No. 21-7195

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLIE L. HARDIN,

Plaintiff-Appellant,

v.

OFFICER HUNT; LINDA YORK;
CRAIG KENNEDY; MICHAEL WARD

Defendants-Appellees.

On Appeal from the U.S. District Court for the
Eastern District of North Carolina
Case No. 5:20-ct-03122

BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Since the passage of the Prison Litigation Reform Act ("PLRA"), the Supreme Court has provided a raft of guidance to lower courts tasked with interpreting the Act's provisions. But there is one through-line in the Court's PLRA guidance that has remained constant from the start: accept what Congress said in the PLRA, but do not read in what Congress did not. *See, e.g.*, *Jones v. Bock*, 549 U.S. 199, 220–24 (2007); *Ross v. Blake*, 578 U.S. 632, 638–39 (2016). This is particularly important, the Court has made clear, in the context of the PLRA's exhaustion requirement. Had the district court in this case followed this simple maxim, Charlie Hardin's complaint would not have been dismissed.

Mr. Hardin was attacked by multiple gang members who tried to stab him. Prison officials did nothing to protect him. Instead, when Mr. Hardin attempted to protect himself, prison officials responded by placing him in administrative segregation. And this dynamic continued, with defendants either actively putting Mr. Hardin in danger or retaliating against Mr. Hardin with restrictive housing assignments when he tried to avoid future attacks. Mr. Hardin then filed suit against a set of prison officials involved in this ordeal. Later, he sought leave to

amend, which the district court granted. In his amended complaint, which centered on the same underlying sequence of events, Mr. Hardin dropped all of the prison officials whom he had initially named as defendants and brought new claims against new defendants, including the four remaining in this case on appeal. And it is undisputed that, by the time Mr. Hardin filed his amended complaint, he had exhausted his administrative remedies as to those new claims in compliance with the PLRA's mandate.

However, the district court dismissed Mr. Hardin's amended complaint for failure to exhaust. It reasoned that even though Mr. Hardin had exhausted his administrative remedies for his new claims before he brought them in his operative, amended complaint, because he had not exhausted remedies before filing his now-obsolete, original complaint, his amended complaint should be dismissed.

This reasoning distorts the meaning of the PLRA's exhaustion requirement in two ways. First, the PLRA simply says that administrative remedies must be exhausted before the relevant claim is brought. Mr. Hardin brought his claims in his amended complaint after those claims were fully exhausted. Second, the PLRA is complemented

by the normal operation of the Federal Rules of Civil Procedure. Under Rule 15, Mr. Hardin was allowed to file an amended complaint to cure any "defects" in his original complaint, including the "defect" of filing prematurely.

Under either theory, or under both, Mr. Hardin met the requirements of the PLRA's exhaustion provision. Because the district court imposed a different requirement without any direction from Congress in the text of the statute and contrary to the decisions of several other Circuits, its dismissal cannot stand. Instead, this Court should reverse this decision and allow Mr. Hardin's claims to go forward.

JURISDICTIONAL STATEMENT

Mr. Hardin filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina. The district court had jurisdiction over Mr. Hardin's claims under 28 U.S.C. §§ 1331 and 1343. The district court dismissed Mr. Hardin's amended complaint on July 20, 2021. JA120. Mr. Hardin timely noticed this appeal on August 12, 2021. JA128. *See* Fed. R. App. P. 4(a)(1)(A). This court has jurisdiction to review the district court's final order under 28 U.S.C. § 1291.

ISSUE PRESENTED

1. Where an incarcerated plaintiff has fully exhausted his administrative remedies in accordance with the PLRA by the time he brings new claims in his operative complaint, may a district court dismiss the complaint for failure to exhaust?

STATEMENT OF THE CASE

I. Statutory Background

The PLRA's exhaustion provision requires that a prisoner exhaust "such administrative remedies as are available" to them in the jail or prison in which they are confined before bringing an action involving prison conditions. 42 U.S.C. § 1997e(a). Under § 1997e(a), exhaustion of all "available" remedies is mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)).

A prisoner is not required to affirmatively plead exhaustion in his complaint. Exhaustion is an affirmative defense under the PLRA and the Federal Rules of Civil Procedure, something a defendant must plead and prove. *Jones v. Bock*, 549 U.S. 199, 211–16 (2007); *see also Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008) ("[I]nmates need not plead exhaustion, nor do they bear the burden of proving it.").

II. Factual Background

Accepting the allegations in Mr. Hardin's complaint as true, *Jackson v. Lightsey*, 775 F.3d 170, 173 (4th Cir. 2014), the facts of this case are these:

On December 12, 2019, while Plaintiff Charlie Hardin was incarcerated at Tabor City Correctional Institution, several gang members attempted to stab him. JA25. During the assault, Mr. Hardin tried to protect himself from his attackers. *Id.*

Although it was Mr. Hardin who had been threatened, the prison transferred him to segregated housing, known as I-CON, at Scotland Correctional Institution following the assault. *Id.* Despite the fact that Mr. Hardin had committed no infraction, and was not being punished for any wrongdoing, he was placed in segregation. JA27.

Following his confinement in I-CON at Scotland, Mr. Hardin was transferred back to Tabor. JA25. The prison offered to place Mr. Hardin in protective custody, but Mr. Hardin declined, because he did not trust prison staff to ensure his safety—prison officials, including Defendants York, Kennedy, and Ward, had sat by and allowed gang members to attack and nearly stab him, and the officer tasked with investigating the

incident had done only a perfunctory investigation and allowed Mr. Hardin's attackers to remain in the general prison population. *Id.* To retaliate against Mr. Hardin for refusing to be placed in protective custody, Defendant York intentionally lied on a housing form to commit him to another stay in administrative segregation. JA25–26. Still having committed no offense, Mr. Hardin was again transferred to administrative segregation, this time for over four months. JA25.

