No. 21-35728

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON DALE EATON,
Plaintiff-Appellant,

v.

T. BLEWETT, Two Rivers Correctional Institution Superintendent, Sued in his individual and Official Capacity as Appropriate; VANDERWALKER, First name unknown; Two Rivers Correctional Institution Correctional Officer, Sued in his individual and Official Capacity as Appropriate; RIDLEY, First name unknown; Two Rivers Correctional Institution Asst. Superintendent of General Services, Sued in her individual and Official Capacity as Appropriate; ROSSI, First name unknown; Two Rivers Correctional Institution Grievance Coordinator, Sued in his individual and Official Capacity as Appropriate; EYNON, First name unknown; Two Rivers Correctional Institution Grievance Coordinator, Sued in his individual and Official Capacity as Appropriate; TWO RIVERS CORRECTIONAL INSTITUTION,
Defendants-Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

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APPELLEES' BRIEF

STATEMENT OF JURISDICTION

Defendants-Appellees agree with and accept plaintiff-appellant's statement of jurisdiction.

ISSUE PRESENTED FOR REVIEW

Where a corrections facility limits by rule the number of active grievances an adult in custody may maintain at any one time, is that rule a "critical procedural rule" that must be followed before a plaintiff can satisfy the Prison Litigation Reform Act's requirement of administrative exhaustion, as codified in 42 U.S.C. § 1997e(a)?

STATEMENT OF THE CASE

A. Nature of the Case

In the only claim on appeal, plaintiff seeks declaratory relief, injunctive relief, and damages (including punitive damages) under 42 U.S.C. § 1983, against various state defendants for an alleged violation of his First Amendment rights. (ER-144–45, -147–48, -149–50). In that claim, he alleges that an Oregon correctional facility—as well as state officials and officers employed at that facility (collectively with the facility, defendants)—violated his First Amendment rights by interfering with or confiscating legal mail. (ER-147–48; *see also* ER-29 (so construing plaintiff's complaint)).

B. Course of Proceedings and Disposition Below

Plaintiff commenced this action by filing a *pro se* complaint. (C.R. 2). By leave of the district court, (C.R. 6, 40), plaintiff amended that complaint twice, (C.R. 7, 41), making the operative complaint his second amended complaint, also filed *pro se*. (C.R. 41; ER-143–50).

Having previously filed an answer to plaintiffs' first amended complaint, (C.R. 12), defendants responded to his second amended complaint with a motion for summary judgment and supporting declarations, (C.R. 46–48). Plaintiff opposed summary judgment and filed his own cross-motion for summary judgment, defendants filed a reply, and plaintiff filed a sur-response with a supporting declaration. (C.R. 52–55).

At the close of all that briefing, the district court entered an order granting defendants' motion for summary judgment, denying plaintiff's cross motion, and dismissing plaintiff's First Amendment claim without prejudice (while also dismissing other claims not at issue in this appeal *with* prejudice). (C.R. 57; ER-23–34). Consistently with that order, the district court entered a judgment of dismissal. (C.R. 58; ER-22). Plaintiff then filed a motion "to include additional evidence," which the district court granted but concluded did not require revisiting its summary judgment rulings. (C.R. 59–60). Plaintiff

next filed a motion to reconsider, which the district court denied. (C.R. 62–63; ER-1–4).

Plaintiff appeals the final judgment, challenging the district court's ruling in favor of defendants on summary judgment.

C. Statement of Facts

The following facts are drawn from the operative complaint, as well as from the parties' summary judgment submissions. Defendants supplement those facts as needed in responding to plaintiff's argument.

1. Defendants mistakenly confiscate a legal-mail envelope for two weeks before correcting their error.

Plaintiff is an adult in custody[1] at Two Rivers Correctional Institution (TRCI) in Oregon. (ER-144; *see also* SER-10). While housed at TRCI in late July 2020, plaintiff received a piece of legal mail that contained an envelope for return mail, with pre-paid postage. (ER-75, -145; SER-49 ¶ 5). Defendant Vanderwalker confiscated that envelope pursuant to an email directive that he understood to require such action as a matter of TRCI policy. (ER-75, -145; SER-49 ¶¶ 4–5; *see also* ER-27–28).

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[1] The Oregon Department of Corrections and its personnel strive to refer to their charges as "adults in custody" (or "AICs"), rather than as "prisoners," "inmates," or the like. This brief does the same.

According to plaintiff, that conduct prevented him from "being able to file a claim concerning the Boy Scouts Of America." (ER-146; *see also* ER-147 (alleging that defendants' conduct prevented him from "timely fil[ing] claim papers to be included in the Boy Scouts Of America Bankruptcy suit")). On appeal, he suggests that the nature of that claim involved sexual abuse he suffered as a young member of the Boy Scouts, that he could have joined a class-action suit against the Boy Scouts simply by completing and returning a form to a lawyer's office, that "[t]here was a very short window" for him to do so, and that counsel in the class-action had sent him a pre-paid envelope to "facilitate speedy turnaround of that form." (App. Br. 4–5).

