No. 22-1485

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAQUETTA ANN COOPWOOD,

Plaintiff-Appellant,

v.

WAYNE COUNTY, MI., ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 2:20-CV-12092
Hon. Victoria A. Roberts

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, THE AMERICAN CIVIL LIBERTIES UNION OF OHIO, AND THE AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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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, 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.

[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.

The American Civil Liberties Union of Kentucky, the American Civil Liberties Union of Michigan, the American Civil Liberties Union of Ohio, and the American Civil Liberties Union of Tennessee are state affiliates of the ACLU.

INTRODUCTION

Prison and jail grievance procedures often resemble the optical illusions of M.C. Escher, with circular stairways and unreachable doors.[2] Under the Prison Litigation Reform Act's ("PLRA's") exhaustion requirement, incarcerated plaintiffs must successfully navigate these complicated pathways if they want to enforce their civil and constitutional rights in federal court. Far too often, however, grievance procedures present insurmountable obstacles that incarcerated plaintiffs cannot overcome, and as a result they are forever barred from obtaining judicial redress. This is particularly true for incarcerated plaintiffs with mental disabilities, like Ms. Coopwood.

But the PLRA's exhaustion requirement has a built-in exception: plaintiffs must only exhaust remedies that are "available." Courts must interpret the unavailability exception with a keen eye for the complexities of grievance procedures and the individual characteristics of plaintiffs, both of which may render remedies unavailable. Courts must also interpret the PLRA consistently with the constitutional right

[2] *Impossible Constructions*, M.C. ESCHER COLLECTION, https://mcescher.com/gallery/impossible-constructions/# (last visited Nov. 14, 2022).

of access to the courts and federal disability rights laws. Where a plaintiff has a mental disability, like a serious mental illness, and cannot access complex grievance procedures as a result, remedies must be found unavailable. Indeed, failure to do so would result in categorically excluding a large portion of the incarcerated population from accessing the courts, and raise serious constitutional and disability discrimination concerns.

SUMMARY OF THE ARGUMENT

Under the PLRA, incarcerated people must exhaust available administrative remedies before filing suit in federal court. 42 U.S.C. § 1997e(a). Many 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.

Courts interpret the PLRA's exhaustion requirement to demand perfect compliance with every step in a grievance regime—with virtually no limitation on how complicated the process may be or how inconsequential the errors. *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 relief for serious civil rights violations.

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 mental illness or intellectual disabilities are at a particular disadvantage. They may be unable to follow complex, multi-step instructions and unable to complete the grievance process without assistance.

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). Prison and jail administrators are responsible for the creation and implementation of grievance requirements, and those officials 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 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 her disability, and officials fail to provide assistance, accommodations, or modifications, courts must find administrative remedies unavailable.

ARGUMENT

I. 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

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[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).

issues in a single grievance,[6] or for failing to name the individuals implicated by the grievance with sufficient specificity.[7] Even the most minor technical error 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

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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 incarcerated plaintiff 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).

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 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 frequently presented in dense policy documents filled with complex language and cross references to other policies and forms. And grievance requirements may not be adequately spelled out in a single document, instead requiring plaintiffs to consult multiple sources—some of which may not be readily available to them.

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[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).

[14] *Chatman v. Johnson*, No. CIV 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 Wayne County Jail grievance policy at issue here is set out in two documents: the Grievance Procedure and the Inmate Handbook. *See generally* Grievance Procedure, R. 5-2, Page ID #31-35; Inmate Handbook, R. 5-4, Page ID #56-58. These documents use words such as "competent," "demeans," "disposition," "duplicative," "imminently," "impugns," "obtained," "profanity," "provisions," "render," "retrieval," "unsatisfactory," "utilize," and "vague." *See generally id.* The documents, unsurprisingly, are ranked "difficult to read" by the Flesch Reading Ease Score, and require college level reading skills to understand, according to the Flesh-Kincaid Grade Level assessment and several other measures.[16]

[16] The Wayne County Jails Grievance Procedure is calculated as "difficult to read" or college level by the following assessments: Flesch Reading Ease Score of 37.1 ("difficult"); Flesch-Kincaid Grade Level of 13 ("college"); Automated Readability Index (developed to assess materials used by United States Air Force) of 14.9 ("21-22 yrs. old (college level)"). The Wayne County Jails Inmate Handbook section titled "Grievance Procedure" is calculated as "difficult to read" with a Flesch Reading Ease Score of 48.6 ("difficult"), a Flesch-Kincaid Grade Level of 11 and an Automated Readability Index score of 12.3 ("Eleventh Grade"). 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, 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

