No. 12-7892

In the
Supreme Court of the United States

WILLIAM DAVID BURNSIDE,
Petitioner,

v.

T. WALTERS, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF AMERICAN FRIENDS SERVICE COMMITTEE AND THE MICHIGAN STATE BAR PRISONS AND CORRECTIONS SECTION AS *AMICI CURIAE* SUPPORTING PETITIONER

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MOTION OF AMERICAN FRIENDS SERVICE COMMITTEE AND THE MICHIGAN STATE BAR PRISONS AND CORRECTIONS SECTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, the American Friends Service Committee and the Prisons and Corrections Section of the Michigan State Bar request leave to file the following *amici curiae* brief in support of the petition for *certiorari*. Both *amici* organizations obtained the petitioner's consent to file this brief. Because of the Sixth Circuit's rule of law at issue in this case, however, *amici*

curiae have not obtained the consent of the respondents' counsel because the respondents were never represented in the courts below. The district court dismissed the plaintiff's complaint *sua sponte* before service of process pursuant to 28 U.S.C. § 1915(e). Likewise, in the Sixth Circuit, the respondents' counsel were never required to appear or file papers. (The absence of counsel for respondents should not affect the Court's decision to grant the writ, because in every case that presents the same issue no counsel for the respondents will have appeared below.)

The petitioner's counsel sent a letter to the respondents' last-known business addresses on January 7, 2013, notifying the respondents of *amici curiae*'s intent to file this brief and requesting the respondents' concurrence. To date, however, neither the petitioner's counsel nor *amici* have received any reply from the respondents.

The two *amici curiae* organizations advocate on behalf of prisoners in Michigan and/or nationwide. The question presented here—which concerns the Prison Litigation Reform Act (PLRA)—greatly affects the interests of prisoners. Specifically, the Sixth Circuit has interpreted the PLRA to say that district courts have no discretion to allow *in forma pauperis* plaintiffs to amend their complaints to avoid *sua sponte* dismissal. The Sixth Circuit's interpretation of the PLRA—which contradicts all other circuits, and which has no basis in the PLRA's text—handicaps the ability of prisoners and other indigent plaintiffs to bring meritorious lawsuits in federal court. In sum, the decision below significantly harms the interests of prisoners and other *in forma pauperis*

plaintiffs, and the *amici curiae* organizations are ideally suited to represent the interests of these litigants.

For these reasons, the American Friends Service Committee and the Prisons and Corrections Section of the Michigan State Bar respectfully request leave of the Court to file this brief as *amici curiae* in support of the petition for *certiorari*.

Respectfully submitted,

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January 18, 2013

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INTEREST OF AMICI CURIAE[1]

The Prisons and Corrections Section of the State Bar of Michigan focuses on the state's criminal justice and penal systems. The Section publishes a newsletter, sponsors conferences and training programs, educates the public, adopts formal positions on matters within its jurisdiction, and promotes the development of corrections policy through empirical research and professional dialogue. The Section also addresses prisoners' and victims' rights, alternatives to incarceration, and post-incarceration issues. The Section makes recommendations to the State Bar as well as to the Executive, the Legislature, and the Judiciary regarding the adoption of fair and effective correctional policy. Membership in the Section is open to all members of the State Bar. Positions taken on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

The Section Council voted to appear as *amicus curiae* in the present case because—although the Sixth Circuit's decision below covers all litigants who file suit under the *in forma pauperis* provisions of 28 U.S.C. § 1915(e)—the case has a hugely dispro-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* and its counsel, made any monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for petitioner has received timely notice of *amici curiae*'s intent to file this brief. As noted in the motion, no counsel of record for the respondents appeared in the case in the courts below. As a result, *amici curiae* have been unable to notify the respondents' counsel, although the respondents themselves were notified.

portionate effect on *prisoner*-plaintiffs, nearly all of whom file their complaints (under the Prison Litigation Reform Act) without the benefit of counsel.

American Friends Service Committee (AFSC) is a national Quaker organization committed to the principles of nonviolence and justice. AFSC's Michigan Criminal Justice Program advocates on behalf of prisoners and their families through lay representation, community organizing, in-prison education, writings, and workshops. AFSC's Michigan program identifies systemic abuses and civil-rights violations, and works on larger reform issues that help prisoners and their families. AFSC Criminal Justice Program serves around 2,000 individual prisoners in Michigan every year. AFSC's national board of directors authorized the organization's appearance as *amicus curiae* in this case.

