No. 20-17519

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIKEB SADDOZAI,
Plaintiff-Appellant,

v.

RON DAVIS, Warden of San Quentin Prison, et al.
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 5:18-cv-05558-BLF
Hon. Beth Labson Freeman, *District Judge*

APPELLANT'S REPLY BRIEF

Easha Anand
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
2443 Fillmore Street
#380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

Katherine Cion
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H Street NE
Suite 275
Washington, D.C. 20002
(202) 869-3438
katie.cion@macarthurjustice.org

Attorneys for Appellant Shikeb Saddozai

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The Prison Litigation Reform Act ("PLRA") requires plaintiffs to exhaust their administrative remedies. 42 U.S.C. § 1997e(a). Shikeb Saddozai exhausted his administrative remedies. The district court granted Mr. Saddozai leave to amend his complaint, where he then detailed how he had exhausted administrative remedies. So, this Court should not allow the district court to dismiss Mr. Saddozai's claims for failure to exhaust administrative remedies.

This logic comes directly from this Court's own precedent. In *Rhodes*, *Cano*, and *Jackson*, three cases binding on this panel, this Court held again and again that the PLRA's exhaustion requirement, "appl[ies] based on when a plaintiff files the operative complaint," whether that's the original or the amended complaint. *Jackson v. Fong*, 870 F.3d 928, 935 (9th Cir. 2017); *see also Rhodes v. Robinson*, 621 F.3d 1002, 1004–05 (9th Cir. 2010); *Cano v. Taylor*, 739 F.3d 1214, 1220 (9th Cir. 2014). Given that precedent, the only work this Court needs to do here is apply its own general rule of pleading to this case: Mr. Saddozai's amended complaint is the operative one; because he satisfied the exhaustion requirement

before filing that operative complaint, the district court's dismissal on exhaustion grounds must be reversed.

I. Mr. Saddozai Satisfied The PLRA's Exhaustion Requirement By Exhausting Administrative Remedies Before Bringing His Operative Complaint.

A. This Court's Precedent Clearly States That A Litigant Need Only Exhaust By The Time The Operative Complaint Is Filed.

This Court has thrice affirmed that the date of an amended or supplemental complaint displaces that of the original complaint for the purposes of a court's exhaustion analysis. Though Defendant wills this Court to act as if it were writing on a blank slate, three of this Court's binding decisions—applying the same overarching principle to three distinct factual scenarios—make exceedingly clear that it is a "*general rule of pleading*" that an amended or supplemental complaint "completely supercedes" an earlier complaint, rendering the original complaint's filing date "irrelevant." *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010) (emphasis added); *see also Cano v. Taylor*, 739 F.3d 1214, 1220–21 (9th Cir. 2014); *Jackson v. Fong*, 870 F.3d 928, 934 (9th Cir. 2017). Defendant says nothing that undermines the force of this binding, on-point case law.

1. Defendant asserts that this Court's decisions in *Rhodes* and *Cano* are limited to the specific facts of each case. Defendant points out that these cases involved prisoner-plaintiffs bringing new claims in their amended pleadings, where, here, Mr. Saddozai elaborated on an existing claim in his amended pleading. *See* Answering Br. ("AB") at 35–39. But this distinction does not make a legal difference, because the holdings in both *Rhodes* and *Cano* hinge on a general understanding of how Federal Rule of Civil Procedure 15 operates. In *Rhodes*, for instance, this Court held that "[t]he filing of the amended complaint was the functional equivalent of filing a new complaint . . . and it was only at that time that it became necessary to have exhausted all of the administrative remedies." 621 F.3d at 1005–06. This holding was not tied to when those claims arose or how those claims differed from those raised in the original complaint. It was a general statement on the operation of Rule 15.

This Court had no trouble applying this exact same conclusion to a completely different set of facts in *Cano* and again holding that "for purposes of the exhaustion requirement, the date of the [amended complaint's] filing is the proper yardstick." *Cano*, 739 F.3d at 1220. Although the plaintiff in *Rhodes* brought claims in his amended

complaint based on conduct that occurred *after* he filed his initial complaint, whereas the plaintiff in *Cano* brought claims in his amended complaint based on conduct that occurred *before* he filed his initial complaint, this Court applied the same proposition: that a plaintiff satisfies the PLRA's exhaustion requirement "as long as [his claims] are administratively exhausted prior to the amendment." *Id*. Applying this proposition in this case, just as this Court applied it in *Rhodes* and *Cano,* Mr. Saddozai exhausted his administrative remedies prior to filing his operative amended complaint, so there was no basis for dismissal.[1]

