22-1148

IN THE

United States Court of Appeals for the Second Circuit

JERMAINE MAKELL,

Plaintiff-Appellant,

v.

C.O. Sailor, Correctional Officer, Sheriff Fludd, County of Nassau, County of Nassau Sheriff's Department, John Donald, Corporal, C.O. Daniel Golden,

Defendants-Appellees,

Sheriff Ms Vera Fludd et. al, Vera Fludd, Sheriff of Nassau County Jail et al, NU Health Medical Care et al, Doctors of NU Health NCCC et al, Doctors of my case at NCCC, NU Health Physicians At NCCC et al, NU Health Physicians et al, Physicians of my case at NCCC, C.O. Mr Golden et, Mr. Golden et al, C.O. @ Nassau County Jail, C.O. Sailor et, Mr. Sailor et al, C.O @ Nassau County Jail, State of New York, John and Jane Does, In the medical Dept. in Nassau County Correctional Center, C.O. Golden, Correctional Officer, John Does 1-3, Correction Officers,

Defendants.

On Appeal from the U.S. District Court

for the Eastern District of New York, No. 19-cv-6993

APPELLANT'S BRIEF

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INTRODUCTION

When two prisoners began fighting in the doorway of his cell, Plaintiff Jermaine Makell got on his bed, put his back against the wall and his hands in the air, and told officers repeatedly that he wasn't involved. Nonetheless, Defendant Corrections Officer Nicholas Sailor pepper sprayed him in the face and later bragged to other prisoners about doing so. When Mr. Makell sued to enforce his rights, the district court shut its doors because it believed that two legal obstacles denied him entry: (1) the Prison Litigation Reform Act's (PLRA's) exhaustion requirement; and (2) qualified immunity. Both holdings erred.

Mr. Makell had been released from prison when he filed the operative complaint in this case, and so the PLRA's exhaustion requirement no longer applied to him. Under the normal operation of the Federal Rules of Civil Procedure, Rule 15 amended and supplemental complaints can cure defects of many stripes, including premature filing. Mr. Makell's case involves a straightforward application of that principle. Mr. Makell filed his initial complaint early—while he was a prisoner and while the PLRA imposed conditions on his ability to sue. Mr. Makell filed his amended complaint when the PLRA no longer applied. The amended complaint cured the premature filing defect.

In *Jones v. Bock*, the Supreme Court held that the PLRA incorporates the normal operation of the Federal Rules absent "express" departure. *See* 549 U.S. 199, 216 (2007). And it called the precise language that the district court believed required dismissal here—"[n]o action shall be brought"—"boilerplate language" insufficient to disclaim the Rules' normal operation. *Id.* at 220. Accordingly, both sister circuits squarely to consider the question post-*Jones* agree: an amended or supplemental complaint filed after release cures a premature filing defect under the PLRA.

Nor should qualified immunity prevent Mr. Makell from getting his day in court. Properly construed, the evidence shows that Officer Sailor pepper sprayed Mr. Makell in the face while Mr. Makell stood against the wall, a cell's length away, with his hands up, repeatedly expressing that he "had nothing to do" with the fight that had since subsided in his doorway. That was a constitutional violation—a clearly established one. The district court only concluded otherwise by misapplying the summary judgment standard and usurping the jury's role.

JURISDICTIONAL STATEMENT

Mr. Makell filed this action pursuant to 42 U.S.C. §§ 1983 and 1985 in the United States District Court for the Eastern District of New York. The district court exercised jurisdiction over Mr. Makell's claims under 28 U.S.C. §§ 1331 and 1343. The district court granted defendants' motion for summary judgment on April 22, 2022 and entered judgment on April 25, 2022. AA175, AA192. Mr. Makell timely noticed this appeal on May 23, 2022. AA193. *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.

ISSUES PRESENTED

1. Does the Prison Litigation Reform Act's exhaustion requirement bar suit where a non-prisoner filed the operative complaint?
2. Does qualified immunity protect a corrections officer who pepper sprayed a cooperative, non-threatening detainee with his hands up and back against the wall?

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The PLRA's exhaustion provision instructs that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Lack of exhaustion is an affirmative defense. *Jones*, 549 U.S. at 216.

Federal Rule of Civil Procedure 15(a) gives courts discretion to permit litigants to amend their pleadings at any stage in the litigation, and instructs courts to grant leave "freely . . . when justice so requires." Fed. R. Civ. P. 15(a). Federal Rule of Civil Procedure 15(d) gives courts discretion to permit litigants to supplement their pleadings at any stage in the litigation. Fed. R. Civ. P. 15(d). The court may grant leave to supplement "even though the original pleading is defective in stating a claim or defense." *Id.*

II. FACTUAL BACKGROUND[1]

At eight or nine on the morning of October 11, 2019, Jermaine Makell was in his cell in the Nassau County Correctional Facility when a fight broke out between two fellow prisoners. AA119, AA123-124. The fighting prisoners entered the open doorway of Mr. Makell's cell but did not enter the cell itself. AA119-120; *see also* AA71-72.

Eager to indicate that he was not involved in the fight, Mr. Makell climbed onto his bed, AA119, which was attached to the cell wall, AA111, and stood—as far from the doorway as he could get—with his back against the wall and his hands in the air. AA119. He repeated aloud that "ha[d] nothing to do with this" fight. AA121.

Corrections Officers Golden and Sailor arrived outside Mr. Makell's cell to break up the fight. AA121-122. Officer Sailor pepper sprayed one of the fighting prisoners. AA123. The altercation, and the officers, remained outside of the cell. AA120; AA74, AA71. Officer Sailor was standing "diagonal" to the fighting prisoners. AA124.

[1] Because this appeal arises from a grant of summary judgment, the statement of facts draws all justifiable inferences in plaintiff's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

But Officer Sailor did not stop with pepper spraying the fighting prisoners. Though Mr. Makell remained on his bed with his back against the wall and his hands up, he "got maced"—Officer Sailor sprayed him in the face. *Id.* Officer Sailor's pepper spray got in Mr. Makell's eyes, temporarily blinding him. *Id.*; AA150. Spray also got in Mr. Makell's ear, and on his face and back. AA150. The pepper spray caused Mr. Makell to fall and hit his face against the wall, loosening a tooth. AA150. Later, Officer Sailor would brag to a prisoner "that he's nine for nine for spraying people in the face." AA58.

Mr. Makell required immediate and long-term medical attention. Later that day, Mr. Makell filed a sick call request describing his injuries, physical and mental: his eyes continued to burn, preventing him from seeing straight; the spray in his ear was giving him a headache and a consistent "ringing" noise; he struggled to think, sleep, open his eyes, or smell; he kept throwing up; his tooth was loose from the impact with the wall; and the incident had depressed him and caused him to feel overwhelmed. AA150. As of late October, he still had trouble seeing out of his right eye, and in late December he twice requested X-Rays of the injuries to his face. AA126, AA129, AA141.

Defendant officers were aware that pepper spray—alternatively referred to in the record as "OC spray" or "mace"—can cause "burning sensations, tearing, difficulty to see," and "affects the way that you breathe." AA73. Officer Sailor in particular was aware that pepper spray causes nasal, skin, and ocular irritation. AA96-97.

III. PROCEDURAL BACKGROUND

Although Mr. Makell contacted internal affairs about the assault, he did not exhaust the facility's internal remedies. AA60-61.

Mr. Makell filed his initial complaint *pro se* on December 12, 2019. AA1. Mr. Makell filed his first amended complaint, also *pro se*, while incarcerated. AA18. After his release, Mr. Makell sought and obtained counsel, and filed a second amended complaint adding new defendants and clarifying the facts entitling him to relief. AA29. Mr. Makell alleged violations of his Fourth, Fifth, Eighth, and Fourteenth Amendment rights based on excessive force, failure to intervene, failure to train, and inadequate medical care. *Id.* at AA30.

The district court dismissed the claims against some defendants early in the case. *See* Order of Dec. 3, 2020, AA8. At the close of discovery, defendants sought summary judgment on the grounds 1) that Mr. Makell

had failed to exhaust administrative remedies, as required by the PLRA; 2) the sued officers had no involvement with Mr. Makell's medical care; and 3) qualified immunity shielded the defendants from liability. *Makell v. County of Nassau*, 19-cv-6993 (BMC), 2022 WL 1205096 (E.D.N.Y. April 22, 2022).

The district court granted the motion for summary judgment on April 22, 2022. It believed that 1) the PLRA's exhaustion requirement barred Mr. Makell's suit, despite his post-release amended complaint; and 2) qualified immunity shielded the defendants in any event. AA175.