Mr. Hardin also alleges that around this time, Defendant Hunt told "a block full of gangbangers [that Mr. Hardin] stabbed their big homie." *Id.* Defendant Hunt's dissemination of that information "further endangered [Mr. Hardin's] safety" by making him a target of gang members. JA25–26. Indeed, prison staff at Tabor routinely "us[e] gang members against other prisoners to cause[] them harm." JA27.

Placement in administrative segregation has been a "significant hardship" for Mr. Hardin. *Id.* As of the time of the filing of his complaint, Mr. Hardin hadn't been able to participate in yard time for nearly a year, which has had a profound effect on his mental health. *Id.* Placement in administrative segregation also meant that Mr. Hardin lost several kinds of "credits," which he had been working on accruing. JA25–27. Among

other things, those credits give prisoners access to privileges within prison—such as phone time and canteen options— and can accelerate a prisoner's release date. *Id.* Mr. Hardin lost these credits solely because of his placement in administrative segregation, even though he had done nothing to warrant this placement and did nothing wrong once in segregation. JA27.

III. Procedural Background

A. Mr. Hardin's Complaints

Mr. Hardin, proceeding *pro se*, filed his initial complaint on March 30, 2020, raising claims under the First, Eighth, and Fourteenth Amendments against six North Carolina prison officials and correctional officers. JA10–13.

Thereafter, Mr. Hardin filed several motions to amend his complaint. On December 3, 2020, the district court issued an order directing Mr. Hardin to particularize his complaint and granting Mr. Hardin's motion to amend. JA19–20. The court specifically instructed Mr. Hardin to "connect the named defendants with the alleged conduct which resulted in the alleged constitutional violation." JA19. On December 15, 2020, Mr. Hardin heeded this advice, filing his First Amended

Complaint, dropping all of his old claims, and bringing new claims under the First, Fifth, Eighth, and Fourteenth Amendments based on the same underlying events but levied against several new defendants whom he had not previously named in his initial complaint, including defendants York, Kennedy, Ward, and Hunt. JA24–26.

By the time Mr. Hardin raised claims against defendants York, Kennedy, Ward, and Hunt, he had fully exhausted at least two grievances related to his claims, on October 6, 2020 and October 27, 2020, respectively. *See* JA84–89; JA106–08; JA110–19. After screening Mr. Hardin's Amended Complaint, the district court found his Eighth Amendment claims against these four defendants were "not clearly frivolous." JA37. Rather, as Mr. Hardin stated a claim against these four defendants, the district court instructed that these claims should go forward. JA38.

B. The District Court Grants Defendants' Motion to Dismiss Mr. Hardin's First Amended Complaint

After Mr. Hardin filed his First Amended Complaint, defendants filed a joint motion to dismiss for failure to exhaust. JA40. The court converted this motion to dismiss into a motion for summary judgment. JA120.

The district court found that Mr. Hardin had properly exhausted administrative remedies for two grievances dealing with his claims against the four defendants on October 6 and October 27, 2020. JA124. However, the district court then incorrectly asserted that, although Mr. Hardin had fully exhausted administrative remedies before bringing claims against Defendants in his First Amended Complaint, this was not enough to satisfy the PLRA's exhaustion requirement. *Id*. Rather, the district court erroneously concluded that Mr. Hardin had to fully exhaust his claims against Defendants York, Kennedy, Ward, and Hunt before filing his *initial* complaint, despite the fact that the initial complaint did not bring claims against these defendants at all. *Id.*

Relying on that incorrect view, the district court dismissed Mr. Hardin's claims for failure to exhaust before "fil[ing] the instant action." *Id.*

SUMMARY OF ARGUMENT

I. Because Mr. Hardin exhausted his administrative remedies before he brought his claims against Defendants in his operative complaint, the First Amended Complaint, that complaint should not have been dismissed for failure to exhaust.

A. The PLRA's exhaustion provision says that "[n]o action shall be brought" until administrative remedies are exhausted. 42 U.S.C. § 1997e(a). The Supreme Court, interpreting this language, has emphasized that the word "action" is simply "boilerplate," and exhaustion actually proceeds on a claim-by-claim basis. *Jones v. Bock*, 549 U.S. 199, 220–24 (2007). Mr. Hardin had not "brought" the claims in his amended complaint until he named Defendants for the first time in his amended complaint. And so Mr. Hardin did all that the PLRA requires by way of exhaustion: He did not "bring" those claims until after they were exhausted.

B. The text and purpose of Federal Rule of Civil Procedure 15, which governs amended and supplemental pleadings, enables plaintiffs to cure a wide range of procedural defects—including, as this Court recognized in *Feldman v. Law Enforcement Associates Corp.*, 752 F.3d 339 (4th Cir. 2014), the defect of filing prematurely. And the text of the PLRA's exhaustion provision confirms that Rule 15 operates in the exhaustion context as it does in other contexts. In accordance with Federal Rule of Civil Procedure 15, then, when Mr. Hardin supplemented his original complaint, that pleading, showing he had exhausted his

administrative remedies, cured the defect present in his initial pleading. The Third, Sixth, and Ninth Circuits—the only circuits to squarely consider the issue in this case—have endorsed the use of amended or supplemental pleadings to correct a PLRA exhaustion defect specifically.

C. The purpose of the PLRA is frustrated, not served, by a rule that requires exhaustion before filing the original complaint. Congress intended the PLRA's exhaustion requirement to give prison officials fair notice and opportunity to address claims internally, and "to reduce the quantity and improve the quality of prisoner suits," *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Here, Mr. Hardin provided this notice and opportunity, because he exhausted his claims against the instant defendants before bringing them in his operative complaint. Further, there is no question that Mr. Hardin could file a new suit tomorrow against Defendants—everyone agrees that he has fully exhausted his claims against them. Requiring the dismissal of this action would thus only multiply the quantity of litigation by turning one action into two. All told, the district court's rule hinders the PLRA's objectives more than it helps them.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). Summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Battle v. Ledford*, 912 F.3d 708, 712 (4th Cir. 2019). (citing Fed. R. Civ. P. 56(a)).

