COMMENT

To Plead or Not to Plead: Does the Prison Litigation Reform Act's Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?

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INTRODUCTION

The number of prisoner complaints has jumped dramatically in recent years — from 6,600 in 1975 to more than 39,000 in 1994.[1] While some of these lawsuits are valid, more and more prisoners file frivolous lawsuits every day.[2] Many of these prisoners file these wasteful and senseless

[1] 141 CONG. REC. S14,418 (1995) (remarks of Sen. Hatch) (stating that in 1994, over 39,000 lawsuits were filed by prisoners in federal courts, resulting in 15% increase from prior year); 141 CONG. REC. S7524 (1995) (remarks of Sen. Dole); Danielle M. McGill, *To Exhaust or Not to Exhaust?: The Prisoner Litigation Reform Act Requires Prisoners to Exhaust All Administrative Remedies Before Filing Excessive Force Claims in Federal Court*, 50 CLEV. ST. L. REV. 129, 130 (2002-2003) (discussing that from 1980 to 1996, petitions filed by federal and state prisoners almost tripled, from 23,230 to 68,235); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1771 (stating that in 1995, prisoner civil rights suits constituted 13% of all civil cases in district courts).

[2] McGill, *supra* note 1, at 130 (stating that courts dismissed 62% of prisoners' petitions and less than 2% of such petitions were adjudicated in favor of prisoners); *see* Patton v. Jefferson Corr. Ctr., 136 F.3d 458, 461 (5th Cir. 1998) (arguing that sheriff and other employees fabricated evidence for purpose of interfering in child custody proceedings in which plaintiff was involved); Abdul-Wadood v. Lee, No. 95-1122, 1996 U.S. App. LEXIS 15924, at *1-2 (7th Cir. June 10, 1996) (demanding return of several magazines seized by correctional officers); Lyell v. Schachle, No. 1-95-0035, 1996 WL 391557, at *1 (M.D. Tenn. Feb. 28, 1996) (arguing Eighth Amendment violation arose when prisoner denied second serving of ice cream); Jones v. Warden of the Stateville Corr. Ctr., 918 F. Supp. 1142, 1145-46 (N.D. Ill. 1995) (claiming male inmates should be allowed access to bras and panties); Scher v. Purkett, 758 F. Supp. 1316, 1316 (E.D. Mo. 1991) (arguing denial of shampoo and

suits as a type of recreational activity.[3] Frivolous lawsuits tie up the courts, waste valuable resources, and lower the quality of justice courts can provide to valid suits.[4] Responding to the courts' irritation and Congress's own frustration with these lawsuits, Congress passed the Prison Litigation Reform Act ("PLRA") in 1996.[5]

The PLRA, which governs all prisoner-initiated suits brought under federal laws, creates various obstacles for prisoners who want to bring suit in federal court.[6] The most important barrier to federal court is the

deodorant violates Eighth Amendment). Prisoners have sued for insufficient storage space, being prohibited from attending a wedding anniversary party, and getting creamy, rather than chunky, peanut butter. 141 CONG. REC. S7524 (1995) (remarks of Sen. Dole); 141 CONG. REC. S14,413 (1995) (remarks of Sen. Dole). Two prisoners also sued because one received a defective haircut by a prison barber and prison officials did not invite the other to a pizza party for a departing prison employee. 141 CONG. REC. S14,413 (1995) (remarks of Sen. Dole); *see also* 141 CONG. REC. S14,627 (1995) (remarks of Sen. Hatch) (describing frivolous suit where prisoner sued officers after cell search, claiming they failed to put his cell back in fashionable condition and mixed his clean and dirty clothes); 141 CONG. REC. S14,418 (1995) (remarks of Sen. Hatch) (describing prisoner who sued to get Reebok or LA Gear sneakers rather than Converse and prisoner who, after flooding his cell, sued when, during cleanup, his pinochle cards got wet); *id*. (remarks of Sen. Kyl) (describing frivolous suit when inmate brought suit after prison officials denied him use of Gameboy video game); 141 CONG. REC. S7527-28 (1995) (describing frivolous suits filed by prisoners in Arizona).

[3] 141 CONG. REC. S7526 (1995) (remarks of Sen. Kyl) ("Most inmate lawsuits are meritless. Filing frivolous civil rights lawsuits has become a recreational activity for long-term residents of our prisons."); 141 CONG. REC. S7527 (1995) (describing prisoners who excessively file suits as recreational habit). Examples given include an inmate who has filed in excess of 100 suits, one prisoner who has filed 184 suits in three years, and a prisoner who has filed more than 700 suits during his incarceration — the most by any single prisoner. *Id*.

[4] 141 CONG. REC. S7524 (1995) (remarks of Sen. Dole) (describing effects of frivolous litigation on justice and court systems); 141 CONG. REC. S14,417-18 (1995) (statement of National Association of Attorneys General). Thirty-three states have estimated that, together, their inmate civil rights suits cost them about $54 million annually. 141 CONG. REC. S14,418 (1995). For all 50 states, the cost of inmate civil rights suits is estimated at $81 million annually. *Id*. Because courts dismiss 95% of suits without the inmate receiving any remedy, the vast majority of the $81 million spent can be attributed to frivolous cases. *Id*.

[5] 42 U.S.C. § 1997e(a) (2004); 141 CONG. REC. S7526 (1995) (remarks of Sen. Kyl) (discussing what PLRA is supposed to accomplish).

[6] Prison Litigation Reform Act, Pub. L. No. 104-134, § 801-10, 110 Stat. 1321-66 (1996). The PLRA represented a major change in prison litigation creating barriers such as administrative exhaustion, forcing even in forma pauperis prisoners to pay filing fees, and creating limits on attorney's fees. Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1660-61 (2002). THE PLRA applies to all prisoner suits, including the two most important civil rights causes of action, under which most prisoners file their suits: 42 U.S.C. § 1983, which allows people to sue state employees for civil rights violations, and *Bivens* actions, which allow people to sue federal employees for civil rights violations. 42

PLRA's exhaustion requirement, section 1997e(a).[7] Section 1997e(a) requires prisoners to exhaust their administrative remedies before they can bring valid suits alleging violations of prison conditions.[8] However, the plain language of the PLRA does not indicate which party should plead administrative remedial exhaustion.[9] The circuits are split about whether the plaintiff or defendant must bear the burden of pleading remedial exhaustion.[10] The majority circuits hold that the defendant must plead failure to exhaust as an affirmative defense.[11] On the other hand, the minority circuits hold that the burden of pleading administrative exhaustion falls on the plaintiff.[12]

This Comment argues that section 1997e(a) creates an affirmative defense requiring the defendant to plead failure to exhaust.[13] Part I

U.S.C. § 1983 (2004); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-97 (1971) (holding that petitioner's complaint states federal cause of action under Fourth Amendment against federal agents). *See generally* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983 (4th ed. 2004) (discussing what section 1983 is and how it provides civil rights protection against state officials); Sonya Gidumal, McCarthy v. Madigan*: Exhaustion of Administrative Agency Remedies and* Bivens, 7 ADMIN. L.J. AM. U. 373, 386-89 (1993) (discussing how *Bivens* created federal cause of action against federal employees).

[7] 42 U.S.C. § 1997e(a) (2004). Section 1997e(a) provides:

> Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Id.

[8] *Id*.; *see* Porter v. Nussle, 534 U.S. 516, 524 (2002) (holding that administrative exhaustion required under section 1997e(a) is mandatory).

[9] 42 U.S.C. § 1997e(a).

[10] *Compare* Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) (holding PLRA creates affirmative defense), *and* Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002) (holding PLRA establishes affirmative defense), *with* Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1210 (10th Cir. 2003) (holding PLRA establishes pleading procedure on plaintiff), *and* Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir. 1998) (holding PLRA establishes pleading procedure on plaintiff).

[11] *Wyatt*, 315 F.3d at 1119; *Ray*, 285 F.3d at 295; Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999) (holding PLRA's exhaustion requirement establishes affirmative defense); Jenkins v. Haubert, 179 F.3d 19, 28-29 (2d Cir. 1999) (holding PLRA's exhaustion requirement creates affirmative defense).

[12] *Steele*, 355 F.3d at 1210; Baxter v. Rose, 305 F.3d 486, 488 (6th Cir. 2002) (holding PLRA's exhaustion requirement establishes pleading requirement); Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000) (holding PLRA's exhaustion requirement establishes pleading requirement); *Brown*, 139 F.3d at 1104.

[13] *Wyatt*, 315 F.3d at 1119; *Ray*, 285 F.3d at 295.

examines the historical background of the exhaustion requirement prior to the PLRA and explains how the law changed after Congress enacted the PLRA. Part II considers the circuit split by looking at two cases representing the majority and minority views, respectively. Part III argues that all circuits should hold that the PLRA's exhaustion requirement creates an affirmative defense. Finally, Part IV suggests possible solutions that would resolve the circuit split and establish that section 1997e(a)'s failure to exhaust provision creates an affirmative defense.

I. BACKGROUND

In 1980, Congress created the first exhaustion requirement when it passed the Civil Rights of Institutionalized Persons Act ("CRIPA"), section 1997e(a).[14] In *McCarthy v. Madison*, the U.S. Supreme Court held that, under CRIPA, administrative exhaustion was not mandatory.[15] Angered by the feverishly rising tide of prison litigation, Congress passed the Prison Litigation Reform Act in 1996, which strengthened CRIPA's section 1997e(a) exhaustion requirement.[16] In *Booth v. Churner*, the U.S. Supreme Court, recognizing section 1997e(a)'s new vigor, held that administrative exhaustion was now mandatory.[17] While current case law mandates administrative exhaustion, neither section 1997e(a) nor the Supreme Court has clearly indicated which party must plead administrative exhaustion.[18]

A. The Exhaustion Requirement Prior to 1996

Prior to 1980, prisoners who wanted to sue in court did not have to satisfy an exhaustion requirement.[19] Congress created the original

[14] Civil Rights of Institutionalized Persons Act, Pub L. No. 96-247, § 7, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997e (1996)).

[15] McCarthy v. Madigan, 503 U.S. 140, 146 (1992) (holding that CRIPA's exhaustion requirement was not mandatory).