SUMMARY OF THE ARGUMENT

I. The Prison Litigation Reform Act requires "prisoners" to exhaust available administrative remedies before turning to federal court. 42 U.S.C. § 1997e(a). It imposes no such requirement on former prisoners suing about prison incidents. *See Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999). Jermaine Makell was not a prisoner when he filed the operative complaint in this case. The PLRA thus imposes no exhaustion requirement.

A. Federal Rule of Civil Procedure 15 allows a party, with leave of court, to file an amended or supplemental pleading setting out facts pre- or post-dating the filing of the initial complaint that make clear the party's right to relief—even if the initial pleading was "defective." *See* Fed. R. Civ. P. 15(a), (d). An amended or supplemental complaint "supersedes" the original complaint and renders it "of no legal effect." *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977). It can cure, among other defects, premature filing under the PLRA. In holding otherwise, the district court offered an untenably "myopic view" of Rule 15. *See Bornholdt v. Brady*, 869 F.2d 57, 68 (2d Cir. 1989).

B. In *Jones v. Bock*, the Supreme Court held that the Federal Rules operate normally in PLRA cases absent "express[]" departure in the statutory language. 549 U.S. 199, 216 (2007). The PLRA's exhaustion provision contains no such departure. To the contrary: its text mirrors that of other provisions, in the same and different statutes, that this and other courts have interpreted to endorse Rule 15's normal operation.

C. For those reasons—the Supreme Court's reminder in *Jones* to abide by the statutory text, plus traditional Rule 15 practice—the two sister courts to address the issue head-on post-*Jones* have held that a

non-prisoner's operative complaint cures a premature, unexhausted filing under the PLRA.

D. Furthermore, Rule 15, which seeks to preserve judicial and party resources by allowing parties to update existing actions rather than starting anew, aids the PLRA's policy aim of judicial efficiency.

E. Regardless, black-letter law instructs that an amended complaint adding new defendants brings new claims. Because the PLRA's exhaustion requirement proceeds claim-by-claim, claims against new defendants added for the first time in a post-release amended complaint are not subject to the exhaustion requirement. At the very least, therefore, Mr. Makell's claim against Corporal John Donald—whom Mr. Makell added to the action for the first time in the Second Amended Complaint—must proceed.

II. The Constitution does not permit—or feature any ambiguity about whether it permits—a corrections officer to pepper spray a cooperative, non-threatening detainee standing a cell's length away with his hands up and back against the wall. Whether analyzed under the Fourteenth Amendment (as is proper) or the Eighth Amendment (as the district court

did), the result is the same: Officer Sailor violated clearly established law, and qualified immunity must be denied.

STANDARD OF REVIEW

This court reviews questions of statutory interpretation de novo. *United States v. Epskamp*, 832 F.3d 154, 160 (2d Cir. 2016). It also reviews a grant of summary judgment—including a grant of summary judgment based on qualified immunity—de novo. *Simpson v. City of New York*, 793 F.3d 259, 265 (2d Cir. 2015). In reviewing a grant of summary judgment, this Court must "resolve all ambiguities and draw all permissible factual inferences in favor of" the non-moving party—here, Mr. Makell. *Simpson*, 793 F.3d at 265. Because "[a]ssessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment," *id.*, "[t]he evidence of the party opposing summary judgment is to be believed." *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996).

ARGUMENT

I. THE PLRA'S EXHAUSTION REQUIREMENT DOES NOT BAR MR. MAKELL'S SUIT.

The Prison Litigation Reform Act (PLRA) requires "prisoners" who seek relief for prison-related wrongs to exhaust available prison remedies before suing in federal court. 42 U.S.C. § 1997e(a). As the provision's text makes clear, and as nobody disputes, the exhaustion requirement applies only to actions "brought . . . by a prisoner"—not by a former prisoner. *See Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999). All parties agree that Mr. Makell was not a prisoner when he filed the Second Amended Complaint, the operative complaint in this case. AA176.

When Mr. Makell filed his initial, now-defunct complaint, he was a prisoner, and he had not exhausted available administrative remedies. AA176. That initial complaint was premature and therefore "defective." *See* Fed. R. Civ. P. 15(d) (allowing supplementation to cure "defective" complaints); *cf. Ramirez v. Collier*, 142 S. Ct. 1264, 1276 (2022) (describing failure to exhaust under the PLRA as a "defect" in the complaint).

When Mr. Makell filed his operative complaint, he was not a prisoner. That operative complaint added new defendants and clarified facts entitling him to relief; it also reflected his newfound status as a free person.[2] Mr. Makell's release was an "occurrence . . . or event that happened after the date" of the initial complaint. *See* Fed. R. Civ. P. 15(d). It released him from the strictures of the PLRA at the same time as it released him from custody.

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[2] Because it reflects facts from before the filing of the initial complaint under Rule 15(a) and also facts subsequent to the filing of the initial complaint (Mr. Makell's release) under Rule 15(d), the operative complaint is technically both an "amended" and a "supplemental" complaint. *See, e.g.*, *Garrett v. Wexford Health*, 938 F.3d 69, 81 & n.17 (3d Cir. 2019). The terms are often used interchangeably. *See, e.g.*, *Chavis v. Chappius*, 618 F.3d 162, 170-71 (2d Cir. 2010) (calling an operative pleading setting out "additional assertions" that happened after the initial complaint an "amended complaint"); 6 WRIGHT & MILLER, FED. PRAC. & PROC. § 1473 (3d ed. 2019) ("Frequently . . . the distinction between an amended and a supplemental pleading is confused and parties seek to add claims or defenses by amendment that are based on events that happened after the action was instituted. A technical misnomer of this type is immaterial[.]"). There is no substantive distinction between an "amended" and "supplemental" complaint for purposes of this appeal. *See id.* § 1504 ("Parties and courts occasionally confuse supplemental pleadings with amended pleadings and mislabeling is common. These misnomers are not of any significance . . . . [I]nattention to the formal distinction between amendment and supplementation is of no consequence."). For clarity's sake, this brief will refer to Mr. Makell's operative complaint as an "amended complaint."

A. An Amended or Supplemental Complaint Under Rule 15 "Supersedes" the Initial Complaint and Can Cure Defects of Many Stripes, Including Premature Filing.

1. Federal Rule of Civil Procedure 15 permits supplemental pleadings "setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). Rule 15(d) seeks to avoid the "rigid and formalistic" requirement 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." Fed. R. Civ. P. 15, Advisory Committee Notes (1963). Rule 15 thus plays an important role in the Rules' quest "to facilitate a proper decision on the merits" rather than dismissing "on the basis of . . . mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962); *see also* 6 WRIGHT & MILLER, FED. PRAC. & PROC. § 1504 (3d ed.) ("The purpose of [Rule 15(d)] is to promote as complete an adjudication of the dispute between the parties as is possible.").

To accomplish this goal, an amended or supplemental complaint "supersedes" the original complaint and becomes the operative

complaint. *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977); *see also Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 456 n.4 (2009); *Rockwell Int'l Corp v. United States*, 549 U.S. 457, 473-74 (2007); *Washer v. Bullitt Cnty.*, 110 U.S. 558, 562 (1884) ("When a petition is amended by leave of court, the cause proceeds on the amended petition."); *Hackner v. Guaranty Trust Co. of N.Y.*, 117 F.2d 95, 99 (2d Cir. 1941) (explaining that an amendment "amounted to" the "filing of the complaint"); *Barnes v. Briley*, 420 F.3d 673, 678 (7th Cir. 2005) ("The filing of the amended complaint was the functional equivalent of filing a new complaint."). The district court in this case appeared to recognize this: its screening order early in the case invited Mr. Makell to file an amended complaint and instructed him that "[t]his amended complaint will completely replace [your] original complaint." AA17.

Because it supersedes the original pleading, an amended or supplemental complaint can cure all sorts of defects in the initial pleading—even "true-blue constitutional defects." *Fund Liquidation Holdings LLC v. Bank of Am. Corp.*, 991 F.3d 370, 390 (2d Cir. 2021). This Court has allowed supplementation to rely on events postdating the filing of the initial complaint to cure a lack of Article III standing. *See*

Travelers Ins. Co. v. 633 Third Assocs., 973 F.2d 82, 87-88 (2d Cir. 1992). It has allowed parties to supplement complaints to recover additional damages for events that occurred between the initial filing and trial. *See Dixon v. Pacific Mutual Life Ins. Co.*, 268 F.2d 812 (2d Cir. 1959). And it has allowed amendment to cure a failure to state a claim, including under the PLRA's screening provision. *See Cruz v. Gomez*, 202 F.3d 593, 596, 598 (2d Cir. 2000).

