No. 21-35728

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON DALE EATON,

Plaintiff-Appellant,

v.

T. BLEWETT, VANDERWALKER, RIDLEY, ROSSI, EYNON,

TWO RIVERS CORRECTIONAL INSTITUTION,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Case No. 2:20-cv-01641
Honorable Michael H. Simon

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Suppose a lawyer's assistant informs the lawyer that she is "available" to argue a motion tomorrow at noon. The lawyer would certainly be confused if it turned out she was actually already scheduled to argue a different motion in a different court tomorrow at noon. The lawyer could only argue the second motion, then, if she canceled the first—something which may have serious consequences. In this way, the lawyer's confusion would be warranted: No ordinary speaker of English uses the word "available" to mean "not currently available but could become available only by sacrificing something important." Yet that's exactly how the district court in this case interpreted the word "available" in the Prison Litigation Reform Act (PLRA).

The PLRA requires prisoners to exhaust "such administrative remedies as are available" in a prison. 42 U.S.C. §1997e(a). In this case, Aaron Eaton tried to file a grievance about guards unlawfully confiscating his legal mail. The prison told him he could not file the new grievance because he already had four active grievances, the maximum allowed by the prison's rules. The district court reasoned that administrative remedies were nonetheless "available" to Mr. Eaton

because he could have withdrawn one of his active grievances and filed the legal-mail grievance instead. It thus dismissed Mr. Eaton's case for failing to exhaust "available" administrative remedies.

Even assuming that Mr. Eaton could have withdrawn an active grievance, doing so would have been extraordinarily difficult and would have had dire consequences by foreclosing any future litigation regarding the subject of that grievance. Holding that a remedy was nonetheless "available" would be like the lawyer's assistant telling the lawyer that she is "available" when the assistant really means that the lawyer is only free if she abandons a parallel commitment before another court. That is simply not what the word "available" means. Because the district court's decision contravenes the plain text of the PLRA, it should be reversed.

JURISDICTIONAL STATEMENT

Mr. Eaton filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Oregon. The district court had jurisdiction over Mr. Eaton's claims under 28 U.S.C. §§ 1331 and 1343. The district court entered summary judgment for Defendants on August 11, 2021. ER-23-34. Mr. Eaton moved for reconsideration, which the district court denied on August 19, ER-3-21, and timely noticed this

appeal on August 25. ER-151-53; *see* Fed. R. App. P. 4(a)(1)(A). This court has jurisdiction to review the district court's final order under 28 U.S.C. § 1291.

ISSUE PRESENTED

1. Are administrative remedies "available" within the meaning of the Prison Litigation Reform Act when a prisoner is not allowed to file a grievance because he has other active grievances?

STATEMENT OF THE CASE

A. Statutory Background

The Prison Litigation Reform Act's exhaustion provision requires that a prisoner exhaust "such administrative remedies as are available" in the jail or prison in which they are confined before bringing an action in federal court involving prison conditions. 42 U.S.C. § 1997e(a). By the terms of the PLRA, then, a prisoner must exhaust only those administrative remedies that are "available" to him. *Id.* A prison's grievance system is not "available" where, for instance, "it operates as a simple dead end," or "when prison administrators thwart inmates from taking advantage of a grievance process through machination." *Ross v. Blake*, 578 U.S. 632, 634-35 (2016) (presenting nonexhaustive list of

instances where a grievance system is not "available"). When a court determines a process was not functionally "available" to a prisoner, exhaustion is no longer required. *Id.*; *see also Sapp v. Kimbrell*, 623 F.3d 813, 822 (9th Cir. 2010). Exhaustion is an affirmative defense, not a pleading requirement, so defendants bear the burden of demonstrating that remedies are available and that a plaintiff failed to exhaust them. *Jones v. Bock*, 549 U.S. 199, 216 (2007).

B. Factual Background

Aaron Eaton, who is currently incarcerated in Oregon, was sexually abused when he was a young scout with the Boy Scouts of America. ER-145-48; ER-38-40, ER-44, ER-62-67. In July of 2020, while housed at the Two Rivers Correctional Institution (TRCI), Mr. Eaton had the opportunity to become a plaintiff in a class-action lawsuit against the Boy Scouts on behalf of thousands of survivors of sexual abuse. *Id.* He had been in contact with outside counsel, and all he needed to do to secure his spot as a plaintiff was send a form to that outside counsel. ER-145-47; ER-38-40, ER-62. There was a very short window for Mr. Eaton to act, so

counsel mailed to Mr. Eaton a pre-stamped envelope addressed back to counsel to facilitate the speedy turnaround of that form. *Id*.

