

ELIMINATING STANDARD PLEADING FORMS THAT REQUIRE PRISONERS TO ALLEGE THEIR EXHAUSTION OF ADMINISTRATIVE REMEDIES

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ABSTRACT

The Prison Litigation Reform Act (PLRA) establishes that prisoners must exhaust all available administrative remedies before filing a lawsuit. The PLRA also imposes a negative consequence—what is commonly referred to as a “strike”—when a court dismisses a prisoner’s lawsuit because it is frivolous, malicious, or fails to state a claim. Before 2007, some federal circuit courts disagreed about whether the PLRA required prisoners to allege the exhaustion of administrative remedies in their complaints. Such a requirement would make any complaint failing to allege exhaustion tantamount to a complaint failing to state a claim and, therefore, grounds for a PLRA strike.

*The United States Supreme Court settled the debate when it held in *Jones v. Bock* that prisoners are not required to allege exhaustion in their complaints. In so holding, the Court explicitly placed the burden on defendants to plead a prisoner’s failure to exhaust administrative remedies as an affirmative defense. Despite the Court’s holding in *Bock*, many federal district courts are still placing this burden on prisoners—requiring them to allege their exhaustion of administrative remedies by having them file *pro forma* complaints that include questions asking if they have exhausted their administrative remedies. The forms with these questions force prisoners to reveal in their complaints the affirmative defense of failure to exhaust administrative remedies. Because a finding of an affirmative defense—in this case, a failure to exhaust administrative*

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remedies—on the face of a complaint is grounds for a failure to state a claim, a prisoner using such a complaint form may have his complaint dismissed for failure to state a claim and will therefore incur a PLRA strike. Three PLRA strikes may foreclose the prisoner from accessing the courts in the future.

To prevent this unintended and unjust consequence, a public-interest group should litigate on behalf of a prisoner being forced to use a *pro forma* complaint that asks him about his exhaustion of administrative remedies. Because the portions of the *pro forma* complaints that ask about exhaustion are inconsistent with Rule 8 of the Federal Rules of Civil Procedure and unlawfully abridge prisoners' substantive rights under the Rules Enabling Act, the group should seek to eliminate the parts of the *pro forma* complaints that ask prisoners about their exhaustion of administrative remedies.

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“It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”

—Nelson Mandela

INTRODUCTION

Nationally, federal district courts have been inconsistent in how they handle civil rights lawsuits brought by prisoners who have been unable to exhaust administrative remedies.¹ The Prison Litigation Reform Act (PLRA) establishes that prisoners must exhaust all available administrative remedies before filing a lawsuit.² The PLRA also imposes a negative consequence³—what is commonly referred to as a “strike”—when a court dismisses a prisoner’s lawsuit because it is frivolous, malicious, or fails to state a claim.⁴ Before 2007, some federal circuit courts disagreed about whether the PLRA required prisoners to allege the exhaustion of administrative remedies in their complaints.⁵ Such a requirement would make any complaint failing to allege exhaustion⁶ tantamount to a complaint failing to state a claim and, therefore, grounds for a PLRA strike.⁷ However, the

1. See discussion *infra* Part II.

2. 42 U.S.C. § 1997e(a) (2012).

3. The PLRA amended 28 U.S.C. § 1915(g) so that a prisoner accruing three “strikes” under the PLRA is disqualified from proceeding with *in forma pauperis* status (IFP Status). 28 U.S.C. § 1915(g) (2012); see also *Ball v. Famiglio*, 726 F.3d 448, 451 (3d Cir. 2013) (explaining that a prisoner may not proceed with IFP Status if “she ha[s] accrued three ‘strikes’ under the PLRA”).

4. 42 U.S.C. § 1997e(c) (2012).

5. See discussion *infra* Part II.

6. For the sake of clarity and pithiness, this Note uses various forms of the phrase “exhaustion of administrative remedies,” including “exhaust,” “exhaustion,” and “failure to exhaust.” All versions of this phrase carry the same meaning and weight as the full version.

7. See discussion *infra* Section II.A.

United States Supreme Court settled the debate when it held in *Jones v. Bock*⁸ that prisoners are not required to allege exhaustion in their complaints.⁹ In so holding, the Court explicitly placed the burden on defendants to plead a prisoner's failure to exhaust administrative remedies as an affirmative defense.¹⁰

Despite the Court's holding in *Bock*, many federal district courts are still placing this burden on prisoners—requiring them to allege their exhaustion of administrative remedies by having them file pro forma complaints¹¹ that include questions asking if they have exhausted their administrative remedies.¹² The forms with these questions force prisoners to reveal in their complaints the affirmative defense of failure to exhaust administrative remedies.¹³ Because a finding of an affirmative defense—in this case, a failure to exhaust administrative remedies—on the face of a complaint is grounds for a failure to state a claim,¹⁴ a prisoner using such a complaint form may have his complaint dismissed for failure to state a claim and will therefore incur a PLRA strike.¹⁵ Three PLRA strikes may foreclose the prisoner from accessing the courts in the future.¹⁶ To prevent this unintended and unjust consequence, a public-interest group¹⁷ should litigate on behalf of a prisoner being forced to use a pro forma complaint that asks him about his exhaustion of administrative remedies.¹⁸ Because the portions of the pro forma complaints that ask about exhaustion are inconsistent with Rule 8 of the Federal Rules of Civil Procedure and unlawfully abridge prisoners' substantive rights under the Rules Enabling Act,¹⁹ the group should seek to eliminate

8. 549 U.S. 199 (2007).

9. *Id.* at 214 (stating that nothing in the PLRA “explicitly or implicitly . . . justifi[es] deviating from the usual procedural practice”).

10. *Id.* at 216 (concluding “that [a] failure to exhaust is an affirmative defense under the PLRA”).

11. Pro forma complaints are complaints prepared in advance for prisoners. See *Pro Forma*, BLACK'S LAW DICTIONARY (10th ed. 2014); see also discussion *infra* Section IV.A. (providing examples of pro forma complaints).

12. See discussion *infra* Section III.A.

13. See discussion *infra* Section III.A.

14. *Bock*, 549 U.S. at 215.

15. See discussion *infra* Section III.A.

16. 28 U.S.C. § 1915(g) (2012).

17. For example, the American Civil Liberties Union advocates for prisoners. *Prisoners' Rights*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/prisoners-rights> (last visited Oct. 6, 2015).

18. See discussion *infra* Part IV.

19. 28 U.S.C. §§ 2071-2077 (2012).

the parts of the pro forma complaints that ask prisoners about their exhaustion of administrative remedies.²⁰

Part I of this Note discusses the history of the PLRA, including a brief history of prison litigation and relevant political trends leading up to the PLRA. Part II discusses germane parts of the PLRA, a circuit split that developed regarding whether the PLRA requires prisoners to allege exhaustion in their complaints, and the Supreme Court's decision in *Jones v. Bock* that resolved that circuit split. Part III illustrates the problem with court-mandated pro forma complaints that has developed in the wake of *Jones v. Bock*, followed by a discussion of limitations to courts' power to create local rules, such as the rules mandating the pro forma complaints. Part IV explains how a public-interest group should litigate to eliminate exhaustion questions from pro forma complaints on the basis that they are inconsistent with Rule 8 of the Federal Rules of Civil Procedure and unlawfully abridge prisoners' substantive rights to access the courts.

I. PRISONERS' RIGHTS BEFORE THE PLRA

Concerns over the civil rights of prisoners have motivated significant legal changes since the beginning of the Civil Rights Movement.²¹ Starting in the 1960s, the Supreme Court began establishing that prisoners should have some basic rights.²² In 1980, Congress passed the Civil Rights of Institutionalized Persons Act²³ (CRIPA), a law that completely overhauled the process by which prisoners could gain access to the federal courts.²⁴ Fifteen years later, swelling political pressure forced Congress to overhaul prison litigation once again by enacting the PLRA.²⁵

20. See discussion *infra* Section IV.B.

21. See discussion *infra* Section I.A.

22. Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 169, 192-93 (Norval Morris & David J. Rothman eds., 1995).

23. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997-1997j (2012)).

24. See discussion *infra* Section I.B (discussing the changes Congress implemented with CRIPA).

25. See discussion *infra* Section I.C (discussing the political landscape before Congress enacted the PLRA).

A. Prison Litigation in the Federal Courts Prior to the PLRA

In the late 1960s and early 1970s, courts began implementing what was known as the “Open-Door Policy”²⁶ as the Supreme Court rendered decisions guaranteeing prisoners more rights.²⁷ In 1964, the Supreme Court held in *Cooper v. Pate* that prisoners could sue government actors for civil rights violations if the prisoners could show that the government actors were acting under color of law.²⁸ The change in *Cooper* marked the beginning of a trend²⁹ leading to the Court’s eventual determination that prisoners have a right to access the courts to vindicate their constitutional rights.³⁰

During the same time period, major societal changes and deteriorating prison conditions pressured policymakers to reform prisons.³¹ During the 1960s, the Civil Rights Movement was gaining momentum, and prisoners were among the deprived groups that civil rights activists were assisting.³² Meanwhile, prisons were becoming overcrowded and understaffed, leading to potentially dangerous situations.³³ With the new wave of civil rights activists and overcrowding prisons, policymakers were forced to make changes.³⁴

26. FED. JUDICIAL CTR., RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 30-31 (1980).

27. *Id.* at 31 (citing landmark Supreme Court decisions that guaranteed prisoners the right to have access to the courts, the right to due process during some disciplinary proceedings, the right to equal protection under the law, and the right not to be subjected to conditions of confinement amounting to cruel and unusual punishment).

28. *See* 378 U.S. 546, 546 (1964).

29. *See* Barbara Belbot, *Where Can a Prisoner Find a Liberty Interest These Days? The Pains of Imprisonment Escalate*, 42 N.Y.L. SCH. L. REV. 1, 1 (1998) (noting the Supreme Court’s increased openness to prisoners’ constitutional claims after 1964).

30. *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974) (“When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.”), *overruled on other grounds by* *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989).

31. LYNN S. BRANHAM, AM. BAR ASS’N CRIMINAL JUSTICE SECTION, *LIMITING THE BURDENS OF PRO SE INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICERS, AND ATTORNEYS GENERAL* 20 (1997) (noting that there were several events forcing courts to face the issue of prison conditions and prisoners’ civil rights).

32. *See id.* (discussing the Civil Rights Movement).

33. *See id.* at 20-21 (discussing events causing increasing pressure for change in prison conditions, one of which was a 1971 riot at Attica State Prison in New York that resulted in forty-three deaths).

34. *See* FED. JUDICIAL CTR., *supra* note 26, at 24-26.

A shift occurred at the beginning of the 1970s with the introduction of state-mandated inmate grievance procedures.³⁵ In a 1970 speech to the National Association of Attorneys General, Chief Justice Warren Burger advocated for the use of prison grievance procedures.³⁶ In response to Chief Justice Burger's speech, state correctional departments introduced inmate grievance procedures, commonly referred to as administrative remedies, in the years that followed.³⁷ Unfortunately, the creation of these administrative remedies was widely ineffective to solve the problem of flooded courts, primarily because the Supreme Court held that courts had no authority to require the exhaustion of certain administrative remedies, especially when deprivations of prisoners' civil rights were in question.³⁸ While prisoners had reasonable access to the courts at that time, Congress was about to construct an administrative wall to greatly inhibit their access.³⁹

B. Civil Rights of Institutionalized Persons Act

In 1980, Congress enacted CRIPA as an attempt to overhaul prison conditions and increase the utility of prison grievance procedures.⁴⁰ CRIPA gave attorneys general the power to bring lawsuits to remedy "egregious or flagrant conditions" in prisons" and the power to intervene in pending suits related to similar issues.⁴¹ However, another part of CRIPA required prisoners to exhaust certain administrative remedies before they could access the federal

35. See Adam Slutsky, Note, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. § 1997e(a) Unduly Burdens Courts and Prisoners*, 73 *FORDHAM L. REV.* 2289, 2293 (2005) (explaining that Justice Warren Burger's speech to the National Association of Attorneys General sparked change in the prison systems).

36. Chief Justice Warren E. Burger, Speech to the National Association of Attorneys General in Washington, D.C. (Feb. 8, 1970), in *FED. JUDICIAL CTR.*, *supra* note 26, at 24.

37. Slutsky, *supra* note 35, at 2293.

38. *Id.* at 2293-94 (explaining that key decisions "'open[ed] [the] door' to federal courts").

39. See discussion *infra* Section I.B.

40. See Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn From It*, 86 *CORNELL L. REV.* 483, 493 (2001) (citing "widespread atrocities and violations of the constitutional rights of" prisoners and others).

41. *Id.* at 494 (explaining the power CRIPA conferred to the U.S. Attorney General).

courts.⁴² Despite some significant criticism, Congress apparently added the exhaustion provision as a counterbalance to parts of CRIPA that would inevitably increase the volume of prisoner civil rights cases in the federal courts.⁴³ With the added provision, Congress hoped to mitigate some of the burden on federal courts by providing state and local officials the chance to remedy constitutional violations before the courts had to intervene.⁴⁴

At first, the burden from CRIPA's exhaustion requirement was limited.⁴⁵ CRIPA required a prisoner's exhaustion only in instances that were "appropriate and in the interests of justice."⁴⁶ Further, if a court decided to require the exhaustion of administrative remedies, rather than dismissing the action, the court would stay the proceedings for up to ninety days, at which point it would resume the proceedings if necessary.⁴⁷ While CRIPA changed the way prisoners attempted to vindicate their rights, the public's perception of prison litigation was also changing.⁴⁸

C. Increased Prisoners and Increased Litigation

From 1980 to 1995, the number of inmates in state prisons increased dramatically, and so did the number of civil rights lawsuits filed by state prisoners in federal courts.⁴⁹ In 1980, there were 12,397 state prisoners who filed civil rights lawsuits in federal courts, and this number increased to 40,569 in 1995, an increase of 227%.⁵⁰ However, the seemingly dramatic increase in civil rights litigation by prisoners was proportionately less than the 237% increase in the number of prisoners in state prisons over the same period of time.⁵¹ Thus, the per capita rate of state prisoners filing suits in federal

42. *Id.* at 494-95.

