No. 21-35728

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON DALE EATON,

Plaintiff-Appellant,

v.

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

TWO RIVERS CORRECTIONAL INSTITUTION,

Defendants-Appellees.

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Defendants offer no argument that under the Prison Litigation Reform Act ("PLRA"), administrative remedies were actually "available" to Aaron Eaton within the plain meaning of the word. Nor could they. No ordinary speaker of English would use the word "available" to describe a grievance process that rejected Mr. Eaton's legal-mail grievance without even reviewing it, solely because the prison was behind in processing other grievances he had filed in recent months. Nor would an ordinary speaker of English use the word "available" to describe a grievance process that would accept Mr. Eaton's legal-mail grievance only if he withdrew a pending grievance, surrendering any future opportunity to file suit on that grievance. That should end the matter. *See Ross v. Blake*, 578 U.S. 632, 638 (2016) (noting that statutory interpretation always begins with the text).

Defendants spend much effort attempting to muddy the waters, arguing that *Ross v. Blake* somehow read the word "available" in the PLRA to mean something different from its dictionary definition. But *Ross* itself defined "available" with reference to its "ordinary meaning" as "capable of use for the accomplishment of a purpose." *Id.* at 642. And the

grievance process was not capable of use by Mr. Eaton for his legal-mail claim. Because Defendants essentially concede that the plain text reading of "available" in the PLRA's exhaustion provision favors Mr. Eaton, this Court should reverse the district court's decision that administrative remedies were "available" to him.

ARGUMENT

I. No Administrative Remedies Were "Available" To Mr. Eaton.

Mr. Eaton had no "available" administrative remedies for his claim that Defendants unconstitutionally confiscated his legal mail because ODOC's grievance policies did not allow him to file a new grievance while he had four already pending. *See* Opening Br. at 15-19. With no "available" remedies for his operative claim, Mr. Eaton satisfied the PLRA's exhaustion requirement. *See id.* The district court suggested otherwise because, in its view, Mr. Eaton could have withdrawn one of his active grievances to make room for his legal-mail grievance. ER-31. But, even assuming he could have done so in time to file the operative grievance, foregoing his rights associated with a pending grievance would not have made administrative remedies "available." *See* Opening Br. at 20-30. Indeed, no ordinary understanding of the word "available"

encompasses that which forces such a difficult choice. *See id.* at 20-23. And in any event, it's not even clear that he could have withdrawn a grievance in time to properly file the operative grievance here. *See id.* at 32-34.

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

As the Supreme Court has explained, the word "available" in the PLRA means precisely what dictionaries say it means: "capable of use for the accomplishment of a purpose." *Ross v. Blake*, 578 U.S. 632, 642 (2016) (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)). Here, Mr. Eaton was blocked from even accessing the first level of review for his legal-mail grievance. Thus, ODOC's grievance process was not capable of use for that claim, rendering remedies unavailable.

1. Defendants do not quarrel with the plain meaning of the word "available." Nor do they argue that ODOC's grievance process was actually "capable of use" by Mr. Eaton for his legal-mail claim. Instead, Defendants point to a passage in *Ross* where the Supreme Court listed, "as relevant here," three examples of when administrative remedies

would not be "available." Appellees' Br. at 17-18 (citing *Ross*, 578 U.S. at 642). Defendants assert that with that passage, the Supreme Court held that administrative remedies are "available" in every other circumstance. Appellees' Br. at 17-18. Not so. In fact, this Court has held just the opposite—that the *Ross* examples are a "non-exhaustive list." *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017).[1] The other circuits that have decided the issue agree. *See Williams v. Corr. Officer Priatno*, 829 F.3d 118, 123 n.2 (2d Cir. 2016) ("We note that the three circumstances discussed in *Ross* do not appear to be exhaustive."); *Ramirez v. Young*, 906 F.3d 530, 538 (7th Cir. 2018) (noting that the *Ross* circumstances "were only examples, not a closed list"); *Muhammad v. Mayfield*, 933 F.3d 993, 1000 (8th Cir. 2019) (identifying the examples in Ross as "at *least* three" of the circumstances where the administrative process may be "unavailable" (emphasis added)).