When that legal mail arrived at TRCI on July 27, however, Defendant Vanderwalker opened it and confiscated the pre-stamped, pre-addressed envelope as contraband. ER-75. Defendant Ridley had sent an email to security staff a few days prior, instructing them to search legal mail and to confiscate contraband, including "prepaid postage envelopes, stamps, blank envelopes, bookmarks, and blank paper or postcards." ER-130, ER-68. That email was in error, however; prepaid postage envelopes in legal mail were allowed under prison policy. ER-130. Apparently realizing the mistake, Ridley sent a second email a couple of weeks later clarifying that prisoners could receive envelopes addressed to an attorney with a metered stamp and the return address of the prisoner, "as these are intended to provide a quick turnaround for legal work." ER-130, ER-68. Defendants returned the envelope to Mr. Eaton approximately two weeks after Vanderwalker had confiscated it, but Mr. Eaton's chance to join the lawsuit against the Boy Scouts had passed, along with his one opportunity at redress for the abuse he faced as a boy. ER-75. Another survivor of abuse housed at TRCI actually received his envelope and

form, and he became a plaintiff to the Boy Scouts lawsuit. ER-62. That survivor was told that the average compensation per survivor would be about six thousand dollars. ER-64-66.[1]

The same day that his mail was confiscated, Mr. Eaton submitted to the prison the operative grievance in this case, complaining of that conduct and asking to have his mail returned. ER-75. That submission complied with the Oregon Department of Corrections' (ODOC) three-step grievance review system, which requires, as a first step, a prisoner to file an original grievance within 14 days after the occurrence giving rise to the grievance. Or. Admin. Reg. § 291-109-0205(1). A week later, the grievance coordinator stamped Mr. Eaton's grievance as "Denied." ER-77. But it was nearly a month before the coordinator finally returned the grievance denial to Mr. Eaton on August 21. ER-76. That denial explained to Mr. Eaton that his grievance had been denied pursuant to an ODOC rule stating: "(1) An [adult in custody] cannot have more than

[1] Last fall, a multi-million-dollar settlement was pre-approved against the Boy Scouts of America in that class-action lawsuit, with claim values ranging anywhere from $3,500 to $2.7 million per survivor. *Boy Scouts Abuse Settlements Are Still Too Low, Victims Groups Say*, Reuters (Sept. 15, 2021), https://www.reuters.com/legal/transactional/boy-scouts-abuse-settlements-are-still-too-low-victims-groups-say-2021-09-15/.

four active complaints (grievances, discrimination complaints, or appeals of either) at any time."[2] *Id.*; Or. Admin. Reg. § 291-109-215(1). By the time Mr. Eaton received that denial, the 14-day window for filing his operative grievance had long since passed, and there was nothing more he could do.

So, without other options, Mr. Eaton took the second step required under the ODOC's exhaustion regime and submitted an initial appeal of the denial of his grievance. ER-77; *see* Or. Admin. Reg. § 291-109-0205(3) (a prisoner must make an initial appeal of the response within 14 days after the grievance response is sent to the prisoner). The Grievance Coordinator's Office stamped that appeal as "Denied" on September 2, but did not mail him a letter returning his appeal and explaining that his appeal constituted "improper use of the grievance system" until

[2] At the time Mr. Eaton filed his grievance, he had four active grievances pending. Those grievances include: TRCI_2020_03_148, received by TRCI March 23, 2020 about "Mold in showers"; TRCI_2020_05_036, received by TRCI May 12, 2020 about "Mold"; TRCI_2020_05_077, received by TRCI May 12, 2020 about "Treatment"; and TRCI_2020_06_080, received by TRCI June 16, 2020 about "Kosher diet." ER-112-14. Although the TRCI had received Mr. Eaton's oldest pending grievance on March 23, by September 10 (171 days later) the "Most Recent Event" was: "Initial appeal sent to responder." ER-114. In other words, 171 days after the ODOC received Mr. Eaton's March 23 grievance, it was only in the second step of the exhaustion process. *Id.*

September 14. ER77-78; ER-125. It also warned that "[i]f an [adult in custody] demonstrates a pattern of improper use of the grievance system," that prisoner can be "subject to the restriction of their access to the grievance … system[]" to two active grievances. ER-78 (quoting Or. Admin. Reg. § 291-109-0240).

On October 10, Mr. Eaton took the last step required for exhaustion under the ODOC's grievance system and filed a final appeal. ER-80; Or. Admin. Reg. § 291-109-0205(5) (a prisoner must make a final appeal within 14 days from the date the initial appeal response is sent to the prisoner). Two weeks later, the Grievance Coordinator's Office sent him a letter explaining that he could not appeal because "[t]he grievance rule does not permit a returned grievance or grievance appeal to be appealed." ER-81.

Even as ODOC hindered his efforts at each step of the grievance process, Mr. Eaton did his best to properly exhaust administrative remedies by seeking the prison's guidance. First, on August 26, he filed a form with the prison asking: "If I send you a grievance and it gets denied does this exhaust my administrative remedies here at TRCI?" ER-53. The response was extraordinarily unhelpful: "Refer to Grievance Rule

291-109," *id.*; Grievance Rule 291-109 covers the entire grievance review system. *See* ER-96-111. Second, on September 9 he sent another letter to the prison asking how many active grievances he had because he was "trying to get his grievances in compliance." ER-51. He received a response a week later: "It is your responsibility to keep track of grievances you have filed. Please refer to previous receipts sent to you to determine which ones are still active." *Id.*

C. Procedural History

Blocked from filing his operative grievance and appeals, Mr. Eaton turned to the federal courts and sued the corrections officials responsible for the confiscation of his legal mail under 42 U.S.C. § 1983. ER-143-50. He raised a First Amendment claim for the deprivation of his legal mail.[3] *Id.*

Three days after Mr. Eaton filed his amended complaint, the Defendants moved for summary judgment. ER-134-42. They argued that

[3] Mr. Eaton also raised a claim that the confiscation of his mail interfered with his Sixth Amendment right to counsel and a Fourteenth Amendment due process claim regarding the sufficiency of the ODOC's grievance system. ER-143-50. Those claims were dismissed by the district court for failing to state claims and are not at issue in this appeal.

