ELIMINATING STANDARD PLEADING FORMS THAT REQUIRE PRISONERS TO ALLEGED 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.

**TABLE OF CONTENTS**

INTRODUCTION ............................................................................. 1181
I. PRISONERS’ RIGHTS BEFORE THE PLRA .................................. 1183
   A. Prison Litigation in the Federal Courts Prior to the PLRA .................. 1184
   B. Civil Rights of Institutionalized Persons Act ................................. 1185
   C. Increased Prisoners and Increased Litigation ............................... 1186
   D. The PLRA ........................................................................... 1188
II. THE CIRCUIT SPLIT LEADING UP TO JONES V. BOCK .................. 1191
   A. Minority View: Circuits Viewing Exhaustion as a Pleading Requirement .................................................... 1192
   B. Majority View: Circuits Viewing Exhaustion as an Affirmative Defense ................................................................. 1193
   C. Jones v. Bock ........................................................................ 1194
      1. Jones v. Bock Holding ....................................................... 1195
      2. Jones v. Bock Dictum ....................................................... 1197
III. COURT RULES CAUSING PLRA STRIKES ................................. 1199
   A. Dawn Ball’s PLRA Strike for Her Failure to Exhaust Administrative Remedies .................................................. 1200
   B. The Rules Enabling Act and District Court Rulemaking ................................................................. 1203
      1. Delegation of Rulemaking Power to District Courts .................. 1204
      2. Further Rulemaking Limitations ........................................ 1205
   C. The Substantive Rulemaking Limitation .................................. 1206
IV. ELIMINATING THE PRO FORMA COMPLAINTS ......................... 1210
A. Pro Forma Complaints Directly Cause PLRA Strikes ...1210
B. Eliminating the Problem Through Litigation .................1211
  1. Court X’s Pro Forma Complaints Violate Rule 83
     of the Federal Rules .................................................1212
  2. Pro Forma Complaints Are in Violation of the
     REA ..........................................................................1219
  3. Rectified Complaint Forms ......................................1225
CONCLUSION .................................................................................1225

“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. 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—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. However, the

1. See discussion infra Part II.
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”).
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 complaints\(^11\) 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 group\(^17\) 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

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\(^8\) 549 U.S. 199 (2007).
\(^9\) *Id.* at 214 (stating that nothing in the PLRA “explicitly or implicitly . . . justif[ies] 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.
\(^17\) 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.
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 \textit{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 \textit{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.

\section{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 Act (CRIPA), a law that completely overhauled the process by which prisoners could gain access to the federal courts.23 Fifteen years later, swelling political pressure forced Congress to overhaul prison litigation once again by enacting the PLRA.24

\begin{itemize}
  \item \textit{See discussion infra} Section IV.B.
  \item \textit{See discussion infra} Section I.A.
  \item \textit{See discussion infra} Section I.B (discussing the changes Congress implemented with CRIPA).
  \item \textit{See discussion infra} Section I.C (discussing the political landscape before Congress enacted the PLRA).
\end{itemize}
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” as the Supreme Court rendered decisions guaranteeing prisoners more rights. 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. The change in Cooper marked the beginning of a trend leading to the Court’s eventual determination that prisoners have a right to access the courts to vindicate their constitutional rights.

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

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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).
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


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.


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

At first, the burden from CRIPA’s exhaustion requirement was limited. CRIPA required a prisoner’s exhaustion only in instances that were “appropriate and in the interests of justice.” 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. While CRIPA changed the way prisoners attempted to vindicate their rights, the public’s perception of prison litigation was also changing.

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. 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%. 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. 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.”

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. 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, shrewdly choosing not to mention that the number of prisoners had increased by 62% over the same period of time. 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. 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. 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.