43. *See id.* at 495 & n.49 (citing opponents' arguments against having an exhaustion requirement).

44. *See id.* at 495.

45. *Id.* at 494-96 (outlining the specific situations where the federal court could require a prisoner's exhaustion of administrative remedies).

46. *Id.* at 495 (quoting 42 U.S.C. § 1997e(a)(1) (1994)).

47. *Id.* at 495-96.

48. *See* discussion *infra* Section I.C.

49. *See* Slutsky, *supra* note 35, at 2294.

50. *See* BRANHAM, *supra* note 31, at 21 (providing various statistics regarding prison litigation after 1980).

51. *Id.* at 21-22.

courts actually dropped “from 40.7 suits per thousand state prisoners in 1980 to 39.4 suits per thousand state prisoners in 1995.”⁵²

Despite the proportional stability of civil rights suits brought by state prisoners in the federal courts from 1980 to 1995, the National Association of Attorneys General and others used the increased litigation as a catalyst for their own agendas.⁵³ The National Association of Attorneys General manipulated statistics to support its agenda and produced a press release that showed a 22% increase in lawsuits brought by state prisoners under 42 U.S.C. § 1983,⁵⁴ shrewdly choosing not to mention that the number of prisoners had increased by 62% over the same period of time.⁵⁵ Republicans in Congress and attorneys general around the country spearheaded a media campaign featuring top-ten frivolous lawsuits lists to create public disdain for prisoner-litigants.⁵⁶ The classic example of a frivolous suit featured in one of these lists was a prisoner complaining over having received chunky peanut butter rather than creamy peanut butter.⁵⁷ While anecdotes were an effective media tool used to stir up public criticism for prisoners using the federal courts, there is serious doubt as to the veracity of these tales.⁵⁸

Chief Judge John O. Newman of the Second Circuit Court of Appeals explained, after his brief research, that there was a media push to denigrate the civil rights of prisoners.⁵⁹ Judge Newman explained that the lawsuit supposedly over peanut butter was actually

52. Slutsky, *supra* note 35, at 2295 (citing BRANHAM, *supra* note 31, at 21-22).

53. *See id.* at 2295-97 (discussing executive organizations campaigning to change the way prisoners litigate).

54. 42 U.S.C. § 1983 (2012). Section 1983 provides grounds for a civil action for “the deprivation of any rights, privileges, or immunities secured by the Constitution and [its] laws.” *Id.*

55. *Damn Lies and Statistics*, PRISON LEGAL NEWS (Apr. 15, 1996), <https://www.prisonlegalnews.org/news/1996/apr/15/damn-lies-and-statistics/>.

56. *See* Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1776-77 (2003) (claiming that the aggressive media campaign from Republicans in Congress and attorneys general engendered the negative public perception of the prison litigation situation).

57. Slutsky, *supra* note 35, at 2296.

58. *See* Jon O. Newman, *Not All Prisoner Lawsuits Are Frivolous*, PRISON LEGAL NEWS (Apr. 15, 1996), <https://www.prisonlegalnews.org/news/1996/apr/15/not-all-prisoner-lawsuits-are-frivolous/> (discussing the veracity of anecdotes about frivolous prison litigation).

59. *See id.* (explaining that a few attorneys general either fabricated stories or took them out of context when giving examples of frivolous lawsuits that were supposedly representative of many other prisoners’ suits).

a prisoner suing for money the prison owed him.⁶⁰ He went on to debunk two similar claims from the attorneys general.⁶¹ In exposing the truth about these anecdotes, Judge Newman astutely opined that government officials should not be creating myths to disparage prisoners.⁶²

Despite Judge Newman's efforts, the stories of frivolous prison litigation provided a political fulcrum for the ambitious, newly Republican Congress.⁶³ In 1994, Republicans published their "Contract with America," in which the party promised that Congress would strive for tougher, more conservative values.⁶⁴ Eager to meet its promises, the newly Republican Congress welcomed the overabundance of prison litigation as an easy target for an exhibition of anti-criminal toughness, and the scene was set for the inception of the PLRA.⁶⁵

D. The PLRA

The available legislative history for the PLRA is sparse.⁶⁶ In light of the growing criticism of frivolous suits by prisoners,⁶⁷

60. *Id.* ("He sued because, after the correctional officer quite willingly took back the wrong product and assured him that the item he had ordered would be sent the next day, the authorities transferred the prisoner that night to another prison, and his account remained charged \$2.50 for the item that he ordered but never received.").

61. *See id.* (explaining that a lawsuit supposedly over the color of towels was actually over the confiscation of towels sent to a prisoner by his family and that a complaint supposedly about a salad bar was actually a twenty-seven-page complaint alleging several major violations).

62. *Id.* ("[T]hose in responsible positions ought not to ridicule all prisoner lawsuits by perpetuating myths about them.").

63. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1566 (2003) (explaining that the National Associations of Attorneys General and the National District Attorneys Association put the PLRA on Congress's agenda).

64. *See generally* U.S. HOUSE OF REPRESENTATIVES, REPUBLICAN CONTRACT WITH AMERICA (n.d.), <http://media.mcclatchydc.com/static/pdf/1994-contract-with-america.pdf>.

65. *See* Schlanger, *supra* note 63, at 1567 ("In the first heady days of Republican control of both chambers of Congress, prisoners made awfully attractive targets—and Republican leaders vying for support from the party faithful were happy to outbid one another in anti-criminal toughness.").

66. *See* Branham, *supra* note 40, at 501 (discussing the PLRA's limited legislative history).

67. *See* Slutsky, *supra* note 35, at 2297-98.

Congress moved hastily for its passage.⁶⁸ The touted purpose of the PLRA was to relieve the judicial system by mitigating the amount of frivolous litigation.⁶⁹ Unfortunately, Congress was so quick to pass the PLRA that it even got the name wrong, naming it the “Prison Litigation Reform Act of 1995” when “it was actually passed in 1996.”⁷⁰ While the time it took to pass the PLRA was short, it brought significant changes to prison litigation.⁷¹

Similar to CRIPA’s exhaustion mandate, § 1997e(a) of the PLRA requires prisoners to exhaust administrative remedies before bringing lawsuits over prison conditions in a federal court.⁷² However, where CRIPA provided courts with discretion to require the exhaustion of administrative remedies only where it was “appropriate and in the interests of justice,”⁷³ the PLRA’s exhaustion requirement is mandatory.⁷⁴ For example, in *Booth v. Churner*, a prisoner argued that there should be no exhaustion requirement when the administrative remedies cannot possibly provide the type of relief sought, but the Court held that prisoners are required to exhaust all *available* administrative remedies, even if the remedies provide no basis for the relief the prisoners are seeking.⁷⁵ While the new, strict exhaustion requirement is a key component of the PLRA, another

68. *Ngo v. Woodford*, 403 F.3d 620, 623 n.1 (9th Cir. 2005) (“[T]he PLRA’s sparse legislative history primarily consists of PLRA proponents parroting the frivolous cases compiled by the National Association of Attorneys General. Sadly, several of the most widely cited cases of frivolous prisoner lawsuits were mischaracterized by the proponents of the PLRA.” (citation omitted)), *rev’d on other grounds*, 548 U.S. 81, 87 (2006).

69. 141 CONG. REC. S14,626-27 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).

70. Susan N. Herman, *Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1988) (“[The PLRA’s] provisions . . . bear many signs of the haste Key terms were not defined, some provisions conflicted with preexisting law, and even the title could have used editing: entitled the Prison Litigation Reform Act of 1995, it was actually passed in 1996.” (footnotes omitted)).

71. See Branham, *supra* note 40, at 493-98 (discussing changes resulting from the PLRA).

72. 42 U.S.C. § 1997e(a) (2012).

73. Branham, *supra* note 40, at 495 (explaining CRIPA’s exhaustion requirements).

74. *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (discussing that all available administrative remedies must be exhausted, regardless of whether they meet any federal standards).

75. 532 U.S. 731, 732 (2001) (“Congress meant to require procedural exhaustion regardless of the fit between a prisoner’s prayer for relief and the administrative remedies possible.”).

provision in the PLRA has also significantly changed litigation for prisoners.⁷⁶

Section 1997e(c) of the PLRA imposes consequences for prisoners repeatedly bringing claims without merit.⁷⁷ First, a federal court is required to dismiss a prisoner's lawsuit sua sponte if the court determines "the action is 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."⁷⁸ If a court *dismisses* a prisoner's claim for one of the four prescribed reasons, the prisoner will incur what is known as a PLRA strike.⁷⁹ A prisoner incurring three such dismissals—three strikes—is barred from claiming *in forma pauperis* filing status (IFP Status).⁸⁰ IFP Status is a status that has been created by Congress to allow indigent citizens—including prisoners—to temporarily forgo the payment of filing fees.⁸¹ Therefore, if a prisoner has thrice had claims dismissed because they are frivolous, malicious, fail to state a claim, or seek monetary relief from someone who is immune from such relief, then a prisoner will be ineligible for IFP Status and will therefore have no access to the courts if he cannot afford to pay a filing fee.⁸²

Congress's passage of the PLRA completely changed the face of prison litigation.⁸³ Prisoners are now required to exhaust all

76. See 42 U.S.C. § 1997e(c) (mandating that prisoners' meritless claims be dismissed sua sponte).

77. *Id.*

78. *Id.* ("The court shall on its own motion or on the motion of a party dismiss any action 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 if the court is satisfied that the action is 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.")

79. *Ball v. Famiglio*, 726 F.3d 448, 452 (3d Cir. 2013) (explaining the PLRA's "three strikes" rule).

80. 28 U.S.C. § 1915(g) (2012) ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [i.e., proceed *in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."); see also *Famiglio*, 726 F.3d at 452 (explaining the interaction of the PLRA with the *in forma pauperis* statute).

81. 28 U.S.C. § 1915(a); see also *Famiglio*, 726 F.3d at 452 (explaining that IFP Status allows indigent prisoners to access the courts).

82. 28 U.S.C. § 1915(g); see also *Famiglio*, 726 F.3d at 452 (explaining the consequences of the "three strikes" provision).

83. See *supra* notes 72-82 and accompanying text.

administrative remedies that are available.⁸⁴ Indigent prisoners are now unable to use IFP Status to access the courts if on three or more occasions they have had claims dismissed on grounds that the claims are frivolous, malicious, fail to state a claim, or seek monetary relief from a defendant who is immune from such relief.⁸⁵ In light of these changes, courts are still struggling to interpret various parts of the PLRA.⁸⁶

II. THE CIRCUIT SPLIT LEADING UP TO *JONES V. BOCK*

After approximately twenty years of applying the PLRA, federal circuit courts disagreed about whether prisoners were required to allege their exhaustion of administrative remedies in their complaints.⁸⁷ Specifically, the Sixth,⁸⁸ Tenth,⁸⁹ and Eleventh⁹⁰ circuits held that if a judge found that a prisoner failed to plead exhaustion, the complaint should be dismissed for failure to state a claim⁹¹—the prisoner incurring a PLRA strike with such a result.⁹² Meanwhile, the First,⁹³ Second,⁹⁴ Third,⁹⁵ Fourth,⁹⁶ Seventh,⁹⁷ Eighth,⁹⁸ and Ninth⁹⁹ circuits held that a prisoner’s failure to exhaust should be treated as an affirmative defense, which, if invoked by a defendant, would not

84. 42 U.S.C. § 1997e(a) (2012).

85. *Id.* § 1997e(c); see also *supra* note 82 and accompanying text.

86. See discussion *infra* Part II.

87. *Jones v. Bock*, 549 U.S. 199, 205-06 (2007) (explaining the circuit split regarding whether prisoners are required to allege exhaustion in their complaints).

88. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (per curiam) (holding that the exhaustion of administrative remedies is a pleading requirement), *abrogated by Bock*, 549 U.S. at 216.

89. *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1210 (10th Cir. 2003) (same), *abrogated by Bock*, 549 U.S. at 216.

90. *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998) (same), *abrogated by Bock*, 549 U.S. at 216.

91. *Bock*, 549 U.S. at 205-06 (explaining the circuit split).

92. 42 U.S.C. § 1997e(c) (2012); see also *Ball v. Famiglio*, 726 F.3d 448, 452 (3d Cir. 2013) (explaining the “three strikes” provision).

93. *Casanova v. Dubois*, 304 F.3d 75, 77 n.3 (1st Cir. 2002) (holding that a failure to exhaust is an affirmative defense).

94. *Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999) (same).

95. *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002) (same).

96. *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 681 (4th Cir. 2005) (same).

97. *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999) (same).

98. *Foull v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001) (same).

99. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (same).

result in the prisoner incurring a PLRA strike.¹⁰⁰ In 2007, the Supreme Court settled the circuit split with its landmark case *Jones v. Bock*.¹⁰¹ Siding with the majority of circuits, the Court held that a prisoner's exhaustion of administrative remedies is not a pleading requirement in prisoners' complaints, but rather an affirmative defense that defendants must plead.¹⁰² Consequently, a prisoner failing to allege exhaustion should not have his complaint dismissed for failure to state a claim and should not incur a PLRA strike.¹⁰³ However, the Court explained in its dictum that if a complaint reveals an affirmative defense on its face—even the affirmative defense of failure to exhaust administrative remedies—the complaint should be dismissed for failure to state a claim.¹⁰⁴ This procedural rule, in conjunction with local federal district court rules, has led to other problems for prisoners.¹⁰⁵

A. Minority View: Circuits Viewing Exhaustion as a Pleading Requirement

An account of the Tenth Circuit's holding in *Steele v. Federal Bureau of Prisons*¹⁰⁶ will illustrate the minority view leading up to *Jones v. Bock*.¹⁰⁷ In *Steele*, Steele filed a claim in the United States Federal District Court for the District of Colorado under the Federal Tort Claims Act but did not commence the separate administrative grievance procedure.¹⁰⁸ He argued that inmates could not access the grievance procedure because the first step depended on cooperation from a staff member.¹⁰⁹ A magistrate judge recommended a dismissal for failure to exhaust administrative remedies, citing no applicable

100. See 28 U.S.C. § 1915(g) (2012) (providing types of dismissals that may disqualify a prisoner for IFP Status, but making no mention of affirmative defenses).