[1] Contrary to Defendants' suggestion, *see* Appellees Br. at 18, *Fordley v. Lizarraga*, 18 F.4th 344 (9th Cir. 2021), is not at odds with that holding. Indeed, after listing the three examples from *Ross* of when administrative remedies are not "available," *Fordley* goes on to give additional examples where remedies are not "available" (for instance, where a prisoner did not have access a grievance form within the time limit for filing a grievance) that are not included in the *Ross* list. 18 F.4th at 351-52.

Consider the consequences of Defendants' position that *Ross* provided the exclusive list of situations where a grievance system is not "available" under the PLRA. A prison that had no grievance system at all or that required a prisoner to win a coin toss in order to file a grievance would be "available" because *Ross* did not contemplate those specific situations. *Ross* itself relied on the plain meaning of the word "available" in interpreting the PLRA's exhaustion provision, so it would have been passing strange to interpret "available" to cover anything besides the three listed unavailability examples.

2. In any event, the facts of Mr. Eaton's case place it squarely within one of the *Ross* examples: He hit a "simple dead end." *Ross*, 578 U.S. at 643. Defendants argue that the "dead end" example does not apply here because "officials [were not] 'unable or consistently unwilling to provide any relief to aggrieved inmates' as a *general* matter." Appellees' Br. at 19 (quoting *Ross*, 578 U.S. at 643). But even if the grievance process was not a dead end for all of Mr. Eaton's grievances (which Defendants have not shown), that is not what *Ross* required. Instead, *Ross* says that a prisoner has hit a "simple dead end" when "the facts on the ground" show that there is no "possibility of some relief." *Ross*, 578 U.S. at 643 (quoting

Booth v. Churner, 532 U.S. 731, 738 (2001)). Here, the facts on the ground demonstrate that Mr. Eaton hit a dead end: He could not file his operative grievance due to the normal operation of ODOC's grievance procedures and thus had no possibility of relief.

Defendants similarly suggest that administrative remedies are unavailable only in cases where entire "procedural systems" are incapable of use. Appellees' Br. at 23. They are mistaken. This Court has already rejected the notion that an entire "procedural system" has to be unavailable. In *Fordley v. Lizarraga*, this Court considered whether a prison's grievance system was available to a prisoner for his claim that he was sexually and physically assaulted and concluded that although the prison "generally had an administrative process for handling emergency grievances, [the plaintiff] demonstrated that the grievance process was effectively unavailable to him" because prison officers never responded to his particular grievance. 18 F.4th 344, 353 (9th Cir. 2021). That accords with how the Supreme Court treats the issue: *Jones v. Bock* held that exhaustion must be assessed on a claim-by-claim basis, not on a prison-wide basis. 549 U.S. 199, 221-24 (2007). And it accords with common sense. Imagine that a guard threatened to kill a prisoner if he

filed a grievance about a particular incident. *Ross* does not compel a conclusion that administrative remedies were "available" simply because the prisoner could have filed a different grievance about something that a different guard did. *See*, *e.g.*, *McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir. 2015).

3. Defendants also argue that reading the PLRA's exhaustion provision to encompass situations where a prison's grievance system is simply not "capable of use" would amount to an overruling of the Supreme Court's holding in *Woodford v. Ngo*, 548 U.S. 81 (2006). Appellees' Br. at 20. Defendants misread *Woodford*.

In *Woodford*, the Supreme Court considered whether a prisoner, who failed to comply with a prison's deadline for appealing the denial of his grievance, no longer had any "available" remedies such that the PLRA's exhaustion requirement was satisfied. The Supreme Court, noting that the "benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance," worried those benefits would be frustrated if a party could "bypass deliberately the administrative process by flouting the agency's procedural rules." *Woodford*, 548 U.S. at 95, 97. Because the prisoner in

Woodford could have filed a grievance appeal on time, but chose instead to "bypass deliberately the administrative process by flouting" the deadline, the Supreme Court held that the prisoner had not satisfied the exhaustion requirement. *Id*. at 98.