[16] 141 CONG. REC. S7523 (1995) (remarks of Sen. Dole) ("Over the past two decades, we have witnessed an alarming explosion in the number of lawsuits filed by State and Federal prisoners."); Prison Litigation Reform Act, Pub. L. No. 104-140, §§ 801-10, 110 Stat. 1327 (1996); 42 U.S.C. § 1997e(a) (1996).

[17] Booth v. Churner, 532 U.S. 731, 741 (2001) (holding that PLRA's exhaustion requirement is mandatory).

[18] Porter v. Nussle, 534 U.S. 516, 524 (2002) (holding fulfillment of PLRA's exhaustion requirement is mandatory); *see* 42 U.S.C. § 1997e(a) (2004).

[19] *See* Winslow, *supra* note 6, at 1668-71. In 1941, the Supreme Court first established that inmates have a right of direct access to the courts. *Id.* at 1668. In 1964, in *Cooper v. Pate*,

exhaustion requirement, section 1997e(a), as part of CRIPA in 1980.[20] CRIPA only applied to 42 U.S.C. § 1983 actions brought by prisoners.[21] A section 1983 action is a cause of action that allows people to sue state employees for civil rights violations.[22] CRIPA did not require prisoners to exhaust administrative remedies before they sued.[23] Instead, CRIPA gave judges the power to require a plaintiff to comply with appropriate administrative proceedings after he or she filed a suit.[24] A judge could

the Supreme Court held that the Civil Rights Act of 1871 protects the fundamental rights of inmates. 42 U.S.C. § 1983 (2004); Cooper v. Pate, 378 U.S. 546 (1964); Winslow, *supra* note 6, at 1668. After the *Cooper* decision, prisoners began to sue for civil rights violations at an astonishing rate. *Id*. at 1670. In 1980, Congress established the first exhaustion requirement with the passage of the Civil Rights of Institutionalized Persons Act. 42 U.S.C. § 1997e(a) (1980).

[20] *See* Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997e), *amended by* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 801-810, 110 Stat. 1321-66 (1996). *See generally* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 493-97 (2001) (discussing CRIPA's exhaustion provision). Congress enacted CRIPA in the face of reports of widespread atrocities and civil rights violations of institutionalized people, including prisoners. *Id*. at 493. Part of CRIPA authorized the U.S. Attorney General to file civil rights actions to stop these problems from occurring. *Id*. at 494. At the same time, CRIPA also created an exhaustion requirement to counterbalance the other protective provisions of CRIPA. *Id*. at 494-95. This counterbalance would encourage local officials to remedy violations in administrative proceedings rather than have the Department of Justice interfere with the officials' operations. *Id*. at 495. CRIPA's exhaustion provision was limited in scope in six ways. *Id*. First, the exhaustion requirement only applied to state and local, not federal, prisoners who brought suit under 42 U.S.C. § 1983, the federal civil rights statute. *Id*. Second, the exhaustion provision only applied to adult prisoners, not juvenile detainees. *Id*. Third, the exhaustion requirement only applied to adult convicted prisoners, not pretrial detainees. *Id*. Fourth, prisoners would only be required to fulfill the exhaustion requirement if the court found that exhaustion would be appropriate and in the interests of justice. *Id*. Fifth, a suit could not be dismissed purely because the prisoner had not tried administrative remedies prior to bringing their suit. *Id*. at 495-96. Sixth, before a court could require a prisoner to use a prison's administrative grievance process, the process had to meet certain requirements as dictated by 42 U.S.C. § 1997e(a)(2). *Id*.

[21] 42 U.S.C. § 1983; *see supra* note 6 (describing 42 U.S.C. § 1983 and its civil rights protection role).

[22] 42 U.S.C. § 1983; *see supra* note 6 (describing 42 U.S.C. § 1983 and its civil rights protection role).

[23] 42 U.S.C. § 1997e(a) (1996); *see* Branham, *supra* note 20 (describing CRIPA's exhaustion requirement).

[24] 42 U.S.C. § 1997e(a)(1) (1996). § 1997e(a)(1) stated:

> Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such

stay a case for up to 180 days to allow administrative exhaustion if he believed administrative proceedings could resolve the suit.[25] A judge could only require a prisoner to exhaust administrative remedies that the judge or an attorney general had certified under section 1997e(a)(2).[26]

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plain, speedy, and effective administrative remedies as are available.

Id.; *see also* Branham, *supra* note 20 (describing CRIPA's exhaustion requirement).

[25] 42 U.S.C. § 1997e(a)(1) (1996); *see also* Branham, *supra* note 20 (describing CRIPA's exhaustion requirement).

[26] 42 U.S.C. § 1997e(a)(2) (1996). § 1997e(a)(2) stated: "The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective." *Id.*; *see also* Branham, *supra* note 20 (describing CRIPA's exhaustion requirement). Under section 1997e(a), certified administrative remedies met minimum acceptable standards or had been determined to be fair and effective. *See* 42 U.S.C. § 1997e(b) (1996). Section 1997e(b) stated:

> (b) Minimum standards for development and implementation of system for resolution of grievances of confined adults; consultation, promulgation, submission, etc., by Attorney General of standards
>
> > (1) No later than one hundred eighty days after May 23, 1980, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of Title 5. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.
> >
> > (2) The minimum standards shall provide —
> >
> > > (A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;
> > >
> > > (B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;
> > >
> > > (C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;
> > >
> > > (D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and
> > >
> > > (E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct

The U.S. Supreme Court interpreted CRIPA's exhaustion requirement in *McCarthy v. Madigan*, where it held that exhaustion of administrative procedures was not mandatory.[27] The Court created a balancing test to determine if courts should require administrative remedies in any specific case.[28] Under CRIPA, unless a judge required it, a prisoner did not have to comply with any administrative proceedings prior to bringing a valid suit.[29] After *McCarthy*, prisoners began to bog down the court system by filing a flurry of frivolous suits.[30] Therefore, courts began to look for relief.

B. The Prison Litigation Reform Act

Worried by increasing prison litigation, which was wasting valuable judicial and legal resources, Congress passed the PLRA in 1996.[31] With the goal of achieving a fifty percent reduction in bogus prisoner claims, the PLRA prevents frivolous prisoner litigation in three ways.[32] First, the PLRA stops federal courts from interfering with and micro-managing

supervision or direct control of the institution.

Id.; *see also* Branham, *supra* note 20 (describing CRIPA's exhaustion requirement).

[27] McCarthy v. Madigan, 503 U.S. 140, 146 (1992) (holding fulfillment of CRIPA's exhaustion requirement not mandatory).

[28] *Id.* ("In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.").

[29] *Id.*

[30] For statistics on rising numbers of prisoner lawsuits, see *supra* notes 1 and 2.

[31] Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321-66 (1996); Robinson v. Young, No. 02-2945-M1/V, 2003 U.S. Dist. LEXIS 26102, at *7 (W.D. Tenn. Feb. 28, 2003) ("The purpose of 42 U.S.C. § 1997e(a) is threefold: to promote judicial efficiency, to encourage prison officials to address legitimate complaints and thereby prevent future injuries, and to create a record that permits speedy and efficient review of the merits of properly filed complaints."); 141 CONG. REC. S7524 (1995) (remarks of Sen. Dole) ("Over the past two decades, we have witnessed an alarming explosion in the number of lawsuits filed by State and Federal prisoners."). Senator Dole then discussed some of the frivolous litigation brought by these prisoners. *Id.*; *see* 141 CONG. REC. S14,418 (1995) (remarks of Sen. Hatch) ("This landmark litigation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits."); *see also* McGill, *supra* note 1, at 133 (giving statistics about increased numbers of prison litigation). From 1980 to 1996, prisoner-initiated litigation increased 300%. *Id.* Ninety-five percent of these suits proved to be without merit and judges dismissed them prior to trial. *Id.*

[32] 141 CONG. REC. S7526 (1995) (remarks of Sen. Kyl) ("If we achieve a fifty percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and non-prisoners."); 141 CONG. REC. S14,316-17 (1995) (remarks of Sen. Abraham) (stating that frivolous lawsuits waste judicial resources).

state prisons.[33] Second, the PLRA contains several measures, such as reductions in attorney's fees awards, to reduce frivolous litigation.[34] Third, and most importantly, the PLRA reduces frivolous prisoner litigation by intensifying CRIPA's exhaustion requirement.[35]

The PLRA strengthened CRIPA's version of section 1997 e(a), in effect making it more difficult for prisoners to bring lawsuits.[36] First, the PLRA's exhaustion requirement applies broadly, encompassing more prisoner litigation than had CRIPA's exhaustion requirement.[37] While CRIPA's requirement only applied to section 1983 civil rights actions, the PLRA's version of section 1997e(a) applies to all prisoner-initiated suits about prison conditions, no matter what federal law the suit is brought under.[38] Second, judges lost their discretion to decide if the exhaustion requirement applied in specific cases.[39] Instead, section 1997e(a) now compels all prisoners to complete mandatory administrative remedial procedures.[40] Prisoners must complete administrative exhaustion before they can bring valid suits, regardless of what administrative remedies

[33] 141 CONG. REC. S14,316 (1995) (remarks of Sen. Abraham) (stating that federal courts have micro-managed and interfered in federal and state prisons for too long).

[34] 141 CONG. REC. S14,317 (1995) (remarks of Sen. Abraham); *see also* Branham, *supra* note 20, at 491-93 (discussing various provisions of PLRA). The PLRA consists of a collection of provisions designed to slow the filing of frivolous lawsuits. *Id*. For example, most prisoners must pay at least an initial filing fee, prisoners must have a physical injury to bring mental and emotional injury suits, prisoners who file frivolous suits can lose good-time credits, and new limits on attorney's fees can substantially limit prisoners' recovery. *Id*.

[35] 42 U.S.C. § 1997e(a) (2004).