101. 549 U.S. 199 (2007).

102. *Id.* at 216 (“We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints.”).

103. See *id.* (holding that prisoners should not have their claims dismissed for failure to state a claim—which would have been a reason for a PLRA strike—if they fail to allege exhaustion).

104. *Id.* at 215-16 (explaining that a failure to exhaust should be treated as a normal affirmative defense).

105. See discussion *infra* Part III.

106. 355 F.3d 1204 (10th Cir. 2003).

107. 549 U.S. at 205-06 (explaining the minority view).

108. *Steele*, 355 F.3d at 1206.

109. *Id.* at 1207.

procedural rule.¹¹⁰ The district court followed the recommendation by dismissing the action for failure to state a claim,¹¹¹ which provided grounds for a PLRA strike against Steele.¹¹² On appeal, the Tenth Circuit affirmed the dismissal for failure to state a claim.¹¹³ Noting that affirmative defenses are waived if they are not timely brought,¹¹⁴ the court reasoned that exhaustion could not be an affirmative defense because it was mandatory and therefore could not be waived under the PLRA.¹¹⁵ Consequently, the court held that exhaustion was a pleading requirement, rather than an affirmative defense,¹¹⁶ maintaining the rule that a prisoner failing to plead exhaustion would have his complaint dismissed for failure to state a claim, which is grounds for a PLRA strike.¹¹⁷

B. Majority View: Circuits Viewing Exhaustion as an Affirmative Defense

An account of the Fourth Circuit's holding in *Anderson v. XYZ Correctional Health Services, Inc.*, will illustrate the majority view prior to *Jones v. Bock*.¹¹⁸ When Anderson sued Virginia prison officials for failure to provide adequate medical treatment for his broken arm, the United States Federal District Court for the Eastern District of Virginia dismissed his complaint for failure to state a claim because he failed to allege exhaustion in his complaint.¹¹⁹ On appeal, employing the principle of *expressio unius est exclusio alterius*,¹²⁰ the court pointed out that the statute includes a list of

110. *Id.*

111. *Id.*

112. *See* 28 U.S.C. § 1915(g) (2012) (listing three dismissals for a failure to state a claim as grounds for barring IFP Status).

113. *Steele*, 355 F.3d at 1209 (declining to follow other circuits that hold a failure to exhaust as an affirmative defense).

114. *Id.* (citing and explaining FED. R. CIV. P. 8).

115. *Id.*

116. *Id.* at 1210.

117. *Id.*; *see also* 28 U.S.C. § 1915(g) (listing three dismissals for a failure to state a claim as grounds for barring IFP Status).

118. *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 675 (4th Cir. 2005).

119. *Id.* at 676.

120. The Supreme Court has explained the meaning of this phrase. *See* *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

grounds for dismissals that should count as strikes—among the list, a failure to state a claim—but the list does not include a failure to exhaust administrative remedies as a reason for a strike-worthy dismissal.¹²¹ The court went on to explain that meanwhile, just a few lines below, the statute allows courts to dismiss prisoners' claims if the prisoners have failed to exhaust administrative remedies prior to bringing suit.¹²² The court argued that Congress must have intentionally omitted exhaustion from its list of strike-worthy dismissals because Congress provided exhaustion as grounds for a permissive dismissal just a few lines later.¹²³ Identifying a clear distinction between a failure to exhaust and a failure to state a claim, the court held that a failure to exhaust is an affirmative defense, rather than a pleading requirement.¹²⁴

With circuits clearly divided, the Supreme Court decided to resolve the conflict.¹²⁵ The Court granted certiorari to Lorenzo Jones, a prisoner appealing the Sixth Circuit's decision that gave him a PLRA strike for failure to state a claim as a result of his failure to plead exhaustion.¹²⁶ With the grant of certiorari, the Court set out to determine whether a prisoner's failure to allege exhaustion should result in a strike-worthy dismissal for failure to state a claim, or an affirmative defense, which would not normally cause the prisoner to incur a PLRA strike.¹²⁷

C. *Jones v. Bock*

In *Jones v. Bock*, the Supreme Court decisively rejected the minority opinion that exhaustion was a pleading requirement and sided with the majority of circuits in holding that a prisoner's failure to exhaust should be viewed as an affirmative defense.¹²⁸ In doing so,

121. *Anderson*, 407 F.3d at 680.

122. *Id.*

123. *Id.*

124. *Id.* at 681 (“[A]n inmate’s failure to exhaust his administrative remedies must be viewed as an affirmative defense that should be pleaded or otherwise properly raised by the defendant.”).

125. *Jones v. Bock*, 549 U.S. 199, 205 (2007).

126. *Jones v. Bock*, 135 F. App’x 837, 838-39 (6th Cir. 2005) (per curiam) (holding that a prisoner has to attach a copy of his prison grievance form to the complaint or explain how he exhausted administrative remedies in the complaint itself).

127. *See Bock*, 549 U.S. at 205 (explaining the circuit split the Court intended to resolve).

128. *Id.* at 216.

the Court provided a comprehensive discussion of the relationship between the PLRA and the Federal Rules of Civil Procedure,¹²⁹ as well as the relationship between various provisions within the PLRA itself.¹³⁰ Finally, the Court provided dictum in hopes of clarifying that a failure to exhaust, viewed as an affirmative defense, should be treated the same way any other affirmative defense would be treated under the Federal Rules of Civil Procedure.¹³¹

1. Jones v. Bock *Holding*

The Court in *Bock* first discussed the significance of Rule 8 of the Federal Rules of Civil Procedure.¹³² The Court explained that Rule 8(a) requires only “a short and plain statement of the claim” in the complaint;¹³³ meanwhile, 42 U.S.C. § 1983,¹³⁴ the statute under which prisoners typically bring civil rights claims,¹³⁵ makes no mention of the exhaustion of administrative remedies as an element needed for an actionable claim.¹³⁶ Therefore, the Court reasoned, to provide a short and plain statement of a claim, a claimant usually does not have the burden of pleading exhaustion when bringing a lawsuit under § 1983.¹³⁷ Rule 8(c), on the other hand, burdens defendants with claiming affirmative defenses in response to plaintiffs’ claims.¹³⁸ The Court noted that the usual practice in other contexts is for a defendant to claim a plaintiff’s failure to exhaust as part of that defendant’s affirmative defense.¹³⁹ Having determined that the usual practice was to view a failure to exhaust as an

129. *See id.* at 212-13 (discussing the PLRA’s effect—or lack thereof—on the normal procedural rules).

130. *See id.* (applying the principal of *expressio unius est exclusio alterius* to determine that Congress did not intend for the PLRA to create an added pleading requirement for prisoners).

131. *Id.* at 214-15 (explaining that an affirmative defense appearing on the face of a complaint is grounds for a dismissal for failure to state a claim).

132. *Id.* at 212 (citing FED. R. CIV. P. 8).

133. *Id.* (quoting FED. R. CIV. P. 8).

134. 42 U.S.C. § 1983 (2012).

135. *Bock*, 549 U.S. at 212.

136. 42 U.S.C. § 1983 (making no mention of administrative remedies).

137. *Bock*, 549 U.S. at 212 (citing FED. R. CIV. P. 8 and explaining its requirements).

138. FED. R. CIV. P. 8(c) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . .”).

139. *Bock*, 549 U.S. at 212 (explaining that exhaustion is treated as an affirmative defense “in the similar statutory scheme [that] govern[s] habeas corpus”).

affirmative defense, the Court had to determine whether there was any reason to depart from the usual practice when handling prisoners' civil rights claims.¹⁴⁰

The Court discussed its previous case *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* to demonstrate that courts should not depart from the usual practice in response to apparent policy concerns.¹⁴¹ In *Leatherman*, the Fifth Circuit, through adjudication,¹⁴² had adopted a heightened pleading standard for claims concerning municipal liability.¹⁴³ The Fifth Circuit created the rule because a claim against a municipality is meritless when the cause of action stems from an agent of the municipality acting outside the scope of her duty.¹⁴⁴ A heightened pleading requirement could allow courts to dismiss such meritless claims¹⁴⁵ by requiring a given plaintiff to allege that the defendant cannot successfully maintain an immunity defense.¹⁴⁶ Such dismissals would protect municipalities from spending money litigating claims for which they are clearly not liable.¹⁴⁷ Though the Supreme Court recognized the legitimate policy concerns addressed by the Fifth Circuit's heightened pleading requirement, the Court emphasized that Rule 8 pleading is a liberal standard and ultimately held that such a requirement could only be imposed by an amendment to the Federal Rules of Civil Procedure, not by a federal district or circuit court.¹⁴⁸ After the *Bock* Court discussed *Leatherman* as an example of a pleading requirement that was invalid for being inconsistent with the

140. *See id.* at 214 (explaining that nothing in the PLRA “justif[ies] deviating from the usual procedural practice”).

141. *Id.* at 212 (citing *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993)).

142. Adjudicatory rulemaking is distinguished from the Court's statutory rulemaking power. *See* discussion *infra* Section III.B.

143. *See Leatherman*, 507 U.S. at 165.

144. *Id.* at 167 (explaining the Fifth Circuit's heightened pleading standard).

145. *See id.* A court could dismiss a claim under Rule 12(b)(6) for failure to state a claim if it did not meet the heightened standard. *See also id.* (explaining that the United States District Court for the Northern District of Texas dismissed a complaint because it did not meet the heightened pleading standard).

146. *Id.* (citing *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)).

147. *See id.* at 166 (explaining respondents' argument that a more relaxed pleading requirement subjects municipalities to expensive discovery when litigation is unnecessary).

148. *See id.* at 168 (“Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”).

usual pleading practice, the Court looked to the PLRA to determine whether it created any reason for a departure from the usual pleading practice.¹⁴⁹

The Court determined that nothing in the PLRA “justif[ies] deviating from the usual procedural practice” for pleading.¹⁵⁰ The Court first noted that Congress was silent on the issue of exhaustion and further explained that congressional silence regarding an added pleading requirement is strong evidence that Congress intended exhaustion to be viewed as an affirmative defense.¹⁵¹ Proponents for a pleading requirement argued that requiring prisoners to allege exhaustion would make it easier to identify meritless claims, but the Court rejected the argument, noting that the same could be said for any affirmative defense.¹⁵² The Court then noted that one of Congress’s primary focuses with the PLRA was the exhaustion of administrative remedies.¹⁵³ With Congress honed in on exhaustion, its choice not to include exhaustion among the listed grounds for a strike-worthy dismissal¹⁵⁴ indicates that it did not intend prisoners to incur a PLRA strike for failing to plead exhaustion.¹⁵⁵ After careful reasoning, the Court decisively held that a “failure to exhaust is an affirmative defense under the PLRA” and that prisoners should not be “required to specially plead or demonstrate exhaustion in their complaints.”¹⁵⁶

2. Jones v. Bock *Dictum*

A more detailed explanation of the procedural rules regarding Rule 8 and Rule 12 of the Federal Rules of Civil Procedure will provide a backdrop for a discussion of the Court’s dictum.¹⁵⁷ While

149. Jones v. Bock, 549 U.S. 199, 214 (2007) (holding that the PLRA does not warrant a departure “from the usual procedural practice”).

150. *Id.*

151. *See id.* at 212 (explaining that congressional silence on the issue of exhaustion is “strong evidence that the usual practice should be followed,” which “is to regard exhaustion as an affirmative defense”).

152. *Id.* at 215.

153. *Id.* at 215-16 (“The rejoinder that the PLRA focused on exhaustion rather than other defenses simply highlights the failure of Congress to include exhaustion in terms among the enumerated grounds justifying dismissal upon early screening.”).

154. *Id.*

155. *See id.* at 216 (explaining that Congress did not intend exhaustion to be a pleading requirement).

156. *Id.*

157. *See id.* at 212-14.

an affirmative defense is normally brought with a defendant's responsive pleading,¹⁵⁸ an affirmative defense can be grounds for a dismissal for failure to state a claim if the defense appears on the face of a complaint.¹⁵⁹ For example, if it is clear by reading the complaint that the defendant is protected by governmental immunity, a protection normally pled as an affirmative defense, the court should dismiss the complaint for a failure to state a claim.¹⁶⁰ However, affirmative defenses will rarely appear on the face of complaints to give courts grounds to dismiss for failure to state a claim.¹⁶¹

Acknowledging that an affirmative defense appearing on the face of a complaint can be grounds for a dismissal for failure to state a claim, the Court in *Bock* explained that its holding does not alter this procedural rule.¹⁶² If a prisoner's failure to exhaust reveals itself on the face of a complaint, consistent with the treatment of any other affirmative defense, the complaint should be dismissed for a failure to state a claim.¹⁶³ The Court warned, however, that this type of dismissal "is a bit of a red herring" because a complaint should only be dismissed for failure to state a claim if the information within the complaint itself—as opposed to information outside the complaint—would not entitle the plaintiff to relief.¹⁶⁴ The Court's dictum effectively clarified that the affirmative defense of failure to exhaust administrative remedies should be treated the same as any other affirmative defense.¹⁶⁵

In sum, the Supreme Court ended a circuit split that existed until 2007 with its decision in *Jones v. Bock*.¹⁶⁶ Originally, a minority

158. FED. R. CIV. P. 8(c).

159. *Bock*, 549 U.S. at 215 (explaining that an affirmative defense on the face of a complaint is grounds for a dismissal for failure to state a claim).