But defendants have found no evidence to establish those facts—the ones recited in the previous paragraph and in plaintiff's opening brief regarding the nature of his claim against the Boy Scouts, the facts underlying it, or his ability to raise it—in the summary judgment record. At a minimum, those facts are not established by the material at the ER pages cited as support in plaintiff's brief. (*See* App. Br. 4–5 (citing ER-145–48 (alleging no more than what is quoted above in the first paragraph of this section); ER-38-40 (generally discussing, in the legal argument section of a brief, only a "claim with the Bankruptcy court for the Boy Scouts of America," and asserting only that plaintiff "will never get compensation that the other boy scouts will get"); ER-44 (declaration from

plaintiff stating only that another adult in custody was able to use a pre-paid envelope to secure representation for a claim against the Boy Scouts, and detailing the terms of a proposed settlement of that claim); ER-62–67 (declarations from other adults in custody about their claims against the Boy Scouts)).

Regardless, defendants returned the confiscated envelope to plaintiff approximately two weeks later. (*See* App. Br. 5 (admitting this fact); *see also* SER-50 ¶ 7). At that time, defendants explained to plaintiff that the confiscation had resulted from a mistaken understanding or miscommunication regarding TRCI policies, which treat prepaid postage envelopes as contraband but make an exception for envelopes that are "addressed to an attorney with a metered stamp and return address" of the adult in custody. (SER-49–50 ¶¶ 4–7)).

Plaintiff contends that, in the time during which the envelope was confiscated, his "chance to join the lawsuit against the Boy Scouts had passed, along with his one opportunity at redress for the abuse he faced as a boy." (App. Br. 5). He further suggests that, had he joined that lawsuit, he would have been entitled to compensation in an amount of at least thousands of dollars. (App. Br. 6). Here, again, defendants have found no evidence in the summary judgment record to establish those facts, whether in the material at the

ER pages that plaintiff cites for support or elsewhere. The most that defendants can see from the record is that a class action was pending against the Boy Scouts as a claim in a bankruptcy proceeding, that a settlement plan was in the works, and that perhaps some members of the class may have received compensation on their claims. (*See* ER-64–66; App. Br. 6 n.1). Defendants have found nothing in the record to establish that plaintiff was eligible to join as a member of that class, that the only reason he was unable to do so was because of an approximately two-week delay in returning a form, or that he would have been entitled to compensation had he been able to join that class.

2. Plaintiff files a grievance regarding the confiscation of the envelope, but that grievance is returned for procedural reasons.

On the same day that the envelope was confiscated on July 27, 2020, plaintiff filed a grievance regarding that conduct, asking for return of the envelope. (SER-41). On August 21, 2020, he was sent notice that his grievance was being "returned" on account of a procedural defect: non-compliance with a rule prohibiting an adult in custody from maintaining "more than four active complaints (grievances, discrimination complaints, or appeals of either) at any time." (SER-40). That decision was premised on an administrative rule that provides, in relevant part:

> (1) An AIC cannot have more than four active complaints (grievances, discrimination complaints, or appeals of either) at any

> time. Any grievance or appeal submitted that exceeds that limit will be found to be an improper use of the grievance review and discrimination complaint review systems and returned to the AIC with a statement of the rule.
>
> (2) An AIC cannot submit more than a combined total of four initial AIC grievances and discrimination complaints per calendar month.
>
> (3) Emergency grievances as defined under Or. Admin. R. 291-109-0110(8),[2] sexual harassment grievances as defined under Or. Admin. R. 291-109-0110(19) and sexual abuse grievances submitted under Or. Admin. R. 291-109-0245 (or any appeal of either) are not counted when determining, for purposes of this rule, the number of active complaints or the number of submitted grievances or discrimination complaints within any calendar month.

Or. Admin. Rule 291-109-0215 (reproduced at SER-19). The relevant rules permit an adult in custody to choose which grievances to pursue at any one time, by withdrawing a pending grievance with the option of potentially reopening it at a later date:

> An AIC may withdraw a grievance by submitting a written request to the institution grievance coordinator at any time during the grievance process. Grievances that have been withdrawn may only be reopened upon written request, at the discretion of the institution grievance coordinator.

Or. Admin. Rule 291-109-0225(4) (reproduced at SER-22).

At the time that plaintiff filed his grievance in this case (designated

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[2] "Emergency grievances" are defined as "grievance[s] alleging actual or significant risk of immediate physical harm." Or. Admin. Rule 291-109-0110(11) (reproduced at SER-14).

TRCI.2020.08.090), he had four active complaints—grievances designated as TRCI.2020.03.148, TRCI.2020.05.036, TRCI.2020.05.077, and TRCI.2020.06.080. (SER-6 ¶ 12). Indeed, between August 2017 and September 2020, plaintiff had filed no fewer than 63 separate grievances, on issues including weight-lifting equipment, meals, grievance response times, and the pots used for cleaning in the kitchen. (*See* SER-31–34). And although the oldest of the four open grievances (designated TRCI.2020.03.148) had in September 2020 been pending since it was received by defendants on March 23, 2020, (*see* SER-32), defendants had resolved many newer grievances in that period, including five filed in the month of April 2020 alone, (*see* SER-31–32).