Most pertinent here, both this Court and the Supreme Court have held that an amended or supplemental complaint can cure premature filing. In *Bornholdt v. Brady*, this Court considered the effect of a supplemental complaint in a case whose original complaint had been filed prematurely—before exhausting administrative proceedings, as required by statute. 869 F.2d 57, 63 (2d Cir. 1989). The Court held that the original complaint's prematurity had no consequence: "[T]he pertinent time on which to focus is not the filing of that original complaint but rather the time at which a supplemental complaint could have been filed."[3] *Id.* at 69. A holding otherwise, the Court commented, would "take[] a myopic

[3] "Could have been" rather than "was" filed because governmental obstruction prevented the plaintiff in *Bornholdt* from knowing of the need to supplement. *Id.*

view of the powers and responsibilities of the district court in light of Fed. R. Civ. P. 15(d)." *Id.* at 68; *see also Howard Opera House Assocs. v. Urb. Outfitters, Inc.*, 322 F.3d 125, 129 (2d Cir. 2003) (allowing an amended complaint to cure "initial defect" of premature filing).

This Court followed a similar rule in allowing amendment to bring a plaintiff into compliance with another provision of the PLRA. In *Chavis v. Chappius*, 618 F.3d 162 (2d Cir. 2010), this Court considered Rule 15's interaction with the PLRA's *in forma pauperis* provision, which states that "[i]n no event" shall certain prisoners "bring a civil action" *in forma pauperis* "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). The original complaint ran afoul of that command: the plaintiff sought to proceed *in forma pauperis* despite facing no imminent danger. *Chavis*, 618 F.3d at 164. The district court denied leave to amend, refusing to consider supplemental allegations "expand[ing] upon [the initial] complaint" with new facts alleging new imminent danger that had arisen since the initial filing. *Id.* at 170. This Court held that the district court abused its discretion in denying leave to amend. *Id.* The facts alleged in the proffered supplemental

complaint—facts that postdated the initial complaint—governed. *Id.* at 171.

The Supreme Court has confirmed this understanding of Rule 15. *Mathews v. Diaz* featured a plaintiff who had failed to pursue administrative remedies. 426 U.S. 67, 75 (1976). Even though the relevant statute made exhaustion a "nonwaivable condition of jurisdiction," the Court had "little difficulty" concluding that a post-exhaustion supplemental complaint "would have eliminated [the] jurisdictional issue" because the plaintiff had since filed the requisite application. *Id.* Once again, the plaintiff's status when they amended—not when they first filed—dictated the outcome.

Just this term, the Supreme Court indicated that the same rule applies to the PLRA's exhaustion provision. An incarcerated plaintiff had failed to exhaust available remedies before suing as required by 42 U.S.C. § 1997e(a)—the exact provision at issue here. *Ramirez v. Collier*, 142 S. Ct. 1264, 1276 (2022). He had exhausted available remedies after filing the initial complaint, and then had filed a supplemental complaint. *Id.* Although the issue was not squarely presented and the Court declined to settle it, the Court brushed aside an argument that the failure to exhaust

barred the action, explaining that the post-exhaustion amended complaints "arguably cured" the "original defect." *Id.* (citing *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010)).

This operation of amended and supplemental complaints—wherein they cure an initial failure to comply with a statutory precondition to suit—predates even the Federal Rules. In *Missouri, Kansas & Texas Railway Co. v. Wulf*, for instance, the Supreme Court considered the effect of amendment where no administrator existed for the defendant's estate, as required by statute, when the original complaint was filed. 226 U.S. 570, 573-74 (1913). The Court held that the plaintiff's operative complaint—filed after she was appointed administrator—cured the original defect: even though "under the Federal statute the plaintiff could not . . . maintain the action" as originally filed, the post-appointment amendment brought the plaintiff into compliance with the statute. *Id.* at 576.

Settled practice dictates an obvious result here. The PLRA requires "prisoners" but not former prisoners to exhaust administrative remedies. 42 U.S.C. § 1997e(a); *Greig*, 169 F.3d at 167. When Mr. Makell filed his initial complaint, he was a "prisoner" who had not exhausted

administrative remedies. AA176-177. He was therefore not in compliance with the statute—he filed prematurely, just like the plaintiffs in *Bornholdt*, 869 F.2d at 63, *Chavis*, 615 F.3d at 164-65, *Mathews*, 426 U.S. at 75, *Ramirez*, 142 S. Ct. at 1276, and *Wulf*, 226 U.S. at 576. When Mr. Makell filed his operative complaint, he was no longer a prisoner. AA177. He was therefore in compliance with the statute—again, just like the plaintiffs in *Bornholdt*, *Chavis*, *Mathews*, *Ramirez*, and *Wulf*. The operative complaint cured the premature filing defect.

2. The district court didn't dispute Rule 15's normal operation. *See* AA17 ("This amended complaint will completely replace [your] original complaint."). But the district court believed that Rule 15 did not operate normally *here* for two reasons. First, it believed that Rule 15 does not permit amendment or supplementation to rescue an action from an affirmative defense. Second, it pointed out that a superseded complaint does not disappear entirely, for all purposes: for instance, admissions made in an initial complaint remain competent evidence, and Rule 4(m) requires service of process within 90 days of filing the initial complaint. *See* Fed. R. Civ. P. 4(m). The first is wrong and the second irrelevant.

a. The district court believed that Rule 15(d) could not cure a failure to exhaust under the PLRA because lack of exhaustion is an affirmative defense. *See Jones*, 549 U.S. at 216. According to the district court, a supplemental or amended complaint "cannot 'cur[e] a deficiency' in the original complaint" because the PLRA imposes no obligation to plead exhaustion and therefore "there is no deficiency to cure." AA184 (quoting *Jackson v. Fong*, 870 F.3d 928, 934 (9th Cir. 2017)).

The district court's cramped view of Rule 15—for which it offered no authority—finds no support in text or precedent.

First, the text of Rule 15 contains no such limitation. Rule 15(a) permits amendment with no further comment except a reminder to district courts to grant leave to amend "freely . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). And Rule 15(d) permits supplementation to "set[] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). Supplementation is appropriate "even though the original pleading is defective in stating a claim or defense," but it isn't limited to such cases. *Id.* That second sentence emphasizes the rule's breadth; it

certainly does not limit its scope, as the district court seemed to believe.[4] The rule imposes no textual limitation on what sorts of "transaction[s], occurrence[s], or event[s]" it contemplates, and offers no indication that the events must relate to a pleading requirement rather than an affirmative defense.[5]

Second, the district court's argument contradicts longstanding practice. Courts regularly permit amendment and supplementation to defeat affirmative defenses. *See Jackson v. Fong*, 870 F.3d 928, 934 (9th

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[4] Indeed, the Advisory Committee made clear that the second sentence was intended to broaden, not narrow, the scope of Rule 15(d), explaining that a court has "discretion to permit a supplemental pleading despite the fact that the original pleading is defective . . . . [*a*]s *in other situations where a supplemental pleading is offered*." Notes of Advisory Comm. on Rules—1963 Amendment (emphasis added).

[5] Even if the District Court read Rule 15 correctly, it made a flawed assumption that susceptibility to an affirmative defense cannot be a "pleading defect." Even though failure to exhaust under the PLRA is an affirmative defense, "a district court still may dismiss a complaint for failure to exhaust administrative remedies if it is clear on the face of the complaint that the plaintiff did not" exhaust. *Williams v. Correction Officer Priatno*, 829 F.3d 118, 122 (2d Cir. 2016) (citing *Jones*, 549 U.S. at 215); *cf. Off. Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003) ("[A] complaint can be dismissed for failure to state a claim pursuant to a Rule 12(b)(6) motion raising an affirmative defense 'if the defense appears on the face of the complaint.'"). Thus, a complaint might feature a "defect" with respect to an affirmative defense, even if the plaintiff has no affirmative obligation to counter it in the pleading.

Cir. 2017) ("A supplemental complaint also can defeat an affirmative defense applicable to an earlier complaint[.]") (citing *Mathews*, 426 U.S. at 75); *Bornholdt*, 869 F.2d at 57-58.[6] Indeed, it can be an abuse of discretion to do otherwise. *See Neeff v. Emery Transp. Co.*, 284 F.2d 432, 434-35 (2d Cir. 1960).

b. Next, the district court pointed out that a superseded complaint does not disappear entirely, for all purposes. *See* AA180 (disagreeing with the Third Circuit's description of a superseded complaint as "a nullity") (quoting *Garrett*, 938 F.3d at 82). Allegations in the original complaint can, the court pointed out, "still constitute admissions by the plaintiff that can be used against him[.]" AA180.

