30 calendar days for appeal of an adverse decision by the Regional Director to the General Counsel. 28 C.F.R. 542.14(a), 542.15(a).

argument, Br. in Opp. 16-17) has cited any instance in which a filing deadline was made even shorter, or in which some other "onerous" procedural requirement was imposed (*id.* at 16), in light of the court of appeals decisions that reject the Ninth Circuit's interpretation of the PLRA. See also *Thomas*, 337 F.3d at 753 n.12 (Rosen, J., dissenting in part) ("To my knowledge, this has not occurred.").

In any event, "[t]he policy argument[] * * * should be addressed to Congress rather than to this Court." *Blum* v. *Stenson*, 465 U.S. 886, 895-896 (1984). As explained above, the text, history, and purposes of the PLRA all point to the conclusion that Congress intended its exhaustion provision to require the *proper* exhaustion of administrative claims. There was no basis for the Ninth Circuit to disregard that intent on the basis of its own policy views.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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