No. 20-2254, 20-2897

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Aaron Vaughn,

Plaintiff–Appellant,

v.

Correctional Officer Imohoff, et al.,

Defendants–Appellees;

Isaac Ray Vaughan, Jr.,

Plaintiff–Appellant,

v.

Albion-SCI, et al.,

Defendants–Appellees.

On Appeal from Final Judgments of the United States District Court for the Western District of Pennsylvania, Case No. 2:17-cv-546, Hon. Lisa P. Lenihan & Case No. 1:18-cv-116, Hon. Richard A. Lanzillo

BRIEF OF AMISTAD LAW PROJECT AND RIGHTS BEHIND BARS AS AMICI CURIAE SUPPORTING REHEARING

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Oct. 10, 2023

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INTERESTS OF THE AMICI CURIAE[1]

Amistad Law Project is organizing to end mass incarceration in Pennsylvania. Through strategic campaigns and legal advocacy, Amistad advances healing justice for communities harmed by the criminal legal system, social inequality, and violence. Amistad regularly receives requests to review materials from *pro se* incarcerated litigants.

Rights Behind Bars (RBB) legally advocates for people in prison to live in humane conditions and contributes to a legal ecosystem in which such advocacy is more effective. RBB seeks to create a world in which people in prison do not face large structural obstacles to effectively advocating for themselves in the courts. RBB helps incarcerated people advocate for their own interests more effectively and through such advocacy push towards a world in which people in prison are treated humanely. RBB routinely litigates issues of exhaustion in the federal appellate courts, including on behalf of formerly *pro se* plaintiffs.

INTRODUCTION

This Court should grant rehearing because, as the Appellants have identified, part of the panel opinion conflicts with this Court's decisions in *Downey v. Pennsylvania Department of Corrections*, 968 F.3d 299 (3d Cir. 2020) and *Robinson v. Superintendent Rockview SCI*, 831 F.3d 148 (3d Cir. 2016), and their combined effect

[1] This brief has been authored entirely by *Amici*'s counsel, and no Party or Party counsel, or any other person or entity, has contributed money or other financial support to the preparation or filing of this brief. All Parties consent to *Amici* filling.

in the wake of *Ross v. Blake*, 578 U.S. 632 (2016). People incarcerated in DOC custody who follow and comply with the plain text ADM 001 directive that grievances about abuse by staff "shall be handled in accordance with this procedures manual" would have no reason to believe that they need do something else. And forcing unwitting prisoners—who, by definition, have been abused by staff—to exhaust a duplicate route is unnecessary to satisfy the notice-giving purpose of the PLRA because they have already given that notice under ADM 001. This Court should grant rehearing.

Amici write separately, however, to urge the Court to grant rehearing because the Panel opinion conflicts with and would undermine this Court's decision in *Paladino v. Newsome*, 885 F.3d 203 (3d Cir. 2018). *Paladino* held that "some type of notice and an opportunity to respond are needed before a district court elects to decide factual disputes regarding exhaustion." *Id.* at 205. The *Paladino* Court recognized and addressed a serious problem with district courts' handling of correctional defendants' assertions of non-exhaustion: resolving disputed factual questions about exhaustion without an adequate record, including even *sua sponte*. This problem is particularly acute for incarcerated plaintiffs who proceed *pro se*, because they lack access to traditional discovery tools available to counseled prison civil rights plaintiffs and through which they could litigate the issue of exhaustion and any applicable *Ross* exceptions. Here, the District Court did exactly what *Paladino* squarely rejected—granted summary judgment for lack of exhaustion, without holding an evidentiary hearing on disputed factual questions or even providing adequate notice to Appellants. By endorsing the District Court's resolution of Appellant Vaughn's and Appellant Vaughan's cases for purported non-exhaustion despite clear disputes of fact

as to that issue and the lack of a *Paladino* hearing, the Panel opinion conflicts with *Paladino* and would undermine it. The Court should grant rehearing on this aspect of the case.