Here, there is absolutely no indication that Mr. Eaton chose to "bypass deliberately the exhaustion process." Mr. Eaton *couldn't* have filed his legal-mail grievance—the four-grievance limit operated to prevent him from even getting his grievance through the door, and the 14-day window in which to file his legal-mail claim passed before prison officials freed up space for him to file it. Indeed, the evidence shows that Mr. Eaton did everything he could to try and afford ODOC a fair opportunity to consider his legal-mail grievance, but was rebuffed. And *Ross v. Blake*—which was decided after *Woodford*—tells us that in such a situation, remedies are not "available" within the plain meaning of the word. 578 U.S. at 642.

For the same reason, Defendants' citation to an out-of-circuit case, *Moore v. Bennette*, 517 F.3d 717 (4th Cir. 2008), is inapposite. Appellees' Br. at 26-27. There, the Fourth Circuit considered a grievance system where the prisoner was prevented from filing a grievance while he had

two other grievances pending. *Moore*, 517 F.3d at 729-30. But the prisoner in that case *could* have resubmitted his grievance once he no longer had two grievances pending and chose not to. *Id.* Thus, *Moore* was similar to *Woodford*—the prisoner could have complied with the prison's rules by filing during the period after the two pending grievances had been resolved but before the time limit to file his grievance had run out; instead, he "deliberately flouted" the process by failing to refile. In this case, by contrast, Mr. Eaton had *no* opportunity to submit his legal-mail grievance. Had he submitted his grievance once one of his four active grievances were resolved, it would have been many months too late. Thus, there was nothing he could do to open up the prison's grievance system to his legal-mail grievance, despite his best efforts.

B. The Plain Text Of The Statute And Constitutional And Policy Considerations Make Clear That Administrative Remedies Are Not Available Where A Prisoner Must Abandon An Active Grievance To Make Them So.

The district court erred by suggesting that remedies were available to Mr. Eaton because he could withdraw an active grievance to make way for his legal-mail claim. Even assuming that withdrawal was a tenable option, *see infra* §1C, such a reading of the exhaustion requirement—that administrative remedies are available even if a prisoner must sacrifice

something important to make them so—runs afoul of the plain meaning of the word "available." It also conflicts with this Court's cases interpreting the word in other statutory contexts. *See* Opening Br. at 21-22 (citing *State of Hawaii ex rel. Attorney General v. FEMA*, 294 F.3d 1152, 1161-62 (9th Cir. 2002); *Whaley v. Schweiker*, 663 F.2d 871, 875 (9th Cir. 1981)).

And on top of the fact that the exhaustion provision speaks in unambiguous terms, construing the word "available" to avoid putting a prisoner to a difficult choice between which grievances to pursue is also in line with important constitutional and policy considerations. A prisoner has a protected First Amendment right to pursue both grievances, *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005), and non-frivolous civil-rights lawsuits, *Lewis v. Casey*, 518 U.S. 343, 351-53, 355 (1996), so the district court's interpretation of "available" has an "intolerable" result: "that one constitutional right should have to be surrendered to assert another," *Simmons v. United States*, 390 U.S. 377, 394 (1968). *See* Opening Br. at 24-28. Such an interpretation also creates perverse incentives for prison officials, who control administrative

grievance processes, to interfere with prisoners' access to grievance procedures. *See id*. at 28-29.

Strikingly, Defendants have no response to Mr. Eaton's principle argument that the plain meaning of "available" forecloses their reading of the exhaustion requirement to force a prisoner to sacrifice one right in order to pursue another. Defendants instead take aim at Mr. Eaton's arguments that constitutional and policy considerations counsel against interpreting the exhaustion requirement to force prisoners to choose between which grievances to pursue.