ARGUMENT

I. Mr. Hardin Exhausted His Administrative Remedies Under the PLRA.

Everyone agrees that Mr. Hardin exhausted his administrative remedies prior to filing his First Amended Complaint. The district court nonetheless dismissed Mr. Hardin's case because it held that he had to exhaust his administrative remedies before filing his *original* complaint.

That was error. Under the plain text of the PLRA, plaintiffs must exhaust their administrative remedies only before they bring a particular claim. Mr. Hardin did so here: His claims against Defendants were not brought until he filed his First Amended Complaint in December 2020, after exhausting his claims in October 2020. Alternatively, the normal operation of Federal Rule of Civil Procedure 15(d) allows plaintiffs to cure

any defects in their original pleading by filing a supplemental complaint—precisely what Mr. Hardin did here. And either way, Mr. Hardin's litigation conforms to the policy goals behind the PLRA's exhaustion requirement in the first place.

A. The Plain Text of the PLRA Says Plaintiffs Only Need to Exhaust Administrative Remedies Prior to Introducing a Claim.

The PLRA's exhaustion provision allows plaintiffs to do exactly what Mr. Hardin did here: bring a fully exhausted claim, even if it is added to an existing action.

The PLRA provides that "[n]o action shall be brought . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Though this provision refers to an "action," the Supreme Court has made clear that language is merely boilerplate and, in fact, the statute proceeds claim-by-claim. *See Jones v. Bock,* 549 U.S. 199, 220–24 (2007). In other words, the statute only mandates that no *claim* shall be brought until such administrative remedies as are available are exhausted. So, the question is whether Mr. Hardin "brought" any *claims* without exhausting administrative remedies.

The answer is no. Each of the claims in Mr. Hardin's amended complaint were "brought" for the first time in the amended complaint and so were fully exhausted prior to being "brought." That is because none of the four defendants named in the amended complaint were named in Mr. Hardin's initial complaint, and it is black-letter law that to add a new defendant is to add a new claim. *See Wilkins v. Montgomery*, 751 F.3d 214, 224 (4th Cir. 2014) ("[A]n amendment adding another party is a new cause of action." (quoting *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 484 (6th Cir.1973)). As each claim in the amended complaint was first brought when the amended complaint was filed in December 2020, after Mr. Hardin had exhausted his administrative remedies, Mr. Hardin satisfied the PLRA.

In other statutory contexts, this Court has already recognized that plaintiffs "bring" suit when they amend their complaints to add new claims. For example, in *Feldman v. Law Enforcement Associates Corp.*, 752 F.3d 339 (4th Cir. 2014), this Court dealt with the Sarbanes-Oxley Act. That Act provides that a plaintiff can seek relief by "bringing an action at law or equity" in federal court, but only after filing a claim with

the Secretary of Labor and waiting 180 days to get a response. 18 U.S.C. § 1514A(b)(1)(B).

In *Feldman*, the plaintiff had brought several claims in a lawsuit against his former company before the 180-day waiting period passed on his Sarbanes-Oxley ("SOX") whistleblower claim. 752 F.3d at 346–47. Once this deadline passed, the plaintiff sought to amend his complaint to add the new SOX claim, now that it was ripe. *Id.* And this Court held that such an amendment was permissible even though the district court would not have had jurisdiction over the SOX claim had Feldman included it in his original complaint. *Id.* at 347–48. This Court thus endorsed the idea that a plaintiff "brings" a new claim on the date that he includes it in an amended complaint—not on the date he filed an original complaint that lacked the new claim altogether. Applying this same reasoning here, Mr. Hardin "brought" his new claims against the four defendants when he first named them in his amended complaint. At that point, he had exhausted his administrative remedies.

Sister circuits that have directly considered this question have unanimously held that adding new, fully exhausted claims via an amended complaint satisfies the plain text of the PLRA's exhaustion

requirement. *Mattox v. Edelman*, 851 F.3d 583, 592 (6th Cir. 2017) ("Our sister circuits have unanimously concluded that Rule 15 permits a prisoner to amend his complaint to add new claims that have only been exhausted after the commencement of the lawsuit." (citing *Cano v. Taylor*, 739 F.3d 1214, 1221 (9th Cir. 2014); *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010); *Cannon v. Washington*, 418 F.3d 714, 719 (7th Cir. 2005) (per curiam); *Boone v. Nose*, 530 F. App'x 112, 113 n.1 (3d Cir. 2013)). For example, in *Mattox v. Edelman*, the Sixth Circuit held that, "because the word 'action' in 1997e(a) is synonymous with the word 'claim,'" a plaintiff who amends his complaint to add newly exhausted claims has only then "brought" those claims for purposes of the exhaustion requirement. 851 F.3d at 595.[1] And that is exactly the

[1] The Sixth Circuit in *Mattox* suggested in dicta that its rule applied "provided that the plaintiff's original complaint contained at least one fully exhausted claim." *Mattox*, 851 F.3d at 592–94. That statement was not only dicta—the complaint in *Mattox* did "contain[] at least one fully exhausted claim," so there was no need to opine on what would happen if it hadn't—but was dicta discussing dicta from a previous Sixth Circuit case. *Id.* In any event, the Sixth Circuit did not claim that such a rule would have any basis in the text of the statute or the normal operation of the Federal Rules of Civil Procedure. *Id.; see Jackson v. Fong*, 870 F.3d 928, 935 (9th Cir. 2017) (characterizing that dicta as a "judge-made rule…in tension with the Court's admonition in *Jones* against deviating from the usual practice under the Federal Rules"). And, indeed, courts that have considered the question have never required that the original

situation here: Mr. Hardin only "brought" his claims once he filed his amended complaint, so under § 1997e(a), that is the relevant deadline for exhaustion.

