No. 07-1426

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHRISTOPHER R. PAVEY Plaintiff-Appellee, v. PATRICK CONLEY, *et al,* Defendants-Appellants.	On Appeal from The United States District Court for the Northern District of Indiana Civil Action No. 03-0662 The Honorable Chief Judge Robert L. Miller, Jr., Presiding.

BRIEF OF *AMICI CURIAE* UPTOWN PEOPLE'S LAW CENTER, LEGAL AID SOCIETY OF NEW YORK'S PRISONERS' RIGHTS PROJECT, D.C. PRISONERS' PROJECT OF THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, PRISONERS' LEGAL SERVICES OF NEW YORK, PRISON LAW OFFICE, THE TEXAS CIVIL RIGHTS PROJECT, FLORIDA INSTITUTIONAL LEGAL SERVICES, INC. AND PRISON LEGAL NEWS IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING *EN BANC*

Matthew L. Kutcher
Catherine K. Dick
Allison V. Passman
LATHAM & WATKINS LLP
Sears Tower, Suite 5800
233 South Wacker Drive
Chicago, IL 60606
(312) 876-7700
Counsel for Uptown People's Law Center, The Legal Aid Society of New York's Prisoners' Rights Project, D.C. Prisoners' Project of the Washington Lawyers' Committee For Civil Rights and Urban Affairs, Prisoners' Legal Services of New York, Prison Law Office, The Texas Civil Rights Project, Florida Institutional Legal Services, Inc. and Prison Legal News

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 07-1426

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):
Uptown People's Law Center, Legal Aid Society of New York's Prisoners' Rights Project, D.C. Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs, Prisoners' Legal Services of New York, Prison Law Office, The Texas Civil Rights Project, Florida Institutional Legal Services, Inc. and Prison Legal News

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Latham & Watkins LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
None.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
None

Attorney's Signature:_____ Date: July 21, 2008
Attorney's Printed Name: Matthew Kutcher

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).
Yes

Address: Sears Tower, Suite 5800
233 South Wacker Drive
Chicago, Illinois 60606

Telephone number: (312) 876-7700 Fax number: (312) 993-9767

e-mail address: matthew.kutcher@lw.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTEREST OF THE AMICI CURIAE

As described below, proposed *amici* are organizations that have an interest in the disposition of actions brought pursuant to 28 U.S.C. § 1983 and under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). *Amici* wish to alert the Court to implications of the panel's decision for prisoners seeking relief related to prison conditions and specific abuses by prison employees which were not addressed by the parties, and do not appear to have been anticipated in the opinion.

The **Uptown People's Law Center** ("the Law Center") is a not-for-profit legal clinic founded in 1975. In addition to providing legal representation, advocacy and education for poor and working people in the Uptown neighborhood of Chicago and surrounding communities, the Law Center also provides legal assistance to people housed in Illinois' prisons in cases related to their confinement. The Law Center has provided direct representation to over 100 prisoners, including several cases before this Court. Many of these cases have included either a legal or a factual dispute over exhaustion.

The **Legal Aid Society of New York's Prisoners' Rights Project** is a private, non-profit organization that has provided free legal assistance to indigent persons in New York City for over 125 years. Through its Prisoners' Rights Project, the Society advocates administratively and pursues class action and test case litigation to protect the legal rights of prisoners in New York state prisons and New York City jails.

The **D.C. Prisoners' Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs**, a non-profit public interest organization, has sought to eradicate discrimination and fully enforce the nation's civil rights laws for over 40 years. Since The Prisoners' Project was founded in 1989, it has engaged in broad-based class action litigation,

improving medical and mental health services, reducing overcrowding, and seeking to improve overall conditions at correctional facilities wherever D.C. inmates are held.

Prisoners' Legal Services of New York ("PLS") is a not-for-profit organization that has been providing civil legal services to indigent inmates in New York State prisons for over thirty-two years. PLS' mission is to ensure that inmates receive fair, just, lawful and humane treatment while incarcerated. PLS seeks to resolve complaints administratively, but in meritorious cases that cannot be resolved administratively, PLS serves as legal counsel in both state and federal courts. PLS has a significant interest in ensuring that inmates who are unable to resolve their complaints administratively have full and fair access to the courts.