Mr. Eaton failed to exhaust available administrative remedies and that he failed to state a claim under the First Amendment. ER-136-39.

Mr. Eaton opposed Defendants' motion. ER-35-42. As for exhaustion, he argued that he had followed the procedures laid out in ODOC's grievance policy but was denied at every step merely because he had properly used the system to seek resolution on four other matters—so he had no remedies available to him. ER-36-38. In other words, the fact that he could not move along in the exhaustion process because he already had four active grievances was itself evidence that he had no available administrative remedies. *Id*. And, because he had only a short window—14 days—to file a grievance, his choice was either to file a grievance and get denied for having too many active grievances or to wait for one of his active grievances to move through the system and be time barred. *Id*. Under the circumstances, he argued, he took all reasonable measures and filed a grievance and grievance appeals anyway. *Id*. (He had also made at least two attempts to figure out from administrative officials what he should do to get his operative grievance into compliance. ER-51, ER-53.) Mr. Eaton also argued that he had stated a claim for the violation of his First Amendment rights. ER-38-40.

The district court entered summary judgment for Defendants. ER-23-34. It agreed with Mr. Eaton that the First Amendment claim regarding the confiscation of legal mail was cognizable, as Mr. Eaton had alleged that the Defendants confiscated his legal mail under a policy that purportedly served no penological interest. ER-29-30. Notwithstanding the viable First Amendment claim, however, the court concluded that Mr. Eaton had not exhausted available administrative remedies because he failed to comply with Oregon's "prison-imposed limits on the number of grievances an adult in custody may file." ER-30. As to Mr. Eaton's argument that he had no choice but to file his operative grievance if he wanted it to be timely, in the court's eyes Mr. Eaton had another option: "withdraw one of his other active grievances." ER-31. Such a withdrawal would not have prejudiced Mr. Eaton, the court thought, because it appeared that two of the grievances were both in some respect related to mold. ER-31 n.3.

Mr. Eaton moved for reconsideration, arguing that Defendants had failed to make the process readily available to him or to govern the grievance procedures fairly. ER-3. He also urged the court to consider the fact that if the mold grievances were the same, the Defendants should

have "followed their own rules and not allowed him to file multiple grievances" on that issue. ER-3-4. Finally, he asserted that the "dep[artment] intentionally delays responses to grievances for months," such that he "is being denied the [r]ight to grieve" other issues. ER-4. The district court denied reconsideration, explaining that: "No one is infallible, but if the Court has erred, which the Court does not believe has occurred in this case thus far, Plaintiff may appeal the Court's decision to the Ninth Circuit." ER-2. Mr. Eaton heeded that advice and timely appealed.

SUMMARY OF THE ARGUMENT

I. There were no administrative remedies available to Mr. Eaton for his legal-mail claim because ODOC's grievance policies did not allow him to file a new grievance while he had four grievances still active. With no "available" remedies for his operative claim, Mr. Eaton was not required to exhaust under the PLRA.

A. As a consensus of dictionaries, Supreme Court precedent, and this Court's own past decisions recognize, "available" in the PLRA's exhaustion provision means "capable of use." Here, the ODOC's limit on the number of grievances a prisoner may have active at any one time

meant that Mr. Eaton was unable to access even the most preliminary level of review for his legal-mail grievance. Rather, Mr. Eaton's attempts to have his claim heard met a "simple dead end." *Ross v. Blake*, 578 U.S. 632, 634-35 (2016). For this claim, then, grievance procedures were quite literally incapable of use and thus unavailable based on a plain reading of the PLRA.

B. The district court was wrong to suggest that remedies were available to Mr. Eaton because he could withdraw an active grievance to make room for his legal mail claim. First, this reasoning runs afoul of the plain meaning of the word "available." The district court made availability conditional by suggesting that remedies are still available even where a prisoner must give up preexisting rights to make them so. But this reading contradicts both the way that dictionaries define "available" and the way that ordinary people use the word. Second, a number of profound constitutional and policy considerations caution against a reading of the PLRA that forces prisoners to abandon one claim to make remedies "available" for another. Constitutionally, the district court's proposal has an "intolerable" result: "that one constitutional right should have to be surrendered to assert another." *Simmons v. United*

States, 390 U.S. 377, 394 (1968). And the district court's reasoning creates perverse incentives for prison officials, who control administrative grievance processes, to gatekeep access to federal court. Without text, intent, or policy to support it, the district court's reasoning cannot stand.