2. Were there any doubt that the principle from *Rhodes* and *Cano* applies where plaintiffs do not allege entirely new claims in their

[1] Defendant notes that the *Cano* court provided, as one reason for its holding, the fact that "a contrary rule would unnecessarily curtail a district court's discretion to allow 'the addition of a new claim in an amended complaint.'" AB at 37 (quoting *Cano*, 739 F.3d at 1120). By quoting this language, Defendant means to cabin *Cano*'s holding to those situations where an amended complaint adds a new claim. However, the quoted language is not the central holding of *Cano*, but rather one additional reason this Court concluded in that scenario that it was prudent to apply the normal rules of pleading. *See Cano*, 739 F.3d at 1120–21. It is clear from the *Cano* decision, which only mentions the above-quoted language as it transitions away from its discussion of the rules of pleading after having already concluded that "for the purposes of the exhaustion requirement, the date of the FAC's filing is the proper yardstick," that the *Cano* court's holding did not rise or fall on this aside. *Id.*

amended complaint, *Jackson v. Fong* dispels it. In *Jackson*, the amended complaint contained no new claims. But this Court still applied the rule from *Rhodes* and *Cano* holding that the date of the amended complaint controlled for exhaustion purposes. *See Jackson*, 870 F.3d at 934–36. *Jackson* thus fatally undermines Defendant's efforts to limit *Rhodes* and *Cano*.

Defendant argues that *Jackson* should itself be read narrowly as applying only to plaintiffs in the same situation as the plaintiff in that case—those who have not alleged new claims but have been released from prison since filing their initial complaints. AB at 39–41. Defendant lobbies for this narrow reading based on the fact that, as he describes it, *Jackson* has not been widely accepted by other circuits since it was handed down in 2017. *Id.* at 41–42. But Defendant cannot back up that claim.

To start, other Circuits have not rejected *Jackson's* reasoning. In fact, as Defendant acknowledges, the Third Circuit has *endorsed Jackson*'s holding. *See Korb v. Haystings*, 860 F. App'x 222, 225 (3d Cir. 2021); *Garrett v. Wexford Health*, 938 F.3d 69, 82–84 (3d Cir. 2019).

And none of the other cases Defendant cites are actually at odds with *Jackson*. For example, Defendant points to *May v. Segovia*, 929 F.3d 1223 (10th Cir. 2019), but the Tenth Circuit there didn't reject this Court's rule that the date of the operative complaint is the relevant date for exhaustion purposes. *See id.* at 1232–33. Instead, the Tenth Circuit said that, even assuming the date of the operative amended complaint controlled, it wouldn't have mattered in that case, because that complaint was tendered while the plaintiff was still in prison (and thus subject to the PLRA's exhaustion requirement). *Id.* Neither did the Fifth Circuit reject *Jackson* in *Bargher v. White*, 928 F.3d 439 (5th Cir. 2019). In fact, the plaintiff in that case had not amended or supplemented his complaint, and nowhere in that case did the Fifth Circuit even reference Rule 15.

The only other two cases Defendant can point to as contradicting *Jackson* predate, and so couldn't have rejected, *Jackson*, and in any event are similarly inapposite. *Foulk v. Charrier,* 262 F.3d 687 (8th Cir. 2001), concluded that remedies were unavailable to the prisoner-plaintiff, such that exhaustion wasn't required at all; anything it said about which complaint to look at was thus dicta. *See id.* at 696–98. And *Harris v.*

Garner, 216 F.3d 970 (11th Cir. 2000) (en banc), deals with the PLRA's physical-injury requirement, not its exhaustion requirement. *Id.* at 972–73. In all, by Defendant's own count, no other circuit has rejected *Jackson*, and the most on-point out-of-circuit precedent actually endorses *Jackson*.

In any event, *Jackson* just doesn't allow for the "narrow reading" Defendant prefers—limiting *Jackson's* reasoning to cases where a plaintiff is released from prison during litigation. Although Defendant fixates on the fact that the plaintiff in *Jackson* was released from prison when he filed his supplemental complaint, this Court in *Jackson* did not. *See* AB at 40–41. Instead, this Court decided *Jackson* based on *Rhodes* and the general rule that the PLRA's exhaustion requirement "appl[ies] based on when a plaintiff files the operative complaint," with no mention of release in this holding. *Jackson*, 870 F.3d at 935. And nowhere in the multiple sections that the *Jackson* decision devoted to analyzing the Rule 15 question did it bring up the fact of release as relevant. *See id.* The *Jackson* Court itself gave no indication that its holding should be limited to situations of release.