Plaintiff appealed the return of his grievance, and he received notice on or about September 14, 2020, that his appeal was denied because a procedurally "returned" grievance cannot be appealed. (SER-6–7 ¶ 13; *see also* SER-37–38). Plaintiff filed a second-level appeal, and he received notice on or about October 23, 2020, that his second appeal was denied for the same reason that his first appeal was denied. (SER-7–8 ¶¶ 15, 17; *see also* SER-35).

While those appeals were pending, plaintiff filed a notice—dated September 15, 2020, and received on September 21, 2020—of his intent to pursue a tort claim based on these events. (SER-7 ¶ 14; *see also* SER-43–44). Such notice is required by the Oregon Tort Claims Act before a plaintiff can

obtain state-law tort damages from the state. *See generally* Or. Rev. Stat. §§ 30.265, 30.275. But such notice also results in administrative or procedural closure of any related grievance under Or. Admin. Rule 291-109-0225(6) (reproduced at SER-22). For that reason, plaintiff's grievance would have been closed once he filed that tort notice, even if it had been otherwise procedurally proper. (SER-7 ¶ 14).

Notwithstanding the procedural return of plaintiff's grievance, defendants did take some informal action regarding the confiscation of his legal mail. On August 17, 2020, TRCI's Assistant Superintendent of General Services sent an email directive seeking to correct any misunderstanding that prepaid postage envelopes addressed to counsel were considered contraband. (SER-49 ¶ 6). And on September 28, 2020, she met personally with plaintiff to explain the miscommunication that had led to the unnecessary confiscation of his envelope, to assure him that she was looking to "rectify" her miscommunication, and to confirm that his envelope had been returned to him. (SER-50 ¶ 7).

3. Plaintiff files his claim in this case, which the district court dismisses.

Consistently with his tort-claim notice, plaintiff ultimately filed a claim against defendants in this case, which he commenced on September 22, 2020. (C.R. 2). As relevant here, he alleged a § 1983 claim for violation of his First Amendment rights. (ER-147–48). The district court construed that claim as

based on the confiscation of the envelope contained in plaintiff's legal mail. (ER-29). The district court concluded that plaintiff's allegations stated a valid First Amendment claim of that sort, but that the claim must nevertheless be dismissed for failure to comply with the exhaustion requirement contained in the Prison Litigation Reform Act (PLRA). (ER-29–32). That requirement states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). The district court rejected plaintiff's argument that defendant's four-active-grievance limit put him to an untenable choice, concluding that plaintiff could have withdrawn one of his pending grievances in order to obtain relief on the one at issue here, and that he therefore failed to exhaust available administrative relief. (ER-31–32).

SUMMARY OF ARGUMENT

Plaintiff contends that the four-active-grievance rule rendered administrative relief so unavailable as to excuse him from the need to exhaust his claim under the PLRA. But this court should reject that argument first because the record establishes that plaintiff's grievance regarding the claim in this case was procedurally defaulted not only for non-compliance with the four-active-grievance rule, but also because he introduced another procedural defect

when he elected to file a tort-claim notice regarding the confiscation of his legal mail.

But plaintiff's procedural default under the four-active-grievance rule was also fatal to his ability to exhaust administrative remedies as required under the PLRA. That rule did not, as the district court correctly ruled, render administrative relief unavailable as contemplated in *Ross v. Blake*, 578 U.S. 632, 642–48, 136 S. Ct. 1850 (2016). Under *Ross*, administrative relief is "unavailable" for the purposes of the PLRA's exhaustion requirement in only three narrow circumstances, none of which are present here. Plaintiff contends that the four-active-grievance rule rendered administrative relief a "dead end," but *Ross* contemplated that circumstance would be present only when an entire administrative framework is wholly illusory—a standard that cannot be met by pointing to a single procedural obstacle. Plaintiff is likewise mistaken to suggest that the rule amounts to an impermissible "machination," because *Ross* contemplated that circumstance would arise only when prison administrators erect byzantine procedural requirements that serve only to "trip up" all but the most skillful prisoners—a standard that cannot be met by pointing to a single straightforward rule that serves the valid purpose of preventing abuse of the administrative process. Indeed, the four-active-grievance rule is precisely the sort of "critical procedural rule" that the Supreme Court has held must be

followed in order to satisfy the PLRA's strict exhaustion requirement. Not only does the rule serve a valid purpose, it provides exceptions for emergency situations that reduce the likelihood that the rule will require an adult in custody to choose between vindicating two different constitutional rights, and the record establishes that plaintiff was put to no such choice in this case.

STANDARD OF REVIEW

Defendants agree with plaintiff that this court "reviews a district court's grant of summary judgment *de novo*." (App. Br. 15 (citing *Gordon v. Cnty. of Orange*, 6 F.4th 961, 967 (9th Cir. 2021))).

Defendants add that this court "may affirm on any basis supported by the record." *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1047 (9th Cir. 2009); *see also Hall v. North American Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007) (noting that, when this court may affirm on any basis supported by the record, the basis for affirmance need not have been relied upon by the district court).

