No. 21-3047

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HOWARD SMALLWOOD,
Plaintiff-Appellant,

v.

DON WILLIAMS, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana
No. 1:20-cv-00404-JPH-DML
Hon. James P. Hanlon

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF INDIANA, THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, AND THE AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION IN SUPPORT OF THE PLAINTIFF-APPELLANT AND REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-3047

Short Caption: Smallwood v. Williams

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
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n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/Jennifer Wedekind Date: 04/13/2022

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American Civil Liberties Union of Indiana (amicus curiae)

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Kenneth J. Falk

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

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Attorney's Printed Name: Kenneth J. Falk

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

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Attorney's Printed Name: Camille E. Bennett

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s Christine Donahoe Date: 4/11/2022

Attorney's Printed Name: Christine Donahoe

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INTEREST OF *AMICI CURIAE*[1]

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*. The ACLU's Disability Rights Program works toward a society in which discrimination against people with disabilities no longer exists, where people with disabilities are valued, integrated members of the community, and where people with disabilities are no longer overrepresented in our nation's jails and prisons.

The **American Civil Liberties Union of Indiana** ("ACLU of Indiana") is the Indiana affiliate of the ACLU. The ACLU of Indiana pursues legal claims against governmental entities in a variety of substantive areas, and frequently represents prisoners in litigation challenging the alleged denial of their

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. 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.

constitutional rights. The ACLU of Indiana has a keen interest in ensuring that the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), is not used to unnecessarily prevent prisoners from exercising their right of access to court and their ability to demonstrate that their rights are being, or have been, violated.

The **American Civil Liberties Union of Illinois** is the ACLU's Illinois state affiliate, with more than 75,000 members and supporters across Illinois. The ACLU of Illinois has appeared before numerous courts, including this Court, in a wide range of cases on behalf of persons in custody. Currently these include *Lippert v. Jeffreys*, No. 1:10-cv-04603 (N.D. Ill.) (Illinois state prisoners with physical healthcare needs), and *Monroe v. Jeffre*ys, No. 3:18-cv-00156-NJR-MAB (S.D. Ill.) (ongoing class action on behalf of transgender prisoners in Illinois state prisons).

The **American Civil Liberties Union of Wisconsin** is a non-profit, non-partisan organization with about 16,000 members statewide. The organization is one of the state affiliates of the ACLU. The ACLU of Wisconsin works to maintain and enhance the Constitutional and civil rights of all people. The ACLU of Wisconsin has litigated many cases on behalf of incarcerated people, including people suffering from constitutionally deficient health care (*see, e.g.*, *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *Flynn v. Doyle*, 672 F. Supp. 2d 858 (E.D.

Wis. 2009)) and victims of abuse seeking relief from their county jailors (*see, e.g.*, *Kingsley v. Hendrickson*, 576 U.S. 389 (2015); *JKJ v. Polk County*, 960 F.3d 367 (7th Cir. 2020)).

INTRODUCTION

Under the Prison Litigation Reform Act ("PLRA"), incarcerated people must exhaust administrative remedies before filing suit in federal court—but only those remedies that are "available." 42 U.S.C. § 1997e(a). Complex grievance procedures present significant obstacles to the courthouse doors for most incarcerated people. For those with serious disabilities, they present insurmountable barriers. In these circumstances, courts must find remedies unavailable.

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. 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]

Additional barriers also affect 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. Incarcerated people with cognitive or intellectual disabilities, like the plaintiff here, may be unable to comprehend complicated

[2] M.C. ESCHER COLLECTION, https://mcescher.com/gallery/impossible-constructions/# (last visited April 12, 2022).

grievance processes. They may be unable to follow complex, multi-step instructions and unable to complete the grievance process without assistance.

Incarcerated people who cannot navigate these complicated pathways are often barred from obtaining judicial redress for serious civil rights violations. Prison administrators reject grievances for procedural missteps, and then courts dismiss those same claims for failure to exhaust.

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 v. Blake*, 578 U.S. 632, 635–36 (2016) (discussing 42 U.S.C. § 1997e(a)). When deciding whether remedies are available, courts should bear in mind the "real-world workings of prison grievance systems[,]" *id.* at 643, as well as the "real-world" disabilities of many individual plaintiffs. Further, courts must consider the PLRA's exhaustion requirements in the context of the Americans with Disabilities Act ("ADA") and Constitutional protections to avoid foreclosing access to the courts for incarcerated people with disabilities. Where, as here, a plaintiff is unable to complete a complicated grievance process as a result of his disability and the prison's failure to provide assistance, accommodations, or modifications, courts must find administrative remedies unavailable. Indeed, failure to do so would result in

categorically excluding a large portion of the prison population from accessing the courts, and raises serious constitutional and disability discrimination concerns.