C. The district court was also wrong to ignore the ways in which the ODOC's procedures operated in practice to render administrative remedies unavailable for Mr. Eaton. Under the ODOC's own policies, Mr. Eaton had a limited window in which to submit his legal-mail grievance. The record here shows that prison officials did not even notify Mr. Eaton about his four active grievances until after the window for submitting his legal-mail claim had passed. By the time Mr. Eaton would have been able to attempt to withdraw a different claim in order to pursue his legal-mail claim, it was too late to do so anyway.

Moreover, even though Oregon's own regulations suggest that a response at each step of the administrative process should take no more than 35 days, prison officials dragged that process out on several of Mr. Eaton's active grievances. Absent these delays on the prison's part, at least one of Mr. Eaton's active claims should have finished the

administrative review process by the time the legal-mail claim was ripe. Where, as here, unreasonable administrative delay makes exhaustion impossible, administrative remedies are not actually available.

STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment *de novo*. *Gordon v. Cnty. of Orange*, 6 F.4th 961, 967 (9th Cir. 2021). Summary judgment is appropriate only where, viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in favor of that party, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Gordon*, 6 F.4th at 967. The obligation to construe a pro se litigant's pleadings liberally is well-established. *Wilk v. Neven*, 956 F.3d 1143, 1147 (9th Cir. 2020).

ARGUMENT

I. Administrative Remedies Were Not "Available" To Mr. Eaton Because He Was Not Allowed To File The Operative Grievance.

The administrative exhaustion provision of the PLRA requires only exhaustion of "such administrative remedies as are *available*" before a prisoner brings an action in federal court. *Ross v. Blake*, 578 U.S. 632, 635-36 (2016) (emphasis added) ("[W]e … underscore [the PLRA's] built-

in exception to the exhaustion requirement: A prisoner need not exhaust remedies if they are not 'available.'") Where an administrative remedy is not "capable of use for the accomplishment of a purpose," it is not "available," and the exhaustion requirement is satisfied. *Id.* at 642.

Here, administrative remedies were not "available" to Mr. Eaton for his legal-mail claim. As dictionaries and precedent make clear, "available" means "capable of use," and Mr. Eaton simply could not use ODOC's administrative remedy system to file his operative grievance because he had already properly used it four other times. The district court seemed to think it was more complicated than that because Mr. Eaton could have withdrawn an active grievance to make room for his legal-mail grievance, leaving administrative remedies "available." But that understanding of "available" contravenes the plain meaning of the word, precedent from this Court and the Supreme Court, and policy considerations. Even assuming administrative remedies are "available" where a prisoner is forced to choose between which civil-rights grievance to pursue, construing the record in Mr. Eaton's favor reveals that he could not have withdrawn an active grievance in time to file his legal-mail grievance. Finally, prison officials dragged out the administrative process

on Mr. Eaton's active grievances such that remedies were not actually available for his legal-mail claim.

A. Available Means "Capable Of Use," And Mr. Eaton Could Not Use ODOC's Administrative Remedy Process.

No administrative remedies were "available" for Mr. Eaton's grievance regarding his legal mail. Mr. Eaton was not allowed to file that grievance because he already filed four other active grievances. As a consensus of dictionaries make clear, and as the Supreme Court confirmed in *Ross v. Blake*, "available" means "capable of use." 578 U.S. at 642 (citing Webster's Third New Int'l Dictionary 150 (1993); Random House Dictionary of the English Language 142 (2d ed. 1987); 1 Oxford English Dictionary 812 (2d ed. 1989); Black's Law Dictionary 135 (6th ed. 1990)). But ODOC's system was not capable of use by Mr. Eaton because it blocked him from filing his operative grievance. Plainly, then, administrative remedies were unavailable for Mr. Eaton's legal-mail claim.

The same conclusion follows from Supreme Court precedent. In *Ross v. Blake*, the Supreme Court fleshed out its interpretation of "available" by offering examples of situations where administrative remedies are not "capable of use," including when they operate as a

"simple dead end." 578 U.S. at 643-44. Here, the ODOC's blocking procedures operated as such a "dead end." Oregon's administrative procedures only allow four active grievances at any one time. Or. Admin. Reg. § 291-109-0215(1). Mr. Eaton tried to file his legal-mail grievance while he had four grievances already active. His attempts were rebuffed not because of anything deficient about his legal-mail claim, but because he had already used the grievance system four times, leaving him with nowhere else to go within that system. In other words, Mr. Eaton met a dead end. At that point, administrative remedies were clearly unavailable to Mr. Eaton.

Along these same lines, this Court has held that a remedy is unavailable where a prison improperly refuses to accept a grievance at the ground floor. In *Sapp v. Kimbrell*, 623 F.3d 813 (9th Cir. 2010), this Court noted that where prisons improperly screen grievances out of the administrative pipeline at the ground level, administrative processes are "plainly unavailable." *Id.* at 823. In *Andres v. Marshall*, 867 F.3d 1076 (9th Cir. 2017), administrative remedies were unavailable because the prison failed to process the plaintiff's grievance at all, and thus shut the claim out of any level of review. *Id.* at 1078-79. Thus, this Court has

acknowledged that when prisoners are completely cut off from the administrative review process, remedies are not "available" within the meaning of the PLRA. And that is precisely what occurred here: the ODOC's grievance procedures operated to exclude Mr. Eaton's grievance from even the most preliminary level of substantive review—the prison immediately rejected the grievance because Mr. Eaton had other active grievances.