3. Defendant alternatively argues that other decisions by this Court—namely *McKinney v. Carey*, 311 F.3d 1198 (9th Cir. 2002), *Vaden v. Summerhill*, 449 F.3d 1047 (9th Cir. 2006), *Akhtar v. Mesa*, 698 F.3d 1202 (9th Cir. 2012), and *Brown v. Valoff*, 422 F.3d 926 (9th Cir. 2005)—undermine this Court's rule that the operative pleading is the proper deadline for exhausting administrative remedies. But each of these decisions predate *Cano* and *Jackson*, and most predate *Rhodes* as well. Further, as this Court made clear in *Rhodes*, *Cano*, and *Jackson* themselves, these prior decisions do not conflict with this Court's newer precedent.

Rhodes already dispensed with the notion that *Vaden* and *McKinney* somehow counsel a different result. In *Rhodes*, this Court specifically held the principle that exhaustion is measured at the time the operative complaint is filed is "consistent with [its] holdings in *Vaden* and *McKinney*." *Rhodes*, 621 F.3d at 1007. And neither *McKinney* nor *Vaden* actually dealt with amended or supplemental complaints. *Rhodes* thus concluded these cases did nothing to abrogate the "general rule of pleading that the [operative complaint] completely supercedes any

earlier complaint, rendering the original complaint non-existent and, thus, its filing date irrelevant." *Id.* at 1005.

Defendant's citation to dicta from this Court's decision in *Akhtar* is also misplaced. Defendant focuses on the following language from *Akhtar*:

> Akhtar asserted his claim for failure to comply with his medical chrono regarding housing in his initial complaint. Neither party disputes that this claim arose before Akhtar filed that complaint. Thus, Akhtar was required to exhaust this claim before he filed his initial complaint.

698 F.3d at 1210. But the plaintiff in *Akhtar* had fully exhausted his administrative remedies "several months before he filed his initial complaint." *Id.* at 1210–11. Thus, anything this Court said about an initial versus an amended complaint was, at best, dicta. And if there were any doubt that the language Defendant points to in *Akhtar* is dicta, that doubt was cleared up by this Court in *Cano*. The plaintiff in *Cano* raised a "claim [that] arose before" he filed his original complaint, as in *Akhtar*. 698 F.3d at 1210. But this Court nonetheless held that he wasn't "required to exhaust this claim before he filed his initial complaint," as the language Defendant quotes from *Akhtar* would have it, *id.*, explaining that "nothing in the … Ninth Circuit's reasoning in *Akhtar*" required that

rule, presumably because that *Akhtar* language was dicta. *Cano*, 739 F.3d at 1220.

Finally, applying this Court's straightforward rule—that a plaintiff must exhaust only by the time of the operative complaint—to this case would not "create tension" with its decision in *Brown*, as Defendant suggests. AB at 32. In *Brown*, this Court held that, while a prisoner pursues his administrative remedies, the statute of limitations for his underlying claim tolls. 422 F.3d at 942. Defendant says that "this justification for tolling evaporates," if this Court sides with Mr. Saddozai, because a plaintiff can file suit at a time that satisfies the statute of limitations, and then amend to satisfy the exhaustion requirement. AB at 32. But that possibility is, in fact, illusory. Prisoner-plaintiffs have virtually no control over the timing of either the prison's grievance process or district court proceedings. They have no way of knowing whether they will be able to exhaust administrative remedies before the district court dismisses their case or whether the district court will give them a chance to amend their complaint after they have finished exhausting administrative remedies. Under the rule that plaintiffs must

exhaust by the time they file their operative complaint, prisoners will still need the sort of tolling *Brown* allows.

4. Defendant also argues that this Court's decision in *Rhodes* was overruled by the Supreme Court's decision in *Ross v. Blake*, 578 U.S. 632 (2016). *See* AB at 42–45. For a three-judge panel to determine that a decision from the Supreme Court overruled this Court's precedent, that decision must "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Murray v. Mayo Clinic*, 934 F.3d 1101, 1105 (9th Cir. 2019) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). *Ross* does no such thing.