That is true as far as it goes: allegations from a superseded complaint constitute a statement by a party opponent and are, "like any other extrajudicial admission made by a party," "competent evidence of the facts stated." *Jean-Louis v. Carrington Mortgage Services, LLC*, 849

[6] The exhaustion requirements under Title VII and the Age Discrimination in Employment Act at issue in *Bornholdt* were affirmative defenses, not pleading requirements. *See Belgrave v. Pena*, 254 F.3d 384, 386 (2d Cir. 2001) (explaining that failure to exhaust administrative remedies under Title VII and the ADEA is "an affirmative defense").

F. Appx. 296, 299 n.15 (2d Cir. 2021) (quoting *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 32 F.2d 195, 198 (2d Cir. 1929)). Unlike allegations in an operative complaint, though, allegations in a superseded complaint are "controvertible." *Id.*[7] That's because, although a superseded complaint continues to be evidence of words a party once uttered, it sheds its legal effect *as a pleading*. *See id.* (describing a superseded complaint as "evidence" "outside the pleadings"). On that front, the law is clear: an amended complaint displaces the superseded complaint as a pleading as demotes it to mere evidence, no different from any other statement. And, of course, it is the original complaint's continuing legal effect as a pleading, not its admissibility as evidence, that bears on the question of when an action was "brought."

The district court also pointed to Rule 4(m) to bolster its point that a superseded complaint does not disappear entirely. AA181. Rule 4(m) requires a plaintiff to serve a summons and complaint "within 90 days

[7] *See also United States v. GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991) ("Although the government is not bound by what it previously has claimed its proof will show any more than a party which amends its complaint is bound by its prior claims, the jury is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims."); *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984).

after the complaint is filed." Fed. R. Civ. P. 4(m). According to the district court, the filing of the original—and not the amended—complaint triggers the 90-day countdown, at least as to defendants named in the original complaint. AA181. The district court interpreted that practice to indicate that "the date of the filing of the original complaint, not the amended complaint, remains controlling" in some situations. AA181.

The district court's argument misses the mark again, for two reasons. First, the district court's posited operation of Rule 4(m) is, at the very least, open to debate. This Court has never decided the question, and its sister circuits and district courts within the circuit are split.[8] In the Ninth Circuit, for instance, an amended complaint restarts the Rule 4(m) countdown as to all defendants, including those named in the original complaint.[9]

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[8] *Compare Gear, Inc. v. L.A. Gear Cal., Inc.*, 637 F. Supp. 1323, 1326 (S.D.N.Y. 1986) (calculating the 4(m) period anew from the date the amended complaint was filed, including for a defendant named in the original complaint) *and Crossen v. Bernstein*, No. 91 CIV. 3501 (PKL), 1994 WL 281881, at *3 (S.D.N.Y. June 23, 1994) (same), *with Butterworth v. Town of Greece*, No. 20-CV-6162-FPG, 2021 WL 241961, at *7 (W.D.N.Y. Jan. 25, 2021) ("The subsequent filing of an amended complaint does not restart the ninety-day clock in which to serve[.]").

[9] *See, e.g.*, *McGuckin v. United States*, 918 F.2d 811, 813 (9th Cir. 1990) ("[W]e must construe the [90] day limit of Rule 4[m] to run from the filing of the second amended complaint."); *Wheat v. Airport Auth. of Washoe*

Second, to the extent Rule 4(m) does treat amended complaints differently than other statutes and rules, that's a function of its text. Rule 4(m) requires service "within 90 days after *the* complaint is filed," which provides some textual basis to treat the initial complaint as "the" sole complaint. *See* Fed. R. Civ. P. 4(m) (emphasis added). And Rule 4(m) instructs that a court "must dismiss the action . . . or order that service be made[.]" *Id.* As the next section explains, the PLRA contains no such express language.

B. The PLRA's Exhaustion Provision Lacks the "Express" Departure from the Federal Rules that *Jones* Requires.

The Supreme Court's decision in *Jones* established that the PLRA incorporates the normal operation of the Federal Rules unless the statutory text "expressly" disclaims it. *See Jones v. Bock*, 549 U.S. 199, 216 (2007) (explaining that "when Congress meant [for the PLRA] to depart from the usual procedural requirements, it did so expressly"). The PLRA's exhaustion requirement does not disclaim Rule 15's normal

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Cnty., 166 F.3d 1219 n.1 (9th Cir. 1999) (unpublished table decision); *Silbaugh v. Chao*, 942 F.3d 911, 916 (9th Cir. 2019) (finding that service was properly made because the plaintiff executed service "within 90 days of filing her amended complaint") (citing *McGuckin*, 918 F.2d at 813).

operation. In fact, its text mirrors that of many other statutes that have been held to endorse Rule 15's operation. Rule 15 therefore operates normally with respect to the PLRA's exhaustion requirement.

In *Jones*, the Supreme Court considered whether the PLRA's instruction that "[n]o action shall be brought" without exhausting administrative remedies required—or even permitted—lower courts to deviate from normal procedure under the Federal Rules. *See* 42 U.S.C. § 1997e(a); *Jones*, 549 U.S. at 220. The PLRA's exhaustion provision 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 facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). The lower court had adopted pleading rules to implement the exhaustion requirement, including a "total exhaustion" rule requiring dismissal of actions containing both exhausted and unexhausted claims. *Jones*, 549 U.S. at 206. The *Jones* Court invalidated the pleading rules, insisting on accepting Congress's words and not adding its own: "[W]hen Congress meant to depart from the usual

procedural requirements," the Court wrote, "it did so expressly." *Id.* at 216.

Jones offered an example of such an express departure. It pointed to Section 1997e(g)—just a few subsections down from the exhaustion requirement—which created a special procedural rule "[n]otwithstanding any other law or rule of procedure." *Id.* (quoting 42 U.S.C. § 1997e(g)). *That* language, the Court said, required departing from usual procedure. But "boilerplate language" like "[n]o action shall be brought" cannot justify departure. *Id.* at 220.[10]

Just as in *Jones*, no "express[]" language permits a departure here. First and most importantly, Section 1997e(a) obviously contains nothing analogous to the "[n]otwithstanding" clause in Section 1997e(g). *Cf. Rhodes v. Robinson*, 621 F.3d 1002, 1007 (9th Cir. 2010) ("Congress has never indicated . . . that it intended to do away with Rule 15(d) and supplemental pleadings in PLRA actions.").

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[10] Notably, this Court had reached the same conclusion pre-*Jones*, deciding that the "[n]o action shall be brought" language is "too ambiguous" to sustain the conclusion that Congress meant to depart from normal practice and institute a "total exhaustion" rule in PLRA cases. *Ortiz v. McBride*, 380 F.3d 649, 657-58 (2d Cir. 2004); *see also Jones*, 549 U.S. at 206 (citing *Ortiz*).

Second, the text it does contain—"[n]o action shall be brought"—is not only "boilerplate," *Jones*, 549 U.S. at 220, but is also consistent with other statutory provisions that have been read to endorse, not override, Rule 15's operation. This is true of similar language both in the PLRA and elsewhere.

Begin with the PLRA. Section 1997e(e) mirrors Section 1997e(a) almost precisely, providing that "[n]o . . . action may be brought by a prisoner . . . for mental or emotional injury . . . without a prior showing of physical injury." 42 U.S.C. § 1997e(e). In *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002), this Court interpreted Section 1997e(e) to interact normally with Rule 15, notwithstanding the admonition that "[n]o . . . action may be brought." The district court had dismissed a prisoner's complaint because it sought relief for mental or emotional injury with no prior showing of physical injury. *Id.* at 414. This Court remanded with instructions to the district court to allow the plaintiff to amend his complaint to cure its initial defect. *Id.* at 419.

The same goes for the PLRA's *in forma pauperis* provision, 28 U.S.C. § 1915(g).[11] As outlined above, this Court confronted that provision in *Chavis v. Chappius*, 618 F.3d 162 (2d Cir. 2010). Its text echoes the text of the exhaustion provision: "In no event shall a prisoner *bring a civil action* . . . under this section if the prisoner" has a certain litigation history "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g) (emphasis added). This Court saw no reason to override Rule 15's normal operation. It found that a supplemental pleading, setting forth factual developments from after the filing of the initial complaint, would have cured the failure to meet the imminent danger exception—so it remanded to allow supplementation. *Chavis*, 618 F.3d at 171.

