No. 21-7362

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MATTHEW JAMES GRIFFIN,

Plaintiff-Appellant,

v.

NADINE J. BRYANT; P. M. MANNION; ARLENE BURGRESS TOODLE; M. A. KHAN; M. BOSSIE; BYRON SCOTT CARTER; UNKNOWN DOE 1, Nurse; UNKNOWN DOE 2, Correctional Officer (aka Dervin),

Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of North Carolina
Case No. 5:17-ct-03173

BRIEF OF PLAINTIFF-APPELLANT

Easha Anand
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
2443 Fillmore Street, #380-15875
San Francisco, CA 94115
easha.anand@macarthurjustice.org

Rosalind Dillon
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
160 East Grand Ave, Floor 6
Chicago, IL 60611
rosalind.dillon@macarthurjustice.org

Devi M. Rao
Katherine Cion
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3438
devi.rao@macarthurjustice.org
katie.cion@macarthurjustice.org

Counsel for Plaintiff-Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1,

1. Party is not a publicly held corporation or other publicly held entity.
2. Party does not have any parent corporations.
3. Party has no stock owned by a publicly held corporation or other publicly held entity.
4. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.
5. The party is not a trade association.
6. This case does not arise out of a bankruptcy proceeding.
7. This is not a criminal case in which there was an organizational victim.

Dated: February 10, 2022 *<u>/s/ Katherine Cion</u>*
Katherine Cion

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INTRODUCTION

Matthew Griffin, a prisoner formerly incarcerated in North Carolina, was seriously injured when Defendants confined him to a non-accessible cell despite his diagnosed vision impairment, sedated him against his will, left him alone despite his calls for help, and denied him needed medical attention when he fell to the ground and dislocated his shoulder. That all happened in 2015. During the six-plus years between that ordeal and the filing of this brief, all Mr. Griffin has asked is that *someone* provide *some form* of relief for the abuse he suffered.

First, Mr. Griffin sought to resolve his complaint internally. But North Carolina's Administrative Remedy Procedure ("ARP") and the way that prison officials operated it took internal resolution off the table. Instead, Mr. Griffin was never given an opportunity to submit his grievance and have it accepted for review. Next, Mr. Griffin turned to the courts, filing claims against Defendants for violating his constitutional rights. But again Mr. Griffin was rebuffed, as Defendants argued and the district court held that he had failed to exhaust administrative remedies under the Prison Litigation Reform Act ("PLRA"). 42 U.S.C. § 1997e(a). Here, then, lies Mr. Griffin's unenviable Catch-22: He could not exhaust

administrative remedies because of North Carolina's own policies, so he tried to come to court. However, according to the district court, he could not bring suit because he first needed to exhaust administrative remedies.

This is why the PLRA includes a caveat in its exhaustion requirement: Plaintiffs only need to exhaust administrative remedies that are "available." *Id.* At a minimum, remedies that are "available" must be capable of use by a prisoner to access some sort of review and relief. Here, the prison's grievance system was not capable of use by Mr. Griffin, as he was denied any chance at review or relief. Thus, the district court erred in finding remedies were available to Mr. Griffin, and its decision should be reversed.

JURISDICTIONAL STATEMENT

Mr. Griffin filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina. The district court had jurisdiction over Mr. Griffin's claims under 28 U.S.C. §§ 1331, 1343. The district court entered summary judgment for Defendants on March 29, 2021. JA166. Mr. Griffin filed a Rule 60 motion for relief from this judgment, which the district court denied on

September 22, JA183, and Mr. Griffin timely noticed this appeal on September 26. JA184; *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

Are administrative remedies "available" within the meaning of the Prison Litigation Reform Act when, under prison policy, a pending grievance blocks a prisoner from filing his operative grievance up until that operative grievance is untimely?

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, 643–44 (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.* 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); *Custis v. Davis*, 851 F.3d 358, 361 (4th Cir. 2017).

B. Factual Background[1]

Matthew Griffin, who, during all events described herein, was incarcerated at Central Prison in Raleigh, North Carolina, is handicapped within the meaning of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. JA22–23. He suffers from strabismus with extropia, a vision impairment that causes double vision, a reduction in the visual field, and a loss of all depth perception. *Id.* These symptoms make Mr. Griffin a serious fall risk. JA23–24. In November 2015, after a state-provided medical specialist confirmed Mr. Griffin's diagnosis, officials at Central Prison issued a medical duty status form for Mr.

[1] The facts included herein are all drawn from verified filings made by Mr. Griffin in the district court.

Griffin, which required the prison to provide him a bottom bunk, assign him to a handicapped-accessible cell, implement fall prevention measures, and not require him to climb stairs. JA23–24.

After the prison issued this medical duty status form, prison officials transferred Mr. Griffin from Central Prison's general population to the prison hospital, where the prison's Chief Medical Officer told Mr. Griffin he was assigned to stay in an emergency room holding cell until a handicapped-accessible cell became available. JA24–26. However, that same day, officials moved Mr. Griffin to the hospital's mental health segregation unit. JA26–27. This unit houses prisoners suffering from acute mental illnesses that frequently manifest in violence. JA27. While this housing assignment was completely inappropriate for Mr. Griffin in any event, in an especially bewildering move, prison officials assigned Mr. Griffin to a non-accessible cell in the mental health unit. *Id.* All the while, ADA compliant cells in that unit sat empty. *Id.* Understandably, Mr. Griffin objected to his new placement, reminding officials that he suffered no mental health problems and needed accommodations for his physical disability. JA29. But the officials he alerted paid him no mind. JA30.