This complete lack of access to ODOC's grievance system ultimately makes this case simple. Because Mr. Eaton's claim could not even get in the door, administrative remedies were not "capable of use" and thus were unavailable under the PLRA.

B. The District Court Was Wrong That Remedies Were "Available" To Mr. Eaton If He Could Withdraw an Active Grievance.

Under the plain meaning of the word, remedies simply were not "available" to Mr. Eaton. The district court thought otherwise because it believed Mr. Eaton could have withdrawn an active grievance to make way for his legal-mail grievance. That possibility, the court suggested, left administrative remedies "available." But even assuming Mr. Eaton could have done so, *but see infra* § IC, an administrative remedy is not available under the PLRA when filing it would require the sacrifice of

another active grievance. To find otherwise would conflict with the plain meaning of "available," precedent from this Court and the Supreme Court, and policy considerations.

1. A remedy is not "available" if a prisoner must withdraw an active grievance to make it so.

To start, dictionary definitions of the word "available" are fatal to the district court's reasoning. Dictionaries published around 1996, the year Congress passed the PLRA, define the word "available" with reference to the present, indicating that something is "available" if it is "present or ready for *immediate* use." Black's Law Dictionary 135 (6th ed. 1987) (emphasis added); *see also* Webster's Third New Int'l Dictionary (1993) ("immediately utilizable"); Merriam Webster's Collegiate Dictionary (10th ed. 1993) ("present or ready for immediate use"). Further, for remedies to be available, they must be accessible and concrete, not hypothetical. *See* Random House Dictionary at 142 ("at hand"); Webster's Third New Int'l Dictionary at 150 ("personally obtainable"); Black's Law Dictionary at 135 ("effectual"). So, "available" means capable of use, now, by this person, toward a particular end—without ifs, ands, or buts. *See Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) ("To be available, a remedy must be available 'as a

practical matter'; it must be 'capable of use; at hand.'" (citation omitted)). However, under the district court's view, the prison's procedures were not immediately capable of use for Mr. Eaton. Instead, remedies would have been available for the desired purpose only *if* and *when* Mr. Eaton had swapped one claim for another. But, as dictionary definitions illustrate, available only *if* and *when* is not available at all.

Indeed, in other statutory contexts, this Court has interpreted the word "available" to exclude that which forces a difficult tradeoff. When this Court interpreted a disaster relief law requiring Hawaii, as a recipient of FEMA aid, to reimburse the federal government if duplicate funds were "available," the panel explained that "practical considerations such as risk, cost, and uncertainty are inherent in the more usual concept of availability. Where one person might consider unlikely or inconvenient possibilities to be available, a more practical person would not." *State of Hawaii* ex rel. *Attorney General v. FEMA*, 294 F.3d 1152, 1161-62 (9th Cir. 2002). With this maxim in mind, this Court held that even though, theoretically, additional funds had been a possibility under Hawaii's insurance policies, these funds were not "available" within the meaning of the statute given Hawaii's commercially reasonable decision to settle

for less than the policies' limits. *Id.* at 1162-63; *see also Whaley v. Schweiker*, 663 F.2d 871, 875 (9th Cir. 1981) (holding that benefits earmarked for a veteran's children were not "available" income for the purposes of social security simply because that veteran *could* opt to spend the income on his own needs over his children's). In this way, this Court has already recognized that when Congress uses the word "available," it does not intend to put anyone to a tough choice. When Congress used the word "available" in the PLRA, it similarly did not intend that result.

Moreover, ordinary English makes clear that the district court's conception of "available" was in error. To return to an earlier example, a lawyer's assistant would not tell the lawyer that she is "available" for a hearing if she had another hearing scheduled at the same time. Technically, the lawyer could probably cancel the first hearing—perhaps with great difficulty and with serious legal consequences—to make the second, just as, technically, Mr. Eaton may have been able to withdraw one grievance—foreclosing any future litigation for that claim—in favor of another. But the word "available" does not mean conditionally available once something else happens, and the district court should not have assumed Congress intended so in drafting the PLRA.

Beyond conflicting with the plain meaning and ordinary usage of "available," the suggestion that administrative procedures were available to Mr. Eaton because he could have withdrawn an active grievance to file another also conflicts with Supreme Court precedent interpreting the PLRA. In *Jones v. Bock*, 549 U.S. 199 (2007), the Supreme Court held that exhaustion needs to be assessed on a claim-by-claim basis. *Id.* at 221-24; *see also Bruce v. Samuels*, 136 S. Ct. 627, 632-33 (2016) (interpreting the PLRA's filing fee schedule to proceed on a per-action rather than per-prisoner basis).