ARGUMENT

I. Prison Grievance Procedures Are Rife With Barriers That Prevent Exhaustion Of Administrative Remedies.

Complex grievance procedures present significant obstacles to the courthouse doors for incarcerated people and may act as complete barriers to justice for many incarcerated people with disabilities. Grievance systems typically include multiple steps, which may include an informal resolution attempt, a formal grievance, and one or two appeals.[3] At each stage, grievants often must meet impossibly tight deadlines, which are frequently less than two weeks and can be as short as two days.[4] And any misstep during the grievance process can forever foreclose grievants from pursuing their civil rights claims in federal court.[5]

Incarcerated people may lose their claims for including multiple issues in a

[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) ("[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 PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 575–76 (2014).

single grievance,[6] or for failing to name the individuals implicated by the grievance with sufficient specificity.[7] Even the most minor of technical errors can prove fatal.[8] For example, filing an "administrative" appeal rather than a "disciplinary" appeal can lead to dismissal for failure to exhaust.[9] So can mailing multiple grievances in a single envelope rather than separately mailing each one;[10] failing to submit a complaint where the requisite form for doing so is unavailable;[11] submitting handwritten copies instead of photocopies even when the photocopier is broken;[12] submitting carbon copies instead of originals;[13] submitting an appeal to

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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.*, *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.,* 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.").

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

[10] *Freeland v. Ballard*, No. 2:14-cv-29445, 2017 WL 337997, at *6–7 (S.D. W.Va. Jan. 23, 2017).

[11] *See Mackey v. Kemp*, No. CV 309-039, 2009 WL 2900036, at *3 (S.D. Ga., July 27, 2009).

[12] *Mack v. Klopotoski*, 540 F. App'x 108, 112–13 (3d Cir. 2013).

[13] *Fischer v. Smith*, No. 10-C-870, 2011 WL 3876944, at *2 (E.D. Wis. Aug. 31, 2011).

the "Inmate Appeals Branch" instead of to the "appeals coordinator";[14] or writing below a form's line that instructed "do not write below this line."[15]

Further, the grievance procedures are generally presented in lengthy policy documents filled with complex language and cross references to other policies and forms. For example, the Indiana Department of Correction ("IDOC") grievance policy at issue here is 15 single-spaced pages, requires the use of at least three different forms, and cross-references at least three other policies. *See generally* IDOC Offender Grievance Process, ECF Doc. 46-3. It uses words such as "allotted," "conform," "conjunction," "deemed," "designee," "frivolous," "generate," "imminent," "mechanisms," "merits," "pertinent," "rationale," "reprisal," "thereby," and "verification." *Id.* It employs phrases such as "time consumed by the offender," "appropriate relief," "thereby establishing a rationale," "extenuating circumstances," and "pursue or originate." *Id.* And it incorporates sentences such as: "No grievance shall be rejected because an offender seeks an improper or unavailable remedy, except that a grievance shall be rejected if the offender seeks a remedy to a matter that is inappropriate to the offender grievance process." *Id.* at 6.

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[14] *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*, 2007 WL 2796575 (E.D. Cal. Sept. 25, 2007).

[15] *Bracero v. Sec'y, Fla. Dep't of Corr.*, 748 F. App'x 200, 203 (11th Cir. 2018).

The policy, unsurprisingly, is ranked "difficult to read" by the Flesch Reading Ease Score, and requires college level reading skills to understand, according to the Flesh-Kincaid Grade Level assessment and several other measures.[16]

Absent from this long, complex document is any clear reference to reasonable modifications, accommodations, or other tools available to provide access to this complex procedure for those who, because of their disabilities, cannot navigate the process without assistance. The policy effectively excludes not only incarcerated people with intellectual disabilities, like Mr. Smallwood, but also people with other disabilities, including people with vision disabilities who cannot read the policy or fill out forms, and people with physical disabilities who cannot hold a pen or write.