The **Prison Law Office** strives to improve the living conditions of California state prisoners by providing free legal services. The Prison Law Office represents individual prisoners, engages in class action and other impact litigation, educates the public about prison conditions and provides technical assistance to attorneys throughout the country.

The **Texas Civil Rights Project** ("TCRP"), founded in 1990 and with multiple offices throughout Texas, promotes racial, social, and economic justice through education and litigation. TCRP uses education and litigation to achieve structural change in areas including prisoners' rights, and a variety of other civil rights and liberties.

Florida Institutional Legal Services, Inc. ("FILS") is a non-profit legal services office representing indigent institutionalized people in Florida. Its primary focus over its 30 year history has been a mix of individual and class action litigation in federal and state courts on behalf of people in Florida state prisons. The exhaustion requirement of the PLRA is a constant issue, particularly where prisoners are mentally ill or developmentally disabled, and in excessive use of force and abuse cases.

Prison Legal News ("PLN") is a non-profit, charitable corporation that publishes a nationally distributed monthly journal of the same name. Since 1990, PLN has reported on news, recent court decisions, and other developments relating to the civil and human rights of prisoners. Approximately sixty-five percent of *PLN* subscribers are state and federal prisoners. PLN and prisoners themselves regularly file litigation under the First Amendment in federal courts nationwide challenging prison officials who censor PLN. Timely resolution of these challenges is of vital interest to PLN, given the time sensitive nature of its publication.

INTRODUCTION

Seven of the eight *amici* are organizations that represent prisoners in a variety of civil legal matters, and the eighth publishes a journal whose censorship in prison is the subject of prisoner First Amendment challenges. They therefore have a strong interest in ensuring that prisoners have full and fair access to the courts under the Prison Litigation Reform Act ("PLRA", Pub. L. No. 104-134). *Amici* support plaintiff-appellee's petition for rehearing *en banc*, on the grounds that the panel decision conflicts with Supreme Court and Seventh Circuit precedent. *See* FED. R. APP. P. 35(a)(1). *Amici* collectively bring years of experience litigating PLRA cases across the country and in this Circuit, and wish to assist the Court in considering the impact of its decision by focusing on two areas of practical adverse consequences that will result if the decision is allowed to stand.[1]

First, the Court's opinion mandates that a district court cannot proceed with merits discovery (or presumably any other aspect of the case, including preliminary injunctive relief) in cases where the exhaustion defense has been raised until that issue has been fully and finally

---

[1] Although this brief confines itself to certain adverse consequences implicated by the panel's decision, *amici* also support petitioner's position that the Seventh Amendment requires that a jury resolve any factual disputes related to the exhaustion defense.

determined (including potential interlocutory appeals). This new, mandatory pre-merits discovery procedure will have significant and potentially disastrous practical consequences for inmates seeking preliminary injunctive relief (for themselves or for others similarly situated). An inmate seeking, for example, relief from medically dangerous conditions would find his case stalled while the parties litigated the affirmative exhaustion defense. Moreover, this new mandatory procedure will not increase court efficiency (as the panel indicated), but rather will decrease the efficiency of prisoner litigation by reducing the discretion of district court judges, provide an incentive to defendants to raise marginal exhaustion defenses, and prevent important preliminary discovery, such as limited discovery regarding the identity of unknown defendants.

Second, the Court's requirement that inmates whose failure to exhaust was "innocent" must go back and re-start the administrative process all over, rather than obtain timely judicial relief, punishes prisoners who acted appropriately and rewards prison officials who may have prevented exhaustion in the first place, thus providing perverse incentives for prison officials to block meritorious grievances. Moreover, prison officials may retaliate against prisoners or not allow them to go back and exhaust after the expiration of the prisons' filing deadlines. As a practical matter, prison administrators (as well as district courts) will be burdened with increasingly stale claims brought long after the events occurred; indeed, some claims may even be time-barred by the time prisoners ultimately get back to court. In prison systems where transfers are frequent, documents, videotapes, and other evidence is discarded in the normal course, and memories fade, the result will be the dismissal of meritorious claims.

For these reasons, the petition should be granted and the decision of the panel should be reheard *en banc*.