Here, the district court seems to have asked if administrative remedies were available to Mr. Eaton as a general matter. But this approach contravenes the Supreme Court's clear instructions in *Jones* for lower courts to look at exhaustion one claim at a time. *Jones*, 549 U.S. at 221-24; *see also Fordley v. Lizaragga*, 18 F.4th 344, 347 (9th Cir. 2021). In light of *Jones*, then, the question the district court should have asked was not: "Were any administrative remedies available to Mr. Eaton?" It was: "Were administrative remedies available for Mr. Eaton's *legal-mail claim*?" And since the prison told Mr. Eaton he could not file his legal-mail claim, the answer to that question is no.

2. Constitutional and policy considerations counsel against a rule that administrative remedies remain available so long as a prisoner can abandon another active grievance.

Beyond the plain meaning of "available," several important constitutional and policy considerations also support the conclusion that when access to administrative remedies for one claim is conditioned upon the abandonment of another, those remedies are not "available" under the PLRA. The district court's reasoning raises constitutional concerns about trading one right for another, encourages machination by prison officials in processing grievances, and undermines the actual policy purposes behind the PLRA's exhaustion requirement. The district court's reasoning thus cannot stand.

i. *First*, affirming the district court's interpretation of "available"—where Mr. Eaton must give up one grievance to pursue another—would raise serious constitutional concerns. The Supreme Court has found it "intolerable that one constitutional right should have to be surrendered to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). Indeed, both the Supreme Court and this Court have averred that it is unacceptable that even a privilege that is not protected by the Constitution should be surrendered to assert a constitutional right. *See*

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding government could not deny plaintiff benefit of employment because of his constitutionally protected speech because it "would allow the government to 'produce a result which [it] could not command directly'" (citation omitted)); *Bittaker v. Woodford*, 331 F.3d 715, 723 (9th Cir. 2003) (holding defendant could not be forced to choose between an ineffective-assistance-of-counsel claim and attorney-client privilege).

Forcing a prisoner to choose whether to withdraw an active grievance for the ability to file a separate grievance essentially forces the prisoner to choose between two constitutional rights. The First Amendment protects the right to pursue a grievance where a grievance system has been made available. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). Here, even assuming he could have withdrawn an active grievance in time to pursue the operative grievance, Mr. Eaton would have had to choose between multiple grievances, each of which he had a First Amendment right to pursue. The First Amendment also protects the right to pursue a non-frivolous civil-rights lawsuit. *Lewis v. Casey*, 518 U.S. 343, 351-53, 355 (1996). Here, withdrawing one of his active grievances would have meant, effectively, giving up on a potential civil-

rights lawsuit: The PLRA would kick Mr. Eaton out of court if he filed a suit without exhausting. In other words, under ODOC's scheme, a prisoner is forced to either give up his right to file a civil-rights lawsuit on issue number five (which requires filing a grievance on issue number five) or give up his right to get into federal court on one of his four active grievances (which must also complete the grievance process to get into court).

The importance of a prisoner's right of access to the courts in our constitutional scheme cannot be overstated: "[A] prisoner ordinarily is divested of the privilege to vote," so the right of access to the courts "might be said to be his remaining and most fundamental political right, because preservative of all rights." *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (internal quotation marks omitted). And the Supreme Court has observed that "the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002). An accessible administrative remedy system, then, allows cases involving serious civil rights violations to be actually adjudicated on the merits, rather than getting shut out of court entirely due to a

prisoner's inability to exhaust. But if the district court is correct—that a department of corrections may provide an administrative remedy system, but prevent prisoners from actually using it if they have properly used it too many times—then the right of access to courts would be rendered a nullity. So, too, would prisoners' underlying constitutional rights.

ODOC's exhaustion regime allows prison officials to put prisoners to a difficult choice regarding the civil-rights abuses they may face while incarcerated. Today, incarcerated people in the United States are often subjected to cruel, inhumane, and degrading conditions. *See, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (prison officials violated Eighth Amendment by confining a prisoner, without clothing, to cells covered with human excrement and overflowing with human waste). Those who need medical and mental health treatment are frequently denied care or ignored. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 502 (2011) (upholding remedial order addressing "grossly inadequate provision of medical and mental health care" to prisoners). And prisoners' right to communicate with the outside world—including legal representation—is often unconstitutionally restricted. *See*, *e.g.*, *Nordstrom v. Ryan*, 856 F.3d 1265, 1272-74 (9th Cir. 2017) (prison's policy of scanning outgoing legal

mail to determine if contents actually concerned legal matters violated First Amendment rights). In short, civil-rights abuses are common in prisons, and it is not unlikely that a prisoner would be subjected to more than four civil-rights violations in the span of a few months. If the district court's understanding of the PLRA is allowed to stand, a prison system could force prisoners to choose between which of the multiple civil-rights violations they may face while incarcerated. That cannot be the law.

ii. *Second*, the district court's interpretation of "available" would create perverse incentives for prison officials. In the context of administrative exhaustion, this Court and the Supreme Court have been historically wary of the possibility of administrative interference with access to grievance procedures, or "machination." *See Ross*, 578 U.S. at 644 (listing "machination" by prison officials as an example of when administrative remedies are unavailable). Notably, such interference need not be intentional or nefarious to be suspect. *See, e.g.*, *Fordley*, 18 F.4th at 354-56 (concluding that administrative remedies were unavailable when prison officials failed to respond to a filed grievance, irrespective of whether this failure was intentional or not); *Andres*, 867

F.3d at 1078-69 (same where prison officials failed to process a timely filed grievance, even without a finding that such failure was intentional).