160. Rhynette Northcross Hurd, *The Propriety of Permitting Affirmative Defenses to Be Raised by Motions to Dismiss*, 20 MEM. ST. U. L. REV. 411, 413 (1990).

161. *Id.* ("For a court to [grant] a 12(b)(6) dismissal on the basis of an affirmative defense, the defense must appear on the face of the complaint; therefore, many . . . affirmative defenses . . . are not likely to be successfully raised by motion to dismiss for failure to state a claim." (footnote omitted)).

162. *Bock*, 549 U.S. at 215.

163. *Id.* (explaining that a complaint can be dismissed for failure to state a claim when an affirmative defense—including a failure to exhaust—appears on the face of the complaint).

164. *Id.* at 214-15.

165. *See id.* (explaining that a failure to exhaust should be treated the same as any other affirmative defense).

166. *See id.* at 205, 215 (describing the circuit split and subsequently ending it).

of the circuit courts was dismissing prisoners' complaints for failure to state a claim—a strike-worthy dismissal under the PLRA¹⁶⁷—if the complaints did not adequately allege exhaustion.¹⁶⁸ However, the Supreme Court rejected the minority view that exhaustion was a pleading requirement by holding in *Bock* that a prisoner's failure to exhaust should be claimed by defendants as an affirmative defense,¹⁶⁹ which is not grounds for a PLRA strike.¹⁷⁰ The Court went on to caution in dictum that an affirmative defense appearing on the face of a complaint is still grounds for that complaint's dismissal for failure to state a claim, and the Court clarified that there is no exception to this rule if the affirmative defense is a failure to exhaust administrative remedies.¹⁷¹ The Court's decision in *Bock* seemed to eliminate the issue of prisoners pleading exhaustion; however, the Court's dictum in *Bock*, in conjunction with district court rules—specifically, rules requiring pro forma complaints prompting prisoners to discuss their exhaustion of administrative remedies—has created a mechanism by which prisoners are still incurring PLRA strikes for failing to allege the exhaustion of administrative remedies in their complaints.¹⁷²

III. COURT RULES CAUSING PLRA STRIKES

Since *Bock*, some federal district court rules¹⁷³ mandating pro forma complaints have been forcing prisoners to reveal the affirmative defense of failure to exhaust in their complaints.¹⁷⁴ An

167. 42 U.S.C. § 1997e(c) (2012).

168. See *Bock*, 549 U.S. at 205.

169. *Id.* at 215.

170. See 42 U.S.C. § 1997e(c) (providing a list of strike-worthy dismissals that does not include losing a case due to a defendant's affirmative defense).

171. See *Bock*, 549 U.S. at 212 (explaining that affirmative defenses appearing on the face of a complaint are grounds for a failure to state a claim and that the affirmative defense of failure to exhaust is no exception to this rule).

172. See discussion *infra* Part III.

173. See, e.g., D. ARIZ. LRCIV 3.4; M.D. FLA. R. 1.05(e); M.D. PA. LR 4.7. The local court rules themselves do not indicate an exhaustion requirement, but they require use of complaint forms that have portions requiring prisoners to discuss the exhaustion of administrative remedies. See *infra* note 175 (providing the standard form complaints corresponding to the court rules listed in note 173, each of which asks prisoners to discuss their exhaustion of administrative remedies, and also providing standard form complaints that do not ask prisoners to discuss exhaustion).

174. See, e.g., *Sanks v. Williams*, No. CV407-070, 2007 WL 3254368, at *2-4 (S.D. Ga. Nov. 2, 2007) (dismissing prisoner's complaint for failure to state a claim because the affirmative defense for failure to exhaust administrative remedies

explanation of Dawn Ball's litigation in the Middle District of Pennsylvania and in the Third Circuit will illustrate how local court rules that require certain pro forma complaints¹⁷⁵ may cause a prisoner to incur a PLRA strike for a failure to state a claim.¹⁷⁶ While courts have some discretion to create these rules, courts' rulemaking power is subject to significant limitations.¹⁷⁷

A. Dawn Ball's PLRA Strike for Her Failure to Exhaust Administrative Remedies

An explanation of the progression of prisoner Dawn Ball's litigation illustrates the problem with pro forma complaints that ask prisoners about their exhaustion of administrative remedies.¹⁷⁸ Ball filed a civil rights action against State Correctional Institution Muncy

appeared on the face of the complaint); *Bilal v. Wise*, No. 2:10-cv-638-FtM-29SPC, 2010 WL 4668474, at *2 (M.D. Fla. Nov. 9, 2010) (same); *Sorce v. Garikpaetiti*, No. 14-CV-0327 BEN (JMA), 2014 WL 2506213, at *3 (S.D. Cal. June 2, 2014) (same).

175. See, e.g., U.S. DIST. COURT FOR THE DIST. OF ARIZ., INSTRUCTIONS FOR A PRISONER FILING A CIVIL RIGHTS COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (2013), <http://www.prisonlaw.com/pdfs/AZSection1983Form,2013.pdf> (providing an example of a standard form complaint that asks prisoners to discuss their exhaustion of administrative remedies); U.S. DIST. COURT MIDDLE DIST. OF FLA., INSTRUCTIONS FOR FILING A CIVIL RIGHTS COMPLAINT BY PRISONERS UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983 (n.d.), <https://www.flmd.uscourts.gov/forms/Prisoner/PrisonerCivilRightsComplaint.pdf> (same); U.S. DIST. COURT FOR THE MIDDLE DIST. OF PA., FORM TO BE USED BY A PRISONER IN FILING A CIVIL RIGHTS COMPLAINT (n.d.), <http://www.pamd.uscourts.gov/sites/default/files/complain.pdf> (same). Still, other federal district courts use forms that do not ask prisoners about their exhaustion of administrative remedies. See, e.g., U.S. DIST. COURT FOR THE W. DIST. OF MICH., FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983 (n.d.), <http://www.miwd.uscourts.gov/sites/miwd/files/cmpref.pdf> (demonstrating a pro forma complaint that does not require prisoners to plead exhaustion); U.S. DIST. COURT DIST. OF MINN., PRISONER CIVIL RIGHTS COMPLAINT (n.d.), <http://www.mnd.uscourts.gov/Pro-Se/ProSeForms/ProSe-Civil-Rights-Complaint.pdf> (same); U.S. DIST. COURT DIST. OF N.H., INSTRUCTIONS FOR FILING A COMPLAINT BY A PRISONER UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983 (n.d.), <http://www.nhd.uscourts.gov/pdf/Inmate%20Complaint%20USDCNH-11.pdf> (same).

176. See discussion *infra* Section III.A (providing an example of the mechanism by which prisoners are incurring PLRA strikes for their failure to exhaust administrative remedies).

177. See discussion *infra* Sections III.B-C (discussing limitations to court rulemaking imposed by Rule 83 of the Federal Rules of Civil Procedure and by The Rules Enabling Act).

178. See *supra* notes 173-175.

(SCI Muncy) in the United States Federal District Court for the Middle District of Pennsylvania.¹⁷⁹ Her complaint alleged that prison officials retaliated against her for reporting an incident of sexual assault.¹⁸⁰ She alleged that, as part of the retaliation, prison officials denied her food, clothes, and basic hygiene products and that they placed her in a filthy cell that was covered in the feces and blood of prior occupants.¹⁸¹

Ball filed her complaint using a district-court-created pro forma complaint provided to her by prison officials.¹⁸² Like many other pro forma complaints for prisoners,¹⁸³ this form required Ball to explain how she had exhausted administrative remedies.¹⁸⁴ Providing boxes to check “yes” or “no,” the complaint asked her: (1) if her institution had a grievance procedure; (2) whether she had filed a grievance concerning the facts contained in the complaint; and (3) whether the grievance process was completed.¹⁸⁵ “Ball checked ‘yes’ for the first two questions and ‘no’ for the third question,” thereby indicating that she had not exhausted all administrative remedies.¹⁸⁶

The defendants attempted to have Ball’s claim dismissed for failure to state a claim because her pro forma complaint revealed that she failed to exhaust administrative remedies.¹⁸⁷ Preparing to make a ruling on the defendants’ motion, the court cited the PLRA and various cases establishing that the exhaustion of administrative remedies is mandatory.¹⁸⁸ Noting Ball’s failure to oppose the

179. Ball v. SCI Muncy, No. 1:08-CV-0391, at *1 (M.D. Pa. Dec. 10, 2008) (casetext), <https://casetext.com/case/ball-v-sci-muncy-2>.

180. *Id.* at *2.

181. *Id.*

182. Ball v. SCI Muncy, 385 F. App’x. 211, 213 (3d Cir. 2010).

183. *See supra* note 175 (providing an example of the pro forma complaint used in the Middle District of Pennsylvania and similar pro forma complaints used in other districts).

184. *See Ball*, 385 F. App’x. at 213 (“The questions are: (1) ‘Is there a grievance procedure available at your institution?’; (2) ‘Have you filed a grievance concerning the facts relating to this complaint?’; and (3) ‘Is the grievance process completed?’”).

185. *Id.* (explaining the contents of the pro forma complaint that Ball used).

186. *Id.*

187. Ball v. SCI Muncy, No. 1:08-CV-0391, at *3 (M.D. Pa. Dec. 10, 2008) (casetext), <https://casetext.com/case/ball-v-sci-muncy-2>.

188. *Id.* at *4 (citing 42 U.S.C. § 1997e(a) (2006) (making exhaustion mandatory)); Porter v. Nussle, 534 U.S. 516, 532 (2002) (holding that prisoners must exhaust administrative remedies, regardless of the relief sought); Woodford v. Ngo, 548 U.S. 81, 93 (2006) (holding that prisoners must exhaust administrative remedies and must do so properly).

defendants' Rule 12(b)(6)¹⁸⁹ motion that alleged Ball failed to exhaust her administrative remedies, the court dismissed her action, explaining that her claims were not properly before the court.¹⁹⁰

On appeal, the Third Circuit affirmed the Middle District of Pennsylvania's decision to dismiss Ball's action for failure to state a claim because her pro forma complaint revealed that she failed to exhaust administrative remedies.¹⁹¹ The court first established that Ball's complaint indicated that she had not exhausted administrative remedies.¹⁹² The court then explained that it could only review matters within Ball's original complaint, noting that Ball's letters and additional complaints explaining her problems with prison officials were irrelevant to the court's review.¹⁹³ Finally, explaining that Ball's complaint provided no excuse for failing to exhaust administrative remedies, the court affirmed the District Court, and Ball proceeded no further with the action.¹⁹⁴

In a separate action that reached the Third Circuit, Ball again brought a § 1983 claim against SCI Muncy, now alleging that the prison was deliberately indifferent to her medical needs.¹⁹⁵ The crux of this case, however, was whether Ball had acquired three strikes under the PLRA, which would preclude her from claiming IFP Status.¹⁹⁶ As part of its decision, the Third Circuit had to determine whether Ball's previously dismissed complaint alleging sexual assault¹⁹⁷ should count as a strike against her pursuant to the PLRA.¹⁹⁸ The court acknowledged that Ball's complaint was dismissed for failure to exhaust administrative remedies¹⁹⁹—a failure

189. FED. R. CIV. P. 12(b)(6) (allowing for complaints to be dismissed when they “fail[] to state a claim upon which relief can be granted”).

190. *SCI Muncy*, No. 1:08-CV-0391, at *5.

191. *Ball*, 385 F. App'x. at 212 (“The District Court granted the Defendants’ motions to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the grounds of failure to exhaust administrative remedies. We agree with the District Court’s decision and accordingly affirm the dismissal of Ball’s claims.”).

192. *See id.* at 213 (“First, the material she cites in her Complaint, which she claims contradicts the check mark stating that she completed the grievance process, does not present a conflict or even any ambiguity.”).

193. *Id.* at 214.

194. *Id.* at 212.

195. *Ball v. Famiglio*, 726 F.3d 448, 451 (3d Cir. 2013) (discussing the case from the district court now on appeal).

196. *Id.*

197. *Ball v. SCI Muncy*, No. 1:08-CV-0391, at *2 (M.D. Pa. Dec. 10, 2008) (casetext), <https://casetext.com/case/ball-v-sci-muncy-2>.

198. *Famiglio*, 726 F.3d at 466 (discussing Ball’s potential strikes).

199. *Id.*

that would not provide an independent ground for a failure to state a claim or a PLRA strike.²⁰⁰ However, because her pro forma complaint included her checkmark indicating that she had not exhausted all administrative remedies,²⁰¹ the court determined that her complaint revealed the affirmative defense for failure to exhaust on its face.²⁰² The court held that a finding of the affirmative defense of failure to exhaust on the face of her complaint in conjunction with the District Court's explicit dismissal in response to the defendant's Rule 12(b)(6) motion caused Ball to accrue a PLRA strike.²⁰³

The Middle District of Pennsylvania's court rule²⁰⁴ mandating the pro forma complaint²⁰⁵ that resulted in Dawn Ball's PLRA strike is not an uncommon court rule.²⁰⁶ Many federal district courts similarly have local rules mandating pro forma complaints that require prisoners to discuss their exhaustion of administrative remedies.²⁰⁷ While federal district courts have some discretion to create such local rules as extensions of the Federal Rules of Civil Procedure, their power to create these rules is subject to various limitations.²⁰⁸

B. The Rules Enabling Act and District Court Rulemaking

Congress established court rulemaking with its passage of the Rules Enabling Act (REA) in 1934.²⁰⁹ The REA created a centralized rulemaking process by delegating to the Supreme Court the power to

200. See 28 U.S.C. § 1915(g) (2012) (providing a list of strike-worthy dismissals that does not include failure to exhaust).