In *Ross*, the Supreme Court held that courts should not "excuse" exhaustion of available administrative remedies. But this Court in *Rhodes* did not "excuse" exhaustion. In *Rhodes*—as in *Cano* and, indeed, as in this case—plaintiff *did* exhaust administrative remedies. The only question was whether exhaustion should be measured at the time the operative complaint was filed, as Rule 15 would normally have it, or whether it had to be measured at the time the initial complaint was filed. *Ross* had nothing to say about that question; it is a red herring that

certainly does not meet this Court's high bar for overruling a prior decision. And as long as *Rhodes*, *Cano*, and *Jackson* have not been overruled, they decide this case in Mr. Saddozai's favor.

B. The Filing Date Of The Amended Complaint Should Govern Here, In Line With This And Other Courts' Rule 15 Holdings In Analogous Statutory Contexts.

Rule 15 seeks to give litigants the chance to ensure their cases get considered on the merits by allowing them to amend or supplement their complaints. In view of this purpose, this Court and the Supreme Court have liberally applied Rule 15, looking to whichever pleading saves a case from being dismissed on procedural grounds. *See, e.g.*, *U.S. for Use of Atkins v. Reiten*, 313 F.2d 673, 674–75 (9th Cir. 1963); *Sec. Ins. Co. of New Haven v. U.S. for Use of Haydis*, 338 F.2d 444, 446 (9th Cir. 1964); *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1043 (9th Cir. 2015); *Mathews v. Diaz*, 426 U.S. 67, 69–73 (1976). Under that approach, this Court should look to the date of the amended complaint for purposes of assessing exhaustion because that's the date that saves Mr. Saddozai's case from being dismissed on procedural grounds.

1. Defendant's attempts to get out from under the weight of authority on this issue are unsuccessful. In his opening brief, Mr.

Saddozai provided four illustrative examples of cases where Rule 15 saved a plaintiff's case despite initial filings that were premature under governing statutes. Opening Br. ("OB") at 25–28. Defendant does not dispute that both *Haydis* and *Northstar Financial* clearly hold that Rule 15 should apply to salvage a plaintiff's case where the original complaint is premature for one reason or another.

Defendant attempts to distinguish the other two cases, to no avail. Start with *Mathews*. Where the PLRA's exhaustion provision says "no action shall be brought" until plaintiffs exhaust administrative remedies, the Social Security Act's exhaustion provision, at issue in *Mathews*, says that, "after a final decision" by the agency, an individual "may obtain review of such decision" within sixty days. 42 U.S.C. § 405(g). Defendant argues this difference in phrasing means that Rule 15 can apply as normal to the statute at issue in *Mathews*, because the exhaustion clause there is a "mere technicality," but cannot apply similarly to the PLRA, because the exhaustion clause there is "mandatory." AB at 26. This difference is illusory. First, if the Social Security Act's exhaustion provision was really a "mere technicality," no one told the Supreme Court that in *Mathews*, where it discussed the Act's "exhaustion *requirement*."

426 U.S. at 76 (emphasis added). And second, the Supreme Court has made clear that, when a statute like the Social Security Act says an actor *may* do *X* if *Y*, the necessary implication is that the actor may *not* do *X* if *not Y*. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). Where the Social Security Act says a claimant "may" obtain review if they exhaust, this means that claimant may *not* obtain review without exhausting—phrasing that is just as mandatory as is the PLRA's. And were there any doubt, *Jackson* already looked to *Mathews* in analyzing the PLRA, making clear there's no dispositive difference between the statutes at issue in the two cases. 870 F.3d at 934.

The same holds true for *Atkins*. Here, again, Defendant treats a slight difference in statutory phrasing—the statute at issue in *Atkins* said the plaintiff "shall have the right to sue"—as drawing the line between mandatory and optional. AB at 26–27. But, as in *Mathews*, principles of statutory construction tell us that this language is mandatory nonetheless. *Mathews* and *Atkins* thus confirm this Court's rule: The amended filing date controls for purposes of mandatory statutory prerequisites. *See* OB at 25–28.

2. Defendant next tries to argue that this Court's rule that the date of the amended complaint controls for exhaustion purposes is incompatible with Rule 15(c) because Rule 15(c) "expressly contemplates that the timing of an original complaint remains relevant." AB at 31. But there is no tension between the two rules. Normally, the date of the amended complaint supersedes the original complaint. *See, e.g.*, *Schiavone v. Fortune*, 477 U.S. 21, 24 (1986). In some cases, this general rule worked against plaintiffs who filed their original complaints within the statute of limitations, but filed amended complaints after the statute of limitations had run. *Id.* That's where Rule 15(c) comes in. It creates a limited exception to the general rule that the date of the amended pleading is the relevant date for all purposes by allowing a plaintiff to rely on the date of the original complaint for statute of limitations purposes. *See* 6A WRIGHT & MILLER, FED. PRAC. & PROC. § 1476 (3d ed.). Rule 15(c) is thus only necessary in the first place *because* of the rule that the date of the amended complaint, not the date of the original pleading, governs.