Still, during the two days and nights that Mr. Griffin spent in this inaccessible cell in the mental health unit, he consistently pled with defendants to move him to an ADA-compliant cell, showing the paperwork that granted him this accommodation. JA30–31. Mr. Griffin's pleas were met first with indifference and, later, antagonism. Defendant Bossie told Mr. Griffin not to wake up any officers for help, because prison officials worked long hours and "need[ed] to get some rest." JA31. Defendant Bryant threatened Mr. Griffin, warning that if he didn't stop bothering the prison staff she would have him involuntarily sedated. JA32. And, when Mr. Griffin continued to assert his right to accommodations, Defendant Bryant made good on her promise. On November 27, she enlisted Defendant Khan, a doctor, for an emergency order to sedate Mr. Griffin. JA33. Defendant Khan complied, although he knew there was no medical justification for giving Mr. Griffin a shot of Ativan. JA33–34. Nonetheless, Defendants lured Mr. Griffin to the front of his cell, handcuffed him, forced him to the floor, and shot him with the sedative. JA34–35. After, Defendant Bryant got to work falsifying a medical-encounter form to explain away the incident, instead of

attending to a handicapped, handcuffed, and drugged Mr. Griffin. JA36–37.

About an hour after he was forcibly sedated, Mr. Griffin stumbled in his noncompliant cell—which lacked a handrail that he might have used to catch himself—falling and striking his head and dislocating his shoulder. JA38. When Mr. Griffin pushed an emergency call button to get help, officials laughed at him, and informed him they'd disconnected the button. JA39–40. "This is a mental health unit," they said, "we would never get any sleep if the call buttons worked." JA39. So, for hours, officials left Mr. Griffin on the floor of his cell, where he eventually "painfully" relocated his own dislocated shoulder. JA40. Prison officials did not allow Mr. Griffin to see a doctor until a week later, and only allowed him to see an orthopedic specialist nearly two months after the incident. *Id.* Mr. Griffin suffered from severe pain and impaired movement in his injured shoulder up through the time he filed this action. JA41.

C. Exhaustion

On the same day that defendants drugged Mr. Griffin and left him alone to fall, November 27, 2015, Mr. Griffin submitted a grievance regarding his involuntary sedation and subsequent injury. JA119. Mr. Griffin's submission complied with North Carolina's Administrative Remedy Process ("ARP") and its three-step grievance review system, which, as an initial step, instructs prisoners to submit their grievances within 90 days of the events that gave rise to the grievance, or else officials can reject the grievance as untimely. JA107; JA109.

But three days later, on November 30, prison officials returned Mr. Griffin's involuntary-sedation grievance as "delayed." JA119. The receiving officer had checked a box on the form indicating that the grievance was "returned and [could] only be accepted when [a] current grievance completes step two." *Id.* This line references North Carolina's policy limiting prisoners to only one grievance pending at or before Step 2 of the ARP's three-step process at a time. JA106. Here, when Mr. Griffin tried to file his involuntary-sedation grievance, he already had a grievance pending for an unrelated complaint about officials denying him

a kosher diet. *See* JA119; JA115–16.[2] And because prison officials had not yet processed that kosher-diet grievance past Step 2 of the ARP's process, prison officials, pursuant to the ARP, blocked Mr. Griffin from filing his involuntary-sedation grievance.

Over the next several months, prison officials failed to process Mr. Griffin's kosher-diet grievance past Step 2 of the grievance procedure, meaning it remained in a blocking position, preventing him from submitting his involuntary-sedation grievance. JA119–21. Indeed, prison officials rejected several of Mr. Griffin's grievances, including his involuntary-sedation grievance, telling him the sole reason for these rejections was that the kosher-diet grievance hadn't yet completed Step 2. JA119; JA127; JA128. However, inexplicably, in early January 2016, prison officials accepted a different grievance from Mr. Griffin even though his kosher-diet grievance still had not yet completed Step 2. JA133; JA135. This arbitrary move on the part of prison officials meant Mr. Griffin then had *two* grievances pending at or before Step 2 of the

[2] Mr. Griffin numbers his grievances chronologically, as the prison does not provide a number for grievances that are not accepted. *See* JA82. This brief uses shorthand to refer to relevant grievances, such as "involuntary-sedation" grievance, or "kosher-diet" grievance.

grievance procedure. And since this new January grievance remained pending after the kosher-diet grievance completed Step 2, by accepting this second grievance prison officials prolonged the amount of time during which Mr. Griffin was blocked from filing his involuntary-sedation claim. JA118–21; JA132–40. In addition, it took prison officials far longer than it should have to process both of these grievances past Step 2, as they did not comply with mandatory time limits for claims contained in North Carolina's own administrative policies. *See* JA107–08 (requiring officials to provide a written response to a Step 1 grievance within 15 days after accepting the grievance, and a written response at Step 2 within 20 days from the appeal from Step 1).