[36] Branham, *supra* note 20, at 497-98 (discussing how PLRA has modified CRIPA's exhaustion requirement). The PLRA modifies CRIPA's exhaustion requirement in four ways. *Id*. First, a court must dismiss all suits in which administrative remedies have not been exhausted. *Id*. Second, federal and juvenile prisoners are now subject to the exhaustion requirement in section 1997e(a). *Id*. Third, the PLRA eliminates the cap on the exhaustion period, which had been 180 days. *Id*. Fourth, the PLRA requires that if administrative remedies are available, prisoners must exhaust them. *Id*.

[37] 42 U.S.C. § 1997e(a) (2004) (stating that exhaustion requirement applies to all federal causes of action). CRIPA's exhaustion requirement only applied to section 1983 cases. 42 U.S.C. § 1997e(a) (1996).

[38] 42 U.S.C. § 1997e(a) (2004); Porter v. Nussle, 534 U.S. 516, 524 (2002) (holding that actions brought against federal officers as *Bivens* actions must also first exhaust administrative grievance procedures before they can be brought in federal court).

[39] Booth v. Churner, 532 U.S. 731, 739 (2001) ("That scheme, however, is now a thing of the past, for the amendments eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be plain, speedy and effective before exhaustion could be required.").

[40] *Porter*, 534 U.S. at 524 ("Once within the discretion of the district court, exhaustion in cases covered by § 1997e(a) is now mandatory.").

are available or what damages their lawsuits seek.[41]

II. CURRENT STATE OF THE LAW

Section 1997e(a)'s plain language does not assign the burden of pleading administrative exhaustion to either party.[42] While holding that section 1997e(a) required mandatory administrative exhaustion, the Supreme Court did not decide which party has the burden of pleading exhaustion.[43] Without direct guidance from section 1997e(a) or the U.S. Supreme Court, each circuit court has developed its own position.[44] The majority rule establishes that section 1997e(a) creates an affirmative defense of failure to exhaust that a defendant must plead.[45] The Sixth

[41] *Id*. ("All 'available' remedies must now be exhausted; these remedies need not meet federal standards, nor must they be 'plain, speedy or effective.'"); *id*. ("Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit.").

[42] 42 U.S.C. § 1997e(a) (2004).

[43] *Porter*, 534 U.S. at 524 (holding that administrative exhaustion is mandatory, but not mentioning anywhere in decision which party has burden of pleading exhaustion).

[44] *Compare* Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) (holding PLRA creates affirmative defense), *and* Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002) (holding PLRA creates affirmative defense), *with* Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1210 (10th Cir. 2003) (holding PLRA establishes pleading requirement), *and* Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir. 1998) (holding PLRA establishes pleading requirement). It is currently unclear which view the Fifth Circuit will adopt. Johnson v. Johnson, 385 F.3d 503, 516 n.7 (5th Cir. 2004) (declining to decide if section 1997e(a) establishes pleading requirement or affirmative defense, while acknowledging that prior cases suggest pleading requirement); Wendell v. Asher, 162 F.3d 887, 890 (5th Cir. 1998) (holding in dicta that "the amended statute imposes a requirement, rather like a statute of limitations, that may be subject to certain defenses such as waiver, estoppel, or equitable tolling.").

[45] The majority view is held by the First, Second, Third, Seventh, Eighth, Ninth, and D.C. Circuits. *Wyatt*, 315 F.3d at 1119 (holding PLRA's exhaustion requirement creates affirmative defense); Casanova v. Dubois, 304 F.3d 75, 77-78 (1st Cir. 2002) (holding PLRA's exhaustion requirement creates affirmative defense); *Ray*, 285 F.3d at 295 (holding PLRA's exhaustion requirement creates affirmative defense); Jackson v. District of Columbia, 254 F.3d 262, 267 (D.C. Cir. 2001) (holding by implication that PLRA's exhaustion requirement creates affirmative defense); Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999) (holding PLRA's exhaustion requirement creates affirmative defense); Perez v. Wis. Dep't of Corr., 182 F.3d 532, 536 (7th Cir. 1999) (holding that PLRA's exhaustion requirement should be treated like statute of limitations and that defendants can waive or forfeit reliance on section 1997e(a) just as they can waive or forfeit benefit of statute of limitations); Jenkins v. Haubert, 179 F.3d 19, 28-29 (2d Cir. 1999) (holding PLRA's exhaustion requirement creates affirmative defense); *see also* Foulk v. Charrier, 262 F.3d 687, 697 (8th Cir. 2001) (holding that PLRA's exhaustion requirement creates affirmative defense). It is unclear whether

and Tenth Circuits' minority view places the burden of pleading administrative exhaustion on the plaintiff.[46] The differences between the majority and minority views center on the courts' conflicting interpretations of section 1997e(a).[47]

A. Wyatt v. Terhune*: The Majority's Pronouncement*

Earl Wayne Wyatt served a seventeen-year sentence for voluntary manslaughter at Mule Creek State Prison in Ione, California.[48] As a practicing Rastafarian, Wyatt wore his hair in dreadlocks.[49] While in prison, Wyatt filed a section 1983 action against the wardens of Mule Creek challenging state prison regulations that require short haircuts for men.[50] Wyatt stated that the regulations violated his fundamental rights in two ways.[51] First, the regulations violated his right to freely practice religion established by the First Amendment and the Religious Freedom Restoration Act ("RFRA").[52] Second, the regulations violated his Fourteenth Amendment right to equal protection.[53]

The defendants brought a Rule 12(b)(1) motion to dismiss for lack of

Foulk v. Charrier will continue to be the rule in the Eighth Circuit because, prior to *Foulk*, three cases all held that PLRA's exhaustion requirement created a pleading requirement. Jarrett v. Norris, No. 00-2953, 2001 U.S. App. LEXIS 14200 (8th Cir. June 25, 2001); Gill v. Herndon, No. 00-3004, 2001 U.S. App. LEXIS 8571 (8th Cir. May 8, 2001); McAlphin v. Morgan, 216 F.3d 680 (8th Cir. 2000). The *Foulk* court did not discuss, cite, or specify whether it overruled these cases.

[46] *Steele*, 355 F.3d at 1210 (holding that PLRA's exhaustion requirement establishes pleading requirement); Baxter v. Rose, 305 F.3d 486, 488 (6th Cir. 2002) (holding that PLRA's exhaustion requirement establishes pleading requirement); Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000) (holding that PLRA's exhaustion requirement establishes pleading requirement); *Brown*, 139 F.3d at 1104 (holding that PLRA's exhaustion requirement establishes pleading requirement).

[47] *Steele*, 355 F.3d at 1210; *Wyatt*, 315 F.3d at 1119.

[48] *Wyatt*, 315 F.3d at 1112.

[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] *Id*.; *see* U.S. CONST. amend. I (creating constitutional right to freedom of religion); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994). *City of Boerne v. Flores*, 521 U.S. 507 (1997), declared that the Religious Freedom Restoration Act ("RFRA") was unconstitutional as applied to the states. After the Supreme Court declared RFRA unconstitutional, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA") in order to provide prisoners a statutory free exercise right. *See* RLUIPA, 42 U.S.C. § 2000cc-1 (2000). *See generally* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575 (1998) (discussing RFRA and its effect on religious freedom cases).

[53] *Wyatt*, 315 F.3d at 1112; *see* U.S. CONST. amend. XIV, § 1 (creating constitutional right to equal protection of laws).

subject-matter jurisdiction.[54] Additionally, the defendants, uncertain about how the court classified the exhaustion requirement, argued that the court should dismiss for failure to exhaust.[55] The district court granted the defendants' motion to dismiss.[56] The court concluded Wyatt's claim was invalid because he had failed to exhaust his administrative remedies.[57]

On appeal, the Ninth Circuit overturned the district court.[58] The court held that the defendants did not meet their burden of pleading exhaustion as an affirmative defense.[59] Rather than creating a pleading requirement burdening the plaintiff, section 1997e(a) establishes an affirmative defense that the defendant must plead.[60]

The Ninth Circuit rejected the defendants' argument that section 1997e(a) creates a pleading requirement for three reasons.[61] First, the Ninth Circuit held that section 1997e(a) should be treated as an affirmative defense, like statutes of limitations, because both share similar imperative language.[62] Second, the Ninth Circuit recognized that courts should not impose heightened pleading requirements without an express order from Congress.[63] The Ninth Circuit did not find an express order in the statute's language and refused to read a heightened pleading requirement into the statute.[64] Third, the Ninth Circuit did not want to impose a heightened pleading requirement on the plaintiff for policy reasons.[65] Instead, prison officials, who have greater access to

[54] *Wyatt*, 315 F.3d at 1116.

[55] *Id*.

[56] *Id.* at 1117.

[57] *Id.*

[58] *Id*. at 1120-21.

[59] *Id.* at 1120.

[60] *Wyatt*, 315 F.3d at 1119 ("We therefore agree with five other circuits that non-exhaustion under section 1997e(a) of the PLRA does not impose a pleading requirement. We hold that section 1997e(a) creates a defense — defendants have the burden of raising and proving the absence of exhaustion.").

[61] *Id*. at 1117.

[62] *Id*. (citing Perez v. Wis. Dep't of Corr., 182 F.3d 532, 536 (7th Cir. 1999)); Jackson v. District of Columbia, 89 F. Supp. 2d 48, 56 (D.D.C. 2000) (holding PLRA's exhaustion requirement and statutes of limitations have equally imperative language and both establish affirmative defenses).

[63] *Wyatt*, 315 F.3d at 1118.

[64] *Id*. at 1118-19. Legislatures know how to indicate that they want to create heightened pleading requirements. *Id*. Without an explicit legislative statement, courts should not impose heightened pleading requirements. *Id*.