Adding to the complexity, the two documents each provide incomplete information about the grievance process requirements. For example, the Grievance Procedure includes a requirement that grievants first attempt to resolve the complaint "through informal contact with staff" and states that grievances will be rejected if this informal resolution is not attempted. *See* Grievance Procedure, R.5-2, Page ID #33, 34. The Inmate Handbook does not convey this requirement. Similarly, the Inmate Handbook includes a requirement that grievance appeals must be filed within 10 days of receiving the grievance response. Inmate Handbook, R. 5-4, Page ID #57. The Grievance Procedure does not mention this requirement. Indeed, it is unclear which set of requirements is controlling, as neither document appears to include the full set of potential requirements that a plaintiff must complete to properly exhaust her administrative remedies.

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reading ease test); Pranay Jindal & Joy C. 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.

Finally, the documents directly contradict one another at times. For example, the Grievance Procedure provides that grievances may be submitted on the "'Inmate Grievance Form' or writing paper." Grievance Procedure, R. 5-2, Page ID #34. *See also id.*, Page ID #33-34 (referring repeatedly to both "grievance forms" and "writing paper"). By contrast, the Inmate Handbook states that grievances "must" be submitted on "the official Wayne County Jail Grievance Form" and that the jail "will not accept grievances that are not on the form." Inmate Handbook, R. 5-4, Page ID #56.

Thus, "proper exhaustion" under the Wayne County Jail grievance policy requires minute technical compliance with procedures set forth in two complex and conflicting documents.[17] Compliance with this procedure is likely challenging for anyone, and likely impossible for someone with serious mental illness or intellectual disabilities, thus

[17] There is no evidence in the record indicating that Ms. Coopwood received both the Grievance Procedure and the Inmate Handbook. Defendants-Appellees asserted below, without support, that Ms. Coopwood received an Inmate Handbook upon entry into the Wayne County Jail. Def. Br., R. 5, Page ID #24. Ms. Coopwood submitted a declaration stating that she does not recall receiving any information regarding the requirements of the grievance procedure. Coopwood Aff., R. 16-2, Page ID# 115 ¶ 15. There is no record evidence suggesting that Ms. Coopwood received the Grievance Procedure.

barring from court any number of plaintiffs with meritorious claims.

II. Common Characteristics of Incarcerated People, Including High Rates of Mental 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,[18] English proficiency,[19] and literacy.[20] Meanwhile, the prevalence of serious mental illness and disability among incarcerated people is

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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), 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).

disproportionately high. Approximately 20 percent of jail detainees and 15 percent of state prisoners are estimated to have serious mental illnesses,[21] compared to about 4 percent of all U.S. adults.[22] And 38 percent of prisoners surveyed in 2016 reported having a disability, according to the most recent numbers reported by the Bureau of Justice Statistics—a rate roughly two and a half times greater than adults in the general U.S. population.[23] The most commonly reported disability among those surveyed was "cognitive disability."[24]

Incarcerated people with serious mental illnesses, such as schizophrenia, may be unable to comply with the grievance process. People with schizophrenia may experience hallucinations, delusions,

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[21] Treatment Advocacy Ctr., *Serious Mental Illness (SMI) Prevalence in Jails and Prisons*, (Sept. 2016), https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-in-jails-and-prisons.pdf.

[22] Substance Abuse and Mental Health Servs. Admin., U.S. Dep't of Human Health Servs., *Results from the 2012 National Survey on Drug Use and Health: Mental Health Findings* 12 (2013), *available at* https://www.samhsa.gov/data/sites/default/files/NSDUHmhfr2012/NSDUHmhfr2012.pdf.

[23] 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.

[24] *Id.* at 1–2.

and "negative symptoms" that diminish a person's abilities.[25] In addition, people with schizophrenia experience cognitive deficits, including lack of attention, working memory, verbal learning and memory, and executive functions.[26] As a result, people with schizophrenia may struggle to remember things, organize their thoughts, or complete tasks.[27] In the community, this may result in a person with schizophrenia struggling with self-care; social, interpersonal, or community interactions; or holding a job.[28] In a carceral environment, people with schizophrenia may be unable to fully comprehend and comply with the intricacies of the grievance process, such as proper procedure, strict timelines, content requirements, or other potentially "bewildering features." *See Ross*, 578 U.S. at 646. In

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[25] Nat'l Alliance on Mental Illness, Schizophrenia, https://nami.org/About-Mental-Illness/Mental-Health-Conditions/Schizophrenia.