SUMMARY OF ARGUMENT

Since 1997, the Sixth Circuit has required that when federal district courts dismiss complaints pursuant to the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(e), the dismissal must be *without leave to amend*. *See McGore v. Wrigglesworth,* 114 F.3d 601 (6th Cir. 1997). In this case, the Sixth Circuit declined an invitation to abandon its no-amendment rule, even though it is the only circuit to retain such a rule after this Court's decision in *Jones v. Bock*, 549 U.S. 199, 214 (2007).

In *Jones*, this Court made clear that the PLRA "does not—explicitly or implicitly—justify deviating from . . . usual procedural practice beyond the depar-

tures specified by the PLRA itself." *Jones*, 549 U.S. at 214. Not a word of the PLRA speaks to amendment procedures. Yet, under the Sixth Circuit's interpretation of the PLRA, district courts cannot permit plaintiffs to amend complaints before a *sua sponte* dismissal, nor can district courts permit the filing of amended complaints after the dismissal.

This hardline no-amendment rule flies in the face of Federal Rule of Civil Procedure 15(a), which establishes a liberal amendment policy to ensure that claims are decided on the merits rather than on formalities and technicalities. By deviating so drastically from the usual procedural practice without any textual basis in the PLRA, the Sixth Circuit has violated both the letter and the spirit of Rule 15(a) and of *Jones*. Accordingly, this Court should grant the writ and summarily reverse the Sixth Circuit.

ARGUMENT

1. The Sixth Circuit's no-amendment rule prevents courts from deciding cases on the merits, which undermines a core purpose of the Federal Rules of Civil Procedure and the PLRA.

One of the Federal Rules of Civil Procedure's "most important objectives" is to ensure that lawsuits are "determined on their merits and according to the dictates of justice"—not based on technicalities or formalities. *Arar v. Ashcroft*, 585 F.3d 559, 595 n.19 (2d Cir. 2009) (quoting 5 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1286 (3d ed. 2004)). Even if an initial

complaint technically fails to state a claim, the underlying claim may still be meritorious. For example, a *pro se* plaintiff may simply "fail to plead his allegations with the skill necessary to state a plausible claim even when the facts would support one." *Gee v. Pacheco*, 627 F.3d 1178, 1186-87 (10th Cir. 2010). Such an "inartfully pleaded claim . . . is wholly distinct from a claim that is . . . frivolous, malicious, or substantively meritless." *McLean v. United States*, 566 F.3d 391, 397 (4th Cir. 2009).

The unique Sixth Circuit rule flies in the face of decades of practice. *See e.g., Gomez v. USAA Federal Savings Bank*, 171 F.3d 794, 795 (2nd Cir. 1999) ("Certainly the court should not dismiss [a *pro se* complaint] without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated."); *Wyant v. Crittenden*, 113 F.2d 170, 175 (D.C. Cir. 1940) ("Observance of the injunction would appear to be particularly appropriate when the party seeking to amend is permitted to proceed *in forma pauperis* and, because of his circumstances, does so without benefit of counsel."). Dismissal of a *pro se* plaintiff's complaint for failure to state a claim "is appropriate only where it is patently obvious that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile." *Wolf v. Petrock*, 382 F. App'x 674, 677 (10th Cir. 2010). The rule permitting amendment exists because "[t]he 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." *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984).

Federal Rule of Civil Procedure 15(a) establishes a liberal amendment policy. The policy spares potentially meritorious but technically deficient claims from dismissal. Specifically, Rule 15(a) instructs courts to "freely give leave" to amend pleadings "when justice so requires." This liberal amendment policy is a "mandate . . . to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The point is to ensure that litigation does not become a mere "technical exercise in the fine points of pleading." *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 612 (5th Cir. 1993). As this Court has recognized, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182.

The Sixth Circuit's no-amendment rule bars district court judges from allowing amendments *before or after* dismissal. According to the Sixth Circuit, a complaint "must be dismissed" if it fails to state a claim at the "moment the complaint is filed." *McGore*, 114 F.3d at 609. Even if the underlying claim appears potentially meritorious, "courts have no discretion in permitting a plaintiff to amend a complaint to avoid a *sua sponte* dismissal." *Id.* at 612. Moreover, such complaints are dismissed with prejudice. *See Hix v. Tennessee Dept. of Corrections*, 196 Fed. Appx. 350, 354 (6th Cir. 2006) ("Section 1915(e)(2) mandates that a complaint filed by a prisoner proceeding *in forma pauperis* be dismissed with prejudice if it . . . fails to state a claim.").