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. 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).
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.
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.\textsuperscript{60} He went on to debunk two similar claims from the attorneys general.\textsuperscript{61} In exposing the truth about these anecdotes, Judge Newman astutely opined that government officials should not be creating myths to disparage prisoners.\textsuperscript{62}

Despite Judge Newman’s efforts, the stories of frivolous prison litigation provided a political fulcrum for the ambitious, newly Republican Congress.\textsuperscript{63} In 1994, Republicans published their “Contract with America,” in which the party promised that Congress would strive for tougher, more conservative values.\textsuperscript{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.\textsuperscript{65}

D. The PLRA

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

\begin{itemize}
\item \textsuperscript{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.”).
\item \textsuperscript{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).
\item \textsuperscript{62} Id. (“[T]hose in responsible positions ought not to ridicule all prisoner lawsuits by perpetuating myths about them.”).
\item \textsuperscript{63} Margo Schlanger, \textit{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).
\item \textsuperscript{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.”).
\item \textsuperscript{66} See Branham, supra note 40, at 501 (discussing the PLRA’s limited legislative history).
\item \textsuperscript{67} See Slutsky, supra note 35, at 2297-98.
\end{itemize}
Congress moved hastily for its passage. The touted purpose of the PLRA was to relieve the judicial system by mitigating the amount of frivolous litigation. 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.”

While the time it took to pass the PLRA was short, it brought significant changes to prison litigation. 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. 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,” the PLRA’s exhaustion requirement is mandatory. 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. While the new, strict exhaustion requirement is a key component of the PLRA, another

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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).


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).


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


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. 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. In light of these changes, courts are still struggling to interpret various parts of the PLRA.

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. Specifically, the Sixth, Tenth, and Eleventh circuits held that if a judge found that a prisoner failed to plead exhaustion, the complaint should be dismissed for failure to state a claim—the prisoner incurring a PLRA strike with such a result. Meanwhile, the First, Second, Third, Fourth, Seventh, Eighth, and Ninth circuits held that a prisoner’s failure to exhaust should be treated as an affirmative defense, which, if invoked by a defendant, would not

85. Id. § 1997e(c); see also supra note 82 and accompanying text.
86. See discussion infra Part II.
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.
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).
97. Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999) (same).
98. Foulk 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. In 2007, the Supreme Court settled the circuit split with its landmark case *Jones v. Bock.* 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. 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. 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. This procedural rule, in conjunction with local federal district court rules, has led to other problems for prisoners.

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* will illustrate the minority view leading up to *Jones v. Bock.* 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. He argued that inmates could not access the grievance procedure because the first step depended on cooperation from a staff member. 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).
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.\textsuperscript{110} The district court followed the recommendation by dismissing the action for failure to state a claim,\textsuperscript{111} which provided grounds for a PLRA strike against Steele.\textsuperscript{112} On appeal, the Tenth Circuit affirmed the dismissal for failure to state a claim.\textsuperscript{113} Noting that affirmative defenses are waived if they are not timely brought,\textsuperscript{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.\textsuperscript{115} Consequently, the court held that exhaustion was a pleading requirement, rather than an affirmative defense,\textsuperscript{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.\textsuperscript{117}

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

An account of the Fourth Circuit’s holding in \textit{Anderson v. XYZ Correctional Health Services, Inc.}, will illustrate the majority view prior to \textit{Jones v. Bock}.\textsuperscript{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.\textsuperscript{119} On appeal, employing the principle of \textit{expressio unius est exclusio alterius},\textsuperscript{120} the court pointed out that the statute includes a list of

\begin{itemize}
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{111} \textit{Id.}
  \item \textsuperscript{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).
  \item \textsuperscript{113} Steele, 355 F.3d at 1209 (declining to follow other circuits that hold a failure to exhaust as an affirmative defense).
  \item \textsuperscript{114} \textit{Id.} (citing and explaining \textit{FED. R. CIV. P.} 8).
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.} at 1210.
  \item \textsuperscript{117} \textit{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).
  \item \textsuperscript{118} Anderson v. XYZ Corr. Health Servs., Inc., 407 F.3d 674, 675 (4th Cir. 2005).
  \item \textsuperscript{119} \textit{Id.} at 676.
  \item \textsuperscript{120} The Supreme Court has explained the meaning of this phrase. \textit{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.").
\end{itemize}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{124}