And Rule 15(c) has no application in this case. This Court has made clear that 15(c) only operates where the *plaintiff* invokes it to help, not

hurt, his case. *See Atkins*, 313 F.2d at 675 (declining to apply 15(c) to undermine a plaintiff's case); *Haydis*, 338 F.2d at 449 (same). Here, Mr. Saddozai has not invoked Rule 15. And even when it applies, Rule 15(c) only requires the original complaint date to govern for statute of limitations purposes, not for any other purpose. *See Haydis*, 338 F.2d at 449 (original complaint date governed for purposes of statute of limitations; amended complaint date governed for purposes of statutory waiting period).

In this case, then, because Rule 15(c) has no applicability, the default rule applies, and the relevant date is the date of the amended complaint. Everyone agrees that Mr. Saddozai had exhausted his administrative remedies prior to that date.

3. Finally, Defendant cites two cases of his own to argue that Rule 15 does not operate as this Court's and the Supreme Court's precedent says it does. *See* AB at 27–28 (citing *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20 (1989)); AB at 31 (citing *Barnes v. Sea Hawaii Rafting, LLC*, 889 F.3d 517, 531 (9th Cir. 2018)). But those cases are not relevant.

To begin, Defendant's citation to *Hallstrom v. Tillamook County* is unavailing. *Hallstrom*, like this case, involved an initial complaint that

was filed prematurely. 493 U.S. at 25–26. But the similarities end there. The *Hallstrom* plaintiffs didn't try to file an amended complaint after the statutory waiting period was over. *Id.* Instead, they asked the district court to issue a stay for the duration of the statutory waiting period. *Id.* This Court has already held in *McKinney* that, consistent with *Hallstrom*, a prisoner-plaintiff who files prematurely cannot obtain a *stay* to finish exhausting under the PLRA. 311 F.3d at 1199. But this Court has also held that a prisoner-plaintiff can *amend* his complaint once the exhaustion process is over—something the *Hallstrom* plaintiffs didn't seek to do but that Mr. Saddozai did here. *Rhodes*, 621 F.3d at 1004–05. And in any event, *Hallstrom* predated (and thus couldn't overrule) *Rhodes*, *Cano*, and *Jackson*, all of which endorse what Mr. Saddozai did here.

The other case Defendant relies on, *Barnes v. Sea Hawaii Rafting, LLC*, is no more helpful to his case. Defendant cites *Barnes* for the proposition that an amended pleading normally supersedes an initial complaint "with regard to the pleading's substance, not its procedural effect." AB at 31 (citing *Barnes*, 889 F.3d at 531). But *Barnes* is completely consistent with this Circuit's rule that courts look to

whichever of an original or amended complaint helps the plaintiff. *See* OB at 25. In *Barnes*, this Court on appeal looked to a claim that was only pled in the original complaint, not the amended complaint, because doing so helped the plaintiff. 889 F.3d at 532.

At bottom, Defendant's arguments only confirm that Rule 15 works to the benefit of plaintiffs seeking to have their claims heard on the merits. Often, Rule 15 does so by allowing plaintiffs to rely on the default rule that the filing date of an amended complaint supersedes the filing date of an original complaint. And that is exactly how Rule 15 applies here. Because Mr. Saddozai fully exhausted his administrative remedies by the time he filed his amended complaint, there is no cause for dismissal under the PLRA's exhaustion requirement.

C. The Text Of The PLRA Confirms That Exhaustion Should Be Measured At The Time The Operative Complaint Is Filed.

The exhaustion requirement of the PLRA provides that "no action shall be brought" without exhausting administrative remedies. The word "brought," as used in other statutes, in statutes of limitations, and in other sections of the PLRA consistently refers to the bringing of the *operative* complaint, amended or otherwise. And at the very least, the

word "brought" is not the sort of explicit statement that the Supreme Court has said is necessary to override the normal operation of the Federal Rules of Civil Procedure. *Jones v. Bock*, 549 U.S. 199, 216 (2007).