201. See *Ball v. SCI Muncy*, 385 F. App'x. 211, 213 (3d Cir. 2010) (describing the form complaint).

202. *Famiglio*, 726 F.3d at 466 (holding that Ball's dismissal in *SCI Muncy* counted as a PLRA strike).

203. *Id.*

204. M.D. PA. LR 4.7.

205. U.S. DIST. COURT FOR THE MIDDLE DIST. OF PA., FORM TO BE USED BY A PRISONER IN FILING A CIVIL RIGHTS COMPLAINT (n.d.), <http://www.pamd.uscourts.gov/sites/default/files/complain.pdf>.

206. See *supra* note 173 (providing examples of court rules requiring forms that ask prisoners about exhaustion).

207. See *supra* note 175.

208. See discussion *infra* Section III.B.

209. See Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071-2077 (2012)); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888 (1999) (discussing the REA and court rulemaking).

create and modify the Federal Rules of Civil Procedure.²¹⁰ The process allows for proposed changes to the rules to go through a sequence of committee review and public comment, followed by a submission to the Supreme Court for a final review before the rules are ultimately transmitted to Congress.²¹¹ Once transmitted, if Congress does not affirmatively act to modify or reject the rules within seven months, they take effect as part of the Federal Rules of Civil Procedure.²¹²

Apart from making the Federal Rules,²¹³ the Court also has the power to determine “the application of the Rules by adjudicating cases and controversies . . . implicat[ing] civil procedure.”²¹⁴ For example, in *Bell Atlantic Corp. v. Twombly*,²¹⁵ the Court abandoned its well-established pleading standard that allowed a plaintiff to satisfy Rule 8(a) with mere legal conclusions, and it created a new and more demanding pleading requirement by interpreting Rule 8(a) to require a plaintiff to plead facts sufficient to make a claim for relief “plausible.”²¹⁶ With this decision, the Court explicitly heightened the standard for Rule 8 pleading in hopes of mitigating the high costs of discovery and reducing unmeritorious cases,²¹⁷ and all federal courts are now bound by the Court’s interpretation of Rule 8(a).²¹⁸

1. Delegation of Rulemaking Power to District Courts

Employing its rulemaking power, the Supreme Court created Rule 83 of the Federal Rules of Civil Procedure to allow federal district courts to make local court rules.²¹⁹ Rule 83 allows for district

210. Bone, *supra* note 209, at 888-89.

211. *Id.*

212. *Id.* at 892.

213. The term “Federal Rules” is interchangeable with “Federal Rules of Civil Procedure” throughout this Note.

214. Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1194 (2012).

215. 550 U.S. 544 (2007).

216. *Id.* at 556.

217. See Mulligan & Staszewski, *supra* note 214, at 1196 (explaining the impact of the Court’s decision in *Twombly*).

218. See *id.* at 1196-97. This concept applies throughout the United States court system, as all lower courts within a given jurisdiction must follow superior courts. Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460-61 (2010).

219. FED. R. CIV. P. 83.

courts to create local rules with a majority vote of district judges after a public notice and comment period.²²⁰ However, the local rules are limited in that they “must be consistent with—but not duplicate—federal statutes and rules adopted” by the Supreme Court pursuant to the REA.²²¹ Consequently, local rules are invalid under Rule 83 if they are inconsistent with the Federal Rules of Civil Procedure as interpreted by the Court.²²² While local rules are subject to the limitations imposed by the Supreme Court through Rule 83, all court rulemaking is further constrained by the REA.²²³

2. Further Rulemaking Limitations

All federal court rules, whether created locally or by the Supreme Court, are subject to certain limits imposed by Congress.²²⁴ The REA’s § 2071 stipulates that district courts may create procedural rules, but it states that those rules must be consistent with the Supreme Court’s rules created pursuant to § 2072.²²⁵ Meanwhile, § 2072 dictates that rules created by the Supreme Court “shall not abridge, enlarge or modify any substantive right.”²²⁶ Therefore, it follows that district court rules—to be consistent with the Supreme Court’s rules—must “not abridge, enlarge or modify any substantive right.”²²⁷ This limitation leaves courts with the power to create local rules that affect procedural rights, but not substantive rights.²²⁸ Unfortunately, distinguishing between procedural rights and substantive rights is controversial.²²⁹ Scholars have long discussed

220. *Id.*

221. *Id.*

222. *Colgrove v. Battin*, 413 U.S. 149, 150-51 (1973) (examining a local court rule for its validity under Rule 83, but ultimately upholding the local rule, holding that it was consistent with the Federal Rules of Civil Procedure).

223. *See* 28 U.S.C. §§ 2071-2072 (2012).

224. *See* Leslie M. Kelleher, *Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 93-95 (1998) (describing the theoretical limits of federal court rulemaking).

225. 28 U.S.C. § 2071.

226. *Id.* § 2072.

227. *Id.* §§ 2071-2072.

228. *See* Kelleher, *supra* note 224, at 101-05 (discussing congressional intent for the REA).

229. *See* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 26-27 (2008) (“To this day, no real consensus has developed as to how the [REA] should be interpreted.”).

Congress's impetus for the REA while attempting to define the difference between procedural and substantive rulemaking.²³⁰

C. The Substantive Rulemaking Limitation

One of Congress's primary concerns with its passage of the REA was that it provided a limitation to the degree of power delegated to the Court for its rulemaking.²³¹ Congress derives its authority to regulate practice and procedure in federal courts from Articles I and III of the Constitution,²³² which give Congress the power to create lower federal courts, along with the Necessary and Proper Clause, which gives Congress the authority to make laws "necessary and proper" for the implementation of that power.²³³ When Congress delegated rulemaking power to the Court with the REA, it prohibited the Court from making rules regarding substantive rights to ensure that the REA reserved for Congress any federal lawmaking that involved policy decisions or required choices among competing interests.²³⁴

In the early days of the REA, the Court largely ignored the rulemaking limitations Congress attempted to impose.²³⁵ In *Sibbach v. Wilson & Co.*,²³⁶ the Court held that the test for determining the validity of a rule created under the REA was "whether a rule really regulates procedure."²³⁷ In other words, if a rule fell somewhere in the uncertain area between procedural and substantive, it would be upheld so long as it regulated procedure in some way.²³⁸ In its 1987 decision of *Burlington Northern Railroad Co. v. Woods*,²³⁹ the Court held that an "incidental" impact on substantive rights was permissible so long as it was necessary to preserve the integrity of a

230. See Kelleher, *supra* note 224, at 101-05 (discussing controversy over the REA); Redish & Murashko, *supra* note 229, at 27-30 (discussing confusion regarding the REA).

231. See Kelleher, *supra* note 224, at 93.

232. U.S. CONST. art. I, § 8; *id.* art. III; see also Kelleher, *supra* note 224, at 62 (explaining constitutional delegation of power).

233. U.S. CONST. art I, § 8.

234. See Kelleher, *supra* note 224, at 93.

235. See *id.* at 95-96.

236. 312 U.S. 1 (1941).

237. *Id.* at 14.

238. Kelleher, *supra* note 224, at 96-97 (discussing the Court's holding in *Sibbach*).

239. 480 U.S. 1 (1987).

uniform system of rules governing federal practice and procedure.²⁴⁰ As the Court recognized virtually no limit to its rulemaking power, Congress sought to redefine the meaning of the REA.²⁴¹

Congress attempted to rectify the Court's failure to recognize any rulemaking limitations by amending the REA in 1988.²⁴² While the 1988 amendment did not change the language of the REA, Congress attempted to change the law's meaning by adding legislative history.²⁴³ An added House Judiciary Committee note explained that the Court had overstepped its bounds and that the Committee felt it needed to carefully state its views on the scope of Congress's delegation of rulemaking power.²⁴⁴ Firstly, the Committee emphasized that Congress had delegated only a portion of its power with the REA and that the substantive rights limitation prohibits the Court from creating rules regarding matters already addressed by acts of Congress or that may be addressed by Congress in the future.²⁴⁵ The Committee went on to explain that the substantive rights limitation goes beyond protecting rights conferred by law; rather, the protection, "[a]t the least . . . prevents . . . rules, otherwise valid," from being applied when they would have the effect of altering rights conferred by substantive law.²⁴⁶ Put differently, the Committee explained that court rules violate the REA when they are created with the intent to regulate procedure but have an incidental effect on substantive rights.²⁴⁷ Finally, the Committee emphasized that only Congress, not the Supreme Court, has the authority to make choices involving policy considerations outside the business of the courts.²⁴⁸

After the 1988 amendment, the Court started constraining its rulemaking power.²⁴⁹ Two years after the amendment, in *Cooter & Gell v. Hartmarx Corp.*, the Court affirmatively recognized that it has no authority to enact rules affecting substantive rights.²⁵⁰ In *Business Guides, Inc. v. Chromatic Communications Enterprises*,

240. *Id.* at 5.

241. See Kelleher, *supra* note 224, at 101-03 (discussing Congress's reason for amending the REA).

242. *Id.*

243. *Id.* at 101-02.

244. *Id.* at 102.

245. H.R. REP. NO. 99-422, at 20-21 (1985).

246. *Id.* at 21-22.

247. Kelleher, *supra* note 224, at 102-03.

248. H.R. REP. NO. 99-422, at 21.

249. Kelleher, *supra* note 224, at 105-06.

250. 496 U.S. 384, 391 (1990).

Inc., Justice Kennedy emphasized in his dissent that the Court needed to further constrain its rulemaking power.²⁵¹ Finally, in the 2010 case of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Court attempted to provide a more explicit rule regarding the substantive rights limitation.²⁵²

In *Shady Grove*, the Court attempted to clarify the distinction between procedural and substantive rules while determining whether Rule 23 of the Federal Rules of Civil Procedure was valid under the REA.²⁵³ Rule 23 allows for multiple plaintiffs to join their claims in a class action against a single defendant.²⁵⁴ Allstate argued that Rule 23 affected its substantive rights by garnering more plaintiffs making claims against it because plaintiffs were more likely to join a class action than they were to bring lawsuits against the company individually.²⁵⁵ In determining whether Rule 23 impermissibly affected substantive rights, the Court enigmatically explained that a rule is unlawfully substantive “if it alters ‘the rules of decision by which [the] court will adjudicate . . . rights.’”²⁵⁶ Applying its rule, the Court upheld Rule 23, reasoning that it merely changes how the claims are processed, not the ultimate outcome of the case.²⁵⁷ The Court explained that Rule 23 does not add or subtract from individual plaintiffs’ claims to relief and that it does not affect defendants’ rights because defendants maintain all of the same defenses.²⁵⁸ While the Court’s reasoning provided some useable framework, there is still no clear definition of the substantive rights limitation.²⁵⁹

While distinguishing between procedural and substantive rules is still a topic of great debate,²⁶⁰ Congress and the Court have

251. 498 U.S. 533, 554 (1991) (Kennedy, J., dissenting).

252. See 559 U.S. 393, 406-07 (2010) (setting forth a new test for determining whether a court rule regulates substance or procedure).

253. *Id.*

254. FED. R. CIV. P. 23.

255. *Shady Grove*, 559 U.S. at 408.

256. *Id.* at 407 (first alteration in original).

257. See *id.* at 407-08 (holding that Rule 23 “undeniably regulated only the process for enforcing . . . rights”).

258. See *id.* (“[N]one altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.”).

259. See Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 453-54 (2013) (discussing the ongoing confusion about the substantive rights limitation).

260. See *id.*

established some general principles that provide some guidance.²⁶¹ First, attempting to rectify the Court's liberal application of the REA, Congress's 1988 amendment established that the Court is prohibited from making rules that conflict with a current federal law or that are likely to conflict with a law Congress may pass in the future.²⁶² Congress also explained that it intended for the Court to be prohibited not only from creating rules for the *purpose* of affecting substantive rights, but also rules that have an *effect* on substantive rights.²⁶³ Finally, in *Shady Grove*, the Court provided that court rules are invalid if they affect how a court will decide an issue²⁶⁴ and that procedural rules should only affect how courts process claims.²⁶⁵ While distinguishing between procedural and substantive rights can be difficult, these general rules provide a framework for making that important determination.²⁶⁶

The Federal Rules of Civil Procedure, along with local court rules—such as the court rules requiring pro forma complaints that ask prisoners about their exhaustion of administrative remedies²⁶⁷—are an integral part of the federal court system.²⁶⁸ Despite the prominence of court rulemaking, courts are subject to significant limitations to their rulemaking power.²⁶⁹ Namely, all local rules must be consistent with the Federal Rules of Civil Procedure,²⁷⁰ and all court rules must respect the substantive rights limitation imposed by the REA.²⁷¹ Therefore, any court rule falling outside the scope of these limitations is invalid and should be eliminated.²⁷²

261. See *Shady Grove*, 559 U.S. at 408 (discussing limitations imposed by the REA); H.R. REP. NO. 99-422, at 21 (1985) (same).

262. See Kelleher, *supra* note 224, at 103.

263. *Id.*

264. See *Shady Grove*, 559 U.S. at 406-08 (discussing limitations imposed by the REA).

265. See *id.* at 407-08.

266. See *id.* at 408 (discussing limitations imposed by the REA); H.R. REP. NO. 99-422, at 21 (1985) (same).

267. See *supra* notes 192, 194 and accompanying text.

268. See Mulligan & Staszewski, *supra* note 214, at 1194-202 (describing how the Court makes the Federal Rules).

269. 28 U.S.C. § 2072 (2012); FED. R. CIV. P. 83.

270. FED. R. CIV. P. 83.

271. 28 U.S.C. § 2072.

272. *Id.* §§ 2071-2072.