With circuits clearly divided, the Supreme Court decided to resolve the conflict.\textsuperscript{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.\textsuperscript{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.\textsuperscript{127}

C. \textit{Jones v. Bock}

In \textit{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.\textsuperscript{128} In doing so,

\begin{itemize}
  \item \textsuperscript{121} \textit{Anderson}, 407 F.3d at 680.
  \item \textsuperscript{122} \textit{Id}.
  \item \textsuperscript{123} \textit{Id}.
  \item \textsuperscript{124} \textit{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.”).
  \item \textsuperscript{125} \textit{Jones v. Bock}, 549 U.S. 199, 205 (2007).
  \item \textsuperscript{126} \textit{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).
  \item \textsuperscript{127} \textit{See Bock}, 549 U.S. at 205 (explaining the circuit split the Court intended to resolve).
  \item \textsuperscript{128} \textit{Id}. at 216.
\end{itemize}
the Court provided a comprehensive discussion of the relationship between the PLRA and the Federal Rules of Civil Procedure, as well as the relationship between various provisions within the PLRA itself. 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. 

1. Jones v. Bock Holding

The Court in Bock first discussed the significance of Rule 8 of the Federal Rules of Civil Procedure. The Court explained that Rule 8(a) requires only “a short and plain statement of the claim” in the complaint; meanwhile, 42 U.S.C. § 1983, the statute under which prisoners typically bring civil rights claims, makes no mention of the exhaustion of administrative remedies as an element needed for an actionable claim. 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. Rule 8(c), on the other hand, burdens defendants with claiming affirmative defenses in response to plaintiffs’ claims. 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. 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).
135. Bock, 549 U.S. at 212.
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.\footnote{140} The Court discussed its previous case \textit{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.\footnote{141} In \textit{Leatherman}, the Fifth Circuit, through adjudication,\footnote{142} had adopted a heightened pleading standard for claims concerning municipal liability.\footnote{143} The Fifth Circuit created the rule because a claim against a municipality is meritorious when the cause of action stems from an agent of the municipality acting outside the scope of her duty.\footnote{144} A heightened pleading requirement could allow courts to dismiss such meritless claims\footnote{145} by requiring a given plaintiff to allege that the defendant cannot successfully maintain an immunity defense.\footnote{146} Such dismissals would protect municipalities from spending money litigating claims for which they are clearly not liable.\footnote{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.\footnote{148} After the \textit{Bock} Court discussed \textit{Leatherman} as an example of a pleading requirement that was invalid for being inconsistent with the

\footnote{140. See id. at 214 (explaining that nothing in the PLRA “justif[ies] deviating from the usual procedural practice”).}
\footnote{141. Id. at 212 (citing \textit{Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit}, 507 U.S. 163 (1993)).}
\footnote{142. Adjudicatory rulemaking is distinguished from the Court’s statutory rulemaking power. See discussion infra Section III.B.}
\footnote{143. See \textit{Leatherman}, 507 U.S. at 165.}
\footnote{144. Id. at 167 (explaining the Fifth Circuit’s heightened pleading standard).}
\footnote{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).}
\footnote{146. Id. (citing Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985)).}
\footnote{147. See id. at 166 (explaining respondents’ argument that a more relaxed pleading requirement subjects municipalities to expensive discovery when litigation is unnecessary).}
\footnote{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.\footnote{Jones v. Bock, 549 U.S. 199, 214 (2007) (holding that the PLRA does not warrant a departure “from the usual procedural practice”).}