1. Defendants first argue that ODOC's limit on the number of active grievances poses no constitutional problems because the rules allow for exceptions when there is an emergency. Appellees' Br. at 30. To start, the fact that the prison's policy makes exceptions in the case of emergencies is of no help in answering the key question here: Whether administrative remedies were "available" to Mr. Eaton's non-frivolous legal-mail claim. Nor have Defendants pointed to anything in the text of the PLRA that would justify defining "available" to mean "unavailable except in an emergency." Moreover, the well-established principle that it's intolerable to condition the exercise of one constitutional right on the

surrender of another is not about preserving constitutional rights only in emergencies or life-or-death situations. In *Perry v. Sindermann*, 408 U.S. 593 (1972), for example, the Supreme Court held that the government could not condition the plaintiff's employment on his agreeing to surrender his constitutionally protected free speech rights—decidedly not an "emergency." *Id.* at 597.

2. Defendants have not contested—nor could they—that the First Amendment protects the right to file a prison grievance as part of "[t]he right of meaningful access to the courts." *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995), *overruled on other grounds by Shaw v. Murphy*, 532 U.S. 223 (2001). Rather, Defendants seem to argue that it is the right to raise non-frivolous grievances that is protected by the First Amendment, instead of simply the right to raise grievances. *See* Appellee's Br. at 25-26, 30-31. That may be true. But here, Mr. Eaton's legal-mail claim was not only non-frivolous, but the district court ruled that Mr. Eaton had in fact stated a claim, which Defendants have failed to challenge on appeal. ER-28-30. Under Defendants' own rule, then, Mr. Eaton's right to pursue his legal-mail claim is protected by the First Amendment.

And Defendants have not shown that any of Mr. Eaton's pending grievances were frivolous such that they did not constitute protected First Amendment activity. While Defendants point to two of Mr. Eaton's pending grievances, which pertained to "mold," arguing that those grievances "would not support a constitutional claim," they are mistaken. Appellees' Br. at 30. Indeed, conditions-of-confinement claims have a home under the Eighth Amendment, which can encompass claims alleging dangers from environmental mold. *See, e.g., Smith v. Leonard*, 244 F. App'x 583, 584 (5th Cir. 2007) (vacating the judgment and remanding an Eighth Amendment claim regarding a prison official's failure to remove "allegedly toxic mold" from prison). In fact, Mr. Eaton filed a lawsuit based on health issues he faced from environmental mold, which survived a motion to dismiss. *Eaton v. Eynon*, No. 2:20-cv-01251 (D. Or. Jul 30, 2020).[2] Thus, viewing the evidence in his favor, Mr. Eaton

[2] Defendants also suggest that Mr. Eaton could have withdrawn one of the "mold" grievances without consequence and thus did not face a situation where he would have to surrender one constitutional right in order to assert another. Appellees' Br. at 30. But the assumption that the mold grievances are about the same thing cannot be made at such an early stage of litigation, at which all inferences are drawn in Mr. Eaton's favor. *Gordon v. Cnty. of Orange*, 6 F.4th 961, 967 (9th Cir. 2021). Indeed, that assumption is based entirely on the fact that the summaries of the grievances both have the word "mold" in them (one is called "mold in

had a protected First Amendment right to pursue the nonfrivolous mold grievances. It would be intolerable, then, to force Mr. Eaton to surrender his constitutional rights associated with the mold grievances to assert his constitutional right to pursue his legal-mail claim. *See Simmons*, 390 U.S. at 394.

3. Defendants next challenge Mr. Eaton's policy arguments, insisting that ODOC's four-grievance limit does not amount to improper machination because it was not designed to "stymy relief or 'trip up' plaintiffs." Appellees' Br. at 22, 26, 29. Defendants misunderstand Mr. Eaton's argument: He does not say that his situation specifically falls within the machination exception contemplated by *Ross*. Rather, he simply argues that signing off on the district court's interpretation of "available" would risk encouraging machination by giving total license to prison officials to manipulate grievance processes in a way that prevents prisoners from exhausting administrative remedies. *See* Opening Br. at 28-29. Indeed, this Court, and the Supreme Court, have been historically

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showers" and one is just called "mold"). But had the two "mold" grievances really been duplicative, one would have been rejected. *See* Or. Admin. R. 291-109-0210(1)-(2) (prohibiting "more than one accepted grievance or discrimination complaint regarding a single incident or issue").

wary of such administrative interference with grievance procedures. *See*, *e.g.*, *Ross*, 578 U.S. at 644; *Fordley*, 18 F.4th at 354-56.