[65] *Id*. at 1119 (holding that imposing technical pleading requirement would be contrary to liberal pleading approach and prison officials are likely to have greater legal expertise

prison records and greater legal expertise, should prove failure to exhaust.[66] For these three reasons, the Ninth Circuit held that the PLRA created an affirmative defense, not a pleading requirement.[67] While the minority circuits have considered these same arguments, they have concluded that section 1997e(a) establishes a pleading requirement on the plaintiff.[68]

B. Steele v. Federal Bureau of Prisons*: The Minority's Declaration*

The Tenth Circuit's decision in *Steele v. Federal Bureau of Prisons* reflects the minority view that section 1997e(a) creates a pleading requirement.[69] While Victor Steele was incarcerated at the U.S. Penitentiary in Florence, Colorado, Federal Bureau of Prisons ("BOP") officials placed him in special housing.[70] When Steele concluded his confinement, he discovered that the prison had misplaced his possessions.[71] Steele filed an administrative tort claim alleging that BOP employees negligently lost his possessions.[72] However, Steele did not file an administrative grievance under the prison's separate procedure for complaints about prison conditions.[73] Once it became clear that the parties could not agree to settle, Steele filed two claims: a Federal Tort Claims Act ("FTCA") claim and a *Bivens* claim.[74] The FTCA allows an individual to sue the federal government when he or she is injured by a federal employee.[75] A *Bivens* action is a judicially-created cause of action that allows people to sue federal employees for civil rights violations.[76] Steele indicated in his

and superior access to prison administrative records).

[66] *Id*. ("In addition, prison officials are likely to have greater legal expertise and, as important, superior access to prison administrative records in comparison to prisoners, especially, as is often the case, when prisoners have moved from one facility to another.").

[67] *Id*. at 1117-19.

[68] *Infra* Part II.B.

[69] Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1210 (10th Cir. 2003).

[70] *Id*. at 1206.

[71] *Id*.

[72] *Id*.

[73] *Id*.

[74] *Id*.

[75] S*ee* Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-80 (2000). *See generally* Gidumal, *supra* note 6, at 375 n.12 (1993) (discussing what Federal Tort Claims Act consists of). Congress enacted the FTCA so that people could sue the federal government when a federal employee injured them. *Id*.

[76] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-97 (1971). Steele filed a *Bivens* action, alleging that the BOP personnel had violated his civil rights by abusing the tort-claim process and conspiring to violate his property rights.

complaint that he had exhausted the available prison administrative remedies.[77]

The defendants moved to dismiss before the district court, claiming that Steele lacked subject-matter jurisdiction and failed to state a claim.[78] They argued that Steele could not bring a valid *Bivens* claim because Steele had not exhausted his available administrative remedies.[79] In an affidavit they attached to their complaint, the defendants alleged that Steele had not pursued the grievance procedure for prison conditions complaints.[80] Steele responded, alleging that the grievance procedure is inaccessible to inmates because the mandatory first step requires cooperation of a prison staff member.[81] Thus, he asked the court to waive the exhaustion requirement.[82] On referral, the magistrate judge recommended dismissal of the entire action for failure to exhaust.[83] The district court, adopting the recommendation, dismissed the action with prejudice.[84]

Steele appealed to the Tenth Circuit, which affirmed the district court's ruling.[85] First, the Tenth Circuit agreed there was no subject-matter jurisdiction over the FTCA claim because the government had sovereign immunity.[86] Second, the Tenth Circuit held that Steele could not bring a valid *Bivens* claim because he had not exhausted his available administrative remedies.[87] Rejecting Steele's request for an exhaustion waiver, the Tenth Circuit reaffirmed that prisoners must exhaust administrative remedies before they can sue in federal court.[88] Once a prisoner has accomplished administrative remedial exhaustion, the prisoner plaintiff has the burden of pleading exhaustion in his complaint.[89] Essentially, section 1997e(a) does not establish an

Steele, 355 F.3d at 1206.

[77] *Steele*, 355 F.3d at 1206.

[78] *Id.* at 1207.

[79] *Id.*

[80] *Id.* (stating that complaint's attached affidavits established Steele had filed administrative tort claims, not prison condition complaints).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 1214.

[86] *Id.* at 1213-14.

[87] *Id.* at 1214.

[88] *Id.* at 1207, 1210.

[89] *Id.* at 1210 ("Instead, we conclude that section 1997e(a) imposes a pleading requirement on the prisoner.").

affirmative defense because a defendant cannot waive section 1997e(a) when he fails to plead failure to exhaust.[90] The Tenth Circuit held that the burden of pleading exhaustion should be on the plaintiff because he filed the original administrative grievance and federal suit.[91] Therefore, the prisoner is the person most qualified to show that he has exhausted all administrative remedies.[92]

To satisfy this burden of proof in a Tenth Circuit court, a plaintiff must complete two steps.[93] First, a plaintiff must file a complaint that meets the pleading requirements of Federal Rule of Civil Procedure 8(a)(2).[94] Second, a plaintiff must attach copies of all applicable administrative paperwork.[95] If a plaintiff does not have copies of the paperwork, he must attach a description of the administrative proceedings to the complaint.[96]

The Tenth Circuit held that these pleading requirements do not establish a judicially-created heightened pleading requirement.[97] Instead, the PLRA establishes a unique procedure that requires these heightened pleading requirements.[98] The PLRA requires courts to screen each lawsuit immediately after filing to determine the suit's validity.[99] The plaintiff must specifically plead exhaustion so that a judge can have sufficient information to screen the case effectively.[100]

III. ANALYSIS

The majority view, as followed by the Ninth Circuit in *Wyatt v.*

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[90] *Id*. at 1209.

[91] *Id*. at 1210.

[92] *Id*.

[93] *Id*. (holding that plaintiff must plead short statement and attach proof that plaintiff exhausted administrative remedies).

[94] *Id*.; *see* FED. R. CIV. P. 8(a)(2) (providing that plaintiff must plead "a short and plain statement of the claim showing that the pleader is entitled to relief").

[95] *Steele*, 355 F.3d at 1210.

[96] *Id.*

[97] *Id*. The Tenth Circuit held that the pleading requirements were consistent with both the provisions of the PLRA and the Federal Rules of Civil Procedure. *Id.* Because the PLRA itself requires the heightened pleading requirements, the heightened requirements are not judicially created, but instead are created by statute. *Id.*

[98] *Id*. at 1211 (holding that specifically pleading exhaustion takes its authority from PLRA's exhaustion requirement).

[99] *Id*. (citing Baxter v. Rose, 305 F.3d 486, 490 (6th Cir. 2002)). No action by a prisoner can validly be brought in federal court until all administrative remedies have been exhausted. 42 U.S.C. § 1997e(a) (2004).

[100] *Steele*, 355 F.3d at 1211.

Terhune, correctly holds that the PLRA's exhaustion requirement creates an affirmative defense under section 1997e(a). The majority view properly establishes an affirmative defense for three reasons.[101] First, the majority circuits' interpretation of section 1997e(a)'s language accurately supports the finding that section 1997e(a) creates an affirmative defense.[102] Second, the purposes behind section 1997e(a) show that Congress intended section 1997e(a) to create an affirmative defense.[103] Third, public policy supports the majority's view that section 1997e(a) establishes an affirmative defense.[104]

A. The Majority Interpretation of Section 1997e(a)'s Language Supports Finding that the Exhaustion Requirement Creates an Affirmative Defense

The plain language of section 1997e(a) requires prisoners to exhaust their administrative remedies before they can bring a valid suit in federal court.[105] While the plain language creates an exhaustion requirement, section 1997e(a) does not specify which party must plead exhaustion.[106] The majority circuits hold that section 1997e(a) creates an affirmative defense that the defendants must plead.[107]

Despite all of the apparent indications that section 1997e(a) creates an affirmative defense, the minority circuits argue otherwise.[108] These courts argue that, for two reasons, section 1997e(a) does not create an affirmative defense because courts cannot waive section 1997e(a).[109] First, in *Porter v. Nussle*, the U.S. Supreme Court held that exhaustion under section 1997e(a) was mandatory, without deciding which party had the burden of pleading exhaustion.[110] The minority circuits argue

[101] *Infra* Part III.

[102] *Infra* Part III.A.

[103] *Infra* Part III.B.

[104] *Infra* Part III.C.

[105] Ray v. Kertes, 285 F.3d 287, 294 (3d Cir. 2002) (holding that plain language of section 1997e(a) requires prisoners to exhaust their administrative remedies before filing suit).

[106] 42 U.S.C. § 1997e(a) (2004).

[107] Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).

[108] Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1209-10 (10th Cir. 2003) (holding PLRA does not establish affirmative defense and that Congress intended PLRA to place pleading requirement on plaintiff because section 1997e(a)'s language cannot be waived); *accord* Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir. 1998) (holding PLRA does not establish affirmative defense).

[109] *Steele*, 355 F.3d at 1210.

[110] Porter v. Nussle, 534 U.S. 516, 524 (2002) (holding that section 1997e(a)'s exhaustion requirement is mandatory).

that waiving the mandatory exhaustion requirement would trivialize *Porter*'s holding.[111] Second, section 1997e(a)'s language requiring mandatory exhaustion does not imply that Congress intended to create any exceptions to the statute.[112] Section 1997e(a) states that "no action shall be brought . . . until administrative remedies as are available are exhausted."[113] When language is unambiguous, the courts should accept the statutory language at face value without further inquiry.[114] Because section 1997e(a) clearly sets up a mandatory scheme with no exceptions, section 1997e(a) cannot create a waivable affirmative defense.[115] Furthermore, because section 1997e(a) does not create an affirmative defense, the plaintiff has the burden of pleading exhaustion.[116]

The minority circuits erred in holding that section 1997e(a) clearly requires a plaintiff to plead administrative exhaustion.[117] Unlike the minority circuits, the majority circuits believe that section 1997e(a)'s plain language is ambiguous as to which party is to plead exhaustion.[118]

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[111] *Steele*, 355 F.3d at 1209 ("This court, however, has warned against 'trivializing the Supreme Court's holding . . . that exhaustion is now mandatory.'").

[112] *Brown*, 139 F.3d at 1103 ("The statute thus requires the exhaustion of all available state administrative remedies by the prisoner before a federal court may entertain and decide his section 1983 action."); *id*. at 1104 (holding that section 1997e(a) consists of plain, mandatory language regarding exhaustion of remedies).

[113] 42 U.S.C. § 1997e(a) (2004). Section 1997e(a) provides:

> Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), 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.

Id.

[114] *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (holding that "where, as here, the words of the statute are unambiguous, the judicial inquiry is complete."); Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."); Rubin v. United States, 449 U.S. 424, 430 (1981) (holding that where court finds statutory terms unambiguous, judicial inquiry is complete unless there are rare or exceptional circumstances).