The Court determined that nothing in the PLRA “justif\[ies\] deviating from the usual procedural practice” for pleading.\footnote{Id.} 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.\footnote{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”).} 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.\footnote{Id. at 215.} The Court then noted that one of Congress’s primary focuses with the PLRA was the exhaustion of administrative remedies.\footnote{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.”).} With Congress honed in on exhaustion, its choice not to include exhaustion among the listed grounds for a strike-worthy dismissal\footnote{Id.} indicates that it did not intend prisoners to incur a PLRA strike for failing to plead exhaustion.\footnote{See id. at 216 (explaining that Congress did not intend exhaustion to be a pleading requirement).} 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.”\footnote{Id.}

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.\footnote{See id. at 212-14.} While...
an affirmative defense is normally brought with a defendant’s responsive pleading.\textsuperscript{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.\textsuperscript{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.\textsuperscript{160} However, affirmative defenses will rarely appear on the face of complaints to give courts grounds to dismiss for failure to state a claim.\textsuperscript{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 \textit{Bock} explained that its holding does not alter this procedural rule.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{165}

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

\begin{itemize}
\item \textsuperscript{158} \textit{Fed. R. Civ. P. 8(c)}.
\item \textsuperscript{159} \textit{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).
\item \textsuperscript{161} \textit{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)).
\item \textsuperscript{162} \textit{Bock}, 549 U.S. at 215.
\item \textsuperscript{163} \textit{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).
\item \textsuperscript{164} \textit{Id.} at 214-15.
\item \textsuperscript{165} \textit{See id.} (explaining that a failure to exhaust should be treated the same as any other affirmative defense).
\item \textsuperscript{166} \textit{See id.} at 205, 215 (describing the circuit split and subsequently ending it).
\end{itemize}
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

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).
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 complaints may cause a prisoner to incur a PLRA strike for a failure to state a claim. While courts have some discretion to create these rules, courts’ rulemaking power is subject to significant limitations.

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. Ball filed a civil rights action against State Correctional Institution Muncy


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.\footnote{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.} Her complaint alleged that prison officials retaliated against her for reporting an incident of sexual assault.\footnote{Id. at *2.} 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.\footnote{Id.}

Ball filed her complaint using a district-court-created pro forma complaint provided to her by prison officials.\footnote{Ball v. SCI Muncy, 385 F. App’x. 211, 213 (3d Cir. 2010).} Like many other pro forma complaints for prisoners,\footnote{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).} this form required Ball to explain how she had exhausted administrative remedies.\footnote{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?’”).} 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.\footnote{Id. (explaining the contents of the pro forma complaint that Ball used).} “Ball checked ‘yes’ for the first two questions and ‘no’ for the third question,” thereby indicating that she had not exhausted all administrative remedies.\footnote{Id.}

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.\footnote{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.} 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.\footnote{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).} Noting Ball’s failure to oppose the
defendants’ Rule 12(b)(6)\textsuperscript{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.\textsuperscript{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.\textsuperscript{191} The court first established that Ball’s complaint indicated that she had not exhausted administrative remedies.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{196} As part of its decision, the Third Circuit had to determine whether Ball’s previously dismissed complaint alleging sexual assault\textsuperscript{197} should count as a strike against her pursuant to the PLRA.\textsuperscript{198} The court acknowledged that Ball’s complaint was dismissed for failure to exhaust administrative remedies\textsuperscript{199}—a failure

\textsuperscript{189.} \textit{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”).

\textsuperscript{190.} \textit{SCI Muncy}, No. 1:08-CV-0391, at *5.

\textsuperscript{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.”).

\textsuperscript{192.} \textit{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.”).

\textsuperscript{193.} \textit{Id.} at 214.

\textsuperscript{194.} \textit{Id.} at 212.

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

\textsuperscript{196.} \textit{Id.}


\textsuperscript{198.} Famiglio, 726 F.3d at 466 (discussing Ball’s potential strikes).