[16] The IDOC grievance policy is calculated as difficult or college level by the following assessments: Flesch Reading Ease Score of 34.2 ("difficult"); Flesch-Kincaid Grade Level of 13.5 ("college"); Automated Readability Index (developed to assess materials used by United States Air Force) of 13.5 ("21-22 yrs. old (college level)"). The Flesch-Kincaid reading ease and reading grade level assessments were developed with the United States Navy and are used widely, including as built-in tools in Microsoft Word, and by government agencies and in statute. *See, e.g.*, Fla. Stat. § 627.4145(1)(a) Readable Language in Insurance Policies (requiring insurance policies to be "readable," defined based on minimum Flesch reading ease test); Pranay Jindal, Joy MacDermid, *Assessing Reading Levels of Health Information: Uses and Limitations of Flesch Formula*, 30 EDUC. FOR HEALTH 84, 85 (2017), https://www.educationforhealth.net/article.asp?issn=1357-6283;year=2017;volume=30;issue=1;spage=84;epage=88;aulast=Jindal#ft33.

Thus, "proper exhaustion" under the IDOC grievance policy requires a degree of minute technical compliance with a complex procedure set forth in a lengthy, convoluted document without any mechanism to accommodate incarcerated people with disabilities. Compliance with this procedure is challenging for anyone, and likely impossible for someone with cognitive or intellectual disabilities, thus barring from court any number of meritorious claims.

II. Many Incarcerated People Face Additional Barriers That Prevent The Exhaustion Of Administrative Remedies.

A. Common Characteristics Of Incarcerated People, Including High Rates Of Disabilities, 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 diminish or eviscerate their chances of successful administrative exhaustion. Incarcerated people have disproportionately low rates of educational attainment,[17] English proficiency,[18] and literacy.[19] Meanwhile, the prevalence of disability and

[17] *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).

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

[19] 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,

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, 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.[20] The most commonly reported disability among those surveyed was "cognitive disability."[21] Any or all of these characteristics may make incarcerated people unable to successfully file and pursue a meritorious claim through the prison grievance system.

Incarcerated people with cognitive or intellectual disabilities in particular, like Mr. Smallwood, may be unable to comply with the grievance process. People with cognitive or intellectual disabilities experience limitations in cognition and adaptive functioning.[22] They often experience difficulty in abstract thinking, problem-solving, planning, and judgment, as well as difficulty in "adaptive behavior," including communication, literacy, participation in social life, and

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EDUCATION, AND TRAINING, at Table 1.2 (Nov. 2016), 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).

[20] 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.

[21] *Id.* at 1–2.

[22] *See* Am. Ass'n on Intellectual & Developmental Disabilities, Frequently Asked Questions on Intellectual Disability, https://www.aaidd.org/intellectual-disability/faqs-on-intellectual-disability ("AAIDD FAQ").

independent living.[23] Intellectual and cognitive disabilities vary widely in impact and significance, and can be "invisible" or unrecognizable to an outsider.[24] A person with cognitive disabilities may be able to participate in casual interactions and conversations, and read and write simple forms, but nonetheless struggle to follow complex, multi-step instructions that are laden with traps for the unwary. These prisoners may be unable to fully comprehend and comply with the intricacies of the grievance process, such as proper procedure, strict timelines, content requirements, or one of many other potentially "bewildering features." *See Ross*, 578 U.S. at 646.

In short, a person with cognitive disabilities may be unable to fulfill the rigorous requirements of grievance procedures without assistance.

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. And people with disabilities may be targeted for violence and intimidation while in prison.[25]

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[23] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th Ed. 2013); AAIDD FAQ, supra n.25.
[24] Tammy Smith, et al., *Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System and Implications for Transition Planning*, 43 EDUC. & TRAINING IN DEVELOPMENTAL DISABILITIES 421, 424-25 (2008), available at https://www.jstor.org/stable/23879673?read-now=1&seq=5.
[25] *See* Jennifer Sarrett, *US prisons hold more than 550,000 people with intellectual disabilities – they face exploitation, harsh treatment*, THE CONVERSATION (May 7,

In response to filing grievances, incarcerated people have been beaten,[26] urinated on,[27] moved to housing units where they are assaulted by other incarcerated people,[28] 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.[29] 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. *See also Gooch v. Young*, 24 F.4th 624, 628 (7th Cir. 2022) ("A remedy is not considered 'available' to an inmate who is prevented by threats or intimidation by prison officials from submitting a grievance according to the prescribed policies.").