In fact, prison officials kept at least one of Mr. Griffins' grievances in the pipeline, pending at or before Step 2 of the ARP, until the 90-day limit for Mr. Griffin to submit his involuntary-sedation grievance passed entirely. Specifically, officials involuntarily sedated Mr. Griffin on November 27, 2015. JA33. So, under the ARP, Mr. Griffin had 90 days—until February 25, 2016—to submit his involuntary-sedation grievance. But prison officials did not clear Mr. Griffin to file his involuntary-sedation grievance until February 26, 2016—one day too late. *See* JA140.

Then, when Mr. Griffin re-submitted his involuntary-sedation grievance, prison officials rejected it as untimely. JA143–49. In other words, there was never a time where North Carolina policy would have allowed him to submit his operative grievance here. Rather, Mr. Griffin's involuntary-sedation grievance was blocked under one ARP provision until it was untimely under another.

D. Procedural History

Blocked from filing his operative grievance, Mr. Griffin turned to the federal courts and sued the North Carolina Department of Public Safety ("NCDPS") employees involved in his involuntary sedation, bringing claims under the Eighth Amendment. JA22. The district court screened Mr. Griffin's case under 28 U.S.C. § 1915A(a), concluding Mr. Griffin stated a plausible claim for relief, allowing his constitutional claims to proceed, and ordering defendants served with Mr. Griffin's complaint.

Defendant Khan and Defendant Bossie filed motions to dismiss, raising non-exhaustion as a defense. JA59; JA72.[3] In response, Mr.

[3] Although Mr. Griffin brought suit against several other Defendants in addition to Defendants Bossie and Khan, those Defendants did not file motions to dismiss based on exhaustion, but as the district court

Griffin, proceeding *pro se*, argued that administrative remedies were unavailable to him, and that he therefore satisfied the PLRA's exhaustion requirement. JA89. Mr. Griffin detailed the North Carolina pending-grievance policy, and explained how, despite doing everything that was required of him, the grievance policy operated to shut his involuntary-sedation grievance out of the administrative process. JA81–89. He also highlighted ways in which the officials responsible for conducting the grievance process violated their own policies by accepting a grievance out of turn and exceeding set time limits for processing grievances, making it impossible for Mr. Griffin to get his grievance filed. JA84; JA86–88.

The district court converted both motions to dismiss into summary judgment motions. JA12. Mr. Griffin again filed a response in opposition, as well as a new statement of facts and specific objections to the motion, all reiterating his unavailability arguments. *See* JA12–13.

Nonetheless, the district court entered summary judgment for the defendants. JA166. The district court asserted that Defendants

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dismissed all of Mr. Griffin's claims for failure to exhaust, they remain parties to this appeal.

presented "undisputed evidence that plaintiff failed to exhaust administrative remedies." JA163. It then briefly addressed Mr. Griffin's argument that administrative remedies were unavailable for his involuntary-sedation claim, concluding, with no explanation, that North Carolina's ARP did not make remedies unavailable under the Supreme Court's holding in *Ross v. Blake*, or this Court's reasoning in *Moore v. Bennette*, 517 F.3d 717 (4th Cir. 2008). JA162–64. The district court dismissed Mr. Griffin's claims, JA165, and entered judgment on March 29, 2021, JA166.

Mr. Griffin timely moved for relief from the district court's judgment. He highlighted several key errors on the part of the district court, including that the defendants had failed to adequately allege that administrative remedies were available to Mr. Griffin, and the court had not heeded relevant distinctions between Mr. Griffin's case and the plaintiff's in *Moore*. JA168–74. However, the district court remained unmoved, finding Mr. Griffin did not meet any of the criteria for relief under Rule 60. JA180–83. Thus, the court denied Mr. Griffin's motion for reconsideration. *Id*. Mr. Griffin timely appealed. JA184.

SUMMARY OF THE ARGUMENT

I. There were no administrative remedies available to Mr. Griffin for his involuntary-sedation claim because, under NCDPS policy, there was never a time where he could have gotten his grievance accepted into the process for review. With no "available" remedies for his operative claim, Mr. Griffin was not required to exhaust under the PLRA.

A. As the Supreme Court and a consensus of dictionaries make clear, "available" in the PLRA's exhaustion requirement means "capable of use." Here, the joint operation of North Carolina's limit on pending grievances and deadline to submit a grievance meant that Mr. Griffin was never able to use the grievance system to have his involuntary-sedation claim heard. The grievance system was, then, quite literally incapable of use, making it unavailable based on a plain reading of the PLRA.

B. In *Ross v. Blake*, the Supreme Court provided some illustrative examples of situations where administrative remedies are unavailable to a would-be grievant. 578 U.S. at 643–44. The ordeal Mr. Griffin faced when trying to access North Carolina's administrative procedure mirrors at least two of the examples listed in *Ross*. First, North Carolina's policies

and the way that prison officials implemented them coalesced to form a "simple dead end," shutting Mr. Griffin out of the grievance system completely. *Id.* at 643. And second, prison officials violated their own grievance policies multiple times, effectively "thwart[ing]" Mr. Griffin's ability to access the grievance system for his involuntary-sedation claim. *Id.* at 644. Whichever way you frame it, remedies were not available to Mr. Griffin.