\textsuperscript{199.} \textit{Id.}
that would not provide an independent ground for a failure to state a claim or a PLRA strike.\textsuperscript{200} However, because her pro forma complaint included her checkmark indicating that she had not exhausted all administrative remedies,\textsuperscript{201} the court determined that her complaint revealed the affirmative defense for failure to exhaust on its face.\textsuperscript{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.\textsuperscript{203}

The Middle District of Pennsylvania’s court rule\textsuperscript{204} mandating the pro forma complaint\textsuperscript{205} that resulted in Dawn Ball’s PLRA strike is not an uncommon court rule.\textsuperscript{206} Many federal district courts similarly have local rules mandating pro forma complaints that require prisoners to discuss their exhaustion of administrative remedies.\textsuperscript{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.\textsuperscript{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.\textsuperscript{209} The REA created a centralized rulemaking process by delegating to the Supreme Court the power to

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

\textsuperscript{201} See Ball v. SCI Muncy, 385 F. App’x. 211, 213 (3d Cir. 2010) (describing the form complaint).

\textsuperscript{202} Famiglio, 726 F.3d at 466 (holding that Ball’s dismissal in SCI Muncy counted as a PLRA strike).

\textsuperscript{203} Id.

\textsuperscript{204} M.D. PA. LR 4.7.


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

\textsuperscript{207} See supra note 175.

\textsuperscript{208} See discussion infra Section III.B.

create and modify the Federal Rules of Civil Procedure. 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. 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.

Apart from making the Federal Rules, the Court also has the power to determine “the application of the Rules by adjudicating cases and controversies . . . implicat[ing] civil procedure.” For example, in Bell Atlantic Corp. v. Twombly, 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.” 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, and all federal courts are now bound by the Court’s interpretation of Rule 8(a).

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. 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.
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. 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. Consequently, local rules are invalid under Rule 83 if they are inconsistent with the Federal Rules of Civil Procedure as interpreted by the Court. 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.

2. Further Rulemaking Limitations

All federal court rules, whether created locally or by the Supreme Court, are subject to certain limits imposed by Congress. 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. Meanwhile, § 2072 dictates that rules created by the Supreme Court “shall not abridge, enlarge or modify any substantive right.” 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.” This limitation leaves courts with the power to create local rules that affect procedural rights, but not substantive rights. Unfortunately, distinguishing between procedural rights and substantive rights is controversial. Scholars have long discussed

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

Congress attempted to rectify the Court’s failure to recognize any rulemaking limitations by amending the REA in 1988.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{245} The Committee went on to explain that the substantive rights limitation goes beyond protecting rights conferred by law; rather, the protection, “at the least . . . prevents . . . rules, otherwise valid,” from being applied when they would have the effect of altering rights conferred by substantive law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{248}

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

\begin{itemize}
\item \textsuperscript{240} Id. at 5.
\item \textsuperscript{241} See Kelleher, supra note 224, at 101-03 (discussing Congress’s reason for amending the REA).
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id. at 101-02.
\item \textsuperscript{244} Id. at 102.
\item \textsuperscript{245} H.R. REP. NO. 99-422, at 20-21 (1985).
\item \textsuperscript{246} Id. at 21-22.
\item \textsuperscript{247} Kelleher, supra note 224, at 102-03.
\item \textsuperscript{248} H.R. REP. NO. 99-422, at 21.
\item \textsuperscript{249} Kelleher, supra note 224, at 105-06.
\item \textsuperscript{250} 496 U.S. 384, 391 (1990).
\end{itemize}
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 usable 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

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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.”).
260. See id.
established some general principles that provide some guidance. 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. 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. Finally, in *Shady Grove*, the Court provided that court rules are invalid if they affect how a court will decide an issue and that procedural rules should only affect how courts process claims. While distinguishing between procedural and substantive rights can be difficult, these general rules provide a framework for making that important determination.

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 remedies—are an integral part of the federal court system. Despite the prominence of court rulemaking, courts are subject to significant limitations to their rulemaking power. Namely, all local rules must be consistent with the Federal Rules of Civil Procedure, and all court rules must respect the substantive rights limitation imposed by the REA. Therefore, any court rule falling outside the scope of these limitations is invalid and should be eliminated.