[115] *Steele*, 355 F.3d at 1209 (declining to characterize section 1997e(a) as creating affirmative defense because it cannot be waived — section 1997e(a) exhaustion is mandatory).

[116] *Id*. at 1210 (holding section 1997e(a) establishes pleading requirement for plaintiffs); Baxter v. Rose, 305 F.3d 486, 488 (6th Cir. 2002) (holding section 1997e(a) creates pleading requirement for plaintiffs).

[117] Wyatt v. Terhune, 315 F.3d 1108, 1117 (9th Cir. 2003).

[118] 42 U.S.C. § 1997e(a) (2004); *see Wyatt*, 315 F.3d at 1117 ("In reaching a contrary conclusion, the Sixth Circuit emphasized the strong language of section 1997e(a), which

By looking beyond the plain language of section 1997e(a), the majority circuits' interpretations of section 1997e(a) confirm that section 1997e(a) creates an affirmative defense.[119]

A comparison between the language in section 1997e(a) and the language in statutes of limitations supports the majority's position.[120] The imperative language of section 1997e(a), similar to the imperative language of statutes of limitations, creates an affirmative defense.[121] Section 1997e(a)'s plain language demands that a plaintiff exhaust administrative remedies prior to bringing suit.[122] Similarly, statutes of limitations have imperative fulfillment language, which courts have held creates an affirmative defense.[123] For example, a District of Columbia statute of limitations states "an action . . . arising under this article must be commenced within three years after the cause of action accrues."[124] The statute's strong language implies that no exceptions can be made to the filing requirement.[125] However, regardless of the commanding language of the D.C. statute, the Federal Rules of Civil Procedure establish that statutes of limitations create affirmative defenses.[126] The guidance provided by the Federal Rules trumps the lack of clarity surrounding which party bears the burden of pleading in the statute of limitations.[127]

Likewise, section 1997e(a) offers commanding, yet ambiguous,

begins 'no action shall be brought.' Such language, however, is inconclusive.").

[119] *Infra* Part III.A.

[120] Jackson v. District of Columbia, 89 F. Supp. 2d 48, 56-57 (D.D.C. 2000) (holding that even though D.C. Code 28:4-111 and section 1997e(a) state their obligations differently, both should be treated similarly because both delineate strict requirements for suit).

[121] Ray v. Kertes, 285 F.3d 287, 292 (3d Cir. 2002).

[122] *Id.*

[123] *Id.*; *see* FED. R. CIV. P. 8(c) (2004) (listing "statute of limitations" as affirmative defense).

[124] D.C. CODE ANN. § 28:4-111 (2000). This statute of limitations deals with suits concerning bank deposits and collections under D.C.'s Uniform Commercial Code. The essential language states: "An action to enforce an obligation, duty, or right arising under this article must be commenced within three years after the cause of action accrues." *Id.*; *Jackson*, 89 F. Supp. 2d at 56-57 (discussing D.C. CODE ANN. § 28: 4-111 and statute of limitations, and comparing its mandatory language to mandatory language of section 1997e(a)).

[125] *Jackson*, 89 F. Supp. 2d at 56-57 (holding that D.C. statute of limitations establishes strict requirements for suit).

[126] *Id.* (recognizing that, under Rule 8(c), statute of limitations is affirmative defense); *see* FED. R. CIV. P. 8(c) (2004) (listing "statute of limitations" as affirmative defense).

[127] FED. R. CIV. P. 8(c) (2004) (listing "statute of limitations" as affirmative defense).

language that is similar to the language of statutes of limitations.[128] Section 1997e(a) states "no action shall be brought . . . until administrative remedies are exhausted."[129] Section 1997e(a)'s language is commanding, but it fails to state which party has the burden of pleading.[130] Since statutes of limitations and section 1997e(a) contain similar imperative, but ambiguous, language, courts should interpret both ambiguities in the same light — as affirmative defenses.[131]

Current common law interpretation of Title VII's exhaustion requirement bolsters the interpretation that section 1997e(a)'s ambiguous language creates an affirmative defense.[132] Title VII's exhaustion requirement states that "within 90 days of receipt of notice of final action . . . or after 180 days from the filing of the initial charge . . . an employee . . . may file a civil action."[133] The language requires that an employee file

[128] *Jackson*, 89 F. Supp. 2d at 57 (holding that even though D.C. Code 28:4-111 and section 1997e(a) state their obligations differently, both should be treated similarly because both delineate strict requirements for suit).

[129] 42 U.S.C. § 1997e(a) (2004). Section 1997e(a) provides:

> Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), 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.

Id.; *Jackson*, 89 F. Supp. 2d at 56 (stating that language of statutes of limitations tend to be equally imperative as section 1997e(a)).

[130] 42 U.S.C. § 1997e(a) (2004).

[131] Perez v. Wis. Dep't of Corr., 182 F.3d 532, 536 (7th Cir. 1999) (holding that PLRA's exhaustion requirement should be treated, like statute of limitations, as affirmative defense); Wendell v. Asher, 162 F.3d 887, 890 (5th Cir. 1998) (holding in dicta that "the amended statute imposes a requirement, rather like a statute of limitations, that may be subject to certain defenses such as waiver, estoppel or equitable tolling"); *Jackson*, 89 F. Supp. 2d at 57. It is at no moment that this statute of limitations states its obligation positively ("An action . . . must be commenced") while section 1997e(a) states it negatively ("No action shall be brought"); both delineate strict requirements for suit, so it seems to the court appropriate to treat them similarly for procedural purposes. *Id.*

[132] Williams v. Runyon, 130 F.3d 568, 573 (3d Cir. 1997) (holding that Title VII's exhaustion requirement creates affirmative defense).

[133] 42 U.S.C. § 2000e-16(c). Section 2000e-16(c) states:

> Civil action by party aggrieved. Within 90 days of receipt of notice of final action taken by a department, agency or unit referred to in subsection 717(a) [subsection (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after 180 days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on

an administrative complaint before they can bring a valid claim.[134]

Courts have held that Title VII's exhaustion requirement creates an affirmative defense regardless of the imperative language in the statute.[135] Where Title VII's exhaustion requirement gives plaintiffs specific filing deadlines for bringing a suit, section 1997e(a) tells plaintiffs that that they cannot bring an action until they exhaust administrative remedies.[136] Both statutes require the completion of elements before an individual can bring a valid suit.[137] Despite this mandatory phrasing, neither statute's language concludes that the burden of pleading falls on the plaintiff.[138] Indeed, courts hold that Title VII's exhaustion requirement establishes an affirmative defense.[139]

> appeal from a decision or order of such department, agency or unit, until such time as final action may be taken by a department, agency or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 U.S.C. § 2000e-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Id.

[134] Roosevelt, *supra* note 1, at 1801. Title VII's exhaustion requirement has various elements. *Id*. First, a federal employee must exhaust administrative remedies available from his or her employer. *Id*. Second, the employee must make timely and required filings with the Equal Employment Opportunity Commission ("EEOC"). *Id*. After these elements have resulted in a final administrative action, an employee has either 90 or 180 days, depending on the status of his or her action, to file a civil action in court. 42 U.S.C. § 2000e-16(c) (2004).

[135] *See* Robinson v. Dalton, 107 F.3d 1018, 1020-21 (3d Cir. 1997) (stating that plaintiff must have exhausted available administrative remedies in order to sue, and in Title VII actions, failure to exhaust is affirmative defense like statutes of limitations).; *accord* Gill v. Summers, No. 00-CV-5181, 2001 U.S. Dist. LEXIS 2954, at *6 (E.D. Penn. Mar. 6, 2001) (describing and citing to *Williams* and *Robinson*). Courts have also waived the preliminary requirements of Title VII. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."). The preliminary filing deadline is detailed in 42 U.S.C. § 2000e-5(e) (2004).

[136] 42 U.S.C. § 1997e(a) (2004). For section 1997e(a)'s text, see *supra* note 113. *See also* 42 U.S.C. § 2000e-16(c) (2004). For statute's complete text, see *supra* note 134.

[137] 42 U.S.C. § 1997e(a) (2004); *id*. U.S.C. § 2000e-16(c); Porter v. Nussle, 534 U.S. 516, 524 (2002) (holding that exhaustion under section 1997e(a) is mandatory); *Gill*, 2001 U.S. Dist. LEXIS 2954, at *6 (holding that "as a precondition to filing suit under Title VII, however, plaintiff must have exhausted available administrative remedies.").

[138] Ray v. Kertes, 285 F.3d 287, 292 (3d Cir. 2002) ("Just as the imperative language in PLRA's exhaustion requirement does not, of itself, act as a jurisdictional bar, neither does the mandatory phrasing determine the burden of pleading."); *Williams*, 130 F.3d at 573 (holding that in Title VII actions, failure to exhaust administrative remedies is affirmative defense like statute of limitations).

[139] *Williams*, 130 F.3d at 573 ("In Title VII actions, failure to exhaust administrative

Courts should treat section 1997e(a) like Title VII and hold that section 1997e(a) creates an affirmative defense as well.[140] The above comparisons show that the majority circuits correctly interpret section 1997e(a)'s language to establish an affirmative defense.[141]

B. The Purpose of Section 1997e(a) Suggests that Congress Intended the Exhaustion Requirement to Create an Affirmative Defense

Congress had two purposes in enacting 1997e(a).[142] First, Congress wanted to lessen the burden that frivolous prisoner litigation created in crowded federal courts.[143] Second, Congress wanted to reinforce the power of prison administrators to control and run their prisons without judicial interference.[144] In order to enforce these purposes and keep federal courts running smoothly, Congress enacted section 1997e(c).[145] Section 1997e(c) allows a judge to dismiss a prisoner's action sua sponte if the lawsuit is frivolous, malicious, or fails to state a claim.[146] Under

remedies is an affirmative defense in the nature of statute of limitations. Because failure to exhaust administrative remedies is an affirmative defense, the defendant bears the burden of pleading and proving that the plaintiff has failed to exhaust administrative remedies.")