All other circuits have recognized that—consistent with Rule 15(a)—district courts should at least have *the discretion* to allow parties to amend technically deficient, but potentially meritorious complaints.[2] Without this discretion, litigation—at least for indigent parties who are the least likely to have legal expertise—is a mere "technical exercise in the fine points of pleading." *Southern Constructors*, 2 F.3d at 612.

2. The Sixth Circuit's no-amendment rule defies *Jones v. Bock*.

In *Jones v. Bock*, 549 U.S. 199 (2007), this Court made clear that the PLRA does not allow courts to approach the Federal Rules of Civil Pro-

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[2] *See, e.g., Gee*, 627 F.3d at 1186 ("Dismissal of a *pro se* complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend. . . . [A] careful judge will explain the pleading's deficiencies so that a prisoner with a meritorious claim can then submit an adequate complaint") (internal quotation marks and brackets omitted); *Paul v. Marberry*, 658 F.3d 702, 705 (7th Cir. 2011) (Posner, J.) ("[W]hen a complaint contains amorphous claims that fail to give the defendant fair notice and so must be dismissed [pursuant to Rule 8(a)(2)'s plain-statement requirement], the plaintiff should be given a chance to amend his complaint to demonstrate whether some legally sufficient claim lies hidden beneath the obscure allegations") (internal quotation marks omitted); *see also Gant v. Walmart*, No. 12-CV-581, 2012 WL 2344637 (M.D. Tenn. June 20, 2012) (discussing the "*McGore* effect" and noting that "every other Circuit Court of Appeals to consider the question has rejected *McGore's* interpretation of § 1915 as requiring *sua sponte* dismissal of a complaint without first permitting the plaintiff to amend").

cedure with a bottle of white out and a red pen. Specifically, the *Jones* Court said that the PLRA "does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself." *Id.* at 214.

As other circuits have recognized, not a word of the PLRA speaks to the amendment of pleadings. *See, e.g., Brown v. Johnson*, 387 F.3d 1344, 1349 (11th Cir. 2004) ("Nothing in the language of the PLRA repeals Rule 15(a)."); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 111 (3d Cir. 2002) (concluding that § 1915(e)(2) does not say "anything about when to permit amendment"). By voiding Rule 15(a) for indigent litigants when the PLRA says nothing about amendment procedures, the Sixth Circuit's refusal to modify its *McGore* rule flouts this Court's holding in *Jones*.[3]

Rule 15(a) allows parties to amend their pleadings in two basic ways. The Sixth Circuit's no-amendment rule fails to give indigent parties the benefit of either. First, pursuant to Rule 15(a)(1), parties may amend their pleadings "once as a matter of course" within 21 days after a complaint is served, or within 21 days after a responsive pleading is due. In the Sixth Circuit, however, this rule is inapplicable to indigent parties. After all, the complaint is subject to dismissal from the "moment the complaint is filed." *McGore*, 114 F.3d at 609. Judges are to screen lawsuits for dismissal "before . . . the individual has had an opportunity to amend the

[3] *Jones* itself reversed a series of Draconian pleading requirements that the Sixth Circuit had grafted onto the PLRA. *See Jones*, 549 U.S. at 205-06.

complaint." *Id.* In short, even though the PLRA is silent on amendment procedures, the Sixth Circuit has used the PLRA to overwrite Rule 15(a)(1) exclusively for indigent litigants—prisoners and non-prisoners alike.

Second, pursuant to Rule 15(a)(2), parties may amend their pleadings with permission—namely, either with "the opposing party's written consent or the court's leave." The court is to "freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). As this Court has recognized, district courts may exercise their discretion to deny leave to amend for several reasons—including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party." *Foman*, 371 U.S. at 182. But "outright refusal to grant leave without any justifying reason . . . is not an exercise of discretion; it is merely abuse of that discretion." *Id.* By holding that courts have "no discretion in permitting a plaintiff to amend a complaint," the Sixth Circuit has held—without the PLRA's saying so—that Rule 15(a)(2) is inapplicable to indigent parties. *See McGore*, 114 F.3d at 612. This holding contradicts *Jones* and cannot survive it.

The *Jones* Court emphasized that "when Congress meant to depart from the usual procedural" practice, "it did so expressly." 549 U.S. at 216. A no-amendment policy could only "be obtained by . . . amending the Federal Rules" or by revising the PLRA itself. *Id.* at 217 (internal quotation marks omitted). The Sixth Circuit lacks the authority to do either.

3. By making meritorious claims vulnerable to permanent dismissal, the Sixth Circuit has undermined the intent of Congress.