III. Prison Administrators Can Use Complex Grievance Systems To Obstruct Meritorious Claims.

Congress enacted the PLRA's exhaustion requirement "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516,

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2021), https://theconversation.com/us-prisons-hold-more-than-550-000-people-with-intellectual-disabilities-they-face-exploitation-harsh-treatment-158407; *see also* HUMAN RIGHTS WATCH, CALLOUS AND CRUEL: USE OF FORCE AGAINST INMATES WITH MENTAL DISABILITIES IN US JAILS AND PRISONS (2015), hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and.

[26] *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).

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

[28] *See, e.g.*, *Rinaldi v. United States*, 904 F.3d 257, 262 (3d Cir. 2018).

[29] *See, e.g.*, *Turner v. Burnside*, 541 F.3d 1077, 1081 (11th Cir. 2008).

524–25 (2002). To that end, "Congress afforded corrections officials time and opportunity to address complaints internally" before federal courts became involved. *Id.* at 525. However, prison administrators have taken what was designed as a shield against frivolous lawsuits and converted it into a sword to strike down cases that have merit.

By imposing needlessly complex requirements that make it all but impossible for incarcerated people to successfully complete the grievance process, and by failing to provide accommodations for incarcerated people with disabilities, prison administrators foreclose 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 whether incarcerated people exhaust their administrative complaints.[30] The fact that prison administrators—the same individuals typically named as defendants in federal lawsuits brought by prisoners—design the very grievance procedures prisoners must satisfy creates a perverse 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."[31] With any minimum requirements for grievance systems swept away

[30] *See* Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEORGE MASON L. REV. 573, 581 (2014).
[31] *Id.*

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)) (alterations in original).

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."[32] For example, in Illinois, after this Court rejected prison officials' argument that a plaintiff's grievance was not detailed enough and noted that the grievance policy contained no specificity requirements,[33] 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 involved in the complaint."[34] Similarly California, which previously only required incarcerated people to "describe the problem and action requested," revised its grievance protocols to require people to identify by name and title or

[32] Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 473 (2012).
[33] *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002).
[34] *See* HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES, *supra* note 8, at 12 (citing ILL. ADMIN. CODE tit. 20, § 504.810(b) (2003)).

position each staff member involved along with the dates each staff member was involved.[35] And Oklahoma added a requirement that incarcerated people must have every page of a grievance notarized.[36] Because "[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), prison administrators' ability to needlessly complicate grievance procedures is limited only by their own creativity.

IV. Courts Should Not Hesitate To Find Remedies Unavailable And Safeguard Access To The Courts.

The mandatory exhaustion requirements of the PLRA, combined with intentionally convoluted grievance procedures and high rates of disabilities, result in an untold number of incarcerated people being unable to vindicate their rights in federal court, no matter how meritorious the case. As one scholar summarized, incarcerated people "who experience even grievous loss because of unconstitutional behavior by prison and jail authorities will nonetheless lose cases

[35] *Snowden v. Prada*, No. CV 12-1466, 2013 WL 4804739, at *7 (C.D. Cal. Sept. 9, 2013) (citing *Lewis v. Mitchell*, 416 F. Supp. 2d 935, 942 (S.D. Cal. Oct. 5, 2005)) (describing changes to California regulations following a court finding that the PLRA did not dictate or require that a plaintiff identify specific parties in their grievance).

[36] *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).

they once would have won, if they fail to comply with technicalities of administrative exhaustion."[37]

But the PLRA was not intended to keep meritorious cases out of court based on mere technicalities and this Court should not interpret it to do so. The statute's supporters emphasized that the legislation was meant to reduce the number of frivolous lawsuits filed, 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."[38] 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."[39]

Indeed, 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. This exception "has real content. *Id.* at 642. As this Court has explained, the "PLRA exhaustion requirement does not

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

'demand the impossible.'" *Lanaghan v. Koch*, 902 F.3d 683, 688 (7th Cir. 2018) (quoting *Pyles v. Nwaobasi*, 829 F.3d 860, 864 (7th Cir. 2016)).

For a grievance procedure to be "available" it must be "'capable of use for the accomplishment of a purpose" and "accessible[.]" *Ross*, 578 U.S. at 642. Where prison grievance regimes have requirements that are functionally impossible to meet, remedies cannot be "capable of use." And where an incarcerated person is unable to comply with a grievance procedure because of a disability, and the prison provides no accommodations to support that person, the procedure is not "accessible."