[140] *See* Jenkins v. Haubert, 179 F.3d 19, 29 (2d Cir. 1999) (holding that prisoner's failure to exhaust administrative remedies constitutes affirmative defense); *Robinson*, 107 F.3d at 1021 (holding that, in Title VII actions, failure to exhaust remedies is affirmative defense).

[141] *Supra* Part III.A.

[142] *Ray*, 285 F.3d at 294 (describing Congress's two concerns in enacting PLRA).

[143] *Id*. (describing one interest as desire to lessen burden that frivolous litigation places on federal courts).

[144] *Id*. (describing second interest as desire to stop federal courts from interfering in federal and state prison administration).

[145] 42 U.S.C. §§ 1997e(c)(1)-(2) (2004). Sections 1997e(c)(1)-(2) state:

> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

Id.; *see Ray*, 285 F.3d at 294 (holding that section 1997e(c) gives judges power to dismiss frivolous cases sua sponte).

[146] 42 U.S.C. §§ 1997e(c)(1)-(2) (2004) (stating judges can dismiss suits sua sponte if they are frivolous, malicious, or fail to state a claim); *Ray*, 285 F.3d at 296 (holding that section 1997e(c) explicitly provides for sua sponte dismissals where suit is malicious, frivolous, or

section 1997e(c), judges should not consider failure to exhaust administrative remedies when considering whether a sua sponte dismissal is appropriate.[147] Instead, section 1997e(c) plainly states a court must dismiss any action if it believes that the action is either frivolous, malicious, or fails to state a claim.[148]

The minority circuits propose that section 1997e(a) creates a unique procedure.[149] This unique procedure requires the court to immediately evaluate whether the complaint states a valid claim.[150] In effect, section 1997e(a) creates a screening procedure.[151] Requiring prisoners to list specific details about their prison grievance proceedings in their complaints allows the courts to screen cases more effectively.[152] Thus, section 1997e(a) requires the plaintiff to plead exhaustion so that vague pleading cannot disguise invalid claims.[153] A complaint that fails to allege administrative exhaustion also fails to state a valid claim and, therefore, courts should quickly dismiss the complaint under section 1997e(c).[154]

The minority, however, incorrectly interprets section 1997e(a)'s purpose. According to the majority, the PLRA's purpose in preventing frivolous litigation does not require section 1997e(a) to force a plaintiff to plead exhaustion.[155] Instead, section 1997e(c)(1) allows courts to dismiss

fails to state claim).

[147] Jackson v. Dist. of Columbia, 89 F. Supp. 2d. 48, 57 (D.D.C. 2000) (stating section 1997e(c) does not contain directive for court to consider sua sponte dismissal for failure to exhaust administrative remedies).

[148] 42 U.S.C. § 1997e(c)(1).

[149] Baxter v. Rose, 305 F.3d 486, 490 (6th Cir. 2002) (holding that PLRA establishes unique procedure under which court, not parties, is required to evaluate whether valid claim has been stated in plaintiff's complaint).

[150] *Id.*

[151] Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1211 (10th Cir. 2003) ("Requiring prisoners to provide courts with information on prison grievance proceedings effectuates PLRA's screening requirement.").

[152] *Id*.

[153] *Baxter*, 305 F.3d at 490 (stating that courts would not be able to effectively screen cases if plaintiffs were able to hide invalid claims with ambiguous pleading).

[154] Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998) ("A claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted."); Irvine v. Toney, No. 1122042, 2004 U.S. Dist. LEXIS 18746, at *4-5 (N.D. Tex. Sept. 20, 2004) ("By choosing to file and pursue suit before meeting the section 1997e exhaustion of administrative remedies requirement, plaintiff has sought relief to which he was not entitled. Consequently, plaintiff's claims lack an arguable basis in law and are frivolous.").

[155] Ray v. Kertes, 285 F.3d 287, 294-95 (3d Cir. 2002) (stating it is not necessary for section 1997e(a) to force plaintiffs to plead exhaustion because, under section 1997e(c),

valueless suits sua sponte, but only if the action is frivolous, malicious, or fails to state a claim.[156] Section 1997e(c)(2) clarifies section 1997e(c)(1)'s procedure.[157] A court that finds a suit frivolous, malicious, or failing to state a claim can dismiss the suit, whether the plaintiff has exhausted administrative remedies or not.[158] Therefore, section 1997e(c) allows a judge to dismiss frivolous suits whether or not a plaintiff has exhausted administrative remedies.[159]

Two reasons suggest that Congress did not intend for judges to consider failure to exhaust when dismissing suits under section 1997e(c). First, section 1997e(c) specifically states the categories that judges can use to dismiss sua sponte. Congress did not list failure to exhaust as one of these categories.[160] A principle of statutory construction states that when a statute specifically enumerates some categories, it impliedly excludes others.[161] When judges apply this principle, they cannot dismiss suits sua sponte for failure to exhaust because failure to exhaust is not an enumerated category.[162] In fact, section 1997e(c) does discuss the role of exhaustion in decisions about sua sponte dismissal. Section 1997e(c)(2) states that courts can dismiss sua sponte without first requiring the exhaustion of administrative remedies.[163] This language shows that Congress considered the need for exhaustion.[164] The absence of failure to exhaust in section 1997e(c) must mean, therefore, that Congress did not

courts have power to dismiss frivolous lawsuits sua sponte).

[156] 42 U.S.C. § 1997e(c)(1) (2004). For section 1997e(c)(1)'s text, see *supra* note 147.

[157] *Id.* § 1997e(c)(2). For section 1997e(c)(2)'s text, see *supra* note 147.

[158] *Id.* For section 1997e(c)(2)'s text, see *supra* note 147.

[159] *Id.* § 1997e(c); Jackson v. Dist. of Columbia, 89 F. Supp. 2d 48, 57 (D.D.C. 2000) (holding that section 1997e(c) allows judge to dismiss frivolous suits sua sponte irregardless of plaintiff's exhaustion status).

[160] 42 U.S.C. § 1997e(c).

[161] Arc Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092, 1099-1100 (9th Cir. 2005) (discussing statutory interpretation principle of *expressio unius est exclusio alterius* – omissions are equivalent of exclusions when statute affirmatively designates certain persons, things, or manners of operation); Ray v. Kertes, 285 F.3d 287, 296 (3d Cir. 2002) (discussing statutory interpretation principle of *expressio unius est exclusio alterius* — when statute clearly states some categories, it excludes others not listed); Boudette v. Barnette, 923 F.2d 754, 756-57 (9th Cir. 1991) (discussing statutory principle of *expressio unius est exclusio alterius* – presumption that where statute specifically designates certain persons, things, or manner of operations, omissions from that language should be understood as exclusions).

[162] *Ray*, 285 F.3d at 296 (discussing enumerated categories of section 1997e(c) and taking notice that failure to exhaust is not specified).

[163] 42 U.S.C. § 1997e(c)(2). For section 1997e(c)(2)'s text, see *supra* note 147.

[164] *Ray*, 285 F.3d at 296 (recognizing that absence of failure to exhaust was important, especially because Congress clearly considered need for exhaustion in section 1997e(c)(2)).

intend to include it.[165]

Second, section 1997e(c)'s structure plainly indicates that failure to exhaust is not a dismissal category.[166] While section 1997e(c)(1) allows a court to dismiss invalid suits for various enumerated categories, section 1997e(c)(2) allows sua sponte dismissal without requiring exhaustion.[167] It makes no sense for Congress to permit dismissal for failure to exhaust in section 1997e(c)(1) and then tell courts to dismiss regardless of administrative exhaustion in section 1997e(c)(2).[168] Moreover, if section 1997e(c)(1) allows judges to dismiss for failure to exhaust, then it renders section 1997e(c)(2) moot.[169]

Courts can dismiss frivolous suits sua sponte under section 1997e(c) regardless of exhaustion status.[170] Thus, the purpose of section 1997e(a), keeping frivolous suits out of court, does not require the plaintiff to plead exhaustion.[171] Instead minority circuits have created a heightened pleading standard because they require that a plaintiff plead more than a short and plain statement.[172] The minority circuits require that the plaintiff not only plead a short statement, but also specifically prove that he or she has exhausted administrative remedies.[173]

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[165] *Id.*

[166] *Id*. at 296 n.9 (holding that section 1997e(c)'s structure belies any possibility that failure to exhaust is included in section 1997e(c)'s broad idea of failure to state claim); Jackson v. Dist. of Columbia, 89 F. Supp. 2d 48, 57 (D.D.C. 2000) (holding section 1997e(c)'s structure demands that failure to exhaust is not dismissal category).

[167] 42 U.S.C. § 1997e(c) (2004); *Jackson*, 89 F. Supp. 2d at 57 (holding section 1997e(c)(2) grants courts power to dismiss sua sponte without requiring exhaustion of administrative remedies).

[168] 42 U.S.C. § 1997e(c); *Jackson*, 89 F. Supp. 2d at 57 ("It makes little sense to permit dismissal for failure to exhaust and then state the court may dismiss without 'first requiring the exhaustion of administrative remedies.'").

[169] 42 U.S.C. § 1997e(c); Snider v. Melindez, 199 F.3d 108, 111 (2d Cir. 1999) ("Presumably, the reason Section 1997e(c)(2) authorizes dismissal 'without first requiring the exhaustion of administrative remedies' is that such exhaustion would be fruitless in an action that the court has determined to be irremediably defective.").

[170] 42 U.S.C. § 1997e(c).

[171] *Ray*, 285 F.3d at 294-95 (holding that because, under section 1997e(c), courts have power to get rid of frivolous lawsuits that clog up federal courts, it is unnecessary for section 1997e(a) to create pleading requirement to force out frivolous suits).

[172] Wyatt v. Terhune, 315 F.3d 1108, 1118 (9th Cir. 2003). Heightened pleading occurs when a court requires pleaders to plead more than is required by Federal Rule of Civil Procedure 8(a)(2). Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 167-68 (1993). Rule 8(a)(2) requires that a complaint include only a short and plain statement of the claim. *Id*. at 168.

