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
No. 2:20-cv-01641
Hon. Michael H. Simon

BRIEF FOR *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF OREGON, THE PRISON LAW OFFICE, AND RIGHTS BEHIND BARS IN SUPPORT OF THE PLAINTIFF-APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are nonprofit organizations with decades of experience litigating on behalf of people who are incarcerated. *Amici* submit this brief to emphasize the outsized impact that minor technical requirements in prison grievance procedures have on incarcerated people's ability to seek enforcement of their civil rights in federal court. In *amici*'s experience, incarcerated people are frequently foreclosed from seeking judicial redress against prison administrators for serious civil rights violations because complex grievance procedures prevent them from being able to fully exhaust administrative remedies.

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 1.7 million members, dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. Consistent with that mission, the ACLU established the National Prison Project ("NPP") in 1972 to protect and promote the civil and constitutional rights of incarcerated people. NPP has been involved in litigation concerning the interpretation of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), since the statute's enactment, both as counsel and as *amicus curiae*.

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the amici, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief.

The **American Civil Liberties Union of Oregon** is a state affiliate of the ACLU, with more than 28,415 members statewide. The ACLU of Oregon is dedicated to defending and advancing civil rights and civil liberties for Oregonians, including the fundamental civil rights protected in the Oregon Constitution and United States Constitution. Among other priorities, the ACLU of Oregon is committed to advocating for lawful treatment of people incarcerated in Oregon prisons and jails.

The **Prison Law Office** is a nonprofit public interest law firm founded in 1976 that provides representation in class action impact litigation in California and Arizona to improve incarcerated persons' conditions of confinement, and directly represents individuals in habeas corpus petitions, appeals, and parole consideration hearings. The Prison Law Office has appeared before this Court in numerous cases involving prisoners' rights, both as direct counsel and as *amicus curiae*. The Prison Law Office also promotes efficient and economical federal litigation by providing incarcerated individuals with self-help material that includes information on how to prosecute federal civil rights actions.

Rights Behind Bars ("RBB") is a non-profit organization representing incarcerated or formerly incarcerated individuals in challenges to their conditions of confinement. Importantly for the present matter, RBB tracks *pro se* litigation filed by incarcerated individuals around the country and regularly serves as appellate

counsel for formerly *pro se* litigants. *See e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52 (2020). Through the organization's tracking and representation of *pro se* litigants, RBB has developed particular knowledge, expertise, and interest in the barriers facing incarcerated individuals in accessing courts. RBB is concerned that the decision below misunderstands the realities facing *pro se* incarcerated litigants and will exacerbate already existing difficulties for incarcerated individuals seeking to file civil rights claims.

INTRODUCTION

Prison grievance systems often contain a gauntlet of procedural minutiae, designed to intimidate the uninitiated, trip up the unwary, and foil all but the most sophisticated grievants from successfully navigating the labyrinth. Indeed, in the era of the PLRA, prison grievance procedures often resemble the optical illusions of M.C. Escher, with circular stairways and unreachable doors.[2]

Incarcerated people who are unable to traverse these complicated pathways—devised, implemented, and enforced by prison administrators—are forced to watch their civil rights claims dismissed for failure to exhaust. Courts need not, and should not, however, defer to prison administrators so reflexively, no matter how dense the thicket of procedural requirements. The language of the PLRA itself provides that incarcerated people need not exhaust grievance procedures that are not "available." *See Ross v. Blake*, 578 U.S. 632, 635-36 (2016). And far too often, prison grievance systems are a "simple dead end" or "practically speaking, incapable of use[,]" *id.* at 643-44, particularly when they limit the number of grievances that an incarcerated person may have pending at any one time. In these cases, as here, remedies should be found to be unavailable under the PLRA.

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[2] M.C. ESCHER COLLECTION, https://mceschercom/gallery/impossible-constructions/# (last visited Jan. 11, 2022).