ARGUMENT

Again, 42 U.S.C. § 1997e(a) requires exhaustion of "such administrative remedies as are available." As this court has explained, the Supreme Court has held that the quoted provision "requires proper exhaustion of administrative remedies," meaning "compliance with an agency's deadlines and *other critical procedural rules*." *Nunez v. Duncan*, 591 F.3d 1217, 1223 (9th Cir. 2010)

(emphasis added; internal quotation marks omitted; discussing *Woodford v. Ngo*, 548 U.S. 81, 93, 126 S. Ct. 2378 (2006)). Compliance with procedural rules is required because "no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Nunez*, 591 F.3d at 1223 (internal quotation marks omitted).

In this case, plaintiff asks this court to excuse his noncompliance with "other critical procedural rules" such as the four-active-grievance limit. In his view, his noncompliance with that rule should be excused because the rule operates to render administrative relief functionally not "available," as contemplated in *Ross v. Blake*, 578 U.S. 632, 642–48, 136 S. Ct. 1850 (2016). In *Ross*, the Court held that the PLRA requires exhaustion of "available remedies," but not "unavailable ones"; that is, it requires exhaustion of "those, but only those, grievance procedures that are capable of use to obtain some relief for the action complained of." *Id.* at 642 (internal quotation marks omitted).

But, as explained below, this court need not decide whether the four-active-grievance rule operates to render administrative relief unavailable. That is so because, even ignoring that rule, plaintiff's claim failed to comply with another critical procedural rule that he does not challenge—the rule requiring administrative closure of a grievance once an adult in custody has filed a tort

claim notice on the issue. And, regardless, even if this court reaches plaintiff's argument, he is mistaken that the four-active-grievance rule renders administrative relief "unavailable" in the way that *Ross* contemplated.

I. Even ignoring plaintiff's non-compliance with the four-active-grievance rule, his claim was also procedurally defaulted because of his tort-claim notice.

One component of the PLRA's exhaustion requirement is the possibility of procedural default—that is, failure to exhaust can occur when a plaintiff sought administrative relief but did so without complying with a prison's procedural rules for administrative review. *See*, *e.g.*, *Varner v. Shepard*, 11 F.4th 1252, 1259 (11th Cir. 2021) (observing that "the PLRA's exhaustion requirement contain a procedural default component" (internal quotation marks, ellipses, and brackets omitted)); *Rinaldi v. United States*, 904 F.3d 257, 267 (3d Cir. 2018) (equating "procedural default" with "failure to exhaust"); *see also id.* at 276 n.4 (Scirica, J., concurring in part and dissenting in part) (noting the Supreme Court's approval of the Third Circuit's holding "that the PLRA's exhaustion provision included a procedural default component"); *Reed-Bey v. Pramstaller*, 603 F.3d 322, 325 (6th Cir. 2010) (recognizing that "[e]xhaustion and procedural default principles . . . in the PLRA[] serve many of the same goals").

Procedural default, in turn, "has its historical and theoretical basis in the

adequate and independent state ground doctrine." *Shafer v. Stratton*, 906 F.2d 506, 509 (10th Cir. 1990); *see Spruill v. Gillis*, 372 F.3d 218, 229 (3d Cir. 2004) (similar).

Thus, each procedural default by plaintiff must be viewed as an adequate and independent basis for concluding that he failed to satisfy the PLRA's exhaustion requirement. And here, the record establishes that plaintiff procedurally defaulted his claim in at least two distinct ways. First, he defaulted that claim by declining to cure his noncompliance with the four-active-grievance limit, thereby failing to obtain a ruling on the merits of his grievance. As argued below, the district court was correct to have relied on that reasoning to conclude that plaintiff failed to exhaust his claim.

But separate and apart from that procedural defect in plaintiff's attempts to obtain administrative relief, plaintiff introduced another procedural defect when he elected to file a tort-claim notice. (SER-7 ¶ 14; *see also* SER-43–44). As noted above, his doing so required defendants to administratively close his grievance under Or. Admin. Rule 291-109-0225(6) (reproduced at SER-22). And, indeed, the record contains unrebutted evidence that, in light of that tort-claim notice, plaintiff's grievance would have been closed even if it had been otherwise procedurally proper. (SER-7 ¶ 14).

On that record, then, this court need not consider whether the four-active-

grievance limit is the kind of rule that renders administrative relief functionally "unavailable" under the PLRA, thereby excusing the need to exhaust such relief. That is so because plaintiff's claim was procedurally defaulted even if his noncompliance with the four-active-grievance rule is ignored. And because that other form of procedural default rests on a rule that cannot even arguably be viewed as rendering administrative relief "unavailable," no further analysis of that rule is necessary.[3]

For that reason alone, this court should affirm.

II. The district court correctly concluded that plaintiff's non-compliance with the four-active-grievance rule rendered his claim procedurally defaulted under the PLRA's exhaustion requirement.