C. The district court's citation to *Moore v. Bennette* as showing that remedies were available does not change this analysis. The *Moore* Court briefly considered North Carolina's pending-grievance policy, but was not presented with and did not address the availability arguments Mr. Griffin raises here—indeed, it could not have, since *Moore* predated *Ross*. 517 F.3d at 729–30. And, besides, North Carolina has, since *Moore*, changed its grievance procedure to impose a much shorter time limit on resubmission, and in doing so substantially altered the availability analysis.

D. Finally, failing to recognize that remedies were unavailable to Mr. Griffin undermines the policy goals behind the PLRA. The exhaustion requirement was meant to give prison officials the chance to

address claims internally before those claims were brought to court. But prison officials never had, and would never have, the chance to address Mr. Griffin's involuntary-sedation claim on the merits. There is thus no utility in keeping Mr. Griffin's claim from judicial review as well.

ARGUMENT

I. Administrative Remedies Were Not "Available" to Mr. Griffin Under the Meaning of the PLRA.

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*, 578 U.S. at 635–36 (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.'"). Here, Mr. Griffin had no "available" administrative remedies, and so the district court should not have dismissed his claims for failure to exhaust.

A. Administrative Remedies Were Not "Available" to Mr. Griffin Under the Plain Meaning and Ordinary Usage of the Word.

No administrative remedies were "available" for Mr. Griffin's involuntary-sedation grievance. Because of the dual-function of North Carolina's one-pending-grievance policy and its 90-day deadline to

submit a grievance, there was never a time where Mr. Griffin could have submitted his operative grievance and had it accepted. As a consensus of dictionaries make clear, and as the Supreme Court confirmed in *Ross*, "available" means "capable of use for the accomplishment of a purpose." 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 NCDPS's system was not capable of use by Mr. Griffin because it did not provide him any opportunity to properly file his involuntary-sedation grievance. His grievance was blocked for months until it was untimely, so the grievance procedure was never capable of use by Mr. Griffin to access review for his involuntary-sedation claim. Plainly, then, administrative remedies were unavailable for Mr. Griffin's involuntary-sedation claim.

Just as the plain meaning of "available" shows that Mr. Griffin's administrative remedies were anything but, so too does the ordinary usage of the word. For example, imagine your credit card company tells you that they are making a rebate "available" to you. They also tell you there's a time-limit on when you can claim the rebate; you need to submit

a form to the credit card company within 90 days after receiving notice of the rebate. Fine, 90 days, all else being equal, is a reasonable amount of time to get a form submitted. But hold on. You can only submit the form after your latest payment is processed. And, for unknown reasons, the credit card company takes months to process the payment you had submitted just days before receiving notice of the "available" rebate. By the time they do get the payment processed, it's too late—the 90-day time limit has run; your rebate is lost. At that point, you would probably take issue with the credit card company's initial notice. They didn't actually make a rebate "available" to you, because they never allowed you to claim it. Their processing delays and time limits made the rebate nothing but a hypothetical. But that is not what the word "available" means, nor how people fairly use it. Here, just as with the rebate, administrative remedies were, ultimately, only a hypothetical for Mr. Griffin. Thus, they were not available to him for his involuntary-sedation claim. *See United States ex rel. Sheldon v. Allergan Sales, LLC,* No. 20-2330, 2022 WL 211172, at *8 (4th Cir. Jan. 25, 2022) (concluding that a statute that references an "available price" is "thus talking about an actual price, not something that is purely hypothetical").

In all, Mr. Griffin's complete lack of access to NCDPS's grievance system ultimately makes this case simple. Because there was never a time where Mr. Griffin could file his grievance without violating North Carolina policy, administrative remedies were not "capable of use" and thus were unavailable under the PLRA.

B. Administrative Remedies Were Not "Available" to Mr. Griffin Based on the Supreme Court's Holding in *Ross*.

In *Ross v. Blake*, the Supreme Court provided some illustrative examples of circumstances where administrative remedies might be unavailable, including: 1) when administrative procedures operate as a "simple dead end," 2) when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation," and 3) when an administrative process is "so opaque that it becomes, practically speaking, incapable of use." 578 U.S. at 643–44. The district court recited these *Ross* examples, and, with perfunctory analysis, concluded that none of these examples apply to Mr. Griffin's case, and he therefore failed to exhaust administrative remedies before filing suit. JA162–64. But that conclusion was in error. Rather, the "facts on the ground" here show that North Carolina's grievance system both operated as a "simple dead end" and

allowed "machination" by prison officials who ultimately thwarted Mr. Griffin's ability to access administrative review for his involuntary-sedation claim. *Ross*, 578 U.S. at 643–44. In either case, administrative remedies were not available.

1. North Carolina's One-Grievance-At-A-Time Policy Operated as a Simple Dead End.

Grievance procedures were not available to Mr. Griffin because, when he tried to submit his operative grievance, he was met with a "simple dead end." *Ross*, 578 U.S. at 643. In *Ross*, the Supreme Court held that when "the facts on the ground" are such that the grievance procedure is "incapable of use for the pertinent purpose," that is a dead end, and remedies are not "available." *Id.*; *Booth v. Churner*, 532 U.S. 731, 736, 738 (2001).