SUMMARY OF ARGUMENT

The administrative exhaustion requirement of the PLRA requires incarcerated people to exhaust administrative remedies prior to bringing suit. 42 U.S.C. § 1997e(a). Courts interpret this requirement to demand perfect compliance with every step in a grievance regime devised by the prison authorities themselves—with virtually no limitation on how complicated the process may be. *See Woodford v. Ngo*, 548 U.S. 81, 90–91 (2006); *see also Porter v. Nussle*, 534 U.S. 516, 524 (2002) ("All 'available' remedies must now be exhausted; those remedies need not meet federal standards, nor must they be 'plain, speedy, and effective.'"). As a result, incarcerated people are often unable to successfully navigate the grievance process and are thus barred from seeking judicial redress for serious civil rights violations.

Additional barriers also hinder incarcerated people's ability to complete the grievance process. Incarcerated people have disproportionately high rates of disabilities and mental illness, and disproportionately low rates of English proficiency and literacy. Threatened or actual retaliation further prevents incarcerated people from completing the grievance process.

In many cases, the procedural barriers that prevent incarcerated people from successfully navigating the grievance process are by design. "[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007). As such, because the responsibility for the

creation and implementation of any and all grievance requirements rests with prison administrators, those administrators can design procedures that will virtually immunize themselves and their staff from suit.

But the PLRA's exhaustion requirement was intended to limit frivolous litigation—not to keep meritorious cases out of court. And the statute contains a "built-in" exception to the exhaustion mandate: incarcerated people need not exhaust administrative remedies that are not "available." *Ross*, 578 U.S. at 635–36. When deciding whether such remedies are unavailable, courts should bear in mind the "real-world workings of prison grievance systems." *See id.* at 643.

Further, overly complicated grievance systems, including those with limits on the number of grievances that may be filed, thereby preventing incarcerated people from exhausting their administrative remedies, may unconstitutionally preclude their access to the courts.

ARGUMENT

I. PRISON GRIEVANCE PROCEDURES ARE LITTERED WITH LANDMINES THAT PREVENT EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Under the PLRA, prisoners must exhaust administrative remedies before filing suit in federal court. 42 U.S.C. § 1997e(a). But complex grievance procedures, combined with short deadlines, present myriad potential stumbling blocks for incarcerated people that may prevent them from ever reaching the courthouse doors.

Grievance systems typically require the incarcerated person to perfectly complete three to four stages, which may include an informal resolution attempt, formal grievance, and one or two levels of administrative appeals.[3] At each stage they must meet often impossibly tight deadlines, which are frequently less than two weeks and can be as short as two to five days.[4] And any misstep during the grievance process can forever foreclose plaintiffs from pursuing their civil rights claims in federal court.[5] Incarcerated people may lose their claims for including multiple

[3] *See* Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 492-94 (2012).

[4] Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 148 (2008), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2261&context=articles ("[I]f prisoners miss deadlines that are often less than fifteen days and in some jurisdictions as short as two to five days, a judge cannot consider valid claims of sexual assault, beatings, or racial or religious discrimination.") (footnote omitted).

[5] *See* Alison M. Mikkor, *Correcting for Bias and Blind Spots in PRLA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 575-76 (2014).

issues on a single grievance.[6] Or for failing to name the individuals[7] or policy[8] implicated by the grievance with sufficient specificity. Even the most minor of technical errors can prove fatal.[9] For example, filing an "administrative" appeal rather than a "disciplinary" appeal[10] or submitting a proper grievance to the wrong official[11] can lead to dismissal for failure to exhaust. So can mailing multiple

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[6] *See, e.g.*, *Simpson v. Greenwood*, No. 06-C-612-C, 2007 WL 5445538, at *2–5 (W.D. Wis. Apr. 6, 2007) (dismissing for non-exhaustion where grievance was rejected for including two issues despite acknowledging that the grievance rules "do not define what is meant by the term 'issue' and its meaning is far from self-evident").

[7] *See, e.g.*, *Williams v. Hollibaugh*, No. 3:04-cv-2155, 2006 WL 59334, at *5–6 (M.D. Pa. Jan. 10, 2006) (requiring grievances to name the relevant official in the complaint even if prison administrators have actual knowledge of that official's role in the incident); *Whitener v. Buss*, 268 F. App'x 477, 478–79 (7th Cir. 2008) (dismissing claim of prisoner who was unable to obtain the relevant officers' names within the 48-hour grievance deadline); *Haynes v. Ivens*, No. 08-cv-13091-DT, 2010 WL 420028, at *5–6 (E.D. Mich., Jan. 27, 2010) (holding grievance naming "Health Care" did not exhaust against a particular physician assistant).