Regardless, the district court correctly rejected plaintiff's contention that the four-active-grievance rule rendered administrative relief so unavailable as to excuse him from the exhaustion requirement. That is so because the Supreme Court has already adopted a narrow interpretation of "unavailable" under the

[3] The purpose of the rule regarding tort-claim notices should be apparent on its face. Once an adult in custody has decided to pursue a state tort claim, he has less incentive to engage with the grievance process, and any further administrative proceedings run the risk of running afoul of rules governing litigation. One purpose of the exhaustion requirement is to promote administrative resolution *without* resort to judicial remedies; once an adult in custody has elected to pursue judicial remedies, that goal is no longer tenable because it is incompatible with the pursuit of legal action.

PLRA, limited to circumstances not present here. And neither plaintiff's nor *amici*'s contrary arguments require a different conclusion.

A. The Supreme Court has held that administrative relief is not "available" under the PLRA only in circumstances not present here.

Arguing that he should be excused from complying with the procedural rule imposing a four-active-grievance limit, plaintiff contends that the rule operates to render administrative relief functionally not "available" as required under the plain text of 42 U.S.C. § 1997e(a). (*See* App. Br. 15–30). That argument relies first, and primarily, on dictionary definitions of the word "available" as used in that statute. (*See* App. Br. 17–18, 20–21).

But the meaning of "available" in 42 U.S.C. § 1997e(a) is not a question of first impression that requires, or even allows, this court to start from dictionary definitions. Rather, the Supreme Court in *Ross* already began that task, explaining that, as a textual matter, "available" means "capable of use" to obtain "some relief for the action complained of." 578 U.S. at 642 (citing various dictionaries; internal quotation marks omitted).

But *Ross* did not stop there because "[t]o state that standard, of course, is just to begin," and the next step is to "apply it to the real-world workings of prison grievance systems." *Id*. at 643. *Ross* went on to apply that standard and identified "three kinds of circumstances" that will render "an administrative

remedy, although officially on the books, . . . not capable of use to obtain relief." *Id*. The Court was clear that the availability standard excuses a failure to exhaust *only* when one of those circumstances is present. *See id*. (explaining that, "when one (or more)" of "these circumstances" arises, "an inmate's duty to exhaust 'available' remedies does not come into play"); *see also Fordley v. Lizarraga*, 18 F.4th 344, 351 (9th Cir. 2021) (explaining that "the Supreme Court has recognized three situations in which an administrative remedy is unavailable"). And the Court conceived of those circumstances as narrow, explaining its expectation that "these circumstances will not often arise." *Ross*, 578 U.S. at 643.

Specifically, *Ross* held that an administrative remedy is not "available" only: (1) "when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) if it is "so opaque that it becomes, practically speaking, incapable of use"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." 578 U.S. at 643–44; *see also Fordley*, 18 F.4th at 351.

Here, plaintiff appears to argue that the four-active-grievance rule rendered administrative relief a "dead end" under the first *Ross* circumstance,

(*see* App. Br. 13, 18), and that the rule is a kind of impermissible "machination" under the third *Ross* circumstance, (*see* App. Br. 24, 28). This court should reject both arguments.[4]

i. The four-active-grievance rule does not render administrative relief a "dead end."

Plaintiff's "dead end" argument misunderstands what *Ross* meant by that term. *Ross* did not mean to suggest, as plaintiff necessarily argues, that administrative relief is an unavailable "dead end" whenever a particular claim is subject to some kind of procedural obstacle. To the contrary, *Ross* was clear that, by "dead end," it meant an administrative review process in which officials were "unable or consistently unwilling to provide any relief to aggrieved inmates" as a *general* matter. *See* 578 U.S. at 643.

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[4] Plaintiff does not appear to argue that the administrative relief procedures here were "opaque" under the second *Ross* circumstance. Nor could he—the four-active-grievance rule sets a bright-line standard that brooks no misunderstanding or ambiguity. And plaintiff does not allege that the relevant grievance rules and forms were unavailable to him. *Contrast Marella v. Terhune*, 568 F.3d 1024, 1026 (9th Cir. 2009) (*per curiam*) (holding that an administrative remedy was effectively unavailable because the inmate did not have access to the proper grievance form within the prison's time limits for filing a grievance); *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) (holding that an administrative remedy was unavailable because the inmate would have needed to access an unobtainable policy in order to bring a timely administrative appeal); *Albino v. Baca*, 747 F.3d 1162, 1173–75 (9th Cir. 2014) (*en banc*) (holding that administrative remedies were unavailable where a manual describing the complaint process was kept from inmates).

That *Ross* contemplated a generalized dead end rather than a dead end for a particular claim is clear from the examples it provided, such as when a "prison handbook directs inmates to submit their grievances to a particular administrative office—but in practice that office disclaims the capacity to consider those petitions." *Id*. The only other "dead end" example *Ross* contemplated was when "administrative officials have apparent authority, but decline ever to exercise it." *Id*. Those examples illustrate that a "dead end" is a process that is entirely illusory—one that functionally could provide no relief to anyone, ever, even if was formally and nominally established by prison rules.