Here, North Carolina's procedures operated as such a "dead end" for Mr. Griffin. North Carolina's administrative procedure only allows one grievance pending at or before Step 2 at any given time. JA106. When Mr. Griffin tried to submit his involuntary-sedation grievance, he already had another grievance pending that had not yet completed Step 2. JA119. Prison officials rejected his involuntary-sedation grievance for this very reason. *Id.* And this barrier to entry only cleared once the time limit for

submitting his involuntary-sedation grievance had already passed. JA140. Mr. Griffin's attempts to exhaust were thus delayed by an administrative one-two punch: one prison policy shut his claim out from the process indefinitely until another shut it out entirely. *Id.* This combined effect culminated in a simple dead end. There was nothing for Mr. Griffin to do, and no potential for relief under the prison's rules. At that point, administrative remedies were clearly unavailable to Mr. Griffin.

Actually, Mr. Griffin's circumstance is analogous to the very facts at issue in *Ross* itself. There, the plaintiff, Mr. Blake, had a grievance related to the use of excessive force. 578 U.S. at 636. Although Mr. Blake did not exhaust remedies under the main administrative process, he asserted that exhaustion was not required because his claim had been taken up by a specialized unit within the prison, and it was unwritten policy once that happened that prisoners could not get relief through the normal channels. *Id.* at 645–47. The Supreme Court held that if it was true that, once the specialized investigation began, claims had no "potential for relief" under the general administrative process, then remedies were not available. *Id.* at 645–48. Here, just as in *Ross*, some

conditional event puts a stop to any access to an administrative process that might otherwise provide relief. Yet, for Mr. Griffin, it was not unwritten prison policy that sealed his fate, but the express provisions of North Carolina's policy that said he could not access the grievance system. And that lack of access renders administrative remedies unavailable.

This Court itself has framed the "availability" holding in *Ross* as ultimately a question of access. *Moss v. Harwood*, 19 F.4th 614, 623 (4th Cir. 2021) (quoting *Ross*, 578 U.S. at 642). That is, *Ross* set out a "functional approach" to availability, "asking whether a purported grievance system is 'in fact not capable of use'" *Id.* (quoting *Ross*, 578 U.S. at 642). For Mr. Griffin, North Carolina's grievance system was, in fact, not capable of use. When Mr. Griffin tried to file his involuntary-sedation grievance, officials immediately rejected it on the ground floor, and thereafter the grievance policy prevented Mr. Griffin from successfully re-submitting this grievance until it was too late under North Carolina policy anyway. Since Mr. Griffin was *not* able to access the grievance process, that process was *not* available to him.

Indeed, in other statutory contexts this Circuit has taken the same functional approach to "availability." For example, in *Bell Arthur Water Corp. v. Greenville Utilities Commission*, 173 F.3d 517 (4th Cir. 1999), this Court addressed whether a housing development was within a utility company's service area based on statutory language defining "service area" as the area where a company "provided service or made service *available*." *Id.* at 525 (emphasis added); 7 U.S.C. § 1926(b). To have made service "available," this Court concluded, the utility company would have to have the capacity to *actually serve* an area. 173 F.3d at 525–26. This Court determined that the reality of the utility company's infrastructure—a six-inch pipeline where at least a twelve-inch pipeline was needed to serve the area—rendered service unavailable. *Id.* Here, NCDPS's grievance system suffers from pipeline issues as well. The way in which North Carolina set up and managed its administrative process created a metaphorical bottleneck that rendered it as "unavailable" as did the too-small pipeline.

At bottom, because Mr. Griffin's claim could not even get in the door, administrative remedies were not "capable of use" but rather

constituted a "simple dead end." As such, remedies were unavailable under the PLRA.

2. Prison Officials Thwarted Mr. Griffin When He Attempted to Access the Grievance Process For His Involuntary-Sedation Claim, Making the Process Unavailable.

Administrative remedies were not available for Mr. Griffin's involuntary-sedation grievance because prison officials thwarted him from accessing the grievance system for this claim.

Under *Ross*, administrative remedies are not available when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." 578 U.S. at 644; *see Moore*, 517 F.3d at 725 ("[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it."). Such thwarting by prison officials need not be malicious or nefarious to render administrative remedies unavailable. *See, e.g.*, *Hill v. Haynes*, 380 Fed. App'x 268, 273–74 (4th Cir. 2010) (remanding where a genuine issue of material fact existed regarding whether "action or inaction" of prison officials rendered remedies unavailable, without regard to specific intent). This is in line with the text of § 1997e(a), which

asks only if remedies were unavailable and remains agnostic to how they got that way. *See Lanaghan v. Koch*, 902 F.3d 683, 688 (7th Cir. 2018) ("[A] grievance procedure can be unavailable even in the absence of affirmative misconduct. The term 'available' is given its ordinary meaning, and it does not include any requirement of culpability on the part of the defendant.").