The Sixth Circuit's no-amendment rule is unnecessary to serve the purposes of the PLRA, which this Court described in *Jones* as (1) to reduce the quantity of meritless prisoner lawsuits, and (2) to provide an adequate avenue for prisoners to proceed with potentially meritorious suits. *See Jones*, 549 U.S. at 203-04 (2007) (citing *Porter v. Nussle*, 534 U.S. 516, 524 (2002) ("The challenge lies in ensuring that the flood of non-meritorious claims does not submerge and effectively preclude consideration of the allegations with merit.").

Congress designed the PLRA to reduce frivolous prisoner litigation in four ways: (1) by imposing an exhaustion-of-remedies requirement, *see* 42 U.S.C. § 1997e(a); (2) by charging prisoners filing fees in full and collecting those fees from their prison accounts over time, *see* 28 U.S.C. § 1915(b); (3) by imposing a three-strikes provision that prevents litigants from filing *in forma pauperis* if three of their prior suits are dismissed as frivolous, or malicious, or for failure to state a claim, *see* 28 U.S.C. § 1915(g); and (4) by preventing prisoners from filing lawsuits for emotional or mental injury, unless demonstrable physical injury also results, *see* 42 U.S.C. § 1997e(e).

These four provisions—all of which are established unambiguously in the PLRA's text—have successfully reduced the number of prisoner lawsuits. Although no other circuit has adopted the no-amendment rule, the number of civil-rights complaints filed

by prisoners nationally dropped significantly after the PLRA's enactment.[4]

The PLRA may be good medicine, but the Sixth Circuit is overmedicating the problem. By forbidding district court judges from granting leave to amend technically deficient but potentially meritorious complaints, the Sixth Circuit may do as much to suppress meritorious litigation as it does to screen out frivolous claims. Congress sought to avoid precisely this collateral damage.

In fact, Congress enacted the PLRA in part to facilitate meritorious claims. *See Jones*, 549 U.S. at 204 ("Congress enacted a variety of reforms designed to filter out the bad claims and facilitate consideration of the good."). Senator Jon Kyl, a PLRA co-sponsor, said that the legislation would "free up judicial resources for claims with merit by both prisoners and nonprisoners." 141 Cong. Rec. S19110-07 (1995). Likewise, Senator Orrin Hatch, a co-sponsor of the bill and the then-Senate Judiciary Committee Chair, said that he did "not want to prevent inmates from raising legitimate claims" and that this "legislation

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[4] *See* John Scalia, *U.S. Dep't of Justice, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000*, 1 (January 2002), http://bjs.ojp.usdoj.gov/content/pub/pdf/ppfusd00.pdf ("The 1996 Prison Litigation Reform Act appears to have resulted in a decrease in the number of civil rights petitions filed by State and Federal prison inmates. They filed 41,679 petitions during 1995 compared to 25,504 during 2000."); Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1559-60 (2003) ("2001 filings by inmates were down forty-three percent since their peak in 1995, notwithstanding a simultaneous twenty-three percent increase in the number of people incarcerated nationwide.").

will not prevent those claims from being raised." 141 Cong. Rec. S18127-05 (1995). Finally, Senator Strom Thurmond, another PLRA co-sponsor, said that the legislation "will allow meritorious claims to be filed," while also giving "the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates." 141 Cong. Rec. S14611-01 (1995). By impeding meritorious claims, the Sixth Circuit's no-amendment rule undermines Congress's intent.

4. Summary reversal is a proper remedy

Given the uniqueness of the Sixth Circuit's harsh *McGore* rule, this Court should not only grant the writ of certiorari, but should summarily reverse the Sixth Circuit. Summary disposition on the merits is appropriate under Supreme Court Rule 16.1 when a lower court's interpretation of a statute is "both incorrect and inconsistent with clear instruction in the precedents of this Court." *Marmet Health Care Center, Inc. v. Brown*, __ U.S. __, 132 S. Ct. 1201, 1203 (2012) (per curiam).

The Sixth Circuit's violation of *Jones v. Bock* warrants summary reversal. The *Jones* Court made clear that the PLRA "does not . . . justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself." 549 U.S. at 214. Here, even though the PLRA is entirely silent on the topic of amendments, the Sixth Circuit has used the PLRA to devise a hardline no-amendment rule, which eliminates Rule 15(a) for all indigent parties, prisoners and non-prisoners alike. This deviation "from the usual procedural practice" is not "specified by the PLRA itself." *See id.* Thus, the Sixth Circuit's

1997 *McGore* rule cannot stand in light of this Court's decision in *Jones*. Summary reversal is therefore proper.

CONCLUSION

For the reasons above, the Court should grant the petition for certiorari and should summarily reverse the judgment below.

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