4. Finally, Defendants do not appear to disagree with the fact that Mr. Eaton's efforts to notify the prison met one of the main goals of the PLRA's exhaustion requirement 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). Instead, Defendants raise two additional policy arguments they believe counsel in favor of the district court's reading of "available." Even assuming that policy arguments are relevant when the statutory language is "plain and unambiguous," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010), Defendants policy arguments fail.

First, Defendants assert that the three-strikes provision of the PLRA indicates that Congress recognized some limit on a prisoner's right to pursue nonfrivolous lawsuits, and therefore Congress must not have meant for the term "available" to preclude any limit on a plaintiff's right to bring nonfrivolous claims. Appellees' Br. at 31. If anything, Defendants' argument actually bolsters, rather than undermines, Mr. Eaton's argument. In drafting the three-strikes provision, Congress

made a decision about how to curb vexatious federal lawsuits by prisoners: by restricting access to the court for any prisoner who files three or more cases dismissed as frivolous, as malicious, or for failure to state a claim. 28 U.S.C. § 1915(g). Congress did not outsource this issue to state prison officials to make up their own, additional rules, meant to keep prisoners out of court. Moreover, ODOC's rule does nothing to screen out cases that lack merit; under ODOC's rule, a prisoner could file four entirely meritorious grievances, any of which would survive a motion to dismiss in a district court, and *still* be blocked from filing an additional meritorious grievance.

Second, Defendants insist that the four-grievance limit is necessary because otherwise ODOC's grievance system will be overwhelmed by too many grievances. But Mr. Eaton is not asking this Court to strike down ODOC's rule, just to conclude that for this particular grievance he had no "available" remedies. The PLRA says nothing about how prisons must run their grievance procedures—they don't have to have a grievance system at all, if they don't want to. In any event, even if the four-grievance limit serves some sort of policy goal, such policy considerations do not trump the plain meaning of the word "available"—"capable of use

for the accomplishment of a purpose"—and Defendants have proffered no possible interpretation of the word "available" that supports their position.

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

Even assuming the that administrative remedies are "available" where a prisoner is forced to choose between which grievance–and therefore which civil-rights lawsuit—they may ultimately pursue, two features of the way ODOC handled his particular grievances rendered remedies unavailable to Mr. Eaton.

1. First, there is a material dispute of fact about whether Mr. Eaton could, in fact, have withdrawn a grievance in time to file his legal-mail grievance. Although the regulations provide that a prisoner "may withdraw a grievance by submitting a written request to the institution grievance coordinator," Or. Admin. R. 291-109-0225(4), the regulations don't provide any further guidance relating to withdrawal, let alone an estimate of how long it would take for such a request to be processed. And Defendants don't present any argument that Mr. Eaton could have withdrawn one of his pending grievances within the 14-day window to timely file his legal-mail grievance. Indeed, given the extraordinary

delays in responding to grievances—it took ODOC nearly one month just to respond to Mr. Eaton's legal-mail grievance and let him know it could not be accepted because he had four pending grievances—it seems unlikely that ODOC could have processed his request to withdraw a grievance and notify him it had done so in time for him to timely file the grievance at issue in this case. At summary judgment, a reasonable juror could thus conclude that Mr. Eaton could not, in fact, have withdrawn another grievance to make way for his legal-mail grievance, as the district court assumed.