[173] Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1210 (10th Cir. 2003) (holding prisoner must plead short statement and describe with specificity administrative proceedings and outcomes); Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir. 1998) (holding

The U.S. Supreme Court has consistently held that courts should not create and impose heightened pleading standards on plaintiffs.[174] Instead, only Congress has the power to impose heightened pleading requirements.[175] First, Congress can create a heightened pleading requirement in the statute itself.[176] However, Congress did not create an express congressional heightened pleading requirement in 1997e(a).[177] Second, Congress can create heightened pleading requirements in the Federal Rules of Civil Procedure.[178] For example, Federal Rule of Civil Procedure 9(b) requires heightened pleading for actions alleging fraud and mistake.[179] Section 1997e(a) only governs actions alleging violations of prison conditions, not fraud or mistake.[180] Thus, Rule 9(b) does not apply. Without a congressional heightened pleading requirement, a plaintiff only has to provide a short and plain statement.[181] Moreover, section 1997e(a)'s purpose does not require a plaintiff to plead administrative exhaustion.[182] Instead, it, along with the majority's interpretation of section 1997e(a)'s language, supports the view that section 1997e(a)'s exhaustion requirement creates an affirmative defense.[183]

prisoner must allege and show that he or she has exhausted all available state administrative remedies.

[174] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-13 (2002) (holding that heightened pleading standards imposed on plaintiffs conflict with liberal system of notice pleading); *Leatherman*, 507 U.S. at 168 (holding that courts should not impose heightened pleading standards on plaintiffs because heightened standards clash with liberal system of notice pleading); Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that plaintiff should not have to set out his claim in detail unless Federal Rules require it).

[175] *See infra* notes 176.

[176] *Wyatt*, 315 F.3d at 1118 ("Legislatures know how to indicate that exhaustion is a pleading requirement when they want to.").

[177] *Id.* ("The PLRA, of course, contains no such command.").

[178] FED. R. CIV. P. 9(b) (stating that fraud and mistake "shall be stated with particularity").

[179] *Swierkiewicz*, 534 U.S. at 513; *see* FED. R. CIV. P. 9(b) (stating that fraud and mistake "shall be stated with particularity").

[180] 42 U.S.C. § 1997e(a) (2004). For section 1997e(a)'s text, see *supra* note 113.

[181] *Swierkiewicz*, 534 U.S. at 513 (holding that Rule 8(a)'s liberal pleading standard applies to all civil actions unless specific heightened pleading requirement applies); *see* FED. R. CIV. P. 8(a)(2) (stating that plaintiff only needs to plead "a short and plain statement showing that the pleader is entitled to relief").

[182] *Supra* Part III.B.

[183] *Id.*

C. Public Policy Supports Finding that Section 1997e(a)'s Exhaustion Requirement Creates an Affirmative Defense

Three public policy reasons support finding that section 1997e(a) creates an affirmative defense. First, traditionally, courts treat pleadings created by pro se prisoners liberally by ignoring imperfections in the pleadings.[184] If courts apply a heightened pleading requirement to pro se complaints, then the heightened pleading would punish any imperfections in pleading, resulting in an intolerant pleading standard.[185] Courts recognize that prisoners are frequently uneducated, unsophisticated, and legally inexperienced.[186] Applying a highly technical pleading requirement invites prisoners to make mistakes in the administrative grievance process and in pleading their cases to the courts.[187] These mistakes would cause valid litigation to be dismissed if an intolerant pleading requirement was utilized.[188] Thus, courts should not apply a heightened pleading requirement to prisoner complaints.

Second, prison officials should bear the burden of pleading because

[184] Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) (acknowledging that pleadings and efforts of pro se litigants, particularly when highly technical requirements are involved, should be construed liberally); Johnson v. California, 207 F.3d 650, 653 (9th Cir. 2000) (recognizing that imperfect pleading by pro se litigants should be liberally construed); McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (recognizing that pleadings of pro se plaintiff must be read liberally); Strope v. Pettis, No. 03-3383-JAR, 2004 U.S. Dist. LEXIS 24332, at *6 (D. Kan. Nov. 23, 2004) ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than pleadings drafted by lawyers.").

[185] *Wyatt*, 315 F.3d at 1119 (holding that imposing technical pleading requirement without express congressional authorization would be contrary to liberal treatment given to pleadings of pro se prisoners); Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir. 1984) ("The rights of pro se litigants require careful protection where highly technical requirements are involved, especially when enforcing those requirements might result in a loss of the opportunity to prosecute or defend a lawsuit on the merits."); John Boston, *Edward V. Sparer Public Interest Law Fellowship Symposium: Road Blocks to Justice: Congressional Stripping of Federal Court Jurisdiction: The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 431 (2001) (discussing that when PLRA is applied to uneducated and unsophisticated prisoners, PLRA's exhaustion requirement invites technical mistakes resulting in inadvertent noncompliance that bar legitimate and valid litigants from court because of procedural, not substantive, errors).

[186] Boston, *supra* note 185, at 431 (discussing that prisoners are legally uneducated and unsophisticated).

[187] *Id*. (stating that technical pleading requirement just invites prisoners to make mistakes).

[188] Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

they have the ability to plead accurately about administrative exhaustion.[189] Prison officials have lawyers and greater access to prison records than prisoners do.[190] With their access to prison records, they are better equipped to provide the court with documentation and explanations of administrative proceedings.[191] In addition, prison officials have control over prison administrative procedures.[192] Prison officials might make it difficult for prisoners to fulfill the exhaustion requirement so that prisoners cannot bring valid suits.[193] While the PLRA intends to stop frivolous prisoner litigation, the PLRA does not intend to block valid litigation with a procedural minefield.[194]

Third, requiring highly technical pleading requirements might bar inmates from bringing their claims because they are blocked from bringing suits in forma pauperis.[195] After prisoners have had three suits dismissed for frivolousness, maliciousness, or failure to state a claim, 28 U.S.C. § 1915(g) blocks prisoners from bringing suits in forma pauperis.[196] Under section 1915(g), prisoners with three strikes can only

[189] *Wyatt*, 315 F.3d at 1119 (recognizing that prison officials are in better position than prisoners are to demonstrate administrative exhaustion).

[190] Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002) (acknowledging that prison officials have attorneys and access to prison records and prisoners do not have this access).

[191] *Id*. (realizing that prison officials can provide court with clear, typed explanations, including photocopies of relevant administrative regulations).

[192] Roosevelt, *supra* note 1, at 1775-76 (discussing that prison administrators, who have control over structure and timing of grievance procedures, cannot be faulted for taking advantage of system, and that there is unlikely to be significant political pressure to stop administrator's understandable desire to reduce litigation against themselves and their staff).

[193] *Id*.

[194] *Id*. at 1776. Roosevelt states that:

> A rule that controls access to courts not by examining the merits of a claim but by shutting the door on uncounseled inmates who fail to navigate a procedural minefield is not a good one. As Justice Breyer has recently stated, a rule that "would close the doors of federal . . . courts to many state prisoners and . . . would do so randomly" is not "consistent with our human rights tradition."

Id.

[195] Boston, *supra* note 185, at 433 ("It is an absolute barrier to a litigant who does not have the money for filing fees — and many do not.").

[196] 28 U.S.C. § 1915(g) (2004). Section 1915(g) states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

sue in forma pauperis if they are in imminent danger of serious physical harm.[197]

Section 1915(g) deeply affects prisoner litigation because about 95% of prisoners file their actions in forma pauperis.[198] Instead of just giving strikes for frivolous or malicious actions, some courts hold that dismissal for failure to exhaust also counts as a strike.[199] While failure to exhaust is a procedural defect, frivolousness, maliciousness, and failure to state a claim are substantive defects.[200] Section 1915(g) states that prisoners with three strikes for frivolousness, maliciousness, or failure to state claims cannot bring suits in forma pauperis.[201] Section 1915(g)'s plain language only discusses strikes for substantive dismissals, not procedural dismissals.[202] Therefore, courts should not impose a strike when they

Id.

[197] *Id*.

[198] B. Patrick Costello, Jr., *"Imminent Danger" Within 28 U.S.C. § 1915(g) of the Prison Litigation Reform Act: Are Congress and Courts Being Realistic?*, 29 J. LEGIS. 1, 2 (2002) (recognizing that because prisoners generally lack sufficient wealth to pay filing fee within thirty days as required, approximately 95% of prisoner-initiated suits are filed in forma pauperis).

[199] Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998) ("A claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted."); Irvine v. Toney, No. 1122042, 2004 U.S. Dist. LEXIS 18746, at *5 (N.D. Tex. Sept. 20, 2004) ("By choosing to file and pursue suit before meeting section 1997e exhaustion of administrative remedies requirement, plaintiff has sought relief to which he was not entitled. Consequently, plaintiff's claims lack arguable basis in law and are frivolous.").

[200] *See* Smith v. Duke, 296 F. Supp. 2d 965, 966-67 (E.D. Ark. 2003):

> The Congressional mandate is clear and unambiguous. Congress outlined three solutions in which a prisoner will receive a "strike." Courts have read related situations into section 1915(g) when a claim is baseless, without merit, or an abuse of the judicial process. While these situations are not literally within section 1915(g), they are clearly associated with actions that are frivolous, malicious, or fail to state a claim upon which relief may be granted. All of the associations go to the merits of the claim itself, not the procedural posture. [. . .]. While curbing abuse of judicial process was clearly one purpose behind the PLRA, a "strike" for failure to exhaust administrative remedies was not included by Congress in section 1915(g) and is a procedural landmine awaiting any pro se litigant.

[201] 28 U.S.C. § 1915(g) (2004). For section 1915(g)'s text, see *supra* note 198.