In granting summary judgment to defendants, the district court briefly cited to, and believed it was bound by, a handful of unpublished cases from this Circuit and various district courts it read to stand for the proposition that "[e]xhaustion of administrative remedies during the course of litigation is insufficient to prevent dismissal." JA124. But Mr. Hardin did not raise unexhausted claims in his original complaint that he later exhausted during the pendency of the litigation. Rather, as he was permitted to do under *Jones*, *Feldman*, and the law of other circuits, Mr. Hardin added new claims against new defendants for the first time in his amended complaint that he had exhausted prior to filing. Not a single case cited by the district court to justify dismissing Mr. Hardin's complaint dealt with whether a plaintiff can amend a complaint to add new, fully exhausted claims.

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complaint have an exhausted claim. *See Jackson*, 870 F.3d at 933–34; *Korb v. Haystings*, 860 F. App'x 222, 226 (3d Cir. 2021).

Overall, then, the text of the statute and the precedent of this and other courts all rally behind a simple rule: the PLRA only requires exhaustion before claims are "brought," and Mr. Hardin only brought claims against the four defendants in this appeal when he first named them in his amended complaint. The exhaustion requirement is thus measured at that point in time. And at that point in time, Mr. Hardin had exhausted his administrative remedies.

B. Per the Ordinary Operation of the Federal Rules of Civil Procedure, Rule 15(d) Allowed Mr. Hardin to Supplement His Original Complaint to Cure Any Pleading Defect, Including Prematurity.

The PLRA's exhaustion requirement doesn't foreclose Mr. Hardin's suit for a second, independent reason: Under the ordinary operation of Federal Rule of Civil Procedure 15(d), he was permitted to supplement his complaint to cure possible defects in that pleading, including filing prematurely. The "liberal amendment policies of the Federal Rules," *Goodman v. Praxair, Inc.*, 494 F.3d 458, 471 (4th Cir. 2007)—and Rule 15 in particular—permit litigants to correct a wide variety of pleading defects through amendment or supplementation.[2] Because the PLRA

[2] An amended complaint, governed by Federal Rule of Civil Procedure 15(a), and a supplemental complaint, authorized by Federal Rule of Civil

does not say otherwise, a failure to exhaust is no exception to this policy. In light of Rule 15, therefore, Mr. Hardin was permitted to resolve any alleged exhaustion issue through the filing of his supplemental complaint.

1. Rule 15's Text and Purpose Plainly Permit an Amended Pleading to Cure an Exhaustion Defect.

Federal Rule of Civil Procedure 15 allows a party to amend or supplement a pleading after it's been filed. As this Court and the Supreme Court have recognized on a number of occasions, Federal Rule of Civil Procedure 15 is designed to allow litigants to cure all manner of pleading defects by amending or supplementing the defective pleading. The very purpose of Rule 15 is to give unskilled litigants the chance to

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Procedure 15(d), are two different types of pleadings, but they are widely regarded as interchangeable. See 6A WRIGHT, MILLER & KANE, FED. PRAC. & PROC. § 1504 (3d ed. 2021) ("Parties and courts occasionally confuse supplemental pleadings with amended pleadings and mislabeling is common. These misnomers are not of any significance, however, and they do not prevent the court from considering a motion to amend or supplement under the proper portion of Rule 15."). For the sake of consistency with the district court's terminology, this brief refers to the relevant complaint in Mr. Hardin's case as his "amended complaint," but in fact, this pleading is a "supplemental complaint" within the meaning of Rule 15(d), because it incorporated an "event that happened after the date of the pleading to be supplemented," Fed. R. Civ. P. 15(d)—to wit, exhaustion.

save their claims from dismissal on technical grounds. As a result, Rule 15 ordinarily requires courts to look at whichever pleading will save a case from dismissal on technical, procedural grounds.

At its core, the purpose of Rule 15 is "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." 6A WRIGHT, MILLER & KANE, FED. PRAC. & PROC. § 1471 (3d ed. 2021); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 158 (1964) (recognizing the "liberality in allowing amendment of pleadings to achieve the ends of justice"); *Krupski v. Costa Crociere S. p. A*, 560 U.S. 538, 550 (2010) (discussing "the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits").

That purpose is reflected most clearly in the text of Rule 15(d). Rule 15(d) was amended expressly to provide that "[t]he court may permit supplementation even though the original pleading is defective in stating a claim or defense." Fed. R. Civ. P. 15(d). In other words, Rule 15(d) by

its own terms permits—indeed, encourages—precisely what occurred in this case: filing a supplemental pleading to reflect a change in circumstances that eliminated a defect present in the original pleading. *See, e.g.*, *Rowe v. U.S. Fid. & Guar. Co.*, 421 F.2d 937, 942 (4th Cir. 1970) (recognizing Rule 15(d) was amended to permit supplemental pleading "even though the original pleading is defective in its statement for relief"); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 28 (4th Cir. 1963) (allowing plaintiff to supplement their complaint to revise their theory of relief, and recognizing Rule 15(d) as "a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted"); 6A WRIGHT, MILLER & KANE, FED. PRACTICE AND PROCEDURE § 1505 (3d ed. 2021) (stating that, pursuant to Rule 15(d), a "plaintiff may belatedly comply with the requirements for stating a claim for relief, either by amendment or supplemental pleading, by adding allegations that indicate a possible right to relief under any legal theory"). This was so because the drafters of the Rule recognized that requiring dismissal of a case on a procedural technicality only to have a plaintiff immediately refile it was a pointless

formality. *See* Fed. R. Civ. P. 15(d) 1963 advisory committee note (recognizing that the 1963 amendment to Rule 15(d) was meant to address, in part, courts requiring that plaintiffs be "needlessly remitted to the difficulties of commencing a new action *even though events occurring after the commencement of the original action have made clear the right to relief*" (emphasis added)). Because the purpose of Rule 15 is to avoid dismissing a case on a procedural technicality, this Court and the Supreme Court have concluded in a variety of contexts that a court should look to whichever complaint facilitates resolution on the merits.