ARGUMENT

I. The Preliminary Exhaustion Hearing Rule and Merits Discovery Bar Will Prejudice Prisoners and Reduce Court Efficiency

The panel's decision requires that the district court follow a specific preliminary exhaustion hearing procedure whenever exhaustion is contested, and requires the court to stay all merits discovery (and presumably any other merits-related activity in a case, including entry of a preliminary injunction) pending the outcome of that procedure. *Pavey v. Conley*, 528 F.3d 494, 497-98 (7th Cir. 2008) (prisoner must "overcome" exhaustion defense before "case proceeds to the merits"). In cases where there are complex factual or legal disputes, this could require targeted discovery, an evidentiary hearing, extensive briefing, and a possible interlocutory appeal, all before even routine discovery, such as that aimed at identifying unknown defendants, can proceed. These requirements will have adverse consequences for prisoners whose claims require immediate judicial relief, and will not provide the increased efficiency sought by the panel.

A. The Preliminary Hearing Rule Will Prejudice Prisoners with Emergency, Potentially Life-Threatening Problems

One effect of this new rule requiring mandatory preliminary hearing on exhaustion is to add a significant hurdle to inmates with meritorious claims who may be seeking immediate, preliminary injunctive relief to remedy serious, sometimes life-threatening conditions. That hurdle could defeat the very purpose of the suit by delaying preliminary relief until the point where the damage has occurred and effective relief is impossible. Where prisoners' health and safety, or their basic constitutional rights, are put at serious risk, numerous courts have found that continued delay constitutes irreparable harm to the prisoner. *See, e.g., Rosado v. Alameida*, 349 F. Supp.2d 1340, 1350 (S.D. Cal. 2004) (granting preliminary injunction requiring defendants to contact liver transplant centers to determine if they will accept prisoner with life-threatening liver condition); *Laube v. Haley*, 234 F. Supp.2d 1227, 1251 (M.D. Ala. 2002) (granting

preliminary relief to remedy unconstitutionally unsafe conditions in womens' prisons "caused by overcrowding and understaffing in open dorms").

Such irreparable harm would have been the result in two cases in this Circuit. The first, which is currently pending in the Northern District of Illinois, involves claims that the prison and infirmary "exposed [the plaintiff] to severe malnourishment, chronic deteriorating bedsores and infection." *Johnson-Ester v. Elyea*, Min. Order, No. 07-4190 (N.D. Ill. Dec. 4, 2007). In issuing a temporary restraining order preventing transfer of the plaintiff from the University of Illinois Medical Center back to the prison infirmary, the court found that the inmate's "life [was] in peril" and immediate remedy was necessary." *Id*. Similarly, another district court found that the risk of irreparable harm to prisoners with serious mental illness in Wisconsin's Supermax facility included "the development of serious mental illness such as the extreme and bizarre behavior of feces smearing and refusing to eat . . . and the exacerbation of existing symptoms, such as increased depression, hallucination, derealization and acute suicidiality," and entered a preliminary injunction ordering defendants to remove those prisoners from the facility. *Jones'El v. Berge*, 164 F.Supp. 2d 1096, 1122-23 (W.D. Wis. 2001). The parties in that case later entered into a consent decree. *Jones'El v. Berge*, 374 F.3d 541 (7th Cir. 2004) (upholding district court's enforcement of the consent decree).

If the district courts that issued the injunctions described above had been subject to the panel's mandatory regime in factual disputes over exhaustion, those prisoners with meritorious claims (who eventually succeeded in obtaining preliminary relief) might not have received the immediate relief they requested during the period in which they litigated the exhaustion defense. The danger to prisoners who are not able to seek preliminary judicial relief even where they are

in danger of imminent, irreparable injury and can show a likelihood of success on the merits cannot be overstated.

B. The Preliminary Hearing Rule and Bar On Merits Discovery Will Reduce Court Efficiency and Prejudice Prisoners' Ability To Prepare Their Claims