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.
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).
280. See supra notes 173-175 (showing examples of the court rules, the corresponding forms, and the results for prisoners).
281. See supra notes 173-175 (showing examples of the court rules, the corresponding forms, and the results for prisoners).
282. See supra notes 173-175 (showing examples of the court rules, the corresponding forms, and the results for prisoners).
284. 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.”).
285. 28 U.S.C. § 1915(g) (2012) (providing types of dismissals that can bar a prisoner from IFP Status).
286. 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. Bock287 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).


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


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
Eliminating Standard Pleading Forms

Jones v. Bock, the Court held that requiring prisoners to plead exhaustion is inconsistent with Rule 8. Meanwhile, the exhaustion questions in Court X’s pro forma complaint will require Prison Mike to allege exhaustion in his complaint. Because Court X’s requirement of the pro forma complaint is inconsistent with Rule 8 as interpreted by the Bock Court, it is invalid under Rule 83.

In Bock, the Court clarified that the PLRA does not provide any reason for deviating from the usual procedural practice regarding Rule 8 pleading. 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. 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. 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.
Inconsistent with the Court’s interpretation of Rule 8 in Bock, Court X’s local rule deviates from the usual procedural practice by forcing prisoners to plead exhaustion. 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. Such a requirement is contrary to the usual procedural practice mandated by the Bock Court 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. Effectively, Court X’s rule removes the Defendant’s burden to argue Prison Mike’s failure to exhaust as an affirmative defense, and it places the burden to plead exhaustion back on Prison Mike. 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.

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. 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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{312}

Similar to the Fifth Circuit’s heightened pleading requirement that was rejected by the Court in \textit{Leatherman},\textsuperscript{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.\textsuperscript{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.\textsuperscript{315} Similarly, in \textit{Leatherman}, the Fifth Circuit was imposing a heightened pleading standard to avoid adjudicating meritless claims.\textsuperscript{316} The Supreme Court recognized the logic behind the policy in \textit{Leatherman}, but nonetheless held that deviating from the pleading standard mandated by Rule 8 was unlawful without an amendment to the Federal Rules.\textsuperscript{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 \textit{Bock}\textsuperscript{318} and, therefore, unlawful under Rule 83.\textsuperscript{319}

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\textsuperscript{310} \textit{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).
\textsuperscript{311} \textit{See id.} at 167.
\textsuperscript{312} \textit{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 . . . .’”).
\textsuperscript{313} \textit{See id.}
\textsuperscript{314} \textit{FED. R. CIV. P.} 8(a)(2) (requiring “a short and plain statement of the claim”).
\textsuperscript{316} \textit{See Leatherman}, 507 U.S. at 167-68 (finding the heightened pleading standard unlawful).
\textsuperscript{317} \textit{See id.} at 168-69.
\textsuperscript{318} \textit{Bock}, 549 U.S. at 216 (holding that prisoners should not be made to demonstrate exhaustion in their complaints).
\textsuperscript{319} \textit{FED. R. CIV. P.} 83.
\end{flushleft}
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*. In *Leatherman*, the Fifth Circuit created the heightened pleading requirement by demanding the heightened pleading while adjudicating cases. Contrarily, Court X’s added pleading requirement is mandated by a local court rule that was created through notice and comment rulemaking. 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 rulemaking and simply obligates prisoners to discuss exhaustion in their complaints before the court even applies Rule 8. Therefore, Court X is not improperly applying Rule 8 in the courtroom the way the Fifth Circuit was improperly applying it in *Leatherman*.