This Court's decision in *Feldman* is again instructive. Recall that in *Feldman*, the plaintiff had satisfied the statute's jurisdictional 180-day waiting period after filing his original complaint but before filing an amended complaint. 752 F.3d at 345–46. This Court held that it had jurisdiction; pursuant to Rule 15(d), "the filing of a supplemental pleading is an appropriate mechanism for curing numerous possible defects in a complaint," including prematurity. *Id.* (quoting *Franks v. Ross*, 313 F.3d 184, 198 (4th Cir. 2002)).

This Court held Rule 15(d) could apply even to cure a defect created by another part of Rule 15. Under Rule 15(c), the date of the original

complaint, rather than the amended complaint, governs—the amended complaint "relates back" to the original complaint—when, among other things, "the amendment asserts a claim or defense that arose out of the conduct, transactions, and occurrences set out in the first complaint." *Id.* at 346. The SOX claim raised by plaintiff in his amended complaint undoubtedly "arose out of" the conduct set out in the first complaint. But if the date of the original complaint governed—if the amended complaint "related back" to the original—the plaintiff would have been within the 180-day waiting period, and this Court would not have jurisdiction. *Id.* This Court held that Rule 15(d) could cure that defect, too: "Because we are not required to apply the doctrine of relation back so literally as to carry a claim to a time within the requisite waiting period so as to prevent the maintenance of the action in the first place," this Court reasoned, "we construe the present complaint as a supplemental pleading under Rule 15(d), thereby curing the defect which otherwise would have deprived the district court of jurisdiction under Rule 15(c)." *Id.* at 347 (cleaned up)[3]

[3] Defendants in *Feldman* alternatively argued that if the amended complaint did not relate back to the original, it would be barred by a two-year statute of limitations. 752 F.3d at 348 n.8. The original complaint thus had a statute of limitations problem while the amended complaint had a prematurity problem. *Id.* In response, this Court said that it would

In this case, as in *Feldman*, defendants argued that the original complaint was "defective" because it was filed prematurely (in this case, before the claims raised in the amended pleading had been exhausted; in *Feldman*, before the 180-day waiting period was over). *Id.*; JA44. Therefore, as in *Feldman*, the Court here should apply Rule 15(d) to resolve the supposed prematurity problem. And even if Mr. Hardin's amended complaint "relates back" to the date of his original complaint—a dubious proposition, since Rule 15(c)'s criteria for relation back are particularly high when new defendants are introduced, *see* Fed. R. Civ. P. 15(c)(1)(C)—*Feldman* holds that Rule 15(d) can cure that "defect," too. *Feldman* thus makes clear that, per the ordinary operation of Rule 15, Mr. Hardin's case should not have been dismissed for failure to exhaust.

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look to the original complaint, per Rule 15(c), for statute of limitations purposes but to the amended complaint for purposes of the SOX 180-day waiting period. Rule 15(d) is so flexible, in other words, that this Court wielded it to look to whichever complaint avoided dismissal on procedural grounds, even where that was a different complaint for each procedural ground. *Id.* As this Court explained, doing otherwise would be "circuitous," and "would force the Court into a "legal merry-go-round," 752 F.3d at 348 n.8 (quoting *Security Ins. Co. of New Haven, Connecticut v. United States ex rel. Haydis*, 338 F.2d 444, 446 (9th Cir.1964)). Rule 15(d) should similarly be the last word in this case.

Notably, *Feldman* relied for its holding in part on *Mathews v. Diaz*, 426 U.S. 67 (1976), a Supreme Court case arguably even more akin to Mr. Hardin's than *Feldman* because it involved an exhaustion requirement rather than a waiting period. In *Mathews*, the Supreme Court considered a statute that required the exhaustion of administrative remedies prior to challenging the denial of various medical benefits in federal court. *See Mathews*, 426 U.S. at 72–73. One of the plaintiffs in that case had not completed the exhaustion process before filing his complaint, exhausting only after the government moved to dismiss for failure to exhaust. *Id.* at 69–73. Relying on a statute that, similar to Rule 15, authorized the use of amendment or supplementation to cure pleading defects like an exhaustion defect, the Supreme Court held that "the statutory purpose of avoiding needless sacrifice to defective pleading applies equally to this case," where plaintiff supplemented their defective original complaint with a supplemental pleading demonstrating exhaustion. *Id.* at 75 n.9.[4]

[4] Several other circuits and the Supreme Court have similarly relied on a reading of Rule 15 that emphasizes addressing procedural defects via amendment rather than dismissal. *See, e.g.*, *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 n.4 (2020) (holding that dismissal with leave to amend a complaint does not count as a strike because of the curative purpose of