Here, prison officials thwarted Mr. Griffin's ability to access the grievance system for his involuntary-sedation claim in at least two ways: 1) by violating their own policy and allowing a later-filed grievance to "jump" the line to take up a blocking position for Mr. Griffin's involuntary-sedation grievance and 2) by exceeding their own time limits for processing Mr. Griffin's pending grievances. Each of these actions on their own, but especially when taken together, show that administrative remedies were unavailable for Mr. Griffin's involuntary-sedation claim because prison officials made them so.

a. Prison Officials Thwarted Mr. Griffin by Arbitrarily Accepting a Later-Filed Grievance.

Prison officials made it impossible for Mr. Griffin to timely file his involuntary-sedation grievance by allowing an additional, later-filed grievance to take up a blocking position ahead of his involuntary-sedation

grievance, contra to their own policies. Recall, prison officials rejected Mr. Griffin's involuntary-sedation grievance in late November 2015 because he submitted it while an earlier-filed grievance, his kosher-diet grievance, had not yet completed Step 2 of the administrative process. JA119. In rejecting this grievance, prison officials cited to their own policy, which only allows one grievance pending at or before Step 2 of the grievance procedure at any given time. *Id.*; JA106. In accordance with this policy, when Mr. Griffin had attempted to file two other grievances while his kosher-diet grievance was pending, these grievances each met the same fate: blocked. JA127; JA130.

However, with no explanation and contrary to their own policies, prison officials accepted a grievance Mr. Griffin filed on January 6, 2016, despite the fact that his kosher-diet grievance had not yet completed Step 2 of the process. JA133; JA135. After accepting this grievance, prison officials took about 50 days to process the January grievance beyond Step 2, meaning it blocked access for Mr. Griffin's involuntary-sedation grievance for approximately two months. JA133–40. During that time, a prison official confirmed to Mr. Griffin that he would have to wait for both his kosher-diet grievance and this new January grievance to complete

Step 2 before resubmitting his involuntary-sedation grievance. JA91–92. And, crucially, Mr. Griffin only received the Step 2 decision for this January grievance one day after the deadline for submitting his involuntary-sedation grievance had passed. JA139–40.

Although it remains unclear exactly why or how this grievance was allowed into the pipeline, the consequences of this acceptance are plain: Mr. Griffin would be blocked from filing his involuntary-sedation grievance until time ran out to file it at all. Had prison officials not introduced the additional January grievance into the pipeline, the single obstacle blocking Mr. Griffin's involuntary-sedation grievance would have been the pending kosher-diet grievance. And Mr. Griffin received a Step 2 decision for his kosher-diet grievance several days before the 90-day time limit to submit his involuntary-sedation grievance ran. JA96. So, without the January grievance in the equation, Mr. Griffin would have had at least a couple of days (from February 22 to February 25) to submit his involuntary-sedation grievance without running afoul of the prison's pending-grievance policy or its time limit for grievance submission. But prison officials, in violation of their own policy, accepted the January grievance into the pipeline. JA133; JA135. And Mr. Griffin

did not receive the Step 2 decision regarding this January grievance until one day after the prison's deadline to submit his involuntary-sedation grievance. JA139–40. Thus, by accepting this one grievance without cause or explanation, prison officials dashed Mr. Griffin's chance at ever getting his involuntary-sedation grievance into the pipeline. For this reason, the prison's grievance system was not "available" to Mr. Griffin.

b. Mr. Griffin Had No "Available" Remedies Because Administrators Took Unreasonably Long to Move His Pending Grievances Forward.

In addition to letting another grievance in the pipeline without cause or explanation, prison officials also rendered remedies unavailable to Mr. Griffin by taking too long to process and respond to his pending claims. As explained above, two pending grievances combined to block Mr. Griffin's involuntary-sedation claim for the entire 90-day period he had to file it: his kosher-diet grievance and his later-filed January grievance. *See* JA119; JA139–40. However, this was only possible because, in processing both grievances, prison officials vastly overshot mandatory time-limits for claim processing embedded in their own administrative policies. *See* JA107–08. These inexplicable delays by prison officials ultimately rendered remedies unavailable to Mr. Griffin for his involuntary-sedation claim.

Prison officials took way too long to get Mr. Griffin a Step 2 decision on his kosher-diet grievance. All told, prison officials took about 118 days from the time Mr. Griffin filed his kosher-diet grievance to process it through Step 2. *See* JA118–21. According to North Carolina's own policy, it should have taken prison officials about 36 days, at most, to process this grievance past Step 2 of the grievance procedure.[4] JA107–08. Indeed, had prison officials heeded the mandatory time limits North Carolina sets out for claim processing, *the entire administrative process*, from start to final resolution, should only have taken about 90 days, maximum. JA107. Yet here, prison officials took nearly a month more than that just to complete Step 2 of Mr. Griffin's kosher-diet claim. Had prison officials

[4] NCPDS specifies time limits for each step of its administrative process, and, at any step, if officials fail to abide by these deadlines, "the grievance will be forwarded to the next step for review." JA106. At Step 1, "formal written response to the inmate shall be made within 15 days of acceptance of the grievance." JA107. At Step 2, officials should provide a formal written response within 20 days from the date a prisoner requests Step 2 review. *Id.* And at each level, a prisoner must request an appeal within 24 hours after they receive an official denial. *Id.* Put together, that means that under NCDPS's own policy, it should not take a grievance much longer than about 36 days to go from acceptance to completion of Step 2, both because the ARP's time limits use mandatory "shall" language to set out strict deadlines, and because, if officials do miss a deadline, the grievance should automatically move on to the next step in the process anyway. JA106.

followed their own policies, Mr. Griffin might have had an opportunity to timely submit his involuntary-sedation grievance. But they did not, and so he did not.