Thompson and *Chavis* resolve this case. "No action may be brought" in Section 1997e(e) and "[i]n no event shall a prisoner bring a civil action" in Section 1915(g) both refer to the operative, not the initial, complaint. Because "[u]nder 'the normal rule of statutory interpretation . . . identical words used in different parts of the same statute are generally presumed

[11] 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).

to have the same meaning," *T.W. v. N.Y. State Bd. of Law Examiners*, 996 F.3d 87, 99 (2d Cir. 2021) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)), "no action shall be brought" must mean the same thing in Section 1997e(a).

Other statutes featuring similar language have also been interpreted to permit Rule 15's normal operation.[12] *See, e.g.*, *Positive Black Talk 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 statute providing 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*

[12] Defendants below cited two cases interpreting similar language in other statutes in ways they consider inconsistent with Rule 15's normal operation. *See Hoffman v. Blaski*, 363 U.S. 335 (1960); *Burns v. Equitable Life Assur. Soc. of U.S.*, 696 F.2d 21 (2d Cir. 1982). But neither discussed Rule 15 or its normal operation, because it simply wasn't at issue in either case. The same goes for prior cases of this Court that have considered the exhaustion requirement. *See Neal v. Goord*, 267 F.3d 116 (2d Cir. 2001).

Elec. Corp., 838 F.2d 286, 289 (8th Cir. 1988) (finding that a statute's instruction that "[n]o action may be commenced" did not preclude a supplemental complaint from curing a prematurity defect). Each case concerned a statute with language similar to the PLRA's exhaustion provision. And each case permitted a Rule 15 amended or supplemental complaint to overcome an initial failure to comply with a statutory precondition to suit.

This Court should interpret Section 1997e(a) similarly.

C. Both Sister Courts to Squarely Confront the Issue Have Concluded That a Post-Release Amendment or Supplementation Cures a Premature Filing Defect Under the PLRA.

For those two reasons—the Supreme Court's reminder in *Jones* to abide by the statutory text, plus traditional Rule 15 practice—the two other courts of appeal to squarely consider this issue since *Jones* have concluded that a post-release or post-exhaustion operative complaint operates as it normally would and cures a failure to exhaust under the PLRA.

The Ninth Circuit considered this precise issue in *Jackson v. Fong*,

870 F.3d 928 (9th Cir. 2017). There, the plaintiff originally brought unexhausted claims while incarcerated. *Id.* at 930. He amended his complaint after his release and argued that the PLRA's exhaustion requirement did not apply because he was not a prisoner when he filed the operative complaint. *Id.* The court noted *Jones*'s admonition to "look to the Federal Rules of Civil Procedure" to guide procedure under the PLRA. *Id.* at 934. Under the Rules' ordinary operation, "[e]xhaustion requirements apply based on when a plaintiff files the operative complaint." *Id.* at 935. Because nothing in the PLRA disclaimed that operation, it applied equally to the PLRA. *Id.* at 931. *See also Saddozai v. Davis*, 35 F.4th 705, 710 (9th Cir. 2022) ("Plaintiff's operative third amended complaint is the only relevant pleading for purposes of the PLRA exhaustion analysis."); *Cano v. Taylor*, 739 F.3d 1214, 1220 (9th Cir. 2014); *Rhodes v. Robinson*, 621 F.3d 1002, 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.").

The Third Circuit agreed in *Garrett v. Wexford Health*, 938 F.3d 69 (3d Cir. 2019). Again, the plaintiff filed an initial complaint, containing

unexhausted claims, while incarcerated, and amended after release. *Id.* at 76-78. And again, the court recited *Jones*'s reminder that "the usual procedural rules apply to PLRA cases unless the PLRA specifies otherwise." *Id.* at 87. It noted that "[i]t has long been the rule . . . that where a party's status determines a statute's applicability, it is his status at the time of amendment and not at the time of the original filing that determines whether a statutory precondition to suit has been satisfied." *Id.* at 82 (citing *Wulf*, 226 U.S. at 575). Because "the PLRA does not override the usual operation of Rule 15," the plaintiff's non-prisoner status at the time of amendment—and not his prisoner status at the time of original filing—governed the PLRA's applicability. *Id.* at 87. *See also Korb v. Haystings*, 860 F. Appx. 222, 225-26 (3d Cir. 2021).

The district court cited to two cases from other circuit courts to support its decision. Both are inapposite. The Sixth Circuit's decision in *Cox v. Mayer*, 332 F.3d 422 (6th Cir. 2003), did not involve an amended or supplemental complaint and only addressed the issue in dicta. *See id.* at 428; *id.* at 428-29 (Moore, J., dissenting) (disagreeing with the majority's Rule 15 reasoning and its decision to reach the question "in dicta"); *Mattox v. Edelman*, 851 F.3d 583, 593 (6th Cir. 2017) ("The *Cox*

panel's dicta do not bind us."). The Eleventh Circuit's decision in *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000), too, only reached the question in dicta, *see id.* at 981 ("assum[ing] for purposes of discussion" that the complaint was amended or supplemented), and involved a different statutory provision (§ 1997e(e)'s physical injury requirement, not § 1997e(a)'s exhaustion requirement).

Moreover, both decisions predated *Jones*. This is not a minor distinction: both courts might have altered course with the benefit of *Jones*'s reminder that "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Jones*, 549 U.S. at 212. Consider *Harris*. In response to the dissent's laundry list of decisions explaining the normal operation of Rule 15, the majority had this to say:

> The decisions the dissenting opinion relies upon are distinguishable. None of them involved a statutory purpose and requirement that the plaintiff be made to bear the differential opportunity cost of a re-filing in order to discourage filings, which is what section 1997e(e) [of the PLRA] is all about. In none of those decisions would the purpose behind the statutory requirement be defeated by treating subsequently occurring facts as though they had occurred before the complaint was filed. That is the situation we would have here, and it was not present in any of the decisions upon which the dissenting opinion is based.

Harris, 216 F.3d at 983. And the *Harris* court took the same tack in distinguishing *Mathews v. Diaz*, explaining that Rule 15's normal operation in *Mathews* did "not undermine the statutory purpose" at issue, while its normal operation here would. *Id.*[13] Similarly, the *Cox* court worried that, while preventing cure would "be judicially uneconomical *in the instant case*," allowing cure "would encourage all prisoners . . . to eschew the grievance process in favor of the courts." *Cox*, 332 F.3d at 427. *Jones* forbade this flavor of judicial policymaking.

D. Rule 15's Normal Operation Furthers the PLRA's Policy Aims.

To the extent this Court is concerned with policy, here, as in *Jones*, *see* 549 U.S. at 223-24, the federal rules' normal operation aids the PLRA's purpose.

The PLRA's exhaustion requirement seeks "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The exhaustion requirement pursues this goal by diverting

[13] *See also Positive Black Talk, Inc.*, 394 F.3d at 366 n.6 (distinguishing *Harris* while interpreting similar language in a different statute by pointing out that "[c]rucial to the *Harris* court's analysis was its view that allowing a cure of the jurisdictional defect would run contrary to the congressional purpose in enacting the PLRA").

some cases to the administrative process. *Jones*, 549 U.S. at 203. But for a released former prisoner, there is no administrative process to which to divert claims. Prisons' grievance procedures are not designed for non-prisoners, so that avenue has closed and "there is no internal process left to undermine." *Jackson*, 870 F.3d at 936.[14]

Nor would dismissing rather than amending relieve the judiciary's burden. Altering Rule 15 in the PLRA exhaustion context would only multiply the amount of prisoner litigation courts must wade through. Because dismissal for a failure to exhaust must be without prejudice, *see* *Berry v. Kerik*, 366 F.3d 85, 87 (2d Cir. 2004), "the court will have to entertain the case a second time after essentially the same action is re-filed," turning one case into two. *Harris*, 216 F.3d at 986 (Tjoflat, J., concurring in part); *cf. Ortiz*, 380 F.3d at 658 (explaining that a rule that would simply "require plaintiffs . . . to refile their claims" undermines the PLRA's purpose); *Jones*, 549 U.S. at 223-24 (same, where a rule would result in "refiled complaints . . . identical to what the district court would

[14] *See Morris v. Eversley*, 205 F. Supp.2d 234, 241 n.4 (S.D.N.Y. 2002); *Liner v. Goord*, 115 F. Supp.2d 432, 434 (S.D.N.Y. 2000) ("Liner has been released from prison and could not now be ordered to exhaust all available administrative remedies . . . .").

have considered" absent the rule). "[T]his hardly 'stem[s] the flood of prisoner lawsuits in federal court.'" *Harris*, 216 F.3d at 986 (Tjoflat, J., concurring in part).