ARGUMENT

I. This Court should grant rehearing to avoid intra-Circuit conflict with *Paladino v. Newsome*.

1. Five years ago, this Court in *Paladino* addressed a persistent problem with district courts' handling of exhaustion issues in prison civil rights cases. In *Paladino*, as in many cases, the District Court had granted summary judgment to the defendants on the basis of lack of exhaustion, "without notifying the parties" that it intended to "resolve the exhaustion issue based on the record alone." Resolving factual issues regarding exhaustion is not necessarily the problem; this Circuit, like others, allows district courts to "resolve factual disputes relevant to the exhaustion issue without the participation of the jury" because exhaustion does not go to the merits of the claims. *Small v. Camden Cnty.*, 728 F.3d 265, 270 (3d Cir. 2013). But while district courts may resolve those factual issues without a jury, they cannot do so without some "baseline procedures" that "are required when a district court undertakes to serve as the fact finder on the exhaustion issue." *Paladino*, 885 F.3d at 210.

What exactly do "baseline procedures" entail? Some Circuits go further than this one; whenever exhaustion is disputed in the Seventh Circuit, for example, "an evidentiary hearing on the availability question [i]s required by *Pavey v. Conley*." *Ramirez v. Young*, 906 F.3d 530, 533 (7th Cir. 2018) (citing *Pavey v. Conley*, 544 F.3d

739 (7th Cir. 2008)). *Paladino* did not go quite that far. "[A] full-scale evidentiary hearing" may not always be necessary—although "surely some cases will need a full-scale hearing." *Paladino*, 885 F.3d at 211. But at the very minimum, a district court considering dismissal or granting judgment on the basis of non-exhaustion must first alert the litigants that it is considering judgment on that basis, and second, "provide the parties with an opportunity to submit materials relevant to exhaustion that are not already before it." *Id*. at 211. Put another way: a district court should not dispose of a prison civil rights case on the basis of non-exhaustion without ensuring that an incarcerated litigant understands that possibility, much less do so *sua sponte*, without any opportunity for such a litigant to make the record he needs on the basis of exhaustion.

2. A district court properly flagging the possibility that it will resolve a factual question as to exhaustion matters particularly to incarcerated litigants proceeding *pro se* because of the nature of *pro se* prison litigation. *Pro se* incarcerated litigants face enormous barriers to building a factual record on any issue, much less one—like exhaustion—where much of the relevant evidence remains in the hands of their jailors. While some of those barriers are attributable to the fact of incarceration and the strictures of the PLRA, others reflect prison defendants' deliberate efforts to stymie *pro se* prisoner plaintiffs. Court rules and other procedural rules exclude even the most diligent prisoner plaintiffs from receiving initial disclosures, and prison defendants often use plaintiffs' incarcerated status to object to discovery that would be pro forma in any other context and would allow those plaintiffs to build the record they need. Ultimately, prison defendants use their exclusive control of the grievance

process and other prison records to prevent prisoner plaintiffs from successfully asserting exceptions to the PLRA exhaustion requirement.