Further, similar timeframe violations by prison officials plagued Mr. Griffin's later-filed January grievance. Recall, prison officials shouldn't have even accepted this January grievance in the first place, as the kosher-diet grievance had not yet completed Step 2 when the January grievance was filed. *See supra* I.B.1.a. But once they did, it took them about 50 days to get Mr. Griffin a Step 2 decision on this grievance. *See* JA133; JA135; JA139–40. Again, this is considerably longer than the prison's own policies allow. And prison officials' time-limit violations for this January grievance ultimately pushed matters over the edge, as this January grievance blocked Mr. Griffin's involuntary-sedation grievance right through when the time to submit that grievance had passed. *See* JA96. In doing so, prison officials thwarted Mr. Griffin and rendered administrative remedies unavailable to him.

And it is not just that prison officials flagrantly violated their own policies and left Mr. Griffin unable to access any level of review for his involuntary-sedation claim in the meantime. Rather, prison officials

conveniently seem to have delayed progress on Mr. Griffin's pending claims right up until the deadline passed for Mr. Griffin to file his grievance at all. North Carolina requires prisoners to submit a grievance no more than 90 days after the event that gave rise to it. JA107. The events giving rise to Mr. Griffin's involuntary-sedation grievance concluded on November 27, 2015. JA35–39. That put the 90-day deadline at February 25, 2015. Mr. Griffin first attempted to submit his grievance the same day that the underlying incident happened. JA119. But prison officials rebuffed his attempt, as the kosher-diet grievance was pending at that time. *Id.* The problem is, prison officials left blocking grievances in the pipeline up until February 26, exactly 91 days after the underlying incident occurred.[5] And when Mr. Griffin re-submitted his involuntary-

[5] The compounding coincidences that dot this timeline, all coalescing to undo Mr. Griffin's attempts to file, support an inference of intentional machination by prison officials. Under the plain text of § 1997e(a), Mr. Griffin doesn't need to show malicious intent by prison officials to show that they made the administrative process unavailable to him. In fact, Mr. Griffin doesn't need to show anything with respect to availability, as, recall, defendants bear the burden of proving this affirmative defense. *Jones*, 549 U.S. at 216. Yet, still, drawing all reasonable inferences in Mr. Griffin's favor, as the Court is required to do at this stage of litigation *see Harris v. Pittman,* 927 F.3d 266, 272 (4th Cir. 2019), the facts suggest intentional machination. Inexplicably, prison officials in January let a grievance into the pipeline after they had consistently rejected at least four others. Then, they left this new grievance pending at or before Step

sedation grievance, prison officials rejected it, citing North Carolina's 90-day time limit to submit as the reason. JA144–49.

In short, prison officials violated their own policies at multiple junctures while processing Mr. Griffin's grievances, rendering administrative remedies unavailable. Officials rejected Mr. Griffin's involuntary-sedation grievance, citing their pending-grievance policy, yet turned around and accepted his January grievance in contravention of that same policy. In addition, through extensive and, at best, arbitrary delays, officials left grievances blocking Mr. Griffin's operative claim from the very first day it arose until the very day it became untimely. There was never a moment when Mr. Griffin could have filed his involuntary-sedation grievance while remaining in compliance with prison policy, all due to the actions and inaction of prison officials. By

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2 for about 50 days, again blowing mandatory deadlines from North Carolina's own policy. Finally, prison officials only notified Mr. Griffin that his involuntary-sedation grievance was free to enter the administrative process exactly 91 days after the underlying incident occurred—just one day after the deadline to timely file. Maybe this was all happenstance, and Mr. Griffin is just supremely unlucky. But taken together, there is at least a genuine issue of material fact as to whether prison officials intentionally prevented Mr. Griffin from filing, rendering administrative remedies unavailable.

definition, then, prison officials thwarted Mr. Griffin, and rendered administrative remedies unavailable.

Finally, it is worth remembering that, under *Jones v. Bock*, exhaustion is an affirmative defense. 549 U.S. at 216. Thus, Defendants, not Mr. Griffin, bear the burden of showing that remedies were available in the first place. *See Moore*, 517 F.3d at 725. Defendants have not met that burden. Instead, through detailed allegations, Mr. Griffin has shown that remedies were not available to him, something he is not even required to do in the first place. Thus, the district court's holding cannot stand.

C. The District Court's Reliance on *Moore v. Bennette* Was in Error.

The district court's cursory analysis is not saved by its citation to this Court's decision in *Moore v. Bennette*. After stating, without explanation, that remedies remained available to Mr. Griffin under *Ross*, the district court cited to *Moore* for support, suggesting in a parenthetical that the *Moore* Court concluded the plaintiff had not exhausted administrative remedies based on NCPDS's rule allowing one grievance pending at a time. JA164. Initially, *Moore* predates *Ross*, such that it cannot possibly support the proposition that Mr. Griffin's case does not

fall into any of the examples of unavailability listed in *Ross*. And, in any event, the *Moore* decision is inapposite.