[8] *See, e.g.*, *Giamboi v. Prison Health Servs*., No. 3:11-CV-00159, 2014 WL 12495641, at *10 (M.D. Pa. Sept. 11, 2014), report and recommendation adopted No. 3:11-CV-00159, 2015 WL 12159307 (M.D. Pa. Jan. 13, 2015) (dismissing for non-exhaustion because plaintiff did not specifically attribute claims to an unconstitutional policy of the health care provider).

[9] *See, e.g.,* HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES, at 14 (June 2009), https://www.hrw.org/sites/default/files/reports/us0609web.pdf ("[U]nder the PLRA, it is common for courts to conclude that prisoners have failed to exhaust because they made minor technical errors in the grievance process.").

[10] *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001).

[11] *See*, *e.g., Keys v. Craig*, 160 F. App'x 125, 126 (3d Cir. 2005) (affirming dismissal of a *pro se* prisoner's lawsuit for non-exhaustion where plaintiff submitted his final appeal to the wrong official).

grievances in a single envelope rather than separately mailing each one;[12] failing to submit a complaint where the requisite form for doing so is unavailable;[13] submitting handwritten copies instead of photocopies even when the photocopier is broken;[14] submitting carbon copies instead of originals;[15] submitting an appeal to the "Inmate Appeals Branch" instead of to the "appeals coordinator";[16] or writing below a form's line that instructed "do not write below this line."[17]

Limiting the number of grievances an incarcerated person may have pending at any one time, as in the case at hand, is a particularly pernicious roadblock. When combined with lengthy response times and content requirements that only allow one issue to be raised per grievance, limitations on the number of pending grievances result in even more dramatic barriers that severely limit the claims a plaintiff can bring in court.

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[12] *Freeland v. Ballard*, No. 2:14-cv-29445, 2017 WL 337997, at *6–7 (S.D. W.Va. Jan. 23, 2017).
[13] *See Mackey v. Kemp*, No. CV 309-039, 2009 WL 2900036, at *3 (S.D. Ga. July 27, 2009).
[14] *Mack v. Klopotoski*, 540 F. App'x 108, 112–13 (3d Cir. 2013).
[15] *Fischer v. Smith*, No. 10-C-870, 2011 WL 3876944, at *2 (E.D. Wis. Aug. 31, 2011).
[16] *Chatman v. Johnson*, No. CV S-06-0578 MCE EFB P, 2007 WL 2023544, at *6 (E.D. Cal. July 11, 2007), *report and recommendation adopted*, No. CV S-06-0578 MCE EFB P, 2007 WL 2796575 (E.D. Cal. Sept. 25, 2007).
[17] *Bracero v. Sec'y, Fla. Dep't of Corr.*, 748 F. App'x 200, 203 (11th Cir. 2018) (per curiam), *cert. denied*, 139 S. Ct. 1631 (2019).

In this case, the lower court held that Mr. Eaton failed to exhaust administrative remedies available to him because he "[did] not comply with prison-imposed limits on the number of grievances that an adult in custody may file." *Eaton v. Blewett*, No. 2:20-cv-1641-SI, 2021 WL 3559462, at *4 (D. Or. Aug. 11, 2021). The court's opinion presumes that Mr. Eaton was the captain of his own destiny and could have simply elected to "withdraw one of his other active grievances." *Id*. at *5. However, such presumption glosses over the real-world consequences of that statement. Limits on the number of pending grievances force people to pick and choose between similarly serious and meritorious concerns. Indeed, the district court's holding requires Mr. Eaton, and plaintiffs like him, to make a Hobson's choice to determine which civil rights claims to pursue and which to surrender—not because their claims are without merit, but because of artificial and arbitrary constraints created by the prison's grievance protocols.