Indeed, plaintiff's contrary reading of *Ross* would amount to a functional overruling not just of the PLRA's exhaustion requirement, but also of the Court's holdings in *Woodford*, neither of which *Ross* purports to disturb. *Woodford* recognized that plaintiffs can easily "bypass the administrative process" by "violating other procedural rules until the prison administration has no alternative but to dismiss the grievance on procedural grounds." 548 U.S. at 88. For that reason, *Woodford* rejected a rule under which "the reason why administrative remedies are no longer available is irrelevant." 548 U.S. at 88, 95. Plaintiff's argument here seeks to revive the holdings of this court that were expressly overruled in *Woodford*. *See* 548 U.S. at 88 (reversing this court's holding that the "respondent had exhausted administrative remedies simply

because no such remedies remained available to him").

Given a correct understanding of *Ross*, plaintiff's "dead end" argument must fail. Nothing about the four-active-grievance rule makes the prospect of administrative relief illusory as a general matter. Plaintiff does not contend that defendants' grievance process is incapable of ever providing any kind of relief, and certainly the summary judgment record contains no evidence even suggesting as much. *See Booth v. Churner*, 532 U.S. 731, 736–38, 121 S. Ct. 1819 (2001) (agreeing that administrative remedies are "available" so long as "the administrative process has authority to take some action in response to a complaint").

Indeed, given "prisons' own incentives to maintain functioning remedial processes," *see Ross*, 578 U.S. at 643, the "dead end" circumstance "will not often arise." Certainly, plaintiff cites no case in which this court has found that circumstance present. Rather, in cases where it has determined that administrative relief was not available, this court has relied in many cases on the opacity or unknowability of administrative procedures under the second *Ross* circumstance. *See Fordley*, 18 F.4th at 352 (collecting cases in which the relevant manuals, policies, or forms were not made available to a plaintiff); *see also Fuqua v. Ryan*, 890 F.3d 838, 850 (9th Cir. 2018) (concluding that administrative relief was unavailable because it was subject to an "essentially

unknowable procedure" (internal quotation marks omitted)). That circumstance is not argued here. In the rest, this court appears to have relied on the third *Ross* circumstance, where officials thwart administrative relief through their "erroneous failure to process the grievance." *Fordley*, 18 F.4th at 352 (collecting cases). That circumstance is not present here for reasons discussed in the next section.

ii. The four-active-grievance rule is not an improper "machination."

Plaintiff's other argument reduces to a question whether the four-active-grievance rule is a "critical procedural rule" as contemplated in *Woodford* or whether it can be disregarded as nothing more than a machination that serves no permissible purpose. As the Supreme Court recognized in *Woodford*, the PLRA's exhaustion rule requires "compliance with an agency's deadlines *and other critical procedural rules* because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." 548 U.S. at 90–91 (emphasis added).

Woodford's formulation necessarily recognizes that proper exhaustion requires more than just compliance with administrative deadlines—it requires compliance with other procedures as well. That is so because "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218, 127 S. Ct. 910 (2007). Nothing

in *Ross*'s discussion of machinations overruled *Woodford*'s requirement of procedural compliance, nor did it open the door to judicial review of particular procedural rules—rather, it contemplated unavailability only in cases where prisons devise entire "procedural *systems*" with the sort of "blind alleys and quagmires" that are intended to "trip up all but the most skillful prisoners." *Ross*, 578 U.S. at 644 (internal quotation marks omitted; emphasis added).

The four-active-grievance rule does not by itself amount to the kind of byzantine procedural system that *Ross* contemplated could render administrative relief unavailable. This court should reject plaintiff's argument for that reason alone, as he cites no case in which this court has relied on *Ross* as license to review the permissibility of individual procedural rules rather than an administrative framework as a whole.

But even if this court were to accept plaintiff's invitation to review the permissibility of the four-active-grievance rule, it should easily conclude that the rule is permissible. The summary judgment record contains no evidence that the rule was created with the purpose of stymying adults in custody who seek redress through the grievance process. Rather, the rule appears motivated by the same purpose as the PLRA itself: Congress's view that adults in custody have less natural incentive than other citizens to avoid frivolous grievances and lawsuits, along with its recognition of a need to therefore modify the incentive

structure in order to limit frivolous complaints that might otherwise hamper the adjudication of legitimate ones. *See, e.g.*, *Woodford*, 548 U.S. at 84 (explaining that "Congress enacted the Prison Litigation Reform Act of 1995 (PLRA) . . . in 1996 in the wake of a sharp rise in prisoner litigation in the federal courts," that the "PLRA contains a variety of provisions designed to bring this litigation under control," and that the exhaustion provision is a "centerpiece of the PLRA's effort to reduce the quantity of prisoner suits" (internal quotation marks and ellipses omitted)); *see also Boivin v. Black*, 225 F.3d 36, 44 & n.6 (1st Cir. 2000) (observing that the PLRA serves goals including "discouraging frivolous suits, protecting the public fisc, and bringing prisoner incentives to litigate more in line with non-prisoner incentives," and that the "legislative history provides ample evidence that Congress had these goals in mind in passing the PLRA").