IV. ELIMINATING THE PRO FORMA COMPLAINTS

In *Jones v. Bock*, the Court unequivocally sided with the majority of circuit courts, holding that a prisoner's failure to exhaust administrative remedies is an affirmative defense, not a pleading requirement.²⁷³ However, many federal district courts now use pro forma complaint forms that require prisoners to include information about their exhaustion of administrative remedies in their complaints,²⁷⁴ and forms that ask for this information can ultimately lead to prisoners incurring PLRA strikes and being disqualified from using IFP Status to access the courts.²⁷⁵ The portions of the court forms requiring prisoners to discuss the exhaustion of administrative remedies in their complaints need to be eliminated to prevent prisoners from being unfairly denied access to the courts.²⁷⁶ Because questions about exhaustion within the pro forma complaints are inconsistent with the Supreme Court's interpretation of Rule 8 and unlawfully abridge prisoners' substantive rights to access the courts, a public-interest group should litigate on behalf of a prisoner who is being forced to use a pro forma complaint that includes portions that ask about exhaustion and seek to eliminate those portions of the form.

A. Pro Forma Complaints Directly Cause PLRA Strikes

Many federal district courts have court rules²⁷⁷ requiring pro forma complaints that force prisoners to provide information about

273. *Jones v. Bock*, 549 U.S. 199, 216 (2007) ("We conclude that [a] failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints.").

274. *See supra* note 175 (providing some examples of pro forma complaints that require prisoners to allege exhaustion and other pro forma complaints that do not require prisoners to allege exhaustion).

275. *See supra* note 174 (providing examples of cases involving prisoners who incurred PLRA strikes as a result of their pro forma complaints revealing the affirmative defense of failure to exhaust).

276. *See, e.g., Ball v. Famiglio*, 726 F.3d 448, 470-71 (3d Cir. 2013) (barring a prisoner from IFP Status after she had a complaint dismissed for failure to state a claim as the result of a pro forma complaint revealing her failure to exhaust administrative remedies).

277. *See supra* note 173 (providing examples of court rules that require the pro forma complaints, but also noting that the requirement that prisoners allege exhaustion arises from the court rules in conjunction with the pro forma complaints themselves).

their exhaustion of administrative remedies.²⁷⁸ Despite most prisoners bringing complaints under 42 U.S.C. § 1983, which does not require any information about the exhaustion of administrative remedies,²⁷⁹ certain pro forma complaints force prisoners to divulge whether they have exhausted all of their administrative remedies.²⁸⁰ Using one of these forms, a prisoner failing to exhaust administrative remedies effectively includes an affirmative defense—failure to exhaust—on the face of his complaint.²⁸¹ While prisoners are required to exhaust administrative remedies, Congress did not intend for a prisoner to incur a PLRA strike for failing to exhaust.²⁸² However, the revelations prompted by the forms' added pleading requirements—namely, affirmative defenses showing up on the face of the complaints—cause prisoners to have their complaints dismissed for failure to state a claim, which is grounds for a PLRA strike.²⁸³ Because such dismissals count as PLRA strikes against prisoners, the pro forma complaints with questions about exhaustion may ultimately cause PLRA strikes, which, in conjunction with two other strikes, will disqualify prisoners from claiming IFP Status to access the courts.²⁸⁴

B. Eliminating the Problem Through Litigation

An effective means to eliminate questions about exhaustion from the pro forma complaints is through the courts. To best illustrate the problem prisoners currently face as a result of the exhaustion questions found within the pro forma complaints and to explain how to eliminate these questions, a discussion using a hypothetical court (Court X) and hypothetical prisoner (Prison Mike)

278. See *supra* notes 173-175 (showing examples of the court rules, the corresponding forms, and the results for prisoners).

279. See 42 U.S.C. § 1983 (2012) (making no mention of the exhaustion of administrative remedies).

280. See *supra* notes 173-175 (showing examples of the court rules, the corresponding forms, and the results for prisoners).

281. See *Jones v. Bock*, 549 U.S. 199, 214-15 (2007) (explaining that an affirmative defense revealing itself on the face of a complaint is grounds for a failure to state a claim).

282. *Id.* at 216 (“It is to say that there is no basis for concluding that Congress implicitly meant to transform exhaustion from an affirmative defense to a pleading requirement by the curiously indirect route of specifying that courts should screen PLRA complaints and dismiss those that fail to state a claim.”).

283. 28 U.S.C. § 1915(g) (2012) (providing types of dismissals that can bar a prisoner from IFP Status).

284. *Id.*

is necessary. This hypothetical will be carried throughout the analysis to illustrate the solution that could be employed to eliminate exhaustion questions from pro forma complaints in any jurisdiction where the complaints exist.²⁸⁵ Within the jurisdiction of Court X, which uses pro forma complaints that require prisoners to reveal information about their exhaustion of administrative remedies, a public-interest group should seek to represent Prison Mike. Prison Mike has grounds for a civil rights lawsuit, has been unable to exhaust administrative remedies, and has two other PLRA strikes.²⁸⁶ Because requiring prisoners to answer questions about exhaustion in their pro forma complaints is inconsistent with Rule 8 of the Federal Rules of Civil Procedure as interpreted by the Court in *Jones v. Bock*²⁸⁷ and unlawfully abridges prisoners' substantive rights²⁸⁸ to access the courts,²⁸⁹ a public-interest group should seek to eliminate the portions of the pro forma complaints that force prisoners to discuss their exhaustion of administrative remedies.

1. *Court X's Pro Forma Complaints Violate Rule 83 of the Federal Rules*

Court X presumably used its power under Rule 83 of the Federal Rules of Civil Procedure to create its local rule that requires Prison Mike to use one of its pro forma complaints that ask prisoners about their exhaustion of administrative remedies.²⁹⁰ Rule 83 requires local rules to "be consistent with" federal law and rules adopted by the Supreme Court.²⁹¹ Therefore, local rules inconsistent with federal law or with the Federal Rules of Civil Procedure are invalid.²⁹² In

285. See *supra* note 173 (providing examples of jurisdictions where such an action would be effective).

286. The hypothetical prisoner has two PLRA strikes from having claims dismissed because they were frivolous, malicious, or failed to state a claim. See 28 U.S.C. § 1915(g).

287. See *Bock*, 549 U.S. at 214-16 (explaining that requiring prisoners to plead their exhaustion of administrative remedies is inconsistent with Rule 8 of the Federal Rules of Civil Procedure).

288. 28 U.S.C. § 2072 (2012) (precluding courts from making rules that affect substantive rights).

289. Prison Mike's access to the courts would be blocked because he would be barred from claiming IFP Status. *Id.* § 1915(g).

290. FED. R. CIV. P. 83 (allowing federal district courts to make local rules).

291. *Id.*

292. See *Colgrove v. Battin*, 413 U.S. 149, 163-64 (1973) (scrutinizing a local court rule for a possible inconsistency with the Federal Rules, but ultimately

Jones v. Bock, the Court held that requiring prisoners to plead exhaustion is inconsistent with Rule 8.²⁹³ Meanwhile, the exhaustion questions in Court X's pro forma complaint will require Prison Mike to allege exhaustion in his complaint.²⁹⁴ Because Court X's requirement of the pro forma complaint is inconsistent with Rule 8 as interpreted by the *Bock* Court,²⁹⁵ it is invalid under Rule 83.²⁹⁶

In *Bock*, the Court clarified that the PLRA does not provide any reason for deviating from the usual procedural practice regarding Rule 8 pleading.²⁹⁷ The Court interpreted Rule 8, clarifying that the usual procedural practice is for plaintiffs to provide only a "short and plain statement of the claim" and for a failure to exhaust to be treated as an affirmative defense.²⁹⁸ Thereafter, the Court held that the PLRA does not implicitly or explicitly allow any court to demand a pleading requirement beyond what Rule 8 already requires—a short and plain statement of the claim.²⁹⁹ Further, by establishing that a failure to exhaust administrative remedies is an affirmative defense, the Court's holding clarified that the burden of pleading exhaustion is on defendants, rather than prisoners.³⁰⁰

upholding the validity of the rule after a determination that the rule was consistent with the Federal Rules).

293. 549 U.S. 199, 215-16 (2007) (citing FED. R. CIV. P. 8).

294. See, e.g., U.S. DIST. COURT FOR THE DIST. OF ARIZ., INSTRUCTIONS FOR A PRISONER FILING A CIVIL RIGHTS COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (2013), <http://www.prisonlaw.com/pdfs/AZSection1983Form,2013.pdf> (providing examples of standard form complaints that ask prisoners to discuss their exhaustion of administrative remedies); U.S. DIST. COURT MIDDLE DIST. OF FLA., INSTRUCTIONS FOR FILING A CIVIL RIGHTS COMPLAINT BY PRISONERS UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983 (n.d.), <https://www.flmd.uscourts.gov/forms/Prisoner/PrisonerCivilRightsComplaint.pdf> (same); U.S. DIST. COURT FOR THE MIDDLE DIST. OF PA., FORM TO BE USED BY A PRISONER IN FILING A CIVIL RIGHTS COMPLAINT (n.d.), <http://www.pamd.uscourts.gov/sites/default/files/complain.pdf> (same).

295. *Bock*, 549 U.S. at 216 (holding that prisoners should not be made to demonstrate exhaustion in their complaints).

296. See FED. R. CIV. P. 83; *Colgrove*, 413 U.S. at 150-51 (upholding a local court rule only because it was consistent with the Federal Rules).

297. See *Bock*, 549 U.S. at 212-14 (explaining that courts' perceived policy concerns do not warrant a departure from the usual procedural practice).

298. See *id.* at 212 (quoting and citing FED. R. CIV. P. 8).

299. See *id.* at 214 ("We think that the PLRA's screening requirement does not—explicitly or implicitly—justify deviating from the usual procedural practice . . .").

300. See *id.* at 208, 216 (reversing the district court judge's holding that a prisoner had the burden to plead exhaustion).

Inconsistent with the Court's interpretation of Rule 8 in *Bock*,³⁰¹ Court X's local rule deviates from the usual procedural practice by forcing prisoners to plead exhaustion.³⁰² Court X's rule strays from the usual practice because in addition to requiring Prison Mike's pleading to include a short and plain statement of the claim, Court X's pro forma complaint requires him to reveal in his complaint the affirmative defense of failure to exhaust administrative remedies.³⁰³ Such a requirement is contrary to the usual procedural practice mandated by the *Bock* Court³⁰⁴ under Rule 8, which requires plaintiffs only to plead a short and plain statement of their claims and which places the burden of bringing an affirmative defense on defendants.³⁰⁵ Effectively, Court X's rule removes the Defendant's burden to argue Prison Mike's failure to exhaust as an affirmative defense,³⁰⁶ and it places the burden to plead exhaustion back on Prison Mike.³⁰⁷ The inclusion of exhaustion questions in Court X's pro forma complaint, therefore, directly contradicts the pleading-burden distribution described by the Court in *Bock*, which placed the burden to plead exhaustion on defendants.³⁰⁸

In holding that prisoners should not be burdened with an added pleading requirement, the *Bock* Court also discussed its previous holding in *Leatherman* where it established that federal courts should not deviate from Rule 8 for perceived policy reasons.³⁰⁹ In that case, the Fifth Circuit imposed a heightened pleading requirement for claimants suing municipalities for what the court perceived to be a

301. *See id.* at 216 (holding that Rule 8 and the PLRA do not require prisoners to plead exhaustion and that prisoners should not have to demonstrate exhaustion in their complaints).

302. *See supra* notes 173, 294 (providing examples of the court rules and the corresponding pro forma complaints).

303. *See supra* note 294 (providing examples of court forms that have sections forcing prisoners to discuss their exhaustion of administrative remedies).

304. *See Bock*, 549 U.S. at 212-16 (explaining the usual procedural practice for pleading and going on to explain that the PLRA warrants no departure from that practice).

305. FED. R. CIV. P. 8(a).

306. FED. R. CIV. P. 8(c) (requiring defendants to plead affirmative defenses).

307. Courts require prisoners to fill out the pro forma complaints in their entirety. *See supra* note 294 (providing examples of the pro forma complaints that, themselves, explain to prisoners that they must fill out the forms completely).

308. *See Bock*, 549 U.S. at 216 (holding that a prisoner's failure to exhaust is an affirmative defense).

309. *Id.* at 212.

legitimate policy concern.³¹⁰ Primarily, the court was attempting to filter out the meritless cases where municipalities clearly had no liability by requiring plaintiffs who were suing municipalities to allege reasons that the municipalities could not maintain the defense of immunity.³¹¹ The Supreme Court, however, rejected the Fifth Circuit's heightened pleading standard, emphasizing that Rule 8 is a liberal pleading standard and explaining that pleading requirements can only be altered by means of amending the Federal Rules.³¹²

Similar to the Fifth Circuit's heightened pleading requirement that was rejected by the Court in *Leatherman*,³¹³ the inclusion of exhaustion questions in Court X's pro forma complaint creates a heightened pleading requirement and therefore goes unlawfully beyond what is required by Rule 8.³¹⁴ Presumably, Court X includes questions about exhaustion in its pro forma complaint to expedite its process of determining whether a prisoner has exhausted administrative remedies so that it can avoid adjudicating meritless matters.³¹⁵ Similarly, in *Leatherman*, the Fifth Circuit was imposing a heightened pleading standard to avoid adjudicating meritless claims.³¹⁶ The Supreme Court recognized the logic behind the policy in *Leatherman*, but nonetheless held that deviating from the pleading standard mandated by Rule 8 was unlawful without an amendment to the Federal Rules.³¹⁷ Similarly, the added pleading requirement found in Court X's pro forma complaints—practical, though, it may be—is inconsistent with the Federal Rules of Civil Procedure per *Bock*³¹⁸ and, therefore, unlawful under Rule 83.³¹⁹

310. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165-66 (1993) (explaining the pleading standard that was imposed by the Fifth Circuit Court of Appeals).

311. *See id.* at 167.