This Court has held repeatedly that "a remedy is not 'available' within the meaning of the Prison Litigation Reform Act to a person physically unable to pursue it." *Lanaghan*, 902 F.3d at 689 (quoting *Hurst v. Hantke*, 634 F.3d 409, 412 (7th Cir. 2011)). This Court must not hesitate to apply this same reasoning to situations where a plaintiff is *mentally* unable to pursue administrative remedies due to a cognitive or intellectual disability. *See Lanaghan*, 902 F.3d at 688 (noting "the proper focus" in unavailability determinations is whether a plaintiff was unable to complete the grievance process "through no fault of his own"); *see also Weiss v. Barribeau*, 853 F.3d 873, 875 (7th Cir. 2017) (holding remedies may not have been available to plaintiff due to mental illness).

V. The Exhaustion Requirement Must Be Construed To Avoid Serious Conflicts With The Constitution and Federal Disability Rights Laws.

The district court here brushed aside evidence that Mr. Smallwood has a cognitive disability that rendered the grievance process unavailable to him, based on its own perceptions of Mr. Smallwood's abilities. In doing so, the lower court created a potential constitutional conflict and contravened federal disability rights laws.

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). Prisoners must "have a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement." *Lewis v. Casey*, 518 U.S. 343, 356 (1996). Frustrating or impeding such a claim violates the Constitution. *Id.* at 353. Yet here, the district court discounted evidence that Mr. Smallwood's disability and Defendants' failure to accommodate that disability rendered the grievance process unavailable to him and prevented "meaningful" access to the courts, in contravention of *Bounds* and *Lewis*.

Further, ignoring an individual's mental disabilities when determining whether remedies are meaningfully "available" runs afoul of federal disability rights laws. Under the Americans with Disabilities Act and the Rehabilitation Act, public entities—including jails and prisons—must make reasonable modifications to services, programs, and activities to ensure that "the service, program, or

activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. §§ 35.130(b)(7)(i), 35.150. Administrative remedies are undoubtedly "service[s], program[s], or activit[ies]" of the prison system. This Court must therefore consider whether remedies are "accessible" or "usable" to a plaintiff, as the Supreme Court did in *Ross*, to allow the PLRA to coexist with federal disability rights principles. *See Ross*, 578 U.S. at 642 (discussing the definition of "available"); 28 C.F.R. § 35.150.

Moreover, in order to ensure equal access for incarcerated people with disabilities, prisons and jails have an obligation to provide reasonable modifications and auxiliary aids and services to ensure incarcerated people with disabilities have an equal opportunity to communicate and to participate in programs and services. *See* 28 C.F.R. §§ 35.130, 35.160; *Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 209–12 (1998). These obligations include making changes—like plain language documents and flexibility in deadlines and precise requirements—that provide disabled prisoners with a meaningful opportunity to exhaust their administrative remedies and access federal courts. And prisons and jails may not sit passively until someone requests such accommodations. Rather, officials must affirmatively provide these reasonable modifications to ensure the availability of administrative remedies. Indeed,

> given that [the ADA] require[s] all entities that provide public services to act affirmatively to ensure that disabled individuals have meaningful

> access, prisons seemingly have even more responsibility in this regard, because inmates necessarily rely totally upon corrections departments for all of their needs while in custody and do not have the freedom to obtain such services (or the accommodations that permit them to access those services) elsewhere.

Pierce v. District of Columbia, 128 F.Supp.3d 250, 269 (D.D.C. 2015) (Jackson, J.). *See also Ramirez v. Collier*, 142 S. Ct. 1264, 2022 WL 867311, at *14 (2022) (Sotomayor, J., concurring) ("Availability is a practical determination that requires considering both whether the administrative system is accessible as designed and whether prison administrators and officers ensure meaningful access to it in practice.").

Here, Defendants, who bear the burden of proving remedies were "available" to Mr. Smallwood, *see Lanaghan*, 902 F.3d at 688, failed to meet that burden. Defendants proffered no evidence that they affirmatively provided Mr. Smallwood reasonable accommodations that allowed him a meaningful opportunity to exhaust his administrative remedies. Indeed, Defendants have produced no evidence that they have any mechanism—affirmative or otherwise—to provide reasonable accommodations, auxiliary aids and services, or other legally required assistance to provide access to the grievance procedure for people with disabilities. The court below therefore erred when it held that remedies were available to Mr. Smallwood.

CONCLUSION

For the forgoing reasons, the Court should reverse the district court's decision and hold that administrative remedies were not available to Mr. Smallwood.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 4,705 words.

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Dated: April 13, 2022

/s/ Jennifer Wedekind
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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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Date: April 13, 2022

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