Mr. Makell's case provides a good example. Upon his release, Mr. Makell could have sought dismissal of his earlier complaint, *see* Fed. R. Civ. P. 41(a), and refiled an identical complaint.[15] Instead, Mr. Makell avoided that inefficiency and amended his complaint, "thereby bringing the case up to date." 6A WRIGHT & MILLER, FED. PRAC. & PROC. § 1504 (3d ed.). He should not be penalized for that decision. *See Jackson*, 870 F.3d at 936 (observing that a plaintiff who amends rather than refiles "promote[s] judicial economy").

Indeed, Rule 15's aim aligns precisely with the PLRA's. Rule 15 seeks to avoid "the needless formality and expense of instituting a new action when events occurring after the original filing indicated a right to relief." 6A WRIGHT & MILLER, FED. PRAC. & PROC. § 1505 (3d ed.). It would be singularly odd to discard Rule 15 in the name of judicial efficiency.

[15] Mr. Makell was, and remains, within the applicable three-year statute of limitations. *See Hogan v. Fischer*, 738 F.3d 509, 517 (2d Cir. 2013); N.Y. C.P.L.R. § 214.

The district court objected that "relieving the federal courts of the need to be the first tribunal to address prisoner grievances—the obvious purpose of the PLRA—is no less applicable whether the prisoner is raising his claim pre-release . . . or post-release." AA184 n.7. If Congress agreed, it would have imposed the same exhaustion requirement on released prisoners as on current ones. It didn't. *Greig*, 169 F.3d at 167 (former prisoners are not "prisoners" for purposes of § 1997e(a)). Instead, it opted to "give preferential treatment to *former* prisoners over *current* prisoners" because current prisoners have unique incentives to misuse the judiciary that "simply do not apply to individuals who were formerly incarcerated." *Id.* That policy choice belongs to Congress.

E. An Amended Complaint Adding New Defendants Brings a New Action Against Those Defendants.

The PLRA's exhaustion requirement provides that "[n]o action shall be brought" by a prisoner absent exhaustion. Though the text refers to an "action," that "boilerplate" language does not abrogate the normal rule that the statute proceeds claim-by-claim. *See Jones*, 549 U.S. at 220. In other words, the statute only mandates that no *claim* shall be brought by a prisoner absent exhaustion.

To add a new defendant is to bring a new claim. *See Rothman v. Gregor*, 220 F.3d 81, 96 (2d Cir. 2000); *Davis v. L.L. Cohen & Co.*, 268 U.S. 638, 642 (1925); *Wilkins v. Montgomery*, 751 F.3d 214, 224 (4th Cir. 2014); *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 484 (6th Cir. 1973).

Therefore, at the very least, the PLRA does not bar claims against new defendants added via amendment after a former prisoner's release. Mr. Makell's Second Amended Complaint—filed post-release—named at least one new defendant, Corporal John Donald. *See* AA177. Regardless of how this Court decides the broader question, those new claims must proceed.

II. OFFICER SAILOR VIOLATED MR. MAKELL'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

Construing the evidence in the light most favorable to Mr. Makell: Officer Sailor turned his pepper spray upon Mr. Makell, a bystander who was verbally articulating his non-involvement and was a full cell-length away from the fighting prisoners with his hands up and back against the wall. Whether analyzed under the Fourteenth Amendment (as was

proper) or the Eighth Amendment (as the district court did), that conduct violated Mr. Makell's clearly established constitutional rights.

A. Qualified Immunity Does Not Shield Officer Sailor's Fourteenth Amendment Violation.

Officer Sailor deployed objectively unreasonable force in violation of the Fourteenth Amendment. And the objective unreasonableness of his conduct was clearly established, making qualified immunity inappropriate.

1. Officer Sailor Violated the Fourteenth Amendment.

Because Mr. Makell was a pretrial detainee[16] when Officer Sailor pepper sprayed him, the Fourteenth Amendment provides the correct framework to analyze his excessive force claim.[17] *See Kingsley v. Hendrickson*, 576 U.S. 389 (2015). To sustain an excessive force claim under the Fourteenth Amendment, a plaintiff need show "only" that an officer used "objectively unreasonable" force. *Id.* at 396-97. Force that

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[16] Mr. Makell's relevant period of incarceration began on September 17, 2019. AA175. The events at issue occurred on October 11, 2019. *Id.* Mr. Makell pleaded guilty to the relevant charges on November 20, 2020.

[17] It is unclear whether the district court disagreed. Though it recited the Eighth Amendment standard, it cited only Fourteenth and Fourth Amendment cases in its qualified immunity analysis. *See* AA188-190.

"appear[s] excessive in relation to" a "legitimate nonpunitive governmental purpose" is objectively unreasonable. *Frost v. New York City Police Dep't*, 980 F.3d 231, 252 (2d Cir. 2020) (quoting *Kingsley*, 576 U.S. at 398). This Court determines objective reasonableness with reference to a number of factors, including (1) the proportionality between the need for force and the amount of force used and (2) the extent of injury inflicted. *See Edrei v. Maguire*, 892 F.3d 525, 537 (2d Cir. 2018) (citing *Kingsley*, 576 U.S. at 397).

Viewing the facts in the light most favorable to Mr. Makell, Officer Sailor's conduct was objectively unreasonable.

First, there was no need for the use of force against Mr. Makell. All parties agree that Mr. Makell was an innocent, cooperative bystander to a fight between other prisoners. AA121. He had his hands up and his back against the wall, a cell-length away from the commotion. AA119. He voiced his non-involvement. AA121. Officer Sailor could not reasonably have perceived him as a threat. Officer Sailor pepper sprayed him anyway. AA123.

Next, the amount of force was disproportionate to the nonexistent need. Pepper spray "beyond doubt . . . constitutes significant force." *Jones*

v. Treubig, 963 F.3d 214, 226 (2d Cir. 2020); *see also Tracy v. Freshwater*, 623 F.3d 90, 98 (2d Cir. 2010) ("Unquestionably, infliction of pepper spray . . . has a variety of incapacitating and painful effects . . . and, as such, its use constitutes a significant degree of force.").

Finally, the pepper spray caused Mr. Makell significant injury. It caused his eyes to burn for weeks afterward. AA150. It caused him to fall and hit his face against the wall, loosening a tooth. AA150; AA176. It caused him headaches; vomiting; trouble thinking, sleeping, opening his eyes, and smelling; and depression. AA150; *see also* AA176. It burned his ear, face, and back. AA150; AA176. And the pain persisted for months: Mr. Makell continued requesting medical attention well into December, more than two months after the incident. AA126, AA129.

A reasonable jury could conclude that Officer Sailor deployed excessive force in violation of the Fourteenth Amendment.

2. Officer Sailor Violated Mr. Makell's Clearly Established Fourteenth Amendment Rights.

Officer Sailor could not reasonably have believed that the Constitution tolerated his conduct. Qualified immunity insulates only officers who violated no "clearly established . . . rights of which a

reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "'[T]he salient question . . . is whether the state of the law' at the time of the incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam) (quoting *Hope*, 536 U.S. at 741); *see also Edrei*, 892 F.3d at 539 (quoting *Terebesi v. Torreso*, 764 F.3d 217, 230 (2d Cir. 2014)).

Officer Sailor had "fair warning." This Court has repeatedly held that using pepper spray or a weapon of similar magnitude "against a non-resisting and non-threatening individual" violates the Fourteenth Amendment. *Treubig*, 963 F.3d at 226.

In *Tracy v. Freshwater*, this Court faced a police officer's use of force to restrain a resistant suspect, followed by pepper spray once the suspect had stopped resisting. *Tracy v. Freshwater*, 623 F.3d 90, 98 (2d Cir. 2010). Because "the use of entirely gratuitous force is unreasonable and therefore excessive," *id.* at 99 n.5, the dose of pepper spray violated the Fourth Amendment. *Id.* at 99. As this Court later noted, "after *Tracy*, any reasonable officer would understand that . . . it violated clearly established law to use pepper spray against a non-resisting and non-

threatening individual." *Treubig*, 963 F.3d at 226. And *Tracy* established the unconstitutionality of that conduct not only under the Fourth Amendment but also under the Fourteenth; the two amendments lend each other law for qualified immunity purposes. *See Lombardo v. City of St. Louis, Mo.*, 141 S. Ct. 2239, 2241 n.2 (2021); *Edrei v. Maguire*, 892 F.3d 525, 542 & n.5 (2d Cir. 2018) (rejecting argument "that Fourth Amendment cases 'cannot establish the law for Fourteenth Amendment purposes'").