Rule 15(a)); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007) ("[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."); *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U.S. 570, 574–76 (1913) (holding that plaintiff's amended pleading, changing none of the facts of the original pleading and, "in effect merely indicat[ing] the capacity in which the plaintiff was to prosecute the action" was permissible under a statutory analog to Rule 15); *U.S. ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 6 (1st Cir. 2015) (allowing relator to cure the subject matter jurisdiction defect in their False Claims Act complaint through supplementation under Rule 15(d), reasoning that "this case is analogous to the cases in which a jurisdictional prerequisite (such as an exhaustion requirement) is satisfied only after suit is commenced" and that "[u]nder the circumstances, it would be a pointless formality to let the dismissal of the second amended complaint stand—and doing so would needlessly expose the relator to the vagaries of filing a new action"); *W. Run Student Hous. Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 171 (3d Cir. 2013) (allowing an amended pleading to "cure a purported factual mistake" and withdrawn judicial admissions because "[t]he amended complaint 'supersedes the original and renders it of no legal effect, unless the amended complaint specifically refers to or adopts the earlier pleading'"); *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 589, 591 (6th Cir. 2013) (holding that "[a]n amended complaint supersedes an earlier complaint for all purposes" and finding that the "master complaint" filed in a multidistrict case to consolidate various cases was the operative pleading governing the court's jurisdictional analysis on appeal because it superseded "any prior individual complaints"); *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 638 n.1, 640–41 (7th Cir. 2004) (determining that plaintiff's claims were not time-barred under the ADEA or ADA by drawing the relevant dates for the "unlawful employment practice" solely from the facts alleged in the amended complaint and affirming that "[i]t is axiomatic that an amended complaint supersedes an original complaint and renders the original complaint void"); *Jones v. Am. State Bank*, 857 F.2d 494, 499 (8th Cir. 1988) (holding that "the failure to obtain a right-to-sue letter prior to the commencement of a suit[,]" a "condition precedent" to filing a federal Title VII action "is a curable defect" via

The district court incorrectly believed otherwise, relying on the proposition that "exhaustion during the course of litigation is insufficient to prevent dismissal." JA124. But Mr. Hardin didn't simply exhaust his remedies during the course of litigation. He properly invoked Federal Rule of Civil Procedure 15 to cure any defect in his original complaint—precisely what *Feldman* allows. Unsurprisingly, none of the cases cited by the district court—all unpublished and nonbinding in any event—involved Rule 15(d) or a supplemental pleading. Because those cases did not have occasion to address the legal question presented in this case, they have no bearing on this case.

2. The Text of the PLRA's Exhaustion Requirement Confirms that Rule 15(d) Should Operate Here as it Normally Would.

The exhaustion provision of the PLRA states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional

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amendment or supplementation); *Martin v. Cent. States Emblems, Inc.*, 150 F. App'x 852, 855 & n.3 (10th Cir. 2005) (recognizing that a plaintiff may cure the defect of failing to file a right-to-sue letter under Title VII by filing a supplemental complaint); *Scahill v. D.C.*, 909 F.3d 1177, 1183–84 (D.C. Cir. 2018) (holding, pursuant to Rule 15(d), that "a plaintiff may cure a standing defect under Article III through an amended pleading alleging facts that arose after filing the original complaint").

> facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

With respect to the PLRA generally, the Supreme Court in *Jones v. Bock*, 549 U.S. 199 (2007), held that the ordinary operation of the Federal Rules governs a court's analysis unless the text of the statute explicitly says otherwise. *See id.* at 216 (explaining that "when Congress meant [for the PLRA] to depart from the usual procedural requirements, it did so expressly"). As an example, the Supreme Court pointed to the text of § 1997e(g), which authorizes a defendant to waive their right to reply to an action brought by a prisoner without constituting an admission of the allegations in the complaint, "[n]otwithstanding any other law or rule of procedure." *Jones,* 549 U.S. at 216 (quoting 42 U.S.C. § 1997e(g)). That provision clearly departed from Fed. R. Civ. P. 8(b)(6) and so superseded the federal rule. *Id.*

In the case of § 1997e(a), far from contravening the Federal Rules, the language of the statute actually confirms the Rules operate here as they normally would. *See Jones*, 549 U.S. at 212 (holding that Congress's silence on the issue of whether exhaustion is a pleading requirement or an affirmative defense was "strong evidence that the usual practice

[under the Federal Rules] should be followed"). Not only does § 1997e(a) not contain the sort of express override that § 1997e(g) contains—"notwithstanding any other … rule or procedure"—but its text is consistent with other statutory provisions that have been read to endorse Rule 15's procedure, not override it. Because there is no indication that the "boilerplate" statutory phrasing of the exhaustion provision, *see id.* at 219–21, was meant to displace the ordinary operation of Rule 15(d), it must apply as it normally would here.

Language in several other statutes similar to the "no action shall be brought" clause of the PLRA's exhaustion provision has consistently been read to endorse the ordinary operation of Rule 15—that is, that a technical defect present in an original complaint can be cured via amendment or supplementation. *See, e.g.*, *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 366 (5th Cir. 2004) ("The notion that the supplemental pleading cures the technical defect, notwithstanding the clear language of [the statute that "no action for infringement . . . shall be instituted until"], is consistent with the principle that technicalities should not prevent litigants from having their cases heard on the merits."), *abrogated on other grounds by Reed*

Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1489 (11th Cir. 1990) (same); *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 289 (8th Cir. 1988) (finding that the "[n]o civil action may be commenced" clause of a statute did not preclude plaintiff from curing a prematurity defect through filing a supplemental complaint).

Further, other provisions of the PLRA employ similar wording and have been read to endorse the ordinary operation of Rule 15. For instance, 28 U.S.C. § 1915(g)[5] prohibits certain prisoners from "bring[ing] a civil action" *in forma pauperis*, unless that prisoner is under "imminent danger of serious physical injury." *Id.* In effectuating that provision, courts ask whether a prisoner is in "imminent danger" at the time of the filing of the operative complaint (often an amended complaint), reflecting that a prisoner "bring[s] a civil action" when they file the operative complaint in a case, even if that is an amended complaint.[6] In addition,

[5] This separate statutory section was also enacted by the PLRA. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 804 (codified as amended in scattered titles and sections of the U.S. Code.).

[6] *See Staley v. Marion Cty. Det. Ctr.*, No. CIV.A.9:06-3207-PMD, 2007 WL 1290242, at *5 (D.S.C. Apr. 30, 2007) (asking whether allegations established plaintiff was under imminent threat of danger "on the date he signed the amended complaint"), *aff'd*, 259 F. App'x 570 (4th Cir.