312. *Id.* at 168 (“We think that it is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit in this case with the liberal system of ‘notice pleading’ set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only ‘a short and plain statement of the claim’”).

313. *See id.*

314. FED. R. CIV. P. 8(a)(2) (requiring “a short and plain statement of the claim”).

315. *Jones v. Bock*, 549 U.S. 199, 212-14 (2007) (describing perceived policy concerns as courts’ impetus for heightened pleading requirements).

316. *See Leatherman*, 507 U.S. at 167-68 (finding the heightened pleading standard unlawful).

317. *See id.* at 168-69.

318. *Bock*, 549 U.S. at 216 (holding that prisoners should not be made to demonstrate exhaustion in their complaints).

319. FED. R. CIV. P. 83.

A supporter of the inclusions of exhaustion questions in Court X's pro forma complaints may argue that Court X's requirement is distinguished from the heightened pleading requirement found in *Leatherman*.³²⁰ In *Leatherman*, the Fifth Circuit created the heightened pleading requirement by demanding the heightened pleading while adjudicating cases.³²¹ Contrarily, Court X's added pleading requirement is mandated by a local court rule that was created through notice and comment rulemaking.³²² Therefore, unlike the Fifth Circuit in *Leatherman*—which was dismissing claims that did not meet its judicially imposed heightened pleading standards—Court X's rule was created through notice and comment rulemaking³²³ and simply obligates prisoners to discuss exhaustion in their complaints before the court even applies Rule 8.³²⁴ Therefore, Court X is not improperly applying Rule 8 in the courtroom the way the Fifth Circuit was improperly applying it in *Leatherman*.³²⁵

Distinguishing *Leatherman* in this manner, however, is problematic because it accounts for an irrelevant distinction between the means by which courts promulgate rules.³²⁶ The Supreme Court has the power to create and modify the Federal Rules through processes contemplated by the REA,³²⁷ but it can also modify and specify the application of the Federal Rules through its adjudicative function.³²⁸ For all practical purposes, all federal courts are bound by the Federal Rules of Civil Procedure, regardless of whether the Court mandates them by statute or through adjudication.³²⁹ Similarly, federal district courts are able to create procedural rules through notice and comment rulemaking,³³⁰ but can also modify and specify the application of those rules through the courts' adjudicative

320. *Leatherman*, 507 U.S. at 167 (describing a heightened pleading standard created through adjudication).

321. *Id.*

322. See *supra* note 173 and accompanying text.

323. See 28 U.S.C. §§ 2071-2072 (2012) (allowing for district courts to make rules through notice and comment rulemaking); FED. R. CIV. P. 83 (same).

324. See FED. R. CIV. P. 8.

325. *Leatherman*, 507 U.S. at 167-69 (holding that the Fifth Circuit's heightened pleading requirement was unlawful).

326. See *supra* Section III.B (discussing court rulemaking).

327. See *supra* Section III.B.

328. See Mulligan & Staszewski, *supra* note 214, at 1194 (describing court rulemaking through adjudication).

329. See *id.* at 1194-95.

330. See 28 U.S.C. §§ 2071-2072 (2012) (allowing for district courts to make rules through notice and comment rulemaking); FED. R. CIV. P. 83 (same).

function.³³¹ And similar to the Supreme Court's rulemaking, for all practical purposes, court rules created by notice and comment rulemaking and court rules created through adjudication are equally binding.³³² Statutory and adjudicative rules equally govern litigants; therefore, either type of court rule may be rendered invalid for its inconsistency with the Federal Rules.³³³ To illustrate, after having its heightened pleading requirement stricken by the Court in *Leatherman*,³³⁴ the Fifth Circuit likely would not have been permitted to use notice and comment rulemaking³³⁵ to circumvent the Court's holding by passing a court rule requiring plaintiffs to attach forms that imposed the same heightened pleading requirement that was stricken by the Court.³³⁶ If such were the case, lower courts could avoid following Supreme Court precedent by simply codifying heightened standards³³⁷ rather than requiring them through adjudication. Consequently, because the Court in *Bock* held that prisoners should not be required to demonstrate exhaustion as part of their complaints,³³⁸ Court X is not permitted to circumvent that holding by requiring prisoners to use pleading forms that force them to plead exhaustion.³³⁹

Finally, Court X's requirement that prisoners discuss exhaustion in their pleadings is inconsistent with what the *Bock* Court held that Congress intended for the PLRA.³⁴⁰ In *Bock*, the Court explained that nothing in the PLRA indicates congressional

331. See *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-69 (1993) (striking the Fifth Circuit's court rule that was created through its adjudication).

332. See FED. R. CIV. P. 83 (providing that courts can make local rules that must be followed); *Dobbins*, *supra* note 218, at 1460-61 (describing the precedential effects of a superior court within a given jurisdiction).

333. See *Leatherman*, 507 U.S. at 168 (finding a court rule created through adjudication to be inconsistent with the Federal Rules); see also *Colgrove v. Battin*, 413 U.S. 149, 150-51 (1973) (examining a local court rule for its validity under Rule 83, but ultimately upholding the local rule, holding that it was consistent with the Federal Rules).

334. See *Leatherman*, 507 U.S. at 167-69.

335. See FED. R. CIV. P. 83.

336. See *id.*

337. See *id.*

338. *Jones v. Bock*, 549 U.S. 199, 216 (2007).

339. See *supra* notes 173, 175 (giving examples of the court rules and their corresponding pro forma complaints that require prisoners to discuss their exhaustion of administrative remedies).

340. See *Bock*, 549 U.S. at 212-16 (holding that Congress did not intend for the PLRA to change Rule 8's application to prisoners).

intent to change the pleading requirements for prisoners.³⁴¹ Rather, the Court explained, it appears that Congress intended for a failure to exhaust to be treated as an affirmative defense and for prisoners not to be burdened with any added pleading requirement.³⁴² Therefore, it follows that Congress did not intend for prisoners to suffer the possibility of incurring a strike for failing to exhaust their administrative remedies.³⁴³ Contrary to congressional intent as described by the Court in *Bock*,³⁴⁴ exhaustion questions in Court X's pro forma complaints create an added pleading requirement for Prison Mike, remove the defendant's burden of claiming an affirmative defense, and create the likely possibility that Prison Mike will incur a PLRA strike for failing to state a claim because the affirmative defense of failure to exhaust will appear on the face of his complaint.³⁴⁵ Because Court X's mandate of exhaustion questions in the pro forma complaint is not "consistent with" Rule 8's application to prisoner-litigants as described by the Court in *Bock*,³⁴⁶ the rule is invalid under Rule 83 of the Federal Rules of Civil Procedure.³⁴⁷

Court X's rule requiring the pro forma complaints that ask about exhaustion is inconsistent with Rule 8 as interpreted by the Court in *Bock* and should therefore be eliminated.³⁴⁸ The Court clarified in *Bock* that the PLRA warrants no deviation from Rule 8's pleading requirement, regardless of perceived policy concerns.³⁴⁹ Meanwhile, presumably in an attempt to reduce the amount of cases it has to adjudicate, Court X has impermissibly created a heightened

341. *See id.*

342. *Id.* at 214-15.

343. *See* 28 U.S.C. § 1915(g) (2012) (providing a list of dismissals that would result in a PLRA strike).

344. *See Bock*, 549 U.S. at 212-16.

345. *See* 28 U.S.C. § 1915(g) (providing a list of dismissals that would result in a PLRA strike).

346. *See Bock*, 549 U.S. at 212 (holding that Rule 8 in conjunction with the PLRA still only requires prisoners to provide a short and plain statement of their claims).

347. FED. R. CIV. P. 83 (demanding that local court rules must be consistent with the Federal Rules).

348. *See Bock*, 549 U.S. at 216 ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints.").

349. *See id.* at 212-14 (explaining examples of courts that were wrong for deviating from the usual procedural practice for perceived policy concerns).

pleading requirement³⁵⁰ by forcing Prison Mike and other prisoners to allege exhaustion. While requiring the pro forma complaints is inconsistent with the Federal Rules and therefore invalid under Rule 83,³⁵¹ requiring the complaints also impermissibly conflicts with the REA by abridging a substantive right.³⁵²

2. Pro Forma Complaints Are in Violation of the REA

Court X's requirement that Prison Mike answer questions about exhaustion in his pro forma complaint is also unlawful because it abridges his substantive right to access the courts.³⁵³ Under § 2071 of the REA, district courts are permitted to make court rules, but those rules must be consistent with rules created by the Supreme Court pursuant to § 2072 of the REA.³⁵⁴ Section 2072 stipulates that the Supreme Court's "rules shall not abridge, enlarge or modify any substantive right."³⁵⁵ Reading § 2071 in conjunction with § 2072, it follows that a district court's rule must not "abridge, enlarge or modify any substantive right."³⁵⁶ Court X's rule unlawfully abridges substantive rights because it conflicts with the PLRA and potential future legislation from Congress by forcing prisoners to plead exhaustion.³⁵⁷ Furthermore, it directly affects how Court X will come to its decision³⁵⁸ by forcing Court X to dismiss Prison Mike's action for failure to state a claim—a strike-worthy dismissal—when it

350. See *supra* notes 173, 175 (providing the court rules and the corresponding complaint forms that work in conjunction to require prisoners to allege the exhaustion of administrative remedies).

351. See FED. R. CIV. P. 83 (stating that local rules have no force if they are not consistent with the Federal Rules).

352. See 28 U.S.C. § 2072(b) (2012) ("Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

353. See *id.*; 28 U.S.C. § 1915(g) (2012) (stating that prisoners may be denied IFP Status for accruing three dismissals if their complaints were dismissed for being frivolous, being malicious, or failing to state a claim).

354. 28 U.S.C. § 2071 (2012).

355. *Id.* § 2072(b).

356. See *id.* §§ 2071-2072 (combining to foreclose district courts from creating rules that interfere with substantive law).

357. See 42 U.S.C. § 1997e (2012) (creating laws dealing with prisoners' exhaustion of administrative remedies and thereby preempting the courts from doing so).

358. The complaint will be dismissed for failure to state a claim because the complaint, itself, will reveal an affirmative defense. See *Jones v. Bock*, 549 U.S. 199, 214-16 (2007) (explaining that a finding of an affirmative defense on the face of a complaint warrants dismissal for failure to state a claim).

otherwise will have had no reason for such a dismissal.³⁵⁹ Finally, because Court X's inclusion of exhaustion questions in the pro forma complaint will ultimately cause Prison Mike's third PLRA strike, the pro forma complaint will egregiously eliminate Prison Mike's substantive right to access the courts by disqualifying him from claiming IFP Status.³⁶⁰

Congress emphasized with its 1988 amendment to the REA that the substantive rights limitation is intended to maintain separation of powers between Congress and the Court.³⁶¹ In doing so, Congress specified that the REA's substantive rights limitation prohibits courts from creating rules in areas where Congress has already passed laws or in areas where Congress is likely to pass laws in the future.³⁶² Therefore, congressional acts—such as the PLRA³⁶³—prohibit the Court from creating rules that address issues similar to the issues already addressed by Congress with such laws, especially if the court rules conflict with congressional acts.³⁶⁴

Court X's rule forcing prisoners to answer questions about exhaustion in their pro forma complaints transgresses the REA's substantive rights limitation³⁶⁵ because it conflicts with the PLRA as interpreted by the Court in *Bock*.³⁶⁶ Because Congress substantially addresses prisoners' exhaustion of administrative remedies with the PLRA, Congress reserved for itself the authority to create rules regarding the exhaustion and thereby prohibited the courts from creating such rules.³⁶⁷ Therefore, Court X usurped Congress's authority when it created the rule requiring pro forma complaints that prompt prisoners to discuss the exhaustion of administrative remedies.³⁶⁸ Furthermore, according to the Court in *Bock*, when

359. Assuming Prison Mike's complaint includes a short and plain statement of his claim, it will satisfy Rule 8. *See* FED. R. CIV. P. 8.

360. *See* 28 U.S.C. § 1915(g) (2012) (barring prisoners from claiming IFP Status if they accrue three PLRA strikes).

361. *See* H.R. REP. NO. 99-422, at 21 (1985).

362. *Id.*

363. 42 U.S.C. § 1997e (2012).

364. *See* H.R. REP. NO. 99-422, at 21.

365. *See* 28 U.S.C. § 2072(b) (2012) (“Such rules shall not abridge, enlarge or modify any substantive right.”).

366. *See* *Jones v. Bock*, 549 U.S. 199, 216-17 (2007) (explaining that Congress did not intend for the PLRA to require prisoners to allege exhaustion in their complaints).

367. *See* 42 U.S.C. § 1997e (creating law that deals with prisoners' exhaustion of administrative remedies); H.R. REP. NO. 99-422, at 21.

368. *See supra* notes 173, 175 (working in conjunction to require prisoners to allege the exhaustion of administrative remedies).

Congress passed the PLRA, it did not intend for prisoners to be required to allege the exhaustion of administrative remedies in their complaints.³⁶⁹ Contrary to congressional intent as described by the Court, Court X's pro forma complaint requirement forces prisoners to allege exhaustion in their complaints.³⁷⁰ Additionally, the Court in *Bock* determined that Congress did not intend for prisoners to incur PLRA strikes for failing to exhaust administrative remedies.³⁷¹ Meanwhile, exhaustion questions within Court X's pro forma complaint will directly cause Prison Mike to incur a PLRA strike for failing to exhaust his administrative remedies.³⁷² Exhaustion questions in the pro forma complaint form will cause this result for Prison Mike because they will force him to include the affirmative defense of failure to exhaust in his complaint, which will result in his complaint being dismissed for failure to state a claim.³⁷³ Court X's collective infringements on congressional power show that Court X's inclusion of exhaustion questions in its pro forma complaints oversteps the boundaries that Congress set with the REA³⁷⁴ and the PLRA.³⁷⁵

The Court provided its own interpretation of the REA's boundaries with its decision in *Shady Grove*.³⁷⁶ In that case, Allstate challenged Rule 23 of the Federal Rules of Civil Procedure—a rule that allows multiple plaintiffs to join their claims in a class action against a single defendant—arguing that it negatively impacts defendants' substantive rights because it causes plaintiffs to bring lawsuits when they would have otherwise abstained from filing suit.³⁷⁷ The Court provided the following enigmatic language for determining when a rule is invalid: A rule is invalid if “it alters ‘the rules of decision by which [the] court will adjudicate . . . rights’” of

369. *Bock*, 549 U.S. at 216-17.