First, as the district court's own parenthetical shows, *Moore*'s discussion of North Carolina's pending-grievance rule did not go directly to availability. When the *Moore* Court discussed North Carolina's policy, it was evaluating plaintiff's argument that he actually had properly filed his grievance, and so had exhausted available remedies. 517 F.3d at 729–30. The court was *not* there addressing whether remedies were available, or whether the one-pending-grievance rule made remedies unavailable. *Id.* In this context, the *Moore* Court cited to North Carolina's pending-grievance rule, concluding that because the plaintiff had a grievance pending before Step 2, prison officials appropriately rejected plaintiff's additional grievance. *Id.* Further, the court rejected plaintiff's argument that, because he had labeled his grievance as an "emergency," it should have been allowed to go through. *Id.* But, again, the key question in this part of the decision was whether plaintiff had properly filed his grievance given the pending-grievance rule. That question is irrelevant to the outcome of Mr. Griffin's case.

Second, the *Moore* Court only concluded that the plaintiff there did not exhaust administrative remedies *because* that plaintiff had time to resubmit his grievance after the blocking grievance cleared Step 2. *Id.* ("Because Moore had no excuse for not resubmitting the grievance . . . when Step 2 of his [previous grievance] was completed," he failed to exhaust his administrative remedies regarding that claim.). Here, in contrast, Mr. Griffin could not successfully re-submit his grievance because prison officials kept blocking grievances at or before Step 2 up until the day after his involuntary-sedation grievance was due. Because the *Moore* plaintiff did not face a similar hurdle, the *Moore* decision does not control here.

Finally, even if *Moore* was talking about availability, and even if the *Moore* plaintiff was likewise unable to re-submit his operative grievance, *Moore* still would not bear on Mr. Griffin's case because the grievance policy then at issue was materially different from the policy currently in effect. In *Moore*, the court quoted then-existent North Carolina policy that allowed grievances to be rejected "if there has been a time lapse of more than *one year* between the event and submission of the grievance." *Id.* at 722. Today, North Carolina can reject a grievance

filed more than *90 days* after the underlying incident occurred—this provision ultimately doomed Mr. Griffin's involuntary-sedation claim. JA106. Put another way, Mr. Moore apparently had more than four times as long as Mr. Griffin to submit a grievance. Such a difference would undoubtedly change the availability analysis. Thus, even if the *Moore* court had evaluated the pending grievance policy in terms of availability, that analysis would not hold today.

D. Policy Considerations Counsel Against Finding Administrative Remedies Remained Available to Mr. Griffin When He Could Not File His Operative Grievance.

In addition to reasons stemming from plain text and precedent, this Court should not find remedies were available to Mr. Griffin because the policy goals Congress intended to serve by requiring administrative exhaustion were actually undermined in this case. 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 policies that simply exclude a grievance from the process altogether do just the opposite, shunting grievances from the administrative process entirely. Indeed, North Carolina's system served only to force Mr. Griffin's claim out of the

administrative system despite his earnest efforts to pursue relief through that avenue. Then, when Mr. Griffin turned to the courts, Defendants attempted to levy this inaccessible system to block access to judicial remedies as well, despite Mr. Griffin's constitutional right of access to some form of relief. *See Lewis v. Casey*, 518 U.S. 343, 351–53, 355 (1996) (recognizing a First Amendment right to pursue a non-frivolous civil-rights claim).

As a result, this appeal arises more than six years after the underlying incident, and still no forum, administrative or otherwise, has considered Mr. Griffin's civil-rights claim on the merits. This cannot be what Congress had in mind when it passed the exhaustion requirement. Because the district court's holding fails as a matter of law and policy, this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment on exhaustion grounds and remand the case for consideration of the merits of Mr. Griffin's claims.

Respectfully Submitted,

Dated: February 10, 2022

/s/ Katherine Cion
Devi M. Rao

Katherine Cion
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3438
devi.rao@macarthurjustice.org
katie.cion@macarthurjustice.org

Easha Anand
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore Street, #380-15875
San Francisco, CA 94115
easha.anand@macarthurjustice.org

Rosalind Dillon
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
160 East Grand Ave, Floor 6
Chicago, IL 60611
rosalind.dillon@macarthurjustice.org

Counsel for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

This case involves a complex set of legal issues that this Court has not yet had the opportunity to comment on or resolve. Further, a central question in this case relates to the interpretation of the Prison Litigation Reform Act. As many cases under this Act are brought *pro se*, the fact that all parties in this case are counseled makes this a particularly appropriate vehicle for deciding the questions at hand. For these reasons, oral argument is necessary and advisable for a full and fair consideration of the issues Mr. Griffin sets forward in his opening brief.

Dated: February 10, 2022

/s/ Katherine Cion
Katherine Cion

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7(B) because this brief contains 7,472 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: February 10, 2022

/s/ Katherine Cion
Katherine Cion

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2022, I electronically filed the foregoing *Brief of Plaintiff-Appellant* with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 10, 2022

/s/ Katherine Cion
Katherine Cion