1. Defendant argues that the text of the PLRA conflicts with Rule 15 because the exhaustion requirement says "no action shall be brought" until plaintiffs exhaust administrative remedies, and "brought" can only refer to the original complaint. AB at 21–22. Thus, Defendant asserts, the text of the PLRA says that a prisoner must exhaust administrative remedies before any litigation begins. *Id.*

But the word "brought" on its own is far from the clear textual signal that the Supreme Court asked for in *Jones* before lower courts can justify casting the Federal Rules aside. Instead, this Court, sister circuits, and the Supreme Court consistently read the word "brought" to refer to an operative complaint, whether that's the initial complaint or an amended complaint. This Court itself has already rejected Defendant's reading of the word "brought" as referring only to an original complaint. *See, e.g.*, *Jackson*, 870 F.3d at 934. Sister circuits that have interpreted other statutes that use similar "no action shall be brought"

language likewise have held that "brought" can refer to an amended, rather than an original, complaint. *See* OB at 32 n.2.

Further, as *Jones* itself recognizes, statutes of limitations often employ the language "no action shall be brought," and, as explained *supra*, I.B.2, an action is "brought" at the time of the operative complaint for statute of limitations purposes unless a plaintiff is able to invoke Rule 15(c) to rely on the date of the original complaint. 549 U.S. at 220. Lastly, the use of the term "brought" or "bring" elsewhere in the PLRA also refers to the filing of the operative complaint, whether it's the original complaint or an amended complaint.[2]

---

[2] And it is the "normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). For instance, 28 U.S.C. § 1915(g) penalizes prisoners if they previously "brought an action" that was dismissed as frivolous, malicious, or for failure to state a claim. Courts impose that penalty if, in a previous case, it was the amended complaint that was dismissed for any of these reasons, because a prisoner "brought an action" at the point where the operative complaint was filed, even if it was the amended complaint. *See Green v. Warden*, No. 3:21-CV-0588-JLS-WVG, 2021 WL 1541638, at *2 (S.D. Cal. Apr. 20, 2021) (noting that plaintiff had one prior penalty from the dismissal of a second amended complaint); *Ortiz v. King Cnty. Corr. Facility*, No. C16-1146-JCC-JPD, 2016 WL 5724313, at *3 (W.D. Wash. Aug. 31, 2016), *report and recommendation adopted*, No. C16-1146-JCC, 2016 WL 5719381 (W.D. Wash. Sept. 30, 2016) ("As plaintiff's amended complaint fails to state a claim upon which relief may be granted, dismissal of this action should count as a [penalty] under the PLRA, 28

2. Defendant also makes various arguments that the PLRA must displace Rule 15 because the PLRA's exhaustion requirement is mandatory. AB at 28–29. Mr. Saddozai agrees that, under the PLRA, prisoner-plaintiffs *must* exhaust administrative remedies. But Mr. Saddozai *did* exhaust administrative remedies. Then, he amended his complaint to reflect this. The question here is not whether exhaustion is mandatory. It's whether, when a plaintiff *complies* with that mandatory exhaustion requirement, a district court must nonetheless dismiss his case if he did so after the original complaint was filed. That the PLRA makes exhaustion mandatory doesn't mean the PLRA conflicts with Rule 15.

3. Finally, Defendant takes issue with Mr. Saddozai's reading of § 1997e(c)(2). AB at 30. But Mr. Saddozai simply reads § 1997e(c)(2) to harmonize with the provisions that surround it. Recall, § 1997e(c)(2) says that a district court "may dismiss" certain claims "without first requiring

---

U.S.C. § 1915(g)."). And, where § 1997e(e) says "no action shall be brought for mental or emotional injuries" under certain conditions, plaintiffs who file an initial complaint "for mental and emotional injuries" can still amend to cure this deficiency through additional allegations in an amended complaint, because the action isn't "brought" until the operative complaint. *See Mitchell v. Horn*, 318 F.3d 523, 534 (3d Cir. 2003).

the exhaustion of administrative remedies." If the exhaustion provision, § 1997e(a), already required courts to dismiss all claims "without first requiring the exhaustion of administrative remedies," then § 1997e(c)(2) would be superfluous. Instead, § 1997e(c)(2) assumes that sometimes, in lieu of dismissal, a district court will allow a plaintiff to finish exhausting administrative remedies (and, presumably, then amend their complaint).