§ 1915(g) penalizes prisoners if they previously "brought an action" that was dismissed as frivolous, malicious, or for failure to state a claim. There, too, courts impose the penalty if, in a previous case, it was the amended complaint that was dismissed as frivolous, malicious, or for failure to state a claim, again because a prisoner "brought an action" at the point where an operative complaint was filed, even if it was the amended complaint.[7] And, where § 1997e(e) says "no action shall be brought for mental or emotional injuries" under certain conditions,

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2007); *Barefoot v. Goulian*, No. 5:08-CT-3162-D, 2010 WL 2696760, at *4 (E.D.N.C. July 7, 2010) ("Based on plaintiff's assertions in the amended complaint, Barefoot has alleged sufficiently that he is in imminent danger of serious physical injury."); *Barefoot v. Holding*, No. 5:08-CT-3159-D, 2010 WL 2402862, at *3 (E.D.N.C. June 14, 2010) ("Barefoot's amended complaint contains no allegation that he is under imminent danger.").

[7] *See McClary v. Joyner*, No. 5:17-CT-3050-FL, 2020 WL 1249368, at *4 (E.D.N.C. Mar. 16, 2020), *appeal dismissed*, No. 20-6406, 2020 WL 5642023 (4th Cir. July 6, 2020) (dismissing an amended complaint and assessing a strike); *Smalls v. Sterling*, No. 2:16-CV-4005-RMG-MGB, 2017 WL 9250343, at *11 (D.S.C. Apr. 18, 2017), *report and recommendation adopted*, No. CV 2:16-4005-RMG, 2017 WL 1957471 (D.S.C. May 11, 2017) ("Even when liberally construed, the allegations of the Amended Complaint are frivolous and/or fail to state a plausible civil rights claim . . . this dismissal should count as a strike."); *Woods v. Lee*, No. 7:17-CV-00542, 2018 WL 265589, at *2 (W.D. Va. Jan. 2, 2018) ("If Plaintiff instead rushes and chooses to seek another amendment in this case, he should know that I may dismiss the second amended complaint with prejudice as frivolous or for failing to state a claim upon which relief may be granted and assess a 'strike.'").

plaintiffs who file an initial complaint "for mental and emotional injuries" can still amend to cure this deficiency through additional allegations. *See Mitchell v. Horn*, 318 F.3d 523, 534 (3d Cir. 2003). In short, other sections of the PLRA that use the words "bring" or "brought" are routinely interpreted to endorse the ordinary operation of Rule 15. This Court should interpret the language in the exhaustion provision similarly.

Finally, a neighboring provision, § 1997e(c)(2) provides further evidence that Congress did not intend to require district courts to dismiss and refile a complaint if they had not exhausted remedies before filing the original complaint. That section says that "the court may dismiss" certain claims "without first requiring the exhaustion of administrative remedies." 42 U.S.C. § 1997e(c)(2). But if § 1997e(a)—the exhaustion requirement—*already* required district courts to dismiss all claims "without first requiring the exhaustion of administrative remedies," § 1997e(c)(2) would be entirely superfluous. Section 1997e(c)(2) therefore contemplates that in lieu of dismissing, the district court will sometimes allow plaintiffs to cure the defect in their original complaint by "requiring the exhaustion of administrative remedies"—and then, presumably, require the litigant to supplement their complaint under Rule 15(d).

3. Several Other Circuits Have Concluded That Federal Rule of Civil Procedure 15 Allows a Plaintiff to Cure a "Defect" By Amending After He Has Exhausted Remedies.

Decisions from the Third, Sixth, and Ninth Circuits examining the interplay between the PLRA and Rule 15 confirm that the Rule operates to cure defects in this context as it ordinarily would in other contexts.

Presented with a scenario nearly identical to the one in this case—an incarcerated plaintiff brought new claims in an amended complaint that were exhausted after the original complaint was filed but before the claims were added to the amended complaint—the Ninth Circuit confirmed that the PLRA's exhaustion requirement was satisfied. In *Cano v. Taylor*, 739 F.3d 1214 (9th Cir. 2014), the Ninth Circuit concluded that, pursuant to Rule 15, it was the amended complaint, containing claims that had been exhausted post-filing, that governed their exhaustion analysis. *Id.* at 1220. The Ninth Circuit held that "claims that arose as a cause of action prior to the filing of the initial complaint may be added to a complaint via an amendment, as long as they are administratively exhausted prior to the amendment," because, under the ordinary federal rules of pleading, an amended complaint supersedes the original complaint such that "for purposes of the

exhaustion requirement, the date of the [amended complaint's] filing is the proper yardstick." *Id.* Other decisions from that Court have affirmed this understanding of Rule 15. *See, e.g.*, *Rhodes*, 621 F.3d at 1005–06 (9th Cir. 2010) ("The 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."); *Jackson v. Fong*, 870 F.3d 928, 935 (9th Cir. 2017) (holding that "[e]xhaustion requirements apply based on when a plaintiff files the operative complaint, in accordance with the Federal Rules of Civil Procedure"). Under the Ninth Circuit's rule, then, the date Mr. Hardin filed his supplemental complaint would be the "proper yardstick" with which to measure exhaustion.

Importantly, this Court has already adopted the Ninth Circuit's approach to Rule 15(d). In *Feldman*, this Court relied on the Ninth Circuit's decision in *Security Ins. Co. of New Haven, Connecticut v. United States ex rel. Haydis*, 338 F.2d 444 (9th Cir.1964) for the proposition that Rule 15(d) could cure the prematurity problem. *Feldman*, 752 F.3d at 347. Having already adopted the Ninth Circuit's approach to Rule 15(d)

in *Feldman*, then, this Court can easily apply that Circuit's decision in *Cano* to the facts of Mr. Hardin's case.