Pro se incarcerated litigants struggle to obtain relevant information both during the grievance process itself and during litigation. The ACLU amicus brief in support of rehearing details the difficulties of the grievance process. *See* Doc. 70. But even after filing in federal court, the structures of prison litigation prevent *pro se* prisoner plaintiffs from relying on normal processes to obtain information about their claims, or about preliminary issues like exhaustion. The Federal Rules of Civil Procedure exempt prison defendants from having to provide initial disclosures to *pro se* prisoner plaintiffs. Fed. R. Civ. P. 26(a)(1)(B)(iv). Many courts have other rules that place unique obstacles in front of *pro se* prisoners in discovery. *See, e.g.*, *Nelson v. Gleason*, No. 14-CV-870A, 2017 WL 2984430, at *1 (W.D.N.Y. July 13, 2017) ("Under this Court's Local Civil Rule, discovery for *pro se* cases is to be filed with this Court, unlike discovery in represented actions."); S.D.N.Y. & E.D.N.Y. L.R. 33.2(e) (explaining that only a few forms of discovery "shall constitute the sole form[s] of discovery available to" incarcerated *pro se* plaintiffs "[e]xcept upon permission of the Court, for good cause shown"). District courts often accompany those rules with precedent mandating weighing security concerns against discoverability, which definitionally put *pro se* plaintiffs in the position of having to justify receiving documents that counseled parties receive as matter of course. *See, e.g.*, *Ivey v. MSOP*, No. 12-cv-30 (DWF) (TNL), 2019 WL 3423573, at *4 (D. Minn. July 30, 2019) ("[T]he Court must attempt to craft a solution that allows Ivey access to the materials necessary to present his case while alleviating Defendants' security concerns. . . The Court will therefore order that

Defendants designate a representative who shall take possession of the disputed discovery."). And as this Court has previously explained, unlike counseled parties in other contexts, *pro se* prisoners typically do not get to take depositions of correctional defendants without court intervention. *See, e.g.*, *McKeithan v. Jones*, 212 F. App'x 129, 131 (3d Cir. 2007) (per curiam) (discussing court discretion to authorize prisoner depositions and describing plaintiff's request for an oral deposition, which the court rejected, as "unorthodox"). When prisoners are forbidden from taking depositions, they lose the ability to ask witnesses under oath about (among other things) the availability of remedies or the exhaustion process.

3. *Paladino* went a long way toward fixing these problems. Indeed, district courts in this Circuit routinely and correctly apply *Paladino* to flag the possibility they will resolve the case on exhaustion grounds, offer plaintiffs the opportunity to expand the record, and hold evidentiary hearings on exhaustion issues, to avoid dismissing a complaint or granting judgment to prison defendants by resolving factual disputes against an incarcerated litigant without an adequate record. *See, e.g.*, *Brown v. Savadogo*, No. 16-4706, *4-5 (E.D. Pa. Jun. 30, 2023) ("Because there is a factual dispute as to whether Brown had administratively exhausted her claims, I entered an Order providing notice that I would consider the preliminary issue of exhaustion in my role as fact-finder and directing the parties to submit any supplemental briefing and additional materials on the issue"); *Cummings v. Bullock*, No. 3:15-cv-2245, *4 (M.D. Pa. Jul. 12, 2018) (noting "the Court's potential resolution of factual disputes" on exhaustion and thus the Court's "Order pursuant to *Paladino v. Newsome*, 885 F.3d 203 (3d Cir. 2018) . . . inviting the parties to supplement the

record with any evidence relevant to the issue of exhaustion"); *Brooking v. D.O.C.*, No. 3:15-cv-2134, *2-3 (M.D. Pa. Apr. 12, 2023) (having "provided the parties with notice or our intent to consider the threshold issue of exhaustion in our role as a factfinder under *Small* and *Paladino*," and given the parties "an opportunity to respond, including the submission of any materials relevant to exhaustion that were not already in the record before us").

4. The District Court here, however, did not follow this Court's holding in *Paladino*. In the cases of both of the Appellants seeking rehearing, the District Court failed to provide notice that it intended to resolve the claims on the basis of non-exhaustion, and did not offer the required opportunity to supplement the record. In Aaron Vaughn's case, for example, the Docket is quite clear that the Court never provided any notice that it intended to grant judgment on the basis of exhaustion, and did not offer an opportunity to supplement the record. *See generally* JA(AV) 50-75. This error compounded the District Court's imposition of the discovery limits described above on Aaron as a *pro se* litigant, preventing him from building a record. JA(AV) 70 ("No formal discovery, such as interrogatories, requests for production or requests for admission will be allowed in this case without leave of court."). In Isaac Vaughan's case, the Court at least seemed more amenable to ensuring that Isaac could obtain relevant discovery as to the merits of his claims. *E.g.* JA(IV) 30 (construing letter as motion to compel and discussing video evidence). But that Court, too, declined to give notice that it intended to dispose of the case on exhaustion grounds as a fact finder, and correspondingly did not give Isaac an opportunity to supplement the record on exhaustion. *See generally* JA(IV) 21-33.