Defendant calls this reading "tortured," suggesting that, under this approach, a district court can "allow an inmate's facially frivolous claims to proceed." AB at 30. But § 1997e(c)(1) *already* requires district courts to dismiss facially frivolous claims, providing that a court "shall … dismiss any action brought with respect to prison conditions … if the court is satisfied that the action is frivolous." *Id.* Section 1997e(c)(2) simply clarifies that while, in some circumstances, a district court should let a prisoner proceed to exhaust his claims, it needn't where those claims are frivolous anyway.

In all, despite numerous attempts, Defendant cannot manufacture any tension between the PLRA's exhaustion requirement and Rule 15, let alone the kind of "express[]" indication that the Supreme Court would require to abrogate the ordinary operation of Rule 15. *Jones*, 549 U.S. at

216. In fact, all signs point in the opposite direction; the text of the PLRA actually affirms the normal operation of Rule 15. Here, that means measuring exhaustion at the time Mr. Saddozai filed his operative amended complaint and holding that Mr. Saddozai has satisfied the exhaustion requirement.

D. The Policy Considerations Underlying The PLRA Are Not Undermined, But Reinforced, By The Normal Operation Of Rule 15.

As detailed in the Opening Brief, this Court's approach to Rule 15 does nothing to undermine the purpose of the PLRA. Congress intended the PLRA to reduce the quantity and improve the quality of prisoner litigation, by filtering out frivolous claims and helping with the development of an administrative record for those cases that do come to court. *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002). *Rhodes*, *Cano*, and *Jackson* promote these ends by streamlining related, nonfrivolous claims into one action.

Defendant makes reference to some of these policy aims but does not explain how requiring Mr. Saddozai to dismiss and refile his claim would serve them. AB at 22–23. For example, Defendant emphasizes the importance of reducing federal court interference with prison

administration. *Id.* Yet by the time Mr. Saddozai filed his operative amended complaint, the prison had completed its entire exhaustion process without "federal-court interference." AB at 22. This process was not rushed or interrupted, because Mr. Saddozai only filed his amended complaint after the grievance process was completed. Per the prison's own policies, there was nothing else to be done internally. It is difficult to see, then, how prison administration would be affected by using the filing date of an amended complaint when assessing exhaustion.

Defendant's second argument—that requiring dismissal to then have an incarcerated plaintiff file the same case under a different time stamp "promotes judicial efficiency," AB at 23—is offered without explanation. This is understandable, because there is nothing remotely efficient about breaking one suit into two, which is what would happen if Mr. Saddozai's complaint was dismissed at this junction, when he has already exhausted, simply for him to refile tomorrow under a new case number. Indeed, judicial economy is not served, but frustrated, when plaintiffs are required to file two identical suits where one will do. Rule 15 was promulgated precisely to avoid such a wasteful result.

Finally, Defendant also seems to suggest that this Court's approach would interfere with the development of the administrative record. AB at 22–23. But that is simply not true. *See* ER-104. In this case, as in *Rhodes* and *Cano*, Mr. Saddozai completed the prison's grievance process before filing his operative complaint; as such, he could not develop the record any further if he tried.

Finally, Congress did not merely prescribe that the exhaustion requirement should reduce the quantity of prisoners' claims, but also made decisions as to how. Defendant's arguments, however, ignore Congress's chosen path. Defendant asserts that it is essential to keep the courthouse doors closed until the entire administrative process runs its course. *See* AB at 34. But that assertion doesn't track with the way Congress designed the exhaustion requirement. As the Supreme Court has explained, Congress intended exhaustion as an affirmative defense, not a pleading requirement. *Jones*, 549 U.S. at 919. Thus, although Congress clearly meant the exhaustion requirement to serve a filtering function, it was not so adamant that claims be filtered out as soon as possible—if Congress had wanted non-exhaustion to doom claims at the soonest possible moment in litigation, it would have made exhaustion a

pleading requirement. That Congress instead included non-exhaustion as an affirmative defense, allowing it to be raised later in the course of litigation, suggests that the PLRA's policy goals remain perfectly well-served even when actions proceed past the most initial steps. In this way, requiring exhaustion at the time of the operative pleading, as opposed to the initial pleading, leaves the requirement's bite entirely intact.

***

In all, though Defendant seems to want a blank slate, this Court must take heed of what's already been written: binding Ninth Circuit precedent says the timing of the amended complaint controls where PLRA exhaustion is concerned. At the time he filed his operative complaint, Mr. Saddozai exhausted his administrative remedies. So, the district court erred by dismissing this case.