[26] Christopher R. Bowie & Philip D. Harvey, *Cognitive deficits and functional outcome in schizophrenia*, 2(4) NEUROPSYCHIATRIC DISEASE AND TREATMENT 531–536 (2006), https://doi.org/10.2147/nedt.2006.2.4.531.

[27] Nat'l Alliance on Mental Illness, *supra* n. 25.

[28] Bowie & Harvey, *supra* n. 26.

short, a person with serious mental illness may be unable to fulfill the rigorous requirements of grievance procedures without assistance.

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*, 534 U.S. at 524–25. 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 can prevent incarcerated people from vindicating their rights in federal court. This should come as no surprise, since prison administrators "have a tangible stake" in whether incarcerated plaintiffs exhaust their

administrative complaints.[29] The fact that prison and jail administrators—the same individuals typically named as defendants in suits brought by incarcerated plaintiffs—design the grievance procedures plaintiffs must satisfy prior to bringing suit 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."[30] With any minimum requirements for grievance systems swept away by the PLRA, prison and jail officials can effectively control access to the courthouse. *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 *Porter*, 534 U.S. at 524)) (alterations in original).

Since the PLRA's enactment in 1996, several state corrections agencies' grievance procedures "have been updated in ways that cannot

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

[30] *Id.*

be understood as anything but attempts at blocking lawsuits."[31] For example, in Illinois, 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,[32] the prison system revised its 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."[33] 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 position each staff member involved, along with the dates each staff member was involved.[34] And Oklahoma added a requirement that

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[31] Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 473 (2012).

[32] *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002).

[33] *See* HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES, at 12 (June 2009), https://www.hrw.org/sites/default/files/reports/us0609web.pdf (citing ILL. ADMIN. CODE tit. 20, § 504.810(b) (2003)).

[34] *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).

incarcerated people must have every page of a grievance notarized.[35] 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, officials' ability to needlessly complicate grievance procedures is limited only by their own creativity.

IV. The Exhaustion Requirement Must Be Construed Consistently With The Constitution and Federal Disability Rights Laws.

The PLRA'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. But the district court imposed a sweeping, categorical rule, holding that there is no "mental capacity" exception to the PLRA's exhaustion requirement—meaning mental disabilities can never render remedies unavailable. Order, R. 22, Page ID #352. This categorical rule runs afoul of the constitutional right of access to the courts and federal disability rights laws.

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[35] *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).

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). Incarcerated plaintiffs 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 Ms. Coopwood's disability rendered the grievance process unavailable to her 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 ADA 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 prison and jail systems. This Court must therefore consider whether remedies are "accessible" or "capable of use" for an individual 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. 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, the procedure is not "accessible."

Moreover, 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 incarcerated people with disabilities with a

meaningful opportunity to exhaust their administrative remedies and access federal courts.

Here, rather than consider whether the defendants had demonstrated that administrative remedies were accessible to Ms. Coopwood in light of her disabilities, the district court appeared to fault Ms. Coopwood because there was no evidence that she "sought assistance" with the grievance process. Order, R. 22, Page ID #353. This too runs afoul of federal disability rights laws. Under the ADA, 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, 1284 (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.").

The district court's rule, combined with convoluted grievance procedures and high rates of disabilities, will 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 they once would have won, if they fail to comply with technicalities of administrative exhaustion."[36]

But the PLRA was not intended to keep meritorious cases out of court based on a plaintiff's disability status.[37] This Court should not interpret it to do so.

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[36] Margo Schlanger, *Inmate Litigation*, 116 HARVARD L. REV. 1555, 1694 (2003) (footnotes omitted).

[37] 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." 141 CONG. REC. S 14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Orrin

CONCLUSION

For the forgoing reasons, the Court should reverse the district court's decision and hold that administrative remedies were unavailable to Ms. Coopwood.

Dated: November 17, 2022

Respectfully submitted,

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Hatch). 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." 141 CONG. REC. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Charles Canady).

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 4,343 words.

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 with 14-point Century Schoolbook font.

Dated: November 17, 2022 *<u>/s/ Jennifer Wedekind</u>*
Jennifer Wedekind

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

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Date: November 17, 2022

/s/ Jennifer Wedekind
Jennifer Wedekind

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