2. Second, ODOC kept Mr. Eaton's active grievances pending for extraordinary lengths of time—far longer than the approximately 130 days contemplated by the grievance process—blocking him from filing his operative grievance here. Opening Br. at 34-35. Defendants do not contest that there were extreme delays. Instead, they try to paint Mr. Eaton as a menace to ODOC's grievance process because he had filed a number of grievances over a three-year period. Appellees' Br. at 34. That argument is a red herring. The grievances that matter for the purposes of Mr. Eaton's case are the four that were pending at the time his legal mail was unconstitutionally confiscated, the oldest of which should have

been resolved in time for Mr. Eaton to file his operative grievance. Opening Br. at 35. By failing to move Mr. Eaton's pending grievances along in a timely manner, Defendants blocked him from filing his legal-mail grievance, rendering administrative remedies unavailable.

To the extent Defendants suggest that the four-grievance limit was necessary to screen Mr. Eaton's meritorious grievances from frivolous ones, there is simply not enough information in the record regarding the merits of the underlying grievances to make such an argument. The prison's grievance log for Mr. Eaton contains only a few words summarizing each of his prior grievances. *See* ER-112-14 (containing the following grievance summaries: "Meals"; "Treatment"; "Religious Diet"; "COVID-19"; "Staff Conduct"). It is thus impossible to tell whether the issues were frivolous, as Defendants seem to suggest, or if Mr. Eaton simply had legitimate grievances he was trying to address with the prison in the manner the prison prescribed.[3]

[3] Notably, two lawsuits that Mr. Eaton has filed in federal court passed a screening review for frivolity and failure to state a claim. *Eaton v. Peters*, No. 2:19-cv-01718 (D. Or. Oct. 28, 2019) (counseled lawsuit regarding Mr. Eaton's confinement for months in cell covered in feces; discovery has closed and case is headed for trial); *Eaton v. Eynon*, No. 2:20-cv-01251 (D. Or. Jul 30, 2020) (lawsuit regarding medical issues Mr. Eaton has faced due to toxic mold exposure; survived motion to dismiss).

Recall that exhaustion is an affirmative defense. *Jones*, 549 U.S. at 216. Defendants thus bore the burden of showing that there were administrative remedies "available" to Mr. Eaton that he failed to exhaust. They did not do so, particularly given that this Court must draw all inferences in Mr. Eaton's favor at this preliminary stage.

II. Defendants' Tort-Claim Argument Is A Nonstarter.

On appeal, Defendants have raised for the first time an argument that Mr. Eaton "procedurally defaulted" his legal-mail claim by filing a notice of his intent to pursue a tort claim regarding the confiscation of his legal mail. Appellees' Br. at 14-15. They assert that his choice to do so is an "adequate and independent basis for concluding that he failed to satisfy the PLRA's exhaustion requirement." Appellees' Br. at 15. That argument fails for several reasons.

To begin, any argument regarding the relevance of the tort-claim notice is waived. Where a party fails to raise an argument before the district court, and instead raises it for the first time on appeal, this Court

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And a third and final lawsuit, though the district court has not yet entered a screening order, does not appear frivolous. *See Eaton v. Or. Dep't of Corr.*, No. 2:22-cv-00117 (D. Or. Jan 24, 2022) (lawsuit regarding the adequacy of the Kosher diet Mr. Eaton has received at his facility).

deems it waived. *Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010); *see also Novato Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1141 n.6 (9th Cir. 1999) (failure to raise argument at summary judgment waives right to raise issue on appeal). Absent from Defendants motion for summary judgment for nonexhaustion is even a mention of the tort-claim notice, let alone any argument that Mr. Eaton's filing of it constitutes an alternate basis for dismissal. *See generally*, ER-134-42.

Waiver aside, Defendants argument fails on the merits. The Oregon Administrative Rule Defendants invoke to argue that Mr. Eaton introduced another basis for dismissal for nonexhaustion when he filed a tort-claim notice is phrased in terms of discretion:

> If an [Adult in Custody] has filed a Notice of Tort Claim with the Oregon Department of Administrative Services while an AIC has an active complaint, and the primary remedy sought by the grievance is monetary relief, DOC *may, in its sole discretion*, discontinue further processing of the grievance and notify the AIC of the conclusion of the administrative review process.