As a result, the District Court made the exact error that *Paladino* set up procedural safeguards to avoid—it resolved factual disputes against both Appellants based upon an inadequate record. Appellants' own rehearing petition highlights some of the places where the District Court seemingly construed facts against them despite the posture. It cites, for example, Isaac having presented evidence that officers specifically thwarted him by refusing to provide grievance materials for weeks, which prevented him from exhausting regardless of the grievance process that applied to him. *See* Rehearing Petition at 14 (citing JA(IV) 230, 237, 267). Aaron's record contained evidence that officials declined to follow the procedures outlined in their own policies, raising questions about whether he could have exhausted, either. *See* Rehearing Petition at 15-16 (citing JA(AV) 356, 359, 296, 298, 307, 314-15). These sorts of disputed issues are exactly why the *Paladino* Court required district courts to give notice that they might resolve a case on the basis of exhaustion, sharpen the issues, and provide for a full record. Indeed, before setting out requirements more generally, it reversed the District Court in the underlying case because of "the conflict between the Prison's records and Paladino's deposition testimony, which created a genuine dispute of material fact." *Paladino*, 885 F.3d at 210. It outlined safeguards going forward to prevent that happening in future cases.

5. The Panel Opinion in this case would undermine *Paladino* because it tacitly endorses the District Court flaunting *Paladino* and its required procedural safeguards. *Amici* suspect the Panel did not intend this—the relevant section of the opinion is about two pages, Slip Op. at 32-34; it took up about the same amount of briefing space in the Parties' panel-stage briefs; it followed several more momentous

holdings on more robustly briefed issues; and the Panel seemingly treated Appellants' non-exhaustion as dictated by its prior holding that Aaron and Isaac need have used ADM 804, Slip Op. at 34 ("We conclude that ADM 804 is the exclusive means of exhaustion. And, having failed to follow the full administrative review process under ADM 804, Isaac and Aaron necessarily failed to properly exhaust their claims under the PLRA."). Again, *Amici* agree with Appellants that ADM 001 should suffice, and that they need not have separately exhausted under ADM 804. *See* Rehearing Petition at 10-14. But even if they need have used ADM 804, that could not have "necessarily" resolved the inquiry, because their briefing in the District Court created disputes as to availability of exhaustion under *Ross*. If Isaac was thwarted, and Aaron's facility failed to process his grievances, there is at least a dispute that their cases should proceed regardless of which administrative remedy process applied to their claims. In rushing past that analysis in the same manner as the District Court, the Panel conflicts with *Paladino* and will create confusion going forward for district courts assessing exhaustion issues.

Accordingly, this Court should at a minimum rehear this case to clarify that both Isaac and Aaron have disputed issues of fact as to exhaustion that preclude summary judgment. It should remand for the District Court to hold *Paladino* hearings for both of them, or at the very least, allow them to supplement the record and develop their facts and arguments about whether administrative remedies were available to them. Doing so would maintain uniformity of precedent with *Paladino*, and prevent confusion and intra-Circuit conflict of law.

CONCLUSION

For these reasons, in addition to those in Appellants' Rehearing Petition, the Court should grant rehearing.

Respectfully submitted,

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Oct. 10, 2023

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a), I certify that this brief:

(i) complies with the type-volume limitation of Rule 29(b)(4) because it contains 2,550 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 16.77.1, set in Century Schoolbook 12-point type.

/s/ Jim Davy

Jim Davy

CERTIFICATE OF SERVICE

I certify that on Oct. 10, 2023, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Jim Davy

Jim Davy