Both the Third and the Sixth Circuits have reached the same conclusion as the Ninth Circuit on facts similar to the ones at issue in this case. In *Korb v. Haystings*, 860 F. App'x 222 (3d Cir. 2021), plaintiff filed his complaint after he had started, but before he had completed, the prison's grievance process. *Id.* at 224. After informing the court he had completely exhausted his administrative remedies, defendants moved to dismiss plaintiff's complaint, and the district court dismissed plaintiff's complaint with prejudice. *Id.* The Third Circuit held, pursuant to their decision in *Garrett v. Wexford Health*, 938 F.3d 69 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 1611 (2020), that plaintiff's letters informing the lower court he had completed the grievance process were supplements to his complaint under Rule 15(d), and that the lower court should have "considered whether they demonstrated that [plaintiff] had exhausted his administrative remedies" before dismissing his complaint. *Id.* at 225–26.

In *Mattox v. Edelman*, 851 F.3d 583 (6th Cir. 2017), the Sixth Circuit held that, under Rule 15(d) and the PLRA, a plaintiff is permitted

to amend their complaint to add claims they exhausted after filing their original complaint. *Id.* at 595. This Court should do the same.

In short, it is clear that the ordinary operation of Rule 15 bars dismissal of Mr. Hardin's amended complaint on exhaustion grounds because the exhaustion defect had been resolved by the filing of the amended complaint in this case.

C. Allowing Mr. Hardin's Claims to Go Forward Furthers the Purposes of the PLRA's Exhaustion Requirement.

Allowing Mr. Hardin's claims to go forward in the present action aligns with the purpose of the PLRA. "Congress enacted the Prison Litigation Reform Act . . . in 1996 in the wake of a sharp rise in prisoner litigation in the federal courts. The PLRA contains a variety of provisions designed to bring this litigation under control." *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (citation omitted); *see also Green v. Young*, 454 F.3d 405, 406 (4th Cir.2006) (same).

The most important goal of the PLRA, reducing the quantity of prisoner litigation, is not served by the district court's rule, which would require a court to dismiss cases that are fully exhausted at the time the operative pleading is filed and require litigants to file entirely new actions. As there is no question he has fully exhausted his remaining

claims at this point, Mr. Hardin could very probably refile his case tomorrow. However, that result promotes inefficiency and multiplies litigation, where a core goal of the exhaustion requirement was to "reduc[e] litigation to the extent complaints are satisfactorily resolved." *Moore v. Bennette*, 517 F.3d 717, 726 (4th Cir. 2008) (quoting *Jones v. Bock*, 549 U.S. 199, 219 (2007)).

On top of creating more work for the district court, turning Mr. Hardin's one case into two may work an additional hardship on him and prisoners like him. District courts routinely charge such prisoners two filing fees to file the exact same complaint. *See, e.g.*, *Ellis v. Kitchin*, No. 2:07CV367, 2010 WL 4071874, at *1 (E.D. Va. June 9, 2010) (concluding that "[a]fter review of 28 U.S.C. § 1914(a), the Court finds that the plain language of the statute requires payment of a new filing fee" when a case is refiled after being dismissed for non-exhaustion). Even prisoners who, like Mr. Hardin, proceed *in forma pauperis* because they have no assets or income, must still eventually pay a full filing fee. *See* 28 U.S.C. § 1915(b)(1). Reading the exhaustion requirement to lead to this empty formalism and unfair result is at odds with the goals of the Federal Rules of Civil Procedure.

Further, Congress did not merely prescribe *that* the exhaustion requirement should reduce the quantity of prisoners' claims, but also made decisions as to *how*. The district court's rule, however, ignores Congress's chosen path. 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. So, requiring exhaustion at the time of the operative pleading, as opposed to the initial pleading, leaves the requirement's bite entirely intact.

In addition, Congress intended for the PLRA not only to reduce the quantity of prisoner litigation, but also to improve its quality. "[F]or cases ultimately brought to court, adjudication could be facilitated by an

administrative record that clarifies the contours of the controversy." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). As the administrative record in Mr. Hardin's case is now complete, the contours of the controversy are clear before discovery has even begun.

Lastly, the exhaustion provision is also meant to filter out "frivolous" cases from meritorious ones. *Porter*, 534 U.S. at 524–25. In exercising its discretion to accept an amended complaint, a district court necessarily concludes that the complaint is not frivolous. If a district court feels as though a prisoner is somehow abusing the opportunity to supplement their complaint, they are free to exercise their discretion to decline granting leave to do so. Indeed, the district court here could have denied Mr. Hardin leave to amend had his request rung of gamesmanship with respect to the exhaustion requirement. But here, the district court exercised its discretion to accept Mr. Hardin's supplemental pleading, at least implicitly concluding that it was what "justice so require[d]". Fed. R. Civ. P. 15(a)(2). In doing so, the district court concluded that Mr. Hardin's supplemental complaint isn't one of those frivolous or bad faith cases the PLRA's exhaustion requirement was designed to weed out.

At bottom, the PLRA's exhaustion requirement, the ordinary operation of the Federal Rules of Civil Procedure, and the policy goals behind the PLRA all point to the same conclusion: Mr. Hardin satisfied the exhaustion requirement with his amended complaint, and his claims should be allowed to go forward.

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. Hardin's claims.

Date: January 24, 2022

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

This case involves a complex set of legal issues that this Court has not yet had the opportunity to comment on or resolve. Further, a decision may open up a circuit split on these important matters of statutory interpretation and civil procedure. For these reasons, oral argument is necessary for a full and fair consideration of the issues Mr. Hardin sets forward in his opening brief.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7(B) because this brief contains 8,540 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: January 24, 2022

/s/ Katherine Cion
Katherine Cion

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2022, I electronically filed the foregoing *Brief of Plaintiff-Appellant* with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 24, 2022

/s/ Katherine Cion
Katherine Cion