Or. Admin. R. 291-109-0225(6) (emphasis added). The filing of a tort-claim notice thus only ends processing of a grievance if ODOC chooses to "discontinue further processing of the grievance." Here, there's no indication in the record that ODOC ever exercised its discretion to stop processing Mr. Eaton's legal-mail grievance. Indeed, none of the

documents Defendants submitted—including the declaration of ODOC's grievance coordinator, SER-3-8—suggest that ODOC did so.

So, it's not clear that ODOC's tort-claim rule had any bearing on the processing of Mr. Eaton's grievance at all. And in fact, it almost certainly didn't: Mr. Eaton filed the tort-claim notice *after* Defendants blocked him from filing his grievance because he had other grievances pending—that is, when there was no "further processing of the grievance" to "discontinue" because the grievance had already been rejected. In other words, he filed the tort-claim notice only after administrative remedies were already unavailable to him.

Finally, *Ross* itself makes Defendants tort-claim-notice argument untenable. In *Ross*, the Supreme Court specifically contemplated a grievance procedure wherein the commencement of an alternative avenue of relief (there, an internal investigation) halted the normal grievance process. *Ross*, 578 U.S. at 646. The Supreme Court remanded, in part, for consideration of whether the alternate avenue of relief truly foreclosed relief through the normal grievance process; if it did, then administrative remedies would be unavailable. *Id.* at 646-48. The similarities to ODOC's tort-claim-notice rule are striking. As in *Ross*,

ODOC's grievance procedure provides that the commencement of an alternative avenue of relief (here, the filing of a notice of intent to file a state tort-law claim) halted the normal grievance process. Or. Admin. R. 291-109-0225(6). But, as in *Ross*, when ODOC chooses to foreclose relief through the normal grievance process in accordance with that rule, administrative remedies become unavailable, not procedurally defaulted as Defendants contend.

Because Defendants never raised the tort-claim notice issue below; because even if they had, there's no indication that the tort-claim notice was the basis for rejecting Mr. Eaton's grievance; and because Defendants' argument would fail under *Ross*, this Court should decline Defendants' invitation to dispose of Mr. Eaton's case on this alternate ground.

* * *

Mr. Eaton, a survivor of sexual assault as a young scout with the Boy Scouts of America, lost out on his one opportunity to seek redress for that abuse because of something Defendants admit was a mistake.[4] Even

[4] Defendants make numerous arguments that the summary judgment evidence does not support Mr. Eaton's recounting of the facts regarding his First Amendment claim. Appellees' Br. at 4-6. But, at the outset,

as ODOC hindered his efforts at each step of the grievance process, Mr. Eaton did everything within his power to try and exhaust administrative remedies, but he was blocked from even filing a grievance asking the prison to right Defendants' wrongs. His only potential recourse was to agree to forego another meritorious grievance—and even then, it's not clear he could have done that in time to properly file his legal-mail claim. The text of the PLRA affirms that ODOC's grievance process was not capable of use by—or "available" to—Mr. Eaton for his legal-mail claim. He has thus satisfied the PLRA's exhaustion requirement.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand the case for consideration of the merits of Mr. Eaton's claims.

Defendants moved for summary judgment only as to PLRA exhaustion, not as to the merits of Mr. Eaton's First Amendment claim. ER-135-37. Accordingly, this Court, as the district court did, looks only to Mr. Eaton's well-pleaded allegations to determine whether he stated a viable First Amendment claim. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). The district court had no trouble concluding that those well-pleaded allegations, *see* Opening Br. at 3-12, support a First Amendment claim, and Defendants haven't argued otherwise, ER-30-31.

Dated: May 13, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of 9th Circuit Rule 32-1(a) because this brief contains 5,023 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

s/ Rosalind Dillon
Rosalind Dillon

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Rosalind Dillon
Rosalind Dillon