Distinguishing *Leatherman* in this manner, however, is problematic because it accounts for an irrelevant distinction between the means by which courts promulgate rules. The Supreme Court has the power to create and modify the Federal Rules through processes contemplated by the REA, but it can also modify and specify the application of the Federal Rules through its adjudicative function. 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. Similarly, federal district courts are able to create procedural rules through notice and comment rulemaking, but can also modify and specify the application of those rules through the courts’ adjudicative

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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.
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.
function. 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. Statutory and adjudicative rules equally govern litigants; therefore, either type of court rule may be rendered invalid for its inconsistency with the Federal Rules. To illustrate, after having its heightened pleading requirement stricken by the Court in *Leatherman*, the Fifth Circuit likely would not have been permitted to use notice and comment rulemaking 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. If such were the case, lower courts could avoid following Supreme Court precedent by simply codifying heightened standards 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, Court X is not permitted to circumvent that holding by requiring prisoners to use pleading forms that force them to plead exhaustion.

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. In *Bock*, the Court explained that nothing in the PLRA indicates congressional
intent to change the pleading requirements for prisoners.\textsuperscript{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.\textsuperscript{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.\textsuperscript{343} Contrary to congressional intent as described by the Court in \textit{Bock},\textsuperscript{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.\textsuperscript{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 \textit{Bock},\textsuperscript{346} the rule is invalid under Rule 83 of the Federal Rules of Civil Procedure.\textsuperscript{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 \textit{Bock} and should therefore be eliminated.\textsuperscript{348} The Court clarified in \textit{Bock} that the PLRA warrants no deviation from Rule 8’s pleading requirement, regardless of perceived policy concerns.\textsuperscript{349} Meanwhile, presumably in an attempt to reduce the amount of cases it has to adjudicate, Court X has impermissibly created a heightened

\begin{thebibliography}{9}
\bibitem{341} See \textit{id}.
\bibitem{342} \textit{Id.} at 214-15.
\bibitem{343} See 28 U.S.C. § 1915(g) (2012) (providing a list of dismissals that would result in a PLRA strike).
\bibitem{344} See \textit{Bock}, 549 U.S. at 212-16.
\bibitem{345} See 28 U.S.C. § 1915(g) (providing a list of dismissals that would result in a PLRA strike).
\bibitem{346} See \textit{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).
\bibitem{347} \textit{Fed. R. Civ. P.} 83 (demanding that local court rules must be consistent with the Federal Rules).
\bibitem{348} See \textit{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.”).
\bibitem{349} See \textit{id.} at 212-14 (explaining examples of courts that were wrong for deviating from the usual procedural practice for perceived policy concerns).
\end{thebibliography}
pleading requirement\textsuperscript{350} 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,\textsuperscript{351} requiring the complaints also impermissibly conflicts with the REA by abridging a substantive right.\textsuperscript{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.\textsuperscript{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.\textsuperscript{354} Section 2072 stipulates that the Supreme Court’s “rules shall not abridge, enlarge or modify any substantive right.”\textsuperscript{355} Reading § 2071 in conjunction with § 2072, it follows that a district court’s rule must not “abridge, enlarge or modify any substantive right.”\textsuperscript{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.\textsuperscript{357} Furthermore, it directly affects how Court X will come to its decision\textsuperscript{358} by forcing Court X to dismiss Prison Mike’s action for failure to state a claim—a strike-worthy dismissal—when it

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{351} See FED. R. CIV. P. 83 (stating that local rules have no force if they are not consistent with the Federal Rules).
  \item \textsuperscript{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.”).
  \item \textsuperscript{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).
  \item \textsuperscript{354} 28 U.S.C. § 2071 (2012).
  \item \textsuperscript{355} Id. § 2072(b).
  \item \textsuperscript{356} See id. §§ 2071-2072 (combining to foreclose district courts from creating rules that interfere with substantive law).
  \item \textsuperscript{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).
  \item \textsuperscript{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).
\end{itemize}
otherwise will have had no reason for such a dismissal. 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.

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. 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. Therefore, congressional acts—such as the PLRA—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.