Under the district court's reasoning, the ability of a prisoner to access federal court on one of his claims is conditioned on the forward progress of other grievances. And prison officials are in charge of this forward progress. The district court's rule would thus give prison officials an immense amount of control over access to administrative remedies and, in turn, access to federal courts. Accidental or otherwise, this gatekeeping role for prison officials can easily lead to trouble, as it did here. Mr. Eaton did everything within his power to give the prison an opportunity to address his grievance that Defendants violated his First Amendment rights by confiscating his mail. Yet the Department kept his active grievances pending beyond the time frame suggested in ODOC's own regulations for adjudicating grievances, thus effectively blocking him from filing additional grievances. Or. Admin. Reg. § 291-109-0205(1)-(6). And it warned him that attempting to file further grievances could lead to his privileges being restricted even further—to only *two* active grievances at a time. ER-78. This Court and the Supreme Court have warned against this exact kind of interference.

iii. *Finally*, Mr. Eaton's efforts to notify the prison met the goals of the PLRA's exhaustion requirement, even if the prison didn't like the way he did so. The exhaustion requirement was meant to address the quantity and quality of prison litigation by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). But the district court's interpretation of the PLRA would not give prison officials any more time or opportunity to address grievances internally. It instead either shuts out a grievance from any administrative review at all or cuts short administrative review for a grievance already in the pipeline in order to push a new grievance through. Neither scenario furthers careful, internal resolution of underlying claims. On the contrary, the district court's reasoning serves only to force a claim out of the administrative system and thus shield it from the courts. But Congress had more nuanced policy goals in mind, none of which are served by the district court's reading of "available."

In short, the district court's conclusion that administrative remedies remained "available" to Mr. Eaton because he could have withdrawn an active grievance to make way for his operative grievance

is not supported by the text, the structure, or the policy goals underlying the PLRA.

C. The Way That ODOC Handled Mr. Eaton's Grievances Rendered Remedies Unavailable.

Even if the district court were correct that administrative remedies are "available" where a prisoner is forced to choose between which civil-rights grievance—and therefore which civil-rights lawsuit—to pursue, that *still* wouldn't end the matter. In this case, administrative remedies were not "available" to Mr. Eaton because of at least two other aspects of ODOC's administrative scheme. First, ODOC did not notify Mr. Eaton that he had too many active grievances until the 14-day window to file his legal-mail claim had passed. So the district court was wrong to assert that Mr. Eaton even had the option of withdrawing an active grievance. Second, the only reason four grievances were still active, leaving no room for Mr. Eaton's legal-mail claim, was ODOC's unreasonable delays in processing Mr. Eaton's earlier-filed grievances. As courts have held in analogous contexts, such extreme delays render administrative remedies unavailable.

1. Defendants did not inform Mr. Eaton that he had four active grievances in time for him to withdraw a grievance in favor of his legal-mail claim.

The district court's ruling rested on a key premise: That Mr. Eaton could have withdrawn one of the four active grievances in time to file his legal-mail claim. But that premise is belied by the record.

For starters, Defendants unconstitutionally confiscated Mr. Eaton's legal mail on July 27, after which he had only until August 10 to file a grievance. ER-75, ER-84. But the Department did not even notify him that he had four active grievances until it sent him an explanation of why his grievance had been denied nearly a month later, on August 21. ER-122. In other words, by the time Mr. Eaton knew he would need to withdraw one of his active grievances to push his operative grievance through, it was already too late to timely file that grievance.[4]

[4] The district court suggested that Mr. Eaton would not be giving up much by withdrawing a pending grievance because it assumed that two of the pending grievances were identical. That assumption was based entirely on the fact that the summaries of the grievances both have the word "mold" in them (one is called "mold in showers" and one is just called "mold"). But had the two "mold" grievances really been duplicative, one would have been rejected. ODOC's regulations specifically prohibit filing "more than one accepted grievance or discrimination complaint regarding a single incident or issue." Or. Admin. Reg. § 291-109-0210(2). Indeed, Oregon's regulations also make clear that a prisoner cannot submit a single grievance regarding more than "one matter, action, or incident."

And even if Mr. Eaton had been notified before August 10 that he would need to withdraw an active grievance in order to file his legal-mail claim, this Court cannot assume that he would have been able to do so in time to file the operative grievance. Although the ODOC grievance system provides that a prisoner "may withdraw a grievance by submitting a written request to the institution grievance coordinator," Or. Admin. Reg. § 291-109-0225(4), it provides no further guidance, let alone an estimate of how long it would take for such a written request to be processed.