II. Defendant Does Not Shoulder His Burden Of Showing That Administrative Remedies Were Available To Mr. Saddozai.

Even if this Court concludes, contra to its own precedent, that Mr. Saddozai did not exhaust remedies, that wouldn't be the end of its inquiry. The PLRA only requires exhaustion of "available" remedies. 42 U.S.C. § 1997e(a). Mr. Saddozai alleged that remedies were not available

to him. At every turn, prison officials—most notably the prison's warden, who told Mr. Saddozai in a meeting in August that he had no recourse for his claims, a deception that was compounded by guards who continued to misrepresent the grievance process and deny Mr. Saddozai necessary forms—thwarted Mr. Saddozai's attempts to exhaust. Defendant asserts that administrative remedies were nonetheless available to Mr. Saddozai. AB at 45–49. But Defendant's arguments fail in both their broad strokes and their particulars.

Defendant generally seems to suggest that, because Mr. Saddozai was ultimately able to force his way into the administrative process, remedies must have been available to him all along. But this Court has already rejected this line of reasoning. In *Marella v. Terhune*, 568 F.3d 1024 (9th Cir. 2009), this Court held that remedies were unavailable when officials had provided the plaintiff with misleading information suggesting an appeal was impossible, despite the fact that the plaintiff went on to submit an appeal. *Id.* at 1026. Those facts look remarkably similar to the ones at issue here: prison officials (most notably the prison's warden) misled Mr. Saddozai, telling him that he had nowhere to go with his grievance. *See* ER-122; ER-127. This rendered remedies

unavailable, even though Mr. Saddozai decided to hedge his bets and file an administrative grievance anyway.

Defendant argues *Marella* is distinguishable because there the prisoner's grievance was canceled and he was told he could not appeal further, where Mr. "Saddozai not only had an available remedy, he used it and exhausted the process." AB at 48. But in *Marella* as well, the plaintiff "used" additional steps in the administrative process even after receiving indications that such steps were not available to him. *See* 568 F.3d at 1026. *Marella* thus confirms that a remedy may not be "available" even if a plaintiff ultimately progresses in the exhaustion process.

Defendant also suggests that Mr. Saddozai's allegations regarding the warden's deception are somehow irrelevant or insufficient to show unavailability. Mr. Saddozai alleged that the prison's warden told him directly that his claims relating to the August 2018 attack had been rejected. *See* OB at 37–38. Defendant suggests that this interaction does not matter because, under California regulations, Mr. Saddozai needed to submit a form to institute the official grievance procedure. AB at 47–48. But Mr. Saddozai doesn't dispute that what the warden told him was an inaccurate reflection of the remedies available to him— in fact, that is

exactly why the meeting with the warden rendered his remedies unavailable: The warden misrepresented the state of things, and misled Mr. Saddozai. *See Ross*, 578 U.S. at 644; *Marella*, 568 F.3d at 1027.

Ultimately, Defendant's arguments on the facts fail not just because they misstate the relevance of what Mr. Saddozai has alleged, but also because they skew the proper frame of reference on the availability question in the first place. Defendant frames the inquiry as if unavailability is a pleading requirement for Mr. Saddozai to satisfy, claiming that Mr. Saddozai failed to "plausibly allege that his administrative remedies were unavailable." AB at 47. Yet Mr. Saddozai was not actually required to allege anything about exhaustion. Under the PLRA, exhaustion is an affirmative defense, and Defendant bears the burden of showing that administrative remedies were "available." *See Jones*, 549 U.S. at 211–12. Defendant does not meet this burden.

In the end, Defendant's availability arguments only underline a key downside to Defendant's Rule 15 arguments. Everyone agrees that Mr. Saddozai has exhausted his remedies at this junction. So why should this Court go back to see what remedies were available and when? That is one more reason why this Court should continue to apply its precedent

dictating that if a prisoner-plaintiff exhausts his remedies before the filing of the operative complaint—even if that complaint is an amended complaint—there's no reason for this Court to inquire into what happened before that time.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand the case for consideration of the merits of Mr. Saddozai's claims.

Date: February 9, 2022

Respectfully Submitted,

/s/ Katherine Cion

Easha Anand
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
2443 Fillmore Street
#380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

Katherine Cion
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H. Street NE
Suite 275
Washington, D.C. 20002
(202) 869-3438
katie.cion@macarthurjustice.org

Attorneys for Appellant Shikeb Saddozai

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,144 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

/s/ Katherine Cion
Katherine Cion

Attorney for Appellant
Shikeb Saddozai

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Katherine Cion
Katherine Cion

Attorney for Appellant
Shikeb Saddozai