For instance, when prison officials only allow four pending grievances at any given time, as here, an incarcerated person with pending grievances about his hearing aids, legal mail, and medical diet is forced to decide whether to use his final available grievance to raise concerns about his blood pressure medication or insulin levels. Or an incarcerated person who has been repeatedly assaulted by other prisoners has to choose which incidents to grieve and which will remain unaddressed. For some, filing a grievance becomes a gamble that another serious

issue won't arise during the long time period—here, at least five months—that their other grievances may be pending. And because filing a grievance is a mandatory prerequisite to bringing a lawsuit in federal court, limiting the number of grievances that can be pending ultimately forces incarcerated people to surrender some of their civil rights claims. This should not, and cannot, be the law.

II. MANY INCARCERATED PEOPLE FACE ADDITIONAL BARRIERS THAT HINDER THEIR ABILITY TO EXHAUST ADMINISTRATIVE REMEDIES.

A. Common Characteristics Of Incarcerated People Make Completing Complex Grievance Procedures Particularly Onerous.

The complexities of prison grievance procedures may stump even the most proficient jailhouse lawyers. And many incarcerated people face additional barriers that further frustrate their chances of successful administrative exhaustion. Incarcerated people have disproportionately low rates of educational attainment,[18] English proficiency,[19] and literacy.[20] Any or all of these characteristics may make it

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[18] *See*, *e.g.*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL PRISONER STATISTICS COLLECTED UNDER THE FIRST STEP ACT, 2021, at Table 1 (Nov. 2021), https://bjs.ojp.gov/library/publications/federal-prisoner-statistics-collected-under-first-step-act-2021 (finding that in 2020, 28.3% of federal prisoners did not have a high school diploma, general equivalency degree, or other equivalent certificate).

[19] *Id.* (finding that in 2020, 11.4% of federal prisoners reported English as a second language).

[20] BOBBY D. RAMPEY, *ET AL.*, U.S. DEP'T OF EDU., HIGHLIGHTS FROM THE U.S. PIAAC SURVEY OF INCARCERATED ADULTS: THEIR SKILLS, WORK EXPERIENCE, EDUCATION, AND TRAINING, at Table 1.2 (Nov. 2016),

harder for incarcerated people to successfully file and pursue a meritorious claim through the prison grievance system. Meanwhile, the prevalence of disability and mental illness among incarcerated people is disproportionately high. According to the most recent numbers reported by the U.S. Department of Justice Bureau of Justice Statistics, a staggering 38% of prisoners surveyed in 2016 reported having a disability—a rate roughly two and a half times greater than adults in the general U.S. population.[21] Significantly, the most commonly reported disability among those surveyed was "cognitive disability."[22] Similarly, 41% of all state and federal prisoners have a history of mental health problems,[23] compared to about 21% of the general population.[24] And about 13% of state and federal prisoners reported experiencing serious psychological distress during the last month.[25]

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https://nces.ed.gov/pubs2016/2016040.pdf (finding 29% of state and federal prisoners fell into the two lowest levels of a six-level literacy scale, compared to 19% of persons in the general population).

[21] LAURA M. MARUSCHAK, *ET AL.*, BUREAU OF JUSTICE STATISTICS, DISABILITIES REPORTED BY PRISONERS, at 1–2 (Mar. 2021), https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf.

[22] *Id.* at 1-2.

[23] LAURA M. MARUSCHAK, *ET AL.*, BUREAU OF JUSTICE STATISTICS, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS, at 1 (June 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/imhprpspi16st.pdf

[24] National Institute of Mental Health, *Mental Illness*, Fig. 1, https://www.nimh.nih.gov/health/statistics/mental-illness#part_2539 (last visited Jan. 14, 2022).

[25] MARUSCHAK, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS, *supra* note 23, at 5 (Table 1). *See also* Margo Schlanger, *Prisoners with Disabilities*, *in* 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295, 295 (Erik Luna ed., 2017),

Prisoners with serious mental illness or intellectual disabilities are at a particular disadvantage when attempting to fulfill the rigorous requirements of grievance procedures. These prisoners may be unable to fully comprehend and comply with the numerous and varied intricacies of the grievance procedure, such as strict timelines, proper formatting, content requirements, or one of many other potentially "bewildering features." *See Ross*, 578 U.S. at 646.