370. *See supra* notes 173, 175 (working in conjunction to require prisoners to allege the exhaustion of administrative remedies).

371. *See Bock*, 549 U.S. at 216-17 (explaining that Congress did not intend for the PLRA to require prisoners to allege exhaustion in their complaints).

372. *See supra* note 174 (providing examples of prisoners using complaints that required them to discuss their exhaustion of administrative remedies and thereby causing them to incur PLRA strikes).

373. *See supra* note 174.

374. 28 U.S.C. §§ 2071-2072 (2012).

375. 42 U.S.C. § 1997e (2012).

376. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406-07 (2010).

377. *Id.* at 408.

the parties.³⁷⁸ While the Court's language here is confusing and unclear, the Court's reasoning seems to provide a more useable framework for determining whether a court rule is permissible under the REA.³⁷⁹ In rejecting Allstate's argument, the Court explained that Rule 23 does not go beyond the REA's substantive rights limitation because it does not change the plaintiffs' claims or the defendants' rights.³⁸⁰ The Court explained that Rule 23 is permissible because it merely changes the process by which claims are brought before a court, but has no bearing on a court's decision.³⁸¹ Therefore, under the reasoning from *Shady Grove*, a rule impermissibly abridges substantive rights when it changes a plaintiff's claim or a defendant's right, or when it changes how the judge will adjudicate the case.³⁸²

The inclusion of exhaustion questions in Court X's pro forma complaints is invalid under the *Shady Grove* Court's interpretation of the REA's substantive rights limitation³⁸³ because it will change the outcome of Court X's decision regarding Prison Mike. While the Court in *Shady Grove* upheld Rule 23 because it allows for the consolidation of claims without changing the ultimate outcome of those claims,³⁸⁴ questions about exhaustion in Court X's pro forma complaints will directly cause Prison Mike's otherwise adequate complaint³⁸⁵ to be dismissed for failure to state a claim.³⁸⁶ Assuming Prison Mike provides a short and plain statement of his claim—without having to use the pro forma complaint that asks him about his exhaustion of administrative remedies—his complaint could not be dismissed for a failure to state a claim.³⁸⁷ Conversely, by

378. See *id.* at 407 (first alteration in original) (quoting *Miss. Publ'g Corp. v. Murphee*, 326 U.S. 438, 446 (1946)). There is still an ongoing debate over how to define substantive rights. Freer, *supra* note 259 at 453-54 (discussing the ongoing confusion about the substantive rights limitation).

379. See *Shady Grove*, 559 U.S. at 407-08 (“[N]one [of the procedural rules in question] altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.”).

380. *Id.*

381. See *id.* (holding that Rule 23 “undeniably regulated only the process for enforcing . . . rights”).

382. See *id.* at 406-08 (providing rationale to help clarify the substantive rights limitation).

383. *Id.*

384. See *id.*

385. This scenario assumes Prison Mike provides a short and plain statement of his claim pursuant to Rule 8(a). FED. R. CIV. P. 8(a).

386. See *supra* note 174 (providing examples to demonstrate how this will occur).

387. See FED. R. CIV. P. 8(a).

answering questions about exhaustion in the pro forma complaint, he will reveal the affirmative defense of failure to exhaust, which will cause him to have his complaint dismissed for failure to state a claim.³⁸⁸ While, without answering questions about exhaustion, Prison Mike may ultimately lose on his claim due to his failure to exhaust administrative remedies,³⁸⁹ the distinction between these two types of losses for Prison Mike is meaningful because, of the two, only a dismissal for failure to state a claim is grounds for a PLRA strike.³⁹⁰ Because questions about exhaustion in Court X's pro forma complaint will change the way Court X adjudicates Prison Mike's rights—namely, causing Court X to dismiss Prison Mike's action for failure to state a claim—it goes beyond altering the process by which claims are brought before the court.³⁹¹ Therefore, under the Supreme Court's characterization of the REA³⁹² in *Shady Grove*,³⁹³ the inclusion of exhaustion questions in Court X's pro forma complaint is invalid because it abridges Prison Mike's substantive rights.

Finally, Congress stipulated in its 1988 amendment to the REA that a court rule is invalid if it attempts to regulate procedure but has an effect on substantive rights.³⁹⁴ Congress created this amendment in response to the Court's jurisprudence, which upheld rules regulating substantive rights so long as the rules also regulated procedure.³⁹⁵ Admittedly, all procedural rules may affect substantive rights to some degree,³⁹⁶ a fact that has been the impetus for much debate.³⁹⁷ However, because Congress explicitly prohibited court rules from

388. See *Jones v. Bock*, 549 U.S. 199, 212-14 (2007) (explaining that a complaint revealing an affirmative defense should be dismissed for failure to state a claim). Such a dismissal is grounds for a PLRA strike. 28 U.S.C. § 1915(g) (2012).

389. See FED. R. CIV. P. 8(c) (allowing for defendants to claim affirmative defenses in responsive pleadings).

390. 28 U.S.C. § 1915(g) (listing the grounds for a PLRA strike and including a failure to state a claim on that list).

391. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406-07 (2010) (upholding Rule 23 because it did not go beyond altering the process by which claims are brought before courts).

392. 28 U.S.C. § 2072 (2012).

393. See *Shady Grove*, 559 U.S. at 406-07.

394. H.R. REP. NO. 99-422, at 20-21 (1985).

395. See, e.g., *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941) (holding that court rules could regulate substantive law so long as they were intended to regulate procedure).

396. See *Shady Grove*, 559 U.S. at 407 (explaining that most procedures have some effect on substantive rights).

397. See Freer, *supra* note 259, at 453-54 (discussing the ongoing debate over the substantive rights limitation).

affecting substantive rights,³⁹⁸ there should be some degree where an incidental effect can be adequately egregious to render a rule invalid, even if the court that created the rule intended it to regulate procedure.³⁹⁹

The inclusion of exhaustion questions found in Court X's pro forma complaint so significantly abridges Prisoner Mike's right to access the courts that it must violate the REA's substantive rights limitation.⁴⁰⁰ Congress created IFP Status to ensure that indigent litigants—such as Prison Mike—are not denied the right to access the courts.⁴⁰¹ While Congress has the authority to deny this right—as it did under certain circumstances with the three strikes provision of the PLRA⁴⁰²—courts should not be permitted to create rules that eliminate this right.⁴⁰³ By answering questions about exhaustion in the pro forma complaint, Prison Mike will reveal the affirmative defense of failure to exhaust administrative remedies on the face of his complaint.⁴⁰⁴ Such an affirmative defense appearing on the face of his complaint will warrant the dismissal of his complaint for failure to state a claim, even if his complaint suffers no other deficiencies.⁴⁰⁵ Prison Mike will therefore incur a PLRA strike that will disqualify him from claiming IFP Status.⁴⁰⁶ Without the ability to claim IFP Status, Prison Mike will be denied his right to access the courts.⁴⁰⁷ In sum, the inclusion of questions about exhaustion in Court X's pro forma complaint has the direct effect of eliminating Prison Mike's substantive right to access the courts by causing him a PLRA strike that will disqualify him for IFP Status.⁴⁰⁸ Because the right Court X's rule abridges—the right to use IFP Status to access

398. H.R. REP. NO. 99-422, at 20-21.

399. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (standing generally for the proposition that undesirable effects can be grounds for a law's unconstitutionality, even when the consequence is unintended).

400. 28 U.S.C. § 2072 (2012).

401. *Id.* § 1915(g); *see also Ball v. Famiglio*, 726 F.3d 448, 451 (3d Cir. 2013) (discussing congressional purpose for creating the IFP statute).

402. 42 U.S.C. § 1997e(c) (2012).

403. H.R. REP. NO. 99-422, at 21 (explaining that the courts should not regulate areas of law already regulated by Congress).

404. *See Jones v. Bock*, 549 U.S. 199, 214-16 (2007) (explaining that a complaint can be dismissed for failure to state a claim if it reveals an affirmative defense on its face).

405. *See id.*

406. This being his third strike, he will be disqualified from IFP Status. 28 U.S.C. § 1915(g).

407. *See id.*

408. *See id.*

the courts—was affirmatively conferred by Congress, Court X’s rule goes beyond the limitations imposed by the REA and is therefore impermissible.⁴⁰⁹

3. Rectified Complaint Forms

The part of Court X’s pro forma complaints that requires prisoners to allege exhaustion⁴¹⁰ should be eliminated. Court X should still be permitted to use pro forma complaints, but they should not include any questions asking prisoners about the exhaustion of administrative remedies.⁴¹¹ Rather, the pro forma complaints should require only pertinent information for identification, as well as an area for prisoners to make short and plain statements of their claims.⁴¹² Such pro forma complaints—already used by several other federal district courts⁴¹³—would be consistent with Rule 8 of the Federal Rules⁴¹⁴ and would not abridge prisoners’ substantive rights.⁴¹⁵ Furthermore, eliminating the part of these complaints that requires prisoners to allege exhaustion would eliminate the unintended consequence of prisoners incurring PLRA strikes for their failure to exhaust administrative remedies.⁴¹⁶

CONCLUSION

While the Court decisively held in *Bock* that the PLRA does not go so far as to create a heightened pleading requirement for prisoners, some district courts have been requiring prisoners to allege

409. *See id.* § 2072.

410. *See supra* note 205 (providing examples of the complaint forms that have prisoners discuss exhaustion).

411. *See, e.g.*, U.S. DIST. COURT FOR THE W. DIST. OF MICH., FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983 (n.d.), <http://www.miwd.uscourts.gov/sites/miwd/files/cmpref.pdf> (providing an example of a pro forma complaint that does not require prisoners to plead exhaustion); U.S. DIST. COURT DIST. OF MINN., PRISONER CIVIL RIGHTS COMPLAINT (n.d.), <http://www.mnd.uscourts.gov/Pro-Se/ProSeForms/ProSe-Civil-Rights-Complaint.pdf> (same); U.S. DIST. COURT DIST. OF N.H., INSTRUCTIONS FOR FILING A COMPLAINT BY A PRISONER UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983 (n.d.), <http://www.nhd.uscourts.gov/pdf/Inmate%20Complaint%20USDCNH-11.pdf> (same).

412. *See supra* note 411.

413. *See supra* note 411.

414. FED. R. CIV. P. 8.

415. 28 U.S.C. § 2072 (2012).

416. *See supra* Section III.A (providing an example of how this occurs).

exhaustion in their complaints.⁴¹⁷ These district courts have circumvented the Court's holding by mandating pro forma complaints that require prisoners to discuss their exhaustion within the complaints.⁴¹⁸ Consequently, prisoners are having their complaints dismissed for failure to state a claim, which causes them to incur PLRA strikes.⁴¹⁹ The pro forma complaints that require prisoners to discuss their exhaustion of administrative remedies are inconsistent with Rule 8 of the Federal Rules as interpreted by the Court in *Bock*⁴²⁰ because they create a more burdensome pleading requirement, and they abridge prisoners' substantive rights to access the courts—a violation of the substantive rights limitation of the REA.⁴²¹ A public-interest group should therefore litigate on behalf of a prisoner—like Prison Mike—and seek to eliminate the portions of the forms that ask prisoners about their exhaustion of administrative remedies.⁴²²

417. *Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding that prisoners should not be made to “demonstrate exhaustion in their complaints”).

418. *See supra* notes 173, 294 (exhibiting the local court rules and the corresponding pro forma complaints that require prisoners to discuss the exhaustion of administrative remedies).

419. *See supra* note 174 (providing examples of prisoners incurring PLRA strikes as a result of their use of pro forma complaints).

420. *See Bock*, 549 U.S. at 212-17.

421. 28 U.S.C. §§ 2071-2072 (2012).

422. *See supra* Subsection IV.B.3.

Forthcoming Articles

The 2015:4 issue will include the following articles from the symposium titled *Persuasion in Civil Rights Advocacy*, held at Michigan State University College of Law on April 10-11, 2015.

The Color-Blind Constitution

Linda Berger

Social Psychology and the Value of Vegan Business Representation for Animal Law Reform

Taimie L. Bryant

Bullshit and the Tribal Client

Matthew L.M. Fletcher

Advocacy for Marriage Equality: The Power of a Broad Historical Narrative During a Transitional Period in Civil Rights

Charles R. Calleros

Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy

Linda H. Edwards

Persuasion in Civil Rights Advocacy: Lessons Learned in Representing Guantanamo Detainees

David J. R. Frakt

A Conundrum for Animal Activists: Can or Should the Current Legal Classification of Certain Animals Be Utilized to Improve the Lives of All Animals? The Intersection of Federal Disability Laws and Breed-Discriminatory Legislation

Rebecca J. Huss

Who Gets to Control Civil Rights Case Management? An Essay on Purposive Organizations and Litigation Agenda-Building

Michael A. Olivas

NCAA Athletes, Unpaid Interns, and the S-Word: Exploring the Rhetorical Impact of the Language of Slavery

Maria L. Ontiveros

Three 3Ls, Kairos, and the Civil Right to Trial in Domestic Violence Cases

Ruth Anne Robbins

Disqualifying Universality Under the Americans With Disabilities Act Amendments Act

Michelle A. Travis

Whither the Second Reconstruction?

Luis Fuentes-Rohwer