Exhaustion is an affirmative defense, not a pleading requirement. *Jones*, 459 U.S. at 216. Defendants thus bore the burden of showing that there were administrative remedies "available" to Mr. Eaton that he

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Or. Admin. Reg. § 291-109-0210(1). A prisoner with mold in his cell may thus have to file one grievance regarding the cleanliness of his cell and a separate grievance regarding medical treatment for health effects of the mold. Or one grievance might have referred to mold in the showers and the other to mold in Mr. Eaton's cell. Drawing all inferences in Mr. Eaton's favor, as is required at this early stage, then, this Court must conclude that, far from being duplicative, the two grievances address different "incidents or issues." *See Gordon*, 6 F.4th at 967. Even if the two grievances addressed the same mold "issue," this Court must assume that they at the very least addressed different aspects of that problem. *See id.*

failed to exhaust. They did not do so, particularly given that this Court must draw all inferences in Mr. Eaton's favor at this preliminary stage.

2. Mr. Eaton had no "available" remedies because administrators took unreasonably long to move his active grievances forward.

The delays Mr. Eaton experienced in receiving responses to his grievances, along with the incredible lengths of time that prison administrators kept his grievances active, hindered his ability to file the operative grievance in this case. Under the ODOC's grievance system, prison officials have 35 days to respond at each step of the three-step grievance process (unless they seek an extension), and prisoners have just 14 days to appeal. Or. Admin. Reg. § 291-109-0205(1)-(6). Accordingly, one might expect a grievance to take around 130 days to complete the exhaustion process, give or take a few days. Essentially, then, a prisoner cannot grieve more than four incidents over that period.

But even that approximate time-frame understates the period over which the four-grievance limit operates. The 35-day deadlines for prison administrators are apparently flexible in practice; along with delays between the administrator's response times and Mr. Eaton receiving responses, those flexible deadlines allowed prison administrators to keep Mr. Eaton from filing his operative grievance. Indeed, prison officials

were able to drag out the administrative remedy process to keep Mr. Eaton's active grievances pending for extraordinary lengths of time. For example, Mr. Eaton's oldest active grievance had been received by the prison on March 23, 2020, and by September 10—171 days later—it was only on initial appeal, the second step of the administrative remedy process. ER-114. Had ODOC processed Mr. Eaton's active grievances in a reasonably timely manner, that oldest active grievance would have been resolved by around July 31, or thereabouts—allowing Mr. Eaton to file a grievance within two weeks of his mail being confiscated on July 27.

The Supreme Court's analogy to administrative law in *Woodford v. Ngo*, 548 U.S. 81 (2016) is instructive here. In *Woodford*, the Court recognized that when Congress passed the PLRA, it likely incorporated the finer details of how long-established exhaustion doctrines in the administrative law context already operated. 548 U.S. at 88-93. Administrative law tells us that when an agency sits on a claim for a long time, administrative remedies become unavailable. Thus, where procedures that claimants would otherwise need to exhaust to make it into federal court allow officials too much discretion to block access to

federal judicial remedies, litigants satisfy the exhaustion requirement. *See Coit Independence Joint Venture v. Illinois Federal Savings and Loan Ins. Co.*, 489 U.S. 561 (1989) (holding administrative remedies did not need to be exhausted where regulations gave an agency "virtually unlimited discretion to bury large claims … in the administrative process."); *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 591-92 (1926) (holding that where an administrative tribunal sat on a matter for an extended period of time without explanation and with no sign of forward progress, a claimant did not need to await a decision before heading to federal court).

Mr. Eaton's dilemma mirrors that faced by plaintiffs in this line of cases. Severe restrictions on the number of grievances a prisoner may have, the flexibility built into the policy to allow administrators to draw out the process, and the strict time limit by which Mr. Eaton needed to get his operative grievance filed all coalesced to allow the ODOC to keep Mr. Eaton's active grievances pending for far longer than the 14 days he had to file an operative grievance and to eventually bar it for good. Just as in the administrative law context, this Court should not allow such delays to shut Mr. Eaton's claims out of judicial review.

CONCLUSION

The extraordinary harm Mr. Eaton suffered because of Defendants' misconduct cannot be overstated. Mr. Eaton, a survivor of sexual assault as a child, had one opportunity to join a lawsuit against his abusers, and he likely would have recovered, at minimum, thousands of dollars—an enormous sum for an incarcerated person. *See supra* n.1. But Defendants stole that opportunity from Mr. Eaton when they unconstitutionally took his legal mail. And ODOC's restrictive policies then blocked Mr. Eaton from even filing a grievance asking the prison to right Defendants' wrongs. Administrative remedies were thus not "available" to Mr. Eaton, and he is entitled to his day in court. For the foregoing reasons, this Court should reverse the judgment of the district court and remand the case for further proceedings.

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Respectfully Submitted,

s/ Rosalind Dillon

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 and 9th Circuit Rule 32, I certify that:

This brief complies with the type-volume limitation of 9th Circuit Rule 32-1(a) because this brief contains 7,563 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

s/ Rosalind Dillon
Rosalind Dillon

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Rosalind Dillon
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