B. Retaliation Also Prevents People From Exhausting Administrative Remedies.

Actual or threatened retaliation far too often acts as a further barrier to accessing and completing the grievance procedure.[26] In response to filing grievances, incarcerated people have been beaten,[27] urinated on,[28] moved to housing

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https://law.asu.edu/sites/default/files/pdf/academy_for_justice/14_Criminal_Justice_Reform_Vol_4_Prisoners-with-Disabilities.pdf (over half of convicted prisoners report symptoms of mental illness, chiefly mania and depression, and 15% report symptoms such as delusions or hallucinations).

[26] *Woodford*, 548 U.S. at 117–19 (Stevens, J., dissenting) (repeatedly observing that prisoners with meritorious claims might well choose not to file grievances out of fear of retaliation); *see also* James E. Robertson, *"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J.L. REFORM 611, 644 (2009) ("[R]etaliation against [incarcerated people who file grievances] acquires a functional quality, to wit, the prospect of deterring the target from filing suit and deterring other inmates from filing grievances.").

[27] *See, e.g.*, *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 793–94 (9th Cir. 2018); *Tuckel v. Grover*, 660 F.3d 1249, 1251 (10th Cir. 2011).

[28] *See Johnson v. Lozano*, No. 2:19-cv-1128 MCE DB P, 2021 WL 38179, at *3 (E.D. Cal. Jan. 5, 2021).

units where they are assaulted by other incarcerated people,[29] and told that they would be transferred so far away as to never be able to see their family until their release from prison, among other retaliatory acts.[30] It is undeniable that "at least some threats disrupt the operation and frustrate the purposes of the administrative remedies process enough that the PLRA's exhaustion requirement does not allow them." *Turner*, 541 F.3d at 1085.

III. PRISON ADMINISTRATORS CAN USE COMPLEX GRIEVANCE SYSTEMS TO IMMUNIZE THEMSELVES FROM SUIT.

The Supreme Court has noted that Congress enacted § 1997e(a) "to reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524–25. To that end, prior to involving the federal courts, "Congress afforded corrections officials time and opportunity to address complaints internally . . . ." *Id.* at 525. However, prison administrators have taken what was intended to serve as a shield to protect them from frivolous lawsuits, and converted it into a sword. By imposing needlessly complex requirements that make it impossible for incarcerated people to successfully complete the grievance process, prison administrators have foreclosed incarcerated people from vindicating their rights in federal court. This, of course, should come as no surprise, since prison administrators "have a tangible stake" in

[29] *See, e.g.*, *Rinaldi v. United States*, 904 F.3d 257, 262 (3d Cir. 2018).
[30] *See, e.g.*, *Turner v. Burnside*, 541 F.3d 1077, 1081 (11th Cir. 2008).

whether or not incarcerated people exhaust their administrative complaints.[31] The fact that prison administrators—the same individuals typically named as defendants in federal lawsuits brought by incarcerated people—are also entrusted to design the very grievance procedures with which incarcerated people must comply in order to bring their lawsuits creates an almost irresistible incentive to make grievance processes as impenetrable as possible. Indeed, "[i]t is their pocketbooks, their professional reputations, and in some cases their very livelihoods that are made vulnerable if a prisoner successfully exhausts his claims."[32] With any minimum requirements for grievance systems swept away by the PLRA, it is truly a case of the fox guarding the henhouse. *See Ross*, 578 U.S. at 641 ("[D]iffer[ing] markedly from its predecessor," the PLRA removed the conditions that administrative remedies be "plain, speedy, and effective" and that they satisfy minimum standards.") (quoting *Nussle*, 534 U.S. at 524).

Indeed, since the PLRA's enactment in 1996, several state corrections agencies' grievance procedures "have been updated in ways that cannot be understood as anything but attempts at blocking lawsuits."[33] Some of these tactics include reducing the amount of time within which prisoners must file their initial

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[31] *See* Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEORGE MASON L. REV. 573, 581 (2014).
[32] *Id.*
[33] Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 473 (2012).

grievance and any subsequent appeals, and extending the time limits within which prison administrators are required to respond to those grievances.[34] These changes allow officials to effectively run out the clock on grievances until incarcerated people are left without formal recourse. This is illustrated by Mr. Eaton's case. Setting aside the false assumption that Mr. Eaton should have known he could withdraw one of his four pending grievances, by the time his grievance was rejected by the Oregon Department of Corrections for exceeding the number of active complaints allowed, the window for Mr. Eaton to re-file the operative grievance would have already closed.