[202] 28 U.S.C. § 1915(g) (2004). *See* Snider v. Melindez, 199 F.3d 108, 111-12 (2d Cir. 1999):

> We believe that "failure to state a claim," as used in Sections 1997e(c) and 1915(g) of PLRA, does not include failure to exhaust administrative remedies — at least absent a finding that the failure to exhaust permanently bars the suit. Failure to exhaust administrative remedies is often a temporary, curable, procedural flaw.

dismiss complaints for failure to exhaust.[203]

The combination of a technical pleading requirement and a plaintiff without legal expertise creates a high probability that prisoner pleadings will be defective.[204] If courts treat dismissal for failure to exhaust as a strike, then section 1915(g) chills not only frivolous claims, but valid claims as well.[205] Prisoners, afraid of getting a strike, may choose not to bring a valid action if they think that they cannot prove administrative exhaustion.[206] Liberal treatment of pro se complaints, prison officials' greater ability to plead exhaustion, and section 1915(g)'s blanket chilling effect support holding that section 1997e(a) creates an affirmative defense.[207] Based on the majority's interpretation of section 1997e(a)'s language, the purposes behind section 1997e(a), and public policy, section 1997e(a) establishes an affirmative defense.[208]

IV. SOLUTIONS

Three possible solutions would clarify that section 1997e(a) establishes an affirmative defense. Each solution resolves the circuit split and aids courts in future litigation.[209] First, the U.S. Supreme Court should hold

Id.; *Smith*, 296 F. Supp. 2d at 966-67:

> The Congressional mandate is clear and unambiguous. Congress outlined three solutions in which a prisoner will receive a "strike." Courts have read related situations into section 1915(g) when a claim is baseless, without merit, or an abuse of the judicial process. While these situations are not literally within section 1915(g), they are clearly associated with actions that are frivolous, malicious, or fail to state a claim upon which relief may be granted. All of the associations go to the merits of the claim itself, not the procedural posture. [. . .]. While curbing abuse of judicial process was clearly one purpose behind the PLRA, a "strike" for failure to exhaust administrative remedies was not included by Congress in section 1915(g) and is a procedural landmine awaiting any pro se litigant.

[203] *Snider*, 199 F.3d at 111-12 (discussing that courts should not treat failure to exhaust as strike under section 1915(g)).

[204] Boston, *supra* note 185, at 431 (discussing that PLRA's exhaustion requirement invites technical, procedural mistakes from legally unsophisticated prisoner plaintiff).

[205] *Cf.* Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court — It May Be Effective, but Is It Constitutional?*, 70 TEMPLE L. REV. 471, 498 (1997) (discussing chilling effect on prisoners, who, knowing that they only have three strikes in their lifetime, have to seriously consider bringing valid claims because they worry about whether it will survive Rule 12(b)(6) motion to dismiss).

[206] *Id.*

[207] *Supra* Part III.C.

[208] *Supra* Part III.

[209] *Infra* Part IV.A-C.

that section 1997e(a) creates an affirmative defense.[210] Second, Federal Rule of Civil Procedure 8(c) should formally list failure to exhaust as an affirmative defense.[211] Third, Congress should pass an amendment to section 1997e(a) that would clearly state that a defendant must plead failure to exhaust as an affirmative defense.[212]

A. The Supreme Court Should Hold that Failure to Exhaust Is an Affirmative Defense

The U.S. Supreme Court should hold that section 1997e(a) establishes an affirmative defense. This solution, while feasible, is unlikely to happen. First, many plaintiffs or defendants never appeal their state or federal cases to the Supreme Court, so the Court cannot hear their cases.[213] Second, if a party does petition for certiorari, it is unlikely that the Supreme Court will hear the case.[214] So far, the Supreme Court has refused to grant certiorari to hear a section 1997e(a) case.[215] It does not appear likely that the Supreme Court will decide this issue in the near future. Thus, the following solutions may be more practical.

B. The Federal Rules Committee Should Amend Federal Rule of Civil Procedure 8(c) to List "Failure to Exhaust" as an Affirmative Defense

The Federal Rules Committee should amend Federal Rule of Civil Procedure 8(c) to list failure to exhaust as an affirmative defense.[216] The

[210] *Infra* Part IV.A.

[211] *Infra* Part IV.B.

[212] *Infra* Part IV.C.

[213] For example, none of the parties in the following cases petitioned the U.S. Supreme Court for a writ of certiorari: Baxter v. Rose, 305 F.3d 486 (6th Cir. 2002); Casanova v. Dubois, 304 F.3d 75 (1st Cir. 2002); Perez v. Wis. Dept. of Corr., 182 F.3d 532 (7th Cir. 1999); Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999).

[214] Timothy Bishop & Jeffrey W. Sarles, *Opposing Certiorari in the U.S. Supreme Court*, FINDLAW FOR LEGAL PROFESSIONALS: APPELLATE LAW, http://profs.lp.findlaw.com/appellate/cert2.html (last visited Oct. 19, 2005) (discussing that, in 1995 term, U.S. Supreme Court denied 1,945 of 2,130 non-indigent certiorari petitions); The Supreme Court Historical Society, How the Court Works: Types of Cases the Court Hears, http://www.supremecourthistory.org/03_how/subs_how/03_a08.html (last visited Oct. 19, 2005) (stating around 70% of certioriari petitions are denied).

[215] *See* Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 50 (2003); Knuckles El v. Toombs, 215 F.3d 640 (6th Cir. 2000), *cert. denied*, 531 U.S. 1040 (2000); Massey v. Helman, 196 F.3d 727 (7th Cir. 1999), *cert. denied*, 532 U.S. 1065 (2001); Brown v. Toombs, 139 F.3d 1102 (6th Cir. 1998), *cert. denied*, 525 U.S. 833 (1998).

[216] Leonidas Mecham, *The Rulemaking Process: A Summary for the Bench and Bar* (Oct. 2004), *available at* http://www.uscourts.gov/rules/proceduresum.htm (describing

amended Rule 8(c) might read as follows (additions italicized):[217]

> Rule 8(c) — Affirmative Defenses.
>
> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, *failure to exhaust*, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

While this amended rule would establish failure to exhaust as an affirmative defense, this solution will not resolve the circuit split. The minority circuits believe that the PLRA itself creates a unique heightened pleading procedure.[218] Regardless of whether Congress amends the Federal Rules of Civil Procedure, the minority circuits will still believe that the correct pleading procedure is the heightened pleading required by the PLRA.[219] Therefore, amending the PLRA is the best solution.

C. Congress Should Amend Section 1997e(a) to State that the Exhaustion Requirement Creates an Affirmative Defense

Amending section 1997e(a) is the only solution that would convince

rulemaking process for various Federal Rules). Congress has authorized the federal judiciary to proscribe the rules of practice, procedure, and evidence for the federal courts. *Id*. The Committee on Rules of Practice and Procedure coordinates the five advisory committees on appellate, bankruptcy, civil, criminal, and evidence rules. *Id*. Amending a rule can be difficult because the rulemaking process takes a minimum of two to three years for a suggestion to be enacted as a rule. *Id*. The process can be outlined as: 1) proposed changes in the rules are suggested; 2) suggestions are considered by the advisory committee on that particular type of rule; 3) if a change is appropriate, then a draft of the change is created; 4) the draft is published and public comment is invited; 5) after public comment, final approval or disapproval is given to the change by the advisory committee; 6) if approved, the proposed rule goes then to the judicial standing committee and then to judicial conference approval, U.S. Supreme Court approval, and finally, Congressional approval. *Id*. If the proposed rule is approved by Congress, then it becomes a new Federal Rule. *Id*.

[217] FED R. CIV. P. 8(c) (2004) (additions italicized).

[218] Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1210 (10th Cir. 2003) (holding that requirement to plead exhaustion with specificity gets its authority from PLRA); *Baxter*, 305 F.3d at 490 (holding that heightened pleading rule takes its authority from PLRA).

[219] *Steele*, 355 F.3d at 1211; *Baxter*, 305 F.3d at 490 (holding that PLRA, not Federal Rules of Civil Procedures, provide authority for unique heightened pleading procedures).

the minority circuits that section 1997e(a) creates an affirmative defense. In order to satisfy the minority circuits, which believe that section 1997e(a)'s language establishes a pleading requirement, Congress must change section 1997e(a)'s language. This amendment should clearly state that 1997e(a) creates an affirmative defense of failure to exhaust that the defendant must plead. The amended section 1997e(a) might read as follows (additions italicized):[220]

> 1997e(a) — Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), 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. *This section creates an affirmative defense of failure to exhaust.*

In order to adhere to the statute, the minority circuits would have to hold that section 1997e(a) establishes an affirmative defense, not a heightened pleading requirement. While this solution is the most practical, any of the three solutions would clarify that section 1997e(a) creates an affirmative defense, not a pleading requirement.[221]

CONCLUSION

The PLRA has created obstacles that block prisoners from bringing frivolous suits to federal court.[222] A split exists among the Federal Courts of Appeals over whether one of those obstacles, section 1997e(a), creates a heightened pleading requirement or an affirmative defense.[223] The majority circuits compellingly argue that section 1997e(a) creates an affirmative defense.[224] Indeed, the majority's interpretation of section 1997e(a)'s language, purpose, and public policy supports that section 1997e(a) establishes an affirmative defense.[225] Moreover, three possible

[220] 42 U.S.C. § 1997e(a) (2004) (additions italicized).

[221] *Supra* Part IV (describing all three possible solutions).

[222] Boston, *supra* note 185, at 469-74 (discussing various measures that PLRA creates to try to keep prisoners out of federal court).

[223] *Compare* Wyatt v. Terhune, 315 F.3d 1108, 1119 (holding PLRA establishes affirmative defense), *and* Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002) (holding PLRA establishes affirmative defense), *with Steele*, 355 F.3d at 1210 (holding PLRA creates heightened pleading requirement), *and* Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir. 1998) (holding PLRA creates heightened pleading requirement).

[224] 42 U.S.C. § 1997e(a) (2004); *supra* Part III.

[225] *Supra* Part III.

solutions would definitively establish that section 1997e(a) creates an affirmative defense rather than a pleading requirement.[226] First, the U.S. Supreme Court should create precedent stating that section 1997e(a) creates an affirmative defense.[227] Second, Federal Rule of Civil Procedure 8(c) should be amended to clearly state that failure to exhaust is an affirmative defense.[228] Third, Congress should amend section 1997e(a).[229] While the PLRA's purpose is to block frivolous litigation, the PLRA should not also block valid and conscientious litigation by employing a heightened pleading requirement.[230]

[226] *Supra* Part IV.
[227] *Supra* Part IV.A.
[228] *Supra* Part IV.B.
[229] *Supra* Part IV.C.
[230] *Supra* Parts III and IV.