Frost v. New York City Police Department applied that principle to the pretrial detainee context. 980 F.3d 231 (2d Cir. 2020). There, this Court denied qualified immunity for a 2012 use of force deployed immediately after corrections officers restrained a pretrial detainee with a history of prison violence who had "charged the officers" who attempted to subdue him. *Id.* at 257. The officers subdued the detainee "after a vigorous struggle," and continued to kick him once subdued. *Id.* Because, as of 2012, "it was clearly established . . . that an officer cannot strike an individual who is compliant and does not pose an imminent risk of harm

to others," this Court denied qualified immunity for the force employed after he was subdued. *Id.*[18]

Similarly, in *Jones v. Treubig*, this Court denied qualified immunity where a police officer tased a suspect who was resisting arrest, and then tased again and pepper sprayed after the suspect had stopped resisting. 963 F.3d at 220, 222. This Court concluded that, as of 2015, a police officer violated clearly established law when he used "significant force against an arrestee who is no longer resisting and poses no threat to the safety of officers or others." 963 F.3d at 225; *see also Soto v. Gaudett*, 862 F.3d 148, 158 (2d Cir. 2017) ("Though the use of force may be reasonable against a suspect who is fleeing, it may be objectively unreasonable against that suspect when he has been stopped and no longer poses a risk of flight.").

Frost, *Tracy*, and *Treubig* clearly established that pepper spray, or force of a similar magnitude, violates the Fourteenth Amendment when

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[18] Although decisions postdating the events at issue here cannot themselves "clearly establish the right 'in the first instance,'" they can demonstrate that the law was already clearly established by the time the underlying incidents occurred. *See Treubig*, 963 F.3d at 227 ("[W]e can rely on decisions that post-date [the events at issue] if they address whether the law . . . was already established . . . prior to [the events at issue].").

it exceeds the bounds necessary to restrain an uncooperative person. These cases necessarily established the excessiveness of the force here, where nobody disputes that Mr. Makell was entirely cooperative—he had his hands up and back against the wall, a cell's length from the commotion in his doorway. They gave Officer Sailor more than "fair warning."

B. Qualified Immunity Does Not Shield Officer Sailor's Eighth Amendment Violation.

Instead of analyzing the case under the Fourteenth Amendment, the district court recited the Eighth Amendment standard. That was wrong; the Fourteenth, not Eighth, Amendment protected Mr. Makell as a pretrial detainee. But in any event, the same result obtains under either amendment: Officer Sailor violated the Constitution, and qualified immunity does not protect him.

1. Officer Sailor Violated the Eighth Amendment.

Force "not applied in a 'good-faith effort to maintain or restore discipline'" violates the Eighth Amendment. *Blyden v. Mancusi*, 186 F.3d 252, 262-63 (2d Cir. 1999); *see also Sims v. Artuz*, 230 F.3d 14, 21 (2d Cir. 2000) (such force "always violate[s]" the Eighth Amendment); *Griffen v. Crippen*, 193 F.3d 89, 91 (2d Cir. 1999) (such force violates the Eighth

Amendment "per se").[19] Officer Sailor pepper sprayed Mr. Makell while Mr. Makell was a cell's length away with his hands up and back against the wall, and was verbally indicating his non-involvement in the altercation occurring in his doorway—and then Officer Sailor bragged about his "nine for nine" record for "spraying people in the face." A reasonable jury could find that Officer Sailor did not pepper spray Mr. Makell in "good faith."

To "infer" whether a defendant acted in good faith, courts examine the "relationship between the need and the amount of force that was used, [and] the extent of injury inflicted." *Whitley v. Albers*, 475 U.S. 312, 321 (1986); *see also Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010); *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997) ("Where no legitimate law enforcement or penological purpose can be inferred from the defendant's

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[19] As this Court articulated in *Blyden*:

> *Hudson* [*v. McMillian*] does not limit liability to that subset of cases where "malice" is present. Rather, *Hudson* simply makes clear that excessive force is defined as force not applied in a "good-faith effort to maintain or restore discipline." 503 U.S. at 7. . . . The Court's use of the terms "maliciously and sadistically" is, therefore, only a characterization of all "bad faith" uses of force and not a limit on liability for uses of force that are otherwise in bad faith.

Blyden, 186 F.3d at 263.

alleged conduct, the abuse itself may . . . be sufficient evidence of a culpable state of mind.").

As explained above, Officer Sailor deployed a disproportionate amount of force compared to the nonexistent need, resulting in significant injury to Mr. Makell.

So the *Whitley* factors support the inference that Officer Sailor did not deploy force in good faith—but "inference" is hardly necessary. After the assault, Officer Sailor bragged that he was "nine for nine for spraying people in the face." AA58. That's hardly a comment from somebody who deployed pepper spray in good faith. *Cf. Crawford v. Cuomo*, 796 F.3d 252, 259 (2d Cir. 2015) (considering an officer's comments in attributing lack of good faith to a search).

In sum, a reasonable jury could conclude that Officer Sailor did not pepper spray Mr. Makell in good faith.

2. Officer Sailor Violated Mr. Makell's Clearly Established Eighth Amendment Rights.

Again, qualified immunity cannot protect Officer Sailor. First, because no reasonable officer could believe that the Eighth Amendment permits the use of force except in good faith, qualified immunity is inappropriate. Second, assuming precedent is necessary to apply that

principle to the facts at issue, there is plenty of it: Second Circuit and sister circuit case law had clearly established a cooperative prisoner's right to be free from the intentional spraying of a harmful substance as of October 2019. And in any event, the constitutional impermissibility of an unprovoked dose of pepper spray was so "obvious," *see Hope*, 536 U.S. at 741, as to give notice to a reasonable officer.

i. No Reasonable Officer Could Believe that the Eighth Amendment Permits the Use of Force Not in Good Faith.

Because no reasonable officer could believe that the Eighth Amendment permits the intentional use of force except in good faith, qualified immunity is inappropriate.

Qualified immunity cannot immunize an officer for a constitutional violation that features wrongful intent as an element. Qualified immunity protects officers who could have "reasonably believed" their actions "to be lawful." *Askins v. Doe No. 1*, 727 F.3d 248, 254 (2d Cir. 2013). But no officer could "reasonably believe" that the Constitution permits an intentional exercise of force not in good faith—no matter the method of force used. *Cf. Muschette*, 910 F.3d at 69 n.1 ("[N]ovel

technology, without more, does not entitle an officer to qualified immunity.").

Accordingly, at least three sister circuits have held that qualified immunity cannot immunize an officer for a constitutional violation that features an intent element. "In this 'unusual' qualified immunity context," where "a constitutional violation has 'wrongful intent' as an element," qualified immunity cannot turn "on the particular factual circumstances under which the officer acted." *Dean v. Jones*, 984 F.3d 295, 310-11 (4th Cir. 2021); *see also Brooks v. Johnson*, 924 F.3d 104, 118-19 (4th Cir. 2019) ("Because 'the case law is intent-specific,' clearly establishing that the bad faith and malicious use of force violates the Eighth Amendment rights of prison inmates, a corrections officer who acts with that culpable state of mind reasonably should know that she is violating the law."); *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002) (explaining that "the two inquiries" raised by the Eighth Amendment's subjective prong and qualified immunity "effectively collapse into one"); *Delgado-Brunet v. Clark*, 93 F.3d 339, 345 (7th Cir. 1996) (same); *Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001) ("Because deliberate indifference . . . requires actual knowledge or

awareness on the part of the defendant, a defendant cannot have qualified immunity if she was deliberately indifferent[.]"); *Carter v. City of Philadelphia*, 181 F.3d 339, 356 (3d Cir. 1999) (deliberately indifferent conduct is "*a fortiori* . . . not objectively reasonable").

Although this Court has not addressed the issue, it has hinted its understanding that constitutional violations that feature an intent element interact differently with qualified immunity than those that don't. It has repeatedly held that, in conducting the "clearly established law" inquiry, courts addressing such claims should not require precedent that mirrors the conduct at hand as closely as they should in other circumstances: "[F]or claims based on intentionally tortious harmful conduct employed in the absence of any legitimate government interest, the requisite degree of particularity [to clearly establish a right] is lessened." *Poe v. Leonard*, 282 F.3d 123, 139 (2d Cir. 2002) (quoting *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 253 (2d Cir. 2001)).

Qualified immunity has no work left to do in this context, and Officer Sailor cannot invoke it to escape liability for his Eighth Amendment violation.

ii. Officer Sailor Violated Mr. Makell's Clearly Established Right Not to be Sprayed With a Harmful Substance as a Cooperative Prisoner.

Even if defeating qualified immunity in this context requires precedent establishing the wrongfulness of the specific conduct at issue, it exists in droves. As of 2019, case law in and out of this circuit clearly established the right of a cooperative and unarmed prisoner, who has not threatened anyone and has not disobeyed any commands, not to be sprayed with a harmful substance.