Other grievance procedure modifications similarly appear designed to make it all but impossible to meet the procedure's requirements and thus fully exhaust. In one state, after a court rejected prison officials' argument that a plaintiff's grievance was not detailed enough and noted that the grievance policy contained no specificity requirements, the prison system revised the grievance policy to require "details regarding each aspect of the offender's complaint, including what happened, when, where, and the name of each person who is the subject of or who is otherwise

[34] *Id.* at 506–10 (discussing changes in Arkansas Department of Corrections' grievances procedures from 1997 through 2011, including a reduction of the time afforded to prisoners to appeal grievance decisions from ten working days to five working days and the introduction of a provision requiring prisoners to agree to time extensions for administrators to issue grievance decisions).

involved in the complaint."[35] Similarly, another state, which previously only required incarcerated people to "describe the problem and action requested," revised its protocols to require people to identify by name and title or position each staff member involved along with the dates each staff member was involved.[36] Yet another state added a requirement that incarcerated people have every page of a grievance notarized.[37] Because "[i]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion[,] *Jones*, 549 U.S. at 218, prison administrators' ability to needlessly complicate grievance procedures is limited only by their own creativity.

IV. COURTS MUST NOT BE HESITANT TO FIND REMEDIES UNAVAILABLE.

The mandatory exhaustion requirements of the PLRA, combined with intentionally convoluted grievance procedures, result in untold numbers of incarcerated people being unable to vindicate their constitutional rights in court, no matter the merit of the case. As one scholar summarized, incarcerated people "who

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[35] *See, e.g.,* HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES, *supra* note 9, at 12 (referencing *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002) and citing ILL. ADMIN. CODE tit. 20, § 504.810(b) (2003)).

[36] *Snowden v. Prada*, No. CV 12-1466, 2013 WL 4804739, at *7 (C.D. Cal. Sept. 9, 2013) (describing changes to California regulations).

[37] *See Craft v. Middleton*, No. CIV-11-925-R, 2012 WL 3886378, at *3 (W.D. Okla., Aug. 20, 2012), *report and recommendation adopted*, No. CIV-11-925-R, 2012 WL 3872010 (W.D. Okla., Sept. 6, 2012).

experience even grievous loss because of unconstitutional behavior by prison and jail authorities will nonetheless lose cases they once would have won, if they fail to comply with technicalities of administrative exhaustion."[38]

But the PLRA was not intended to keep meritorious cases out of court based on mere technicalities. The statute's supporters emphasized that the legislation was meant to reduce the number of frivolous lawsuits filed, but not to bar those with serious claims. Senator Hatch explained, "I do not want to prevent inmates from raising legitimate claims. The legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system."[39] Representative Canady similarly stated that the PLRA's requirements "will not impede meritorious claims by inmates but will greatly discourage claims that are without merit."[40]

Further, the statute's plain language includes an exception to the exhaustion requirement: incarcerated people need not exhaust administrative remedies that are not "available." *See Ross*, 578 U.S. at 635–36. And this exception to the mandatory exhaustion requirement "has real content." *Id.* at 642. For a grievance procedure to

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[38] Margo Schlanger, *Inmate Litigation*, 116 HARVARD L. REV. 1555, 1694 (2003) (footnotes omitted).
[39] 141 CONG. REC. S 14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Orrin Hatch).
[40] 141 CONG. REC. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Charles Canady).

be "available" it must be "'capable of use' to obtain 'some relief for the action complained of.'" *Id*. Where prison grievance regimes are riddled with requirements that are functionally impossible to meet, remedies cannot be said to be "capable of use" for the purposes of the PLRA. And where a grievance is rejected out of hand because of limitations on the number of pending grievances, the system is not accessible for the "accomplishment of a purpose." *See id.* at 643 (noting that an administrative procedure is unavailable when "it operates as a simple dead end – with officers unable or consistently unwilling to provide any relief to aggrieved inmates"). Indeed, the Supreme Court has recognized that "officials might devise procedural systems" with "blind alleys and quagmires . . . in order to 'trip[ ] up all but the most skillful prisoners.'" *Ross*, 578 U.S. at 644 (quoting *Woodford*, 548 U.S. at 102). In those cases, too, "such interference with an inmate's pursuit of relief renders the administrative process unavailable." *Ross*, 578 U.S. at 644.