As the Fourth Circuit has explained, adults in custody "are not similarly situated" to those not in custody; they "have their basic material needs provided at state expense," they "are further provided with free paper, postage, and legal assistance," and they "often have free time on their hands that other litigants do not possess." *Roller v. Gunn*, 107 F.3d 227, 234 (4th Cir. 1997). For that reason, "there has been a far greater opportunity for abuse of the federal judicial system in the prison setting." *Id.*; *see also Boivin*, 225 F.3d at 44 (similar,

adding that the "problem of prisoner litigiousness is exacerbated by the nature of prison life, as inmates tend to egg each other on" and that "[e]xperience has shown that these and other factors, acting in concert, encourage inmates to bring large numbers of insubstantial claims—or so Congress rationally could have thought").

Put simply, the PLRA reflects Congress's view that, without some check on the ability for adults in custody to file frequent and often frivolous complaints, courts will be too overburdened to timely resolve meritorious complaints, from adults in custody and others. *See, e.g.*, 141 Cong. Rec. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits.").

And if that is true for civil lawsuits, it is all the more true for administrative grievances, which are much easier to file. Plaintiff here illustrates the point: again, between August 2017 and September 2020, he filed no fewer than 63 separate grievances, on issues including weight-lifting equipment, meals, grievance response times, and the pots used for cleaning in the kitchen. (*See* SER-31–34). If every adult in custody filed as many grievances as plaintiff, the administrative process would be so overburdened that no meritorious complaint could expect to produce timely relief,

undermining the purpose of the administrative system. Limiting adults in custody to four active grievances at any one time serves as a brake on what Congress, in the PLRA, recognized as an otherwise unchecked incentive to take a scatter-gun approach to grievances.

For those reasons, the four-active-grievance rule is precisely the kind of "critical procedural rule" contemplated in *Woodford*, and it is not the sort of machination intended only to stymy relief or "trip up" plaintiffs as contemplated in *Ross*. Were there any doubt about the rule's purpose, its exceptions for emergency grievances, sexual harassment grievances, and sexual abuse grievances suffice to demonstrate that the rule is intended to *facilitate*, rather than stymy, relief for legitimate complaints. *See* Or. Admin. Rule 291-109-0215 (reproduced at SER-19).

Indeed, the four-active-grievance rule and its emergency exceptions make it similar to one that the Fourth Circuit easily concluded was permissible. *See Moore v. Bennette*, 517 F.3d 717 (4th Cir. 2008). In *Moore*, the court concluded that a "grievance was properly returned and did not serve to exhaust [the plaintiff's] remedies" when it was returned pursuant to a rule that prohibited an adult in custody "from submitting a new grievance before all previously filed grievances have completed Step 2 or been resolved"—with an exception for "emergency grievances" that "present a substantial risk of

physical injury or other serious and irreparable harm to the grievant if regular time limits are followed." 517 F.3d at 721–22, 729–30. And *Moore* reached that conclusion even after recognizing—in anticipation of *Ross*—that "an administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it." 517 F.3d at 725.

This court should reach the same conclusion here as the Fourth Circuit did in *Moore*—a limit on active grievances is a permissible and critical procedural rule, and noncompliance with that rule amounts to a procedural default under the PLRA's exhaustion requirement.[5]

B. None of plaintiff's arguments affect the result mandated by the Supreme Court's view of "available."

Seeking a different analysis, plaintiff argues primarily that the four-active-grievance rule put him to the untenable and impermissible choice of abandoning either his grievance in this case or one of his previous-but-still-

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[5] Finally, because defendants expressly relied on the four-active-grievance rule as the cited reason for returning plaintiff's grievance here, (*see* SER-40), this case is different from those that plaintiff relies upon. (*See* App. Br. 18–19 (*discussing Sapp v. Kimbrell*, 623 F.3d 813 (9th Cir. 2010), and *Andres v. Marshall*, 867 F.3d 1076 (9th Cir. 2017)). In *Sapp* and *Andres*, this court concluded only that administrative relief would be unavailable if the record reflected an "erroneous failure to process the grievance" *at all*, not an affirmative decision to return the grievance under a permissible procedural rule. *See Fordley*, 18 F.4th at 352 (discussing *Sapp* and *Andres*).

pending grievances. (App. Br. 19–31). But, first, his argument is not entirely accurate because withdrawing a timely filed but pending grievance does not necessarily preclude reopening it at a later date. *See* Or. Admin. Rule 291-109-0225(4) (reproduced at SER-22). Thus, the choice created by the rule is at least somewhat less stark than plaintiff suggests.

Regardless, plaintiff's argument is not well taken under the current version of the PLRA's exhaustion requirement, which marks a departure from an earlier version of the statute that required administrative remedies to be "plain, speedy, and effective" and meet certain "minimum acceptable standards" of fairness and effectiveness before exhaustion could be enforced. *See Booth v. Churner*, 532 U.S. 731, 739–40 & n.5, 121 S. Ct. 1819 (2001). Those requirements are "a thing of the past," having been repealed by the current version of 42 U.S.C. § 1997e(a). *Booth*, 532 U.S. at 736; *Woodford*, 548 US at 102.