Court X’s rule forcing prisoners to answer questions about exhaustion in their pro forma complaints transgresses the REA’s substantive rights limitation because it conflicts with the PLRA as interpreted by the Court in *Bock*. 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. 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. Furthermore, according to the Court in *Bock*, when

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362. *Id.*


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).


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

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.
377. Id. at 408.
the parties.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{381} Therefore, under the reasoning from \textit{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.\textsuperscript{382}

The inclusion of exhaustion questions in Court X’s pro forma complaints is invalid under the \textit{Shady Grove} Court’s interpretation of the REA’s substantive rights limitation\textsuperscript{383} because it will change the outcome of Court X’s decision regarding Prison Mike. While the Court in \textit{Shady Grove} upheld Rule 23 because it allows for the consolidation of claims without changing the ultimate outcome of those claims,\textsuperscript{384} questions about exhaustion in Court X’s pro forma complaints will directly cause Prison Mike’s otherwise adequate complaint\textsuperscript{385} to be dismissed for failure to state a claim.\textsuperscript{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.\textsuperscript{387} Conversely, by

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  \item \textsuperscript{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).
  \item \textsuperscript{379} See \textit{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.”).
  \item \textsuperscript{380} Id.
  \item \textsuperscript{381} See id. (holding that Rule 23 “undeniably regulated only the process for enforcing . . . rights”).
  \item \textsuperscript{382} See id. at 406-08 (providing rationale to help clarify the substantive rights limitation).
  \item \textsuperscript{383} Id.
  \item \textsuperscript{384} See id.
  \item \textsuperscript{385} This scenario assumes Prison Mike provides a short and plain statement of his claim pursuant to Rule 8(a). \textsc{FED. R. CIV. P.} 8(a).
  \item \textsuperscript{386} See supra note 174 (providing examples to demonstrate how this will occur).
  \item \textsuperscript{387} See \textsc{FED. R. CIV. P.} 8(a).
\end{itemize}
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. While, without answering questions about exhaustion, Prison Mike may ultimately lose on his claim due to his failure to exhaust administrative remedies, 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. 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. Therefore, under the Supreme Court’s characterization of the REA in Shady Grove, 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. 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. Admittedly, all procedural rules may affect substantive rights to some degree, a fact that has been the impetus for much debate. However, because Congress explicitly prohibited court rules from

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

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. Congress created IFP Status to ensure that indigent litigants—such as Prison Mike—are not denied the right to access the courts. While Congress has the authority to deny this right—as it did under certain circumstances with the three strikes provision of the PLRA—courts should not be permitted to create rules that eliminate this right. 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. 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. Prison Mike will therefore incur a PLRA strike that will disqualify him from claiming IFP Status. Without the ability to claim IFP Status, Prison Mike will be denied his right to access the courts. 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. Because the right Court X’s rule abridges—the right to use IFP Status to access

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).
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).
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.\textsuperscript{409}

3. Rectified Complaint Forms

The part of Court X’s pro forma complaints that requires prisoners to allege exhaustion\textsuperscript{410} 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.\textsuperscript{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.\textsuperscript{412} Such pro forma complaints—already used by several other federal district courts\textsuperscript{413}—would be consistent with Rule 8 of the Federal Rules\textsuperscript{414} and would not abridge prisoners’ substantive rights.\textsuperscript{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.\textsuperscript{416}

CONCLUSION

While the Court decisively held in \textit{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

\begin{itemize}
\item \textsuperscript{409} See \textit{id.} § 2072.
\item \textsuperscript{410} See \textit{supra} note 205 (providing examples of the complaint forms that have prisoners discuss exhaustion).
\item \textsuperscript{412} See \textit{supra} note 411.
\item \textsuperscript{413} See \textit{supra} note 411.
\item \textsuperscript{414} Fed. R. Civ. P. 8.
\item \textsuperscript{416} See \textit{supra} Section III.A (providing an example of how this occurs).
\end{itemize}
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 Bock420 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

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.
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