This Court's decision in *Hogan v. Fischer*, for one, involved markedly similar facts to the ones at issue here. *See* 738 F.3d 509 (2d Cir. 2013). There, like here, the plaintiff alleged that he was sprayed in his cell for no reason. *Id.* at 512. The spraying resulted in nearly identical, though less severe, symptoms: "The substance burned [plaintiff's] eyes, and he sustained a 'cut/scratch on [his] neck.'" *Id.* at 513. Like Mr. Makell, the plaintiff suffered "from recurring problems with his eyes and his skin, as well as psychological harm." *Id.* This Court held that the officers' conduct "undoubtedly" transgressed the Eighth Amendment. *Id.* at 517.

Hogan gave a reasonable officer "fair warning" that spraying a cooperative, non-threatening prisoner with a harmful substance violates the Eighth Amendment. *See Tolan*, 572 U.S. at 656.

Other cases outside of the "spraying" context gave a reasonable officer the same warning. Indeed, this Court has sustained Eighth Amendment violations even for force applied immediately after a prisoner threatened prison safety, if the prisoner had since been restrained. For instance, in *Gibeau v. Nellis*, this Court sustained an Eighth Amendment violation where corrections officers hit a since-restrained prisoner three times in the head with a small flashlight shortly after the prisoner was engaged in an altercation "like a street brawl" in which he "push[ed,] . . . shov[ed,] . . . and hit" an officer. 18 F.3d 107, 108-10 (2d Cir. 1994). The conclusion that hitting a recently-restrained, "brawl[ing]" prisoner violates the Eighth Amendment would put any reasonable officer on notice that pepper spraying a prisoner who had his hands up and back against the wall does as well.

"[A] compelling consensus of cases in . . . sister circuits" confirms what is already clear from this Court's cases. *See Treubig*, 963 F.3d at 236, 237 n.13; *see also Sloley v. VanBramer*, 945 F.3d 30, 40 (2d Cir. 2019)

("In addition to being 'dictated by controlling authority,' a right may be 'clearly established' if it is supported by 'a robust consensus of cases of persuasive authority.'") (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018)).[20]

At least five sister circuits have reached a "robust" consensus that the use of pepper spray or a similarly harmful weapon violates the Eighth Amendment if, at the time the weapon is used, the prisoner is non-threatening or restrained—even where, unlike in this case, the prisoner has disobeyed orders or threatened or harmed an officer. *See, e.g.*, *Brooks*, 924 F.3d at 108, 111 (reversing grant of summary judgment and denying qualified immunity where, after seven minutes of attempted negotiation and a warning, officers tased a "disrespectful and uncooperative" prisoner who was using "aggressive" language and refusing to have his picture taken); *Iko v. Shreve*, 535 F.3d 225, 240 (4th Cir. 2008) (denying qualified immunity where the defendant properly used pepper spray to assist in a cell extraction but continued to deploy it after the prisoner

[20] In *Treubig*, for instance, this Court held that "a compelling consensus" of four cases from four fellow circuits that had held similar conduct unconstitutional sufficed to clearly established the right. 963 F.3d at 236-37.

tried to comply with orders); *Roberson v. Torres*, 770 F.3d 398, 400, 406 (6th Cir. 2014) (affirming denial of qualified immunity where defendant officer pepper sprayed a prisoner he believed to be disobeying orders); *Walker v. Bowersox*, 526 F.3d 1186, 1189 (8th Cir. 2008) (reversing grant of summary judgment where defendant officer used pepper spray on a prisoner in his cell who disobeyed three orders, had an item that "could be used as [a] weapon[]," and was "disrupting the unit routine and distracting officers"); *Furnace v. Sullivan*, 705 F.3d 1021, 1025, 1030 (9th Cir. 2013) (denying qualified immunity where a prisoner alleged that he was pepper sprayed in the face after a disagreement with a guard over a meal tray because "a significant amount of force was employed without significant provocation from" the plaintiff); *Evans v. Heimgartner*, 811 F. Appx. 505, 505-06 (10th Cir. 2020) (affirming denial of qualified immunity for 2016 use of pepper spray where prisoner resisted being placed in restraints).[21]

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[21] *See also Dean*, 984 F.3d at 299, 301, 311 (reversing grant of qualified immunity for 2015 incident wherein defendant officer pepper sprayed a prisoner "almost immediately after" the prisoner head-butted him and a question of fact remained as to degree of ongoing struggle); *Treats v. Morgan*, 308 F.3d 868, 870 (8th Cir. 2002) (upholding denial of qualified immunity where a prison guard pepper sprayed a prisoner who had disobeyed an order); *DeSpain v. Uphoff*, 264 F.3d 965, 977, 979-80 (10th

Case law from this and sister circuits had clearly established, as of October 2019, that the Constitution forbids spraying a harmful substance at a cooperative, non-threatening prisoner. Qualified immunity was not appropriate.

C. Gratuitously Pepper Spraying a Prisoner in the Face Obviously Violates the Constitution.

Even if the case law did not speak so clearly, qualified immunity should not protect Officer Sailor—under either amendment. Pepper spraying a cooperative prisoner in the face from across a cell—while he verbally expresses his cooperation and holds his hands in the air and back against the wall—"obviously" violates the Constitution.

This Court and the Supreme Court have repeatedly warned that the absence of analogous precedent does not guarantee immunity for egregious constitutional violations. *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hope v. Pelzer*, 536 U.S. 730, 741, 745-46 (2002); *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020); *Johnson v. Newburgh Enlarged Sch.*

Cir. 2001) (accepting, at summary judgment, evidence that an officer was "seen laughing after the incident" to indicate that he had intentionally pepper sprayed into the air; denying qualified immunity even though the pepper spray was not directed at anyone in particular and no establishing cases discussed pepper spray).

Dist., 239 F.3d 246, 251 (2d Cir. 2001); *Edwards v. Arnone*, 613 F. Appx. 44, 47 (2d Cir. 2015). For conduct sufficiently beyond the pale, "the unlawfulness of the officer's conduct is sufficiently clear" to defeat qualified immunity "even though existing precedent does not address similar circumstances." *City of Escondido*, 139 S. Ct. at 504 (quoting *D.C. v. Wesby*, 138 S. Ct. 577, 581 (2018)).

This is one such case. Viewing the facts in the light most favorable to Mr. Makell, Officer Sailor turned his pepper spray on a fully cooperative prisoner with his hands up and back against the wall. No "reasonable" government official requires access to a case book to know that the law forbids unprovoked violence that "has a variety of incapacitating and painful effects." *Tracy*, 623 F.3d at 98.

D. The District Court Failed to Resolve Ambiguities in Mr. Makell's Favor.

The district court granted qualified immunity because it believed that Mr. Makell "was not sprayed intentionally." AA190. But that's not what Mr. Makell testified. He testified that he "got maced" while he stood with his hands up and his back against the wall. His request for medical care reiterates that he was "sprayed with mace in [his] eyes, mouth, and

ear." And Officer Sailor later bragged to a prisoner "that he's nine for nine for spraying people in the face." AA58. That hardly sounds like the description of an accidental use of force.

In any event, whether Officer Sailor pepper sprayed Mr. Makell in the face intentionally or whether he did so inadvertently (despite Mr. Makell's testimony to the contrary and even though Officer Sailor bragged about it thereafter) is a classic jury question: Because "a sojourn into a [party's] mind-set" is traditionally a function best "entrusted to the jury," a trial is "indispensable" in such cases. *Id.*; *see also Rodriguez v. Village Green Realty, Inc.*, 788 F.3d 31, 49 (2d Cir. 2015) (summary judgment is especially inappropriate "where subjective issues regarding a litigant's state of mind . . . are squarely implicated") (quoting *Patrick v. LeFevre*, 745 F.2d 153, 159 (2d Cir. 1984)); *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir. 2001) ("state of mind" matters "call for a 'sparing' use of the summary judgment device because of juries' special advantages over judges in this area") (quoting *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir. 1998)).

CONCLUSION

The PLRA did not require Mr. Makell, who was not a prisoner when he filed his operative complaint, to exhaust prison remedies. And qualified immunity was inappropriate on this record. This Court should reverse.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2022, I electronically filed the foregoing opening brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date:September 9, 2022

/s/ Easha Anand
Easha Anand

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that this brief complies with the type-volume limitation of L.R. 32.1(a)(4)(A) because this brief contains 12,106 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that 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 2016 and Century Schoolbook 14-point font.

Date:September 9, 2022

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