By eliminating any substantive requirements for administrative procedures under the exhaustion requirement, Congress could not have intended for courts to do what plaintiff asks here—continue judicial review of individual procedural rules and excuse a failure to exhaust whenever it is attributable to some rule that does not survive such judicial review. *Cf. Booth*, 532 U.S. at 741

n.6 ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.").

And *Ross* did not intend to allow for such broad-reaching review simply by suggesting that procedural "machinations" can render administrative relief unavailable. Again, *Ross* expressly limited that kind of analysis to situations where prison administrators "devise procedural systems (including the blind alleys and quagmires just discussed) *in order to trip up* all but the most skillful prisoners." 578 U.S. at 644 (emphasis added; internal quotation marks and brackets omitted). That is, *Ross* permits judicial inquiry at most, if at all, into the *purpose* of a challenged procedural rule, not into its *effect* (or "effectiveness," as contemplated in the since-repealed PLRA provision). But plaintiff here offers no evidence of improper purpose; he offers only hypotheticals about improper effect.[6]

Even if this court were to review the four-active-grievance rule for the kind procedural effectiveness that Congress eliminated as a condition for

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[6] Although plaintiff argues that no showing of intent is necessary under this court's availability-of-remedy caselaw, the decisions he cites involve failures to process or respond to grievances at all, not a properly communicated decision to return a grievance for procedural defects. (*See* App. Br. 28–29). That is, the cases that plaintiff cites were based on thwarting exhaustion through something other than procedural "machination," and they are therefore inapposite to a claim based on "machination," which necessarily requires some intent.

requiring exhaustion under the PLRA, it should reject plaintiff's arguments. Much of plaintiff's argument is premised on the difficulty of being forced to choose between two grievances once an adult in custody is at the four-grievance limit. But such a choice is "intolerable" only when "one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967 (1968). In this case, that prospect is only hypothetical, as at least two of plaintiff's active grievances pertained to mold, which without more would not support a constitutional claim. (*See* App. Br. 7 n.2 (describing active grievances)). And the emergency exceptions to the four-active-grievance rule make the prospect of a truly difficult choice unlikely enough that this court should not consider that possibility until faced with a case where it arises and where the rule actually has forced a plaintiff to give up a "serious civil rights" claim. (*See* App. Br. 26, 28 (suggesting that possibility)).

Moreover, the PLRA's use of the word "available" should be interpreted in a manner consistent with the PLRA generally. Plaintiff asserts that he enjoys a First Amendment right to pursue grievances without limit, as well as to pursue non-frivolous lawsuits without limit. (App. Br. 25). But the PLRA suggests otherwise. For example, that law contains a "three strikes" provision that prohibits granting *in forma pauperis* status in further lawsuits—frivolous or otherwise—after an adult in custody has on three or more prior occasions filed

an action that was dismissed because it was frivolous or fails to state a claim. *See* 28 U.S.C. § 1915(g). That suggests that Congress recognized some limit on plaintiff's right to pursue even non-frivolous lawsuits. The exhaustion requirement itself likewise limits plaintiff's right to pursue such lawsuits. If the right to judicial relief may be so limited, then the same must be true for administrative relief, and Congress is unlikely to have used the word "available" in a way that precludes such limits.

Indeed, one purpose of the PLRA's mandatory exhaustion requirement is to "enable[] district courts hearing these prisoner claims to distinguish better between frivolous and meritorious ones." *Booth v. Churner*, 206 F.3d 289, 298 n.9 (3d Cir. 2000), *aff'd*, 532 U.S. 731, 121 S. Ct. 1819 (2001). Under that view, the PLRA is better served by an administrative review process that requires adults in custody to make some effort to themselves distinguish between frivolous and nonfrivolous claims by limiting the number of active grievances. For that reason as well, the four-active-grievance rule is consonant with the purposes of the PLRA, and this court should decline to read that statute's use of the word "available" as foreclosing such a rule.

In short, even if other statutes use the word "available" to mean something akin to "without having to make a choice between rights," the PLRA's purposes require reading that word differently here—again, the

purpose of the PLRA was to introduce certain choices into an adult in custody's path to litigation, so as to bring their incentives "more in line" with those of other litigants. *See Boivin*, 225 F.3d at 44 & n.6. At most, "available" means without having to make *difficult* choices between *substantial* rights, which plaintiff did not need to do here given the nature of some of his pending grievances, and which the challenged rule avoids by making exceptions for emergency grievances.

Also mistaken is plaintiff's contention that "available" should be interpreted and applied on a claim-by-claim basis. (*See* App. Br. 23). Although he is correct that precedent requires applying *exhaustion* separately to each claim, the examples discussed in *Ross* demonstrate that availability of administrative relief must be assessed at a more general level, at least when a plaintiff is arguing that a particular administrative review framework is a "dead end" or has been undermined by "procedural systems" full of "blind alleys and quagmires." 578 U.S. at 643–44.

Finally, plaintiff cannot meet *Ross*'s high bar for demonstrating "unavailability"—which, again, *Ross* contemplated "will not often arise," 578 U.S. at 643—by pointing to general delays in processing his grievances. (*See* App. Br. 31–36).

To the extent that plaintiff complains of defendants' delay in notifying