The Court must not be hesitant to apply this Congressionally created exception. Indeed, courts have stepped in and determined a grievance system was unavailable to plaintiffs who were unable to access it due to physical barriers imposed by prison officials, such as the deprivation of writing materials or documentation,[41] or lockdowns that deprived incarcerated people of access to

[41] *Marella v. Terhune*, No. 03cv660-BEN (MDD), 2011 WL 4074865, at *9-10 (S.D. Cal. Aug. 16, 2011) (holding sworn allegation of deprivation of writing materials and forms in hospital and infirmary precluded dismissal for non-exhaustion), *report*

grievance kiosks.[42] Similarly, this Court has found administrative remedies unavailable where prison officials refused to provide a plaintiff with a sufficient number of grievance forms. *See Almy v. Davis*, 726 F. App'x 553, 556-57 (9th Cir. 2018). This Court likewise should hold that where prison officials impose procedural barriers to accessing the grievance system, such as refusing to accept more than four grievances at a given time, remedies are unavailable.

V. LIMITS ON THE NUMBER OF PENDING GRIEVANCES CAN UNCONSTITUTIONALLY DENY PRISONERS ACCESS TO THE COURTS.

It is "established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). Yet here, the district court's decision requires incarcerated people to pick and choose between valid civil rights claims because of the limitations of the grievance procedure. Requiring an incarcerated person to surrender a claim in order to initiate the grievance process on a subsequent concern prevents "meaningful" access to the

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and recommendation adopted, No. 03cv660-BEN (MDD), 2011 WL 4074750 (S.D. Cal. Sept. 13, 2011); *Woods v. Carey*, No. CIV S-04-1225 LKK GGH P, 2007 WL 2688819, at *1–2 (E.D. Cal. Sept. 13, 2007) (vacating recommendation for exhaustion dismissal pending inquiry into plaintiff's access to his legal property, which he said impeded his timely appeal).

[42] *Kendrick v. Limburg*, No. 1:17-cv-03000-JRS-DML, 2019 WL 1330382, at *4 (S.D. Ind. Mar. 25, 2019) (finding remedy unavailable where plaintiff in administrative segregation during a lockdown was denied access to the kiosk from which grievances could be filed for the last six days of the seven-day period for filing grievances).

courts to litigate the surrendered claim, in violation of the First Amendment. *Jones v. Williams*, 791 F.3d 1023, 1035 (9th Cir. 2015) ("The First Amendment guarantees a prisoner the right to seek redress of grievances from prison authorities and as well as a right of meaningful access to the courts."); *Alvarez v. Hill*, No. CV04-884-BR, 2005 WL 3447943, at *3 (D. Or. Dec. 15, 2005), *aff'd in part, rev'd in part* by *Alvarez v. Hill*, 518 F.3d 1152 (9th Cir. 2008) ("It is well-established that prisoners have a constitutional right of meaningful access to the courts.") (citing *Bounds*, 430 U.S. at 821).

At a minimum, the canon of constitutional avoidance forecloses the district court's interpretation of the PLRA's exhaustion requirement. "Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). Where, as here, a grievance procedure's requirements have effectively barred a plaintiff from accessing the courts by limiting the number of complaints that may be filed, this Court should find remedies unavailable under the PLRA.

CONCLUSION

For the forgoing reasons, the Court should reject the district court's finding that Mr. Eaton failed to exhaust administrative remedies available to him and hold

that remedies are unavailable under the PLRA when a grievance procedure's requirements prevent a plaintiff from filing a grievance by limiting the number of complaints that may be filed.

Dated: January 18, 2022

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION

/s/ Jennifer Wedekind
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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