Amici believe, based on their broad experience trying prisoner civil rights cases, that the inflexible preliminary hearing on exhaustion rule and merits discovery bar adopted by the panel will create, rather than reduce, inefficiencies in handling these cases and further hinder prisoners' already limited ability to prepare their claims. Prior to the panel's decision, district courts were already empowered to stay discovery on the merits where appropriate. *See Societe Nationale v. District Court*, 482 U.S. 522, 552 (1987) (courts "normally" exercise "broad discretion . . . in managing pretrial discovery"); *Brill v. Lante Corp.*, 119 F.3d 1266, 1275 (7th Cir. 1997) ("Managing the discovery process is the district court's business"). The panel's mandate that every contested exhaustion defense must be tried prior to any merits discovery strips the district courts of their discretion to direct and manage the claims before them. For example, the panel's opinion bars limited discovery to identify defendants whose names are not known to the plaintiff so that they can be joined in a timely manner. *See, e.g., Billman v. Indiana Dept. of Corrections*, 56 F.3d 785, 789 (7th Cir. 1995) (prisoner's "initial inability to identify the injurers is not by itself a proper ground for the dismissal of the suit" because it would "gratuitously prevent him from using the tools of pretrial discovery to discover the defendants' identity"). It might similarly be read to bar district courts from taking such routine steps as requiring prison officials to preserve evidence. Should a case later proceed on the merits where such early steps were not taken, it may be too late to recover lost evidence, and plaintiffs may face increased difficulty in determining the identity of the defendants.

This preliminary hearing rule and attendant bar on discovery further provides defendants with the incentive to assert the defense even where it is marginal, if only to slow the progress of the case through the court system. Where, as in *Pavey*, the factual disputes related to exhaustion are also intertwined with the merits, the panel's procedure artificially bifurcates the claim and the exhaustion defense such that the parties may have to untangle overlapping discovery and repeat much of the same briefing (and present the same evidence) at the merits stage of the case.

Accordingly, the inflexible rule established by the panel's opinion requiring that exhaustion always be resolved first and the attendant bar on merits discovery until exhaustion is finally resolved will reduce, rather than increase, judicial efficiencies as the district courts are divested of their discretion to manage their dockets and cases are drawn out by two sets of discovery and trials. Neither the panel nor defendants have demonstrated that there is wide-spread abuse of discretion by the district courts in handling these issues. The panel's opinion thus mandates an inflexible regime to fix a problem which does not exist.

II. Prisoners Will be Adversely And Improperly Affected By Being Denied Access To Judicial Relief When Prisons Prevent Exhaustion Of Administrative Remedies

This Court's decision does not just affect prisoners who could have exhausted the prison administrative remedy system but did not. It also applies to prisoners who failed to exhaust through no fault of their own, even if that failure was the result of staff misconduct. *See Pavey*, 528 F.3d at 498 (holding that where a prisoner's "failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), … he will be allowed to go back and exhaust[.]"). Such a mandate neither comports with the PLRA's language, nor its underlying purposes, nor with the goal of efficiently litigating prisoner claims. Indeed, requiring prisoners to return to the same system that has already failed them punishes prisoners for not using an administrative processes which was never available to them. In addition, this

requirement to return to the administrative process provides perverse incentives for officials to hinder that process by removing any repercussions for obstructing prisoners' access to court. This requirement is impractical, inefficient, and unjust.

First, there is as much, if not more, potential for prison personnel to sabotage or retaliate against a prisoner in his second attempt to exhaust, since at that point it is clear the prisoner is suing prison staff. Second, even absent misconduct by officials, prisoners' claims will have become increasingly stale and difficult to prove in the time between the alleged violation, first attempt at exhaustion, litigation in court, return to the administrative system, and re-filing, commencement and completion of litigation on the merits. Third, the panel's procedure ignores the reality of prison administrative systems, which are generally set up only to handle claims made within days or weeks of the incidents involved. *See Woodford v. Ngo*, 548 U.S. 81, 95-96 (2006) ("[T]he deadline for filing an administrative grievance is not very long – 14 to 30 days according to the United States[.]"). Such delay affects both the efficacy of injunctive relief and the practical ability to litigate any claims.

A. Requiring Prisoners To "Go Back And Exhaust" Remedies Rendered Initially Unavailable Through No Fault of Their Own Conflicts With Prior Precedent of this Court and the Purpose of the PLRA

The PLRA does not compel prisoners to wait until administrative remedies **become** available. Rather, it requires that prisoners exhaust those remedies "as **are** available." 42 U.S.C. § 1997e(a). As that language suggests, this Court has consistently held that prisons cannot exploit the exhaustion requirement to thwart prisoners' access to court, nor be "rewarded for preventing an inmate access to an administrative remedy." *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2006). For example, prisoners were allowed to proceed where officials made administrative remedies unavailable by:

- being dilatory and "fail[ing] to respond to inmate grievances," *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002); *Brengettcy v. Horton*, 423 F.3d 674, 682 (7th Cir. 2005); *Turner*, 137 Fed. Appx. at 882;
- mishandling or failing to properly deliver a prisoner's grievances, *Dole v. Chandler*, 438 F.3d 804, 811 (7th Cir. 2006) at 811;
- refusing to provide grievance forms, *Dale*, 376 F.3d at 656;
- misleading prisoners regarding exhaustion of their remedies, *Pavey v. Conley*, 170 Fed. Appx. 4, 8-9 (7th Cir. Feb. 1, 2006);
- failing to assist disabled or incapacitated prisoners file grievance, *see id.* at 9;
- neglecting to provide clear regulations on the proper procedure for exhausting administrative remedies, *Westefer v. Snyder*, 422 F.3d 570, 580 (7th Cir. 2005); or
- harming or threatening prisoners, or engaging in other affirmative misconduct, *see Kaba v. Stepp*, 458 F.3d 678, 684 (7th Cir. 2006).

District courts in this circuit have relied upon this Court's rulings and likewise deemed administrative remedies exhausted where prison officials rendered them unavailable. *See, e.g., Vasquez v. Hilbert*, No. 07-0723, 2008 U.S. Dist. LEXIS 42011 (E.D. Wis. May 28, 2008) (internal citations and quotations omitted) (denying summary judgment where dispute as to whether failure to exhaust resulted from "an error by the prison officials," or the prison's failure to "clearly identify the proper route for exhaustion"); *Goodvine v. Gorske*, No. 06-0862, 2008 U.S. Dist. LEXIS 7517, at *14 (E.D. Wis. Jan. 30, 2008) (denying summary judgment because of question as to whether failure to exhaust was due to a misleading or confusing prison policy); *Johnson-Ester v. Elyea*, No. 07-4190, 2007 U.S. Dist. LEXIS 75912 (N.D. Ill. Oct. 10, 2007) (refusing to dismiss complaint for failure to exhaust where complaint alleged prisoner's serious disability and mental incapacity and his mother tried to pursue administrative remedies on his behalf to no avail); *Lampkins v. Roberts*, No. 06-0639, 2007 U.S. Dist. LEXIS 22695, at *6 (S.D. Ind. Mar. 27, 2007) (denying summary judgment for failure to exhaust because prison did not show that "plaintiff was aware, or even should have been aware" of a procedural deadline);

Cooper v. Rothstein, No. 04-8164, 2007 U.S. Dist. LEXIS 36069, at *5-6 (N.D. Ill. May 17, 2007) (denying summary judgment despite prisoner's failure to exhaust because disputed fact as to whether prison failed to respond to grievance); *Mellender v. Dane County*, No. 06-0298, 2006 U.S. Dist. LEXIS 80103 (W.D. Wis. Oct. 27, 2006) (denying summary judgment for failure to exhaust where jail personnel failed to give prisoner a pencil, his glasses, and otherwise prevented him from filing a grievance).

Prison officials thus understand that they cannot defeat prisoners' claims by refusing to make those administrative remedies available. Deviating from this Circuit's well-reasoned precedent will worsen the unavailability of administrative remedies due to the perverse incentive it creates for prison officials to obstruct exhaustion (and thus access to court). This result does not advance the PLRA's purpose of affording prisons an opportunity to internally redress prisoners' complaints and weeding out unmeritorious claims.

B. Prisoners May Not Be Able To "Go Back And Exhaust" Or Will Suffer Significant Prejudice If They Try To Do So

This Court's requirement for a prisoner to "go back and exhaust" may not be practical or possible for multiple reasons. First, failure to exhaust is often caused by prison officials' interference with the administrative system or prisoners' fear of retaliation for filing grievances.[2]

---

[2] *See, e.g.,* Pearson v. Welborn, 471 F.3d 732, 739-41 (7th Cir. 2002) (affirming jury verdict in favor of prisoner for retaliatory disciplinary complaint filed against him which prevented his removal from the maximum security facility); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir.) (affirming injunction protecting prisoners who were subjected to retaliation for filing grievances and a lawsuit), cert. denied, 534 U.S. 1066 (2001); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (awarding compensatory damages to prisoner placed in isolation for filing grievances); *Maurer v. Patterson*, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge); *see* Brenda V Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3.2 Crim. L. Br. 10 (2008) (discussing retaliation for reporting of prison rape); The Human Rights Watch Global Report on Women's Human Rights, *Punishment and Retaliation*, available at http://www.hrw.org/about/projects/womrep/General-102.htm#P1751_474909 (last visited Jul. 20, 2008) ("[W]ithout exception, prisoners in every state told us of being terrified that if they registered a complaint of sexual abuse the officers would find

Because the parties from whom prisoners must seek their administrative remedies are frequently the same ones who committed the underlying wrong – or are their co-workers – there is as much, if not more, potential for prison personnel to sabotage or retaliate against a prisoner in his second attempt to exhaust. *See Cleavinger v. Sartner*, 474 U.S. 193, 204 (1985) (noting pressures on prison hearing officers to act favorably towards fellow employees in disputes with prisoners). Moreover, under the panel's decision, prisoners have no judicial recourse when prison officials prevent them from exhausting administrative remedies – they must simply try again under the same system in which they were first wronged. Removing any detrimental consequences for interfering with prisoners' abilities to pursue administrative remedies will likely encourage further exploitation of the exhaustion requirement and expose prisoners to unintended adverse consequences – or at least remove any incentive for prison officials to ensure that their grievance systems operate properly.

Second, prisoners may not be able to "go back and exhaust" even in the absence of affirmative misconduct by staff. Federal and state prisons in the Seventh Circuit require that prisoners file grievances within 14 to 60 days after the complained-of conduct occurred.[3] While some prisons allow extensions for "good cause," such determinations are completely

---

out about it and seek retribution against them. In every prison that we visited, such retaliatory acts by officers frequently occurred."); United States General Accounting Office, *Women in Prison Sexual Misconduct by Correctional Staff: Report to the Hon. Eleanor Holmes Norton, House of Representatives* at 7-8, available at http://www.gao.gov/archive/1999/gg99104.pdf (1999) (reporting that full extent of staff sexual misconduct is unknown and underreported due to fear of retaliation and vulnerability felt by female inmates).

[3] *See, e.g.*, 28 C.F.R. § 542.14(a) (2002) (requiring completion of informal procedures and filing of the formal written complaint within 20 days of the event); Ill. Admin. Code tit. 20, § 504.810(a) (2003) ("A grievance shall be filed within 60 days after the discovery of the incident, occurrence, or problem that gives rise to the grievance."); Ind. Dept. of Correction, Policy No. 00-02-301(XV) (Dec. 1, 2005) ("The formal written grievance must be filed within 20 working days from the date of the incident or triggering event."); Wis. Admin. Code DOC § 310.09(6) (2005) ("An inmate shall file a complaint within 14 calendar days after the occurrence giving rise to the complaint . . . .").

discretionary.[4] If the prisons to which the Court orders prisoners to return and go back and exhaust choose not to excuse their untimely filings (even though the Court already found good cause to "allow" the second exhaustion attempt), those claims will remain unexhausted for purposes of the PLRA. *See Dole*, 438 F.3d at 809 (stating that if prisoners fail to properly use the grievance process, prisons can refuse to hear the grievances and the claims can be "indefinitely unexhausted"); *Ford*, 362 F.3d at 400-01 ("If it is too late to pursue administrative remedies, then exhaustion will prove impossible and § 1997e(a) will permanently block litigation.").

Third, even if prisoners are allowed to "go back and exhaust," they still face significant hurdles to obtaining relief, such as the expiration of the limitations period. While courts regularly toll the statutory period during the pendency of the grievance process, the same does not necessarily apply where the statute has run during the period that prisoners pursue judicial remedies. *See Johnson v. Rivera*, 272 F.3d 519, 522 (7th Cir. 2001) (tolling the limitations period during completion of the grievance process). Because this Court has not specifically addressed the issue, prisoners may not be able to rely on equitable tolling to stop the clock for statute of limitations purposes.[5]

---

[4] *See, e.g.*, 28 C.F.R. § 542.14(b) ("Where the inmate demonstrates a valid reason for delay, an extension in filing time may be allowed."); Ill. Admin. Code tit. 20, § 504.810(a) ('[I]f an offender can demonstrate that a grievance was not timely filed for good cause, the grievance shall be considered."); Ind. Dept. of Correction, Policy No. 00-02-301(XV) ("The Facility Head or Department Offender Grievance Manager may consider a grievance or grievance appeal submitted outside the noted timeframes if it appears that there was an appropriate reason for the delay."); Wis. Admin. Code DOC § 310.09(6) ("[T]he institution complaint examiner may accept a late complaint for good cause."); *Hoeft v. Wisher*, 181 Fed. Appx. 549, 550 (7th Cir. 2006) (refusing to consider late grievance despite prisoner's transfer because "the temporary absence did not constitute good cause to excuse the untimeliness.").

[5] Federal courts apply a forum state's statute of limitations and tolling principles to Section 1983 claims. *Wallace v. Kato*, -- U.S. ---, 127 S.Ct. 1091, 1094 (2007); *Hardin v. Straub*, 490 U.S. 536, 538-39 (1989) (internal citations and quotation omitted); *Bd. of Regents of Univ. of State of New York v. Tomanio*, 446 U.S. 478, 484-86 (1980).

Even if prisons allowed untimely exhaustion and equitable tolling were applied, prisoners would still be prejudiced by the resulting delay in obtaining relief. At best, in the absence of officials' misconduct, in *amici*'s experience, it is not unusual for exhaustion to take a year or more. More delay due to prison officials' misconduct would further hamper prisoners' already limited ability to prepare their claims (primarily *pro se*) and obtain timely relief. For example, since prisoners and/or prison officials are frequently transferred, a protracted repeat grievance procedure would impede prisoners' abilities to locate and interview witnesses. Prisoners would also likely be faced with evidentiary problems as witnesses' memories faded over time. Even if innocent prisoners successfully re-navigate the prison administrative process and return to federal court with an exhausted claim, they might be required to pay the filing fee again, despite their lack of culpability in the initial failure to exhaust.[6]

Most significantly though, prisoners would be forced to sit on their claims awaiting completion of the grievance process or wait long enough to satisfy the court that a response is not forthcoming. *See Ford v. Johnson*, 362 F.3d 395, 400 (7th Cir. 2004) (holding that a prisoner who waited six months for a final decision had still could not bring his claim). Even then, prisoners would have to re-file their claims, get through the initial screening, and likely prove up exhaustion at a preliminary hearing before being able to litigate their stale claims on the merits.

"The exhaustion requirement serves legitimate purposes, but it is not intended to give

---

[6] Although this Circuit has not yet decided the question, the practice in the district courts has been to require a new filing fee after non-exhaustion is cured. *See, e.g, O'Richardson v. Orange Crush Tactical Unit*, No. 96-5237, 1996 WL 732513, at *2-3 (N.D. Ill. Dec. 18, 1996); *Pough v. Dep't of Corrections*, No. 96 C 6685, 1996 WL 613176, at *1 (N.D. Ill. Oct. 22, 1996); *Cage v. Smith*, No. 96 C 5969, 1996 WL 613173, at *1 (N.D. Ill. Oct. 22, 1996) (same). *But see Owens v. Keeling,* 461 F.3d 763, 772-774 (6th Cir. 2006) (new filing fee not required).

authorities the opportunity to create insurmountable obstacles to lawsuits that may be essential to protect constitutional and other legal rights." *See Lampkins*, 2007 U.S. Dist. LEXIS 22695, at *4. The Court should thus follow its precedent and avoid creating perverse incentives for prison officials to interfere with the exhaustion requirement. This Court should reconsider penalizing and prejudicing prisoners with potentially meritorious claims for prison officials' misconduct by requiring them to "go back and exhaust" remedies that were not available when they should have been.

CONCLUSION

Amici request that the Court grant plaintiff-appellee's petition for rehearing *en banc* in view of the foregoing conflict of precedent and the adverse consequences that will result if additional procedural requirements are applied to prisoners under the panel's decision.

Dated: July 21, 2008

Respectfully submitted,

One of the Attorneys for *Amici Curiae*

Matthew L. Kutcher (A.R.D.C. #6275320)
Catherine K. Dick (A.R.D.C. #6292702)
Allison V. Passman (A.R.D.C. #6287610)
LATHAM & WATKINS LLP
Sears Tower, Suite 5800
233 South Wacker Drive
Chicago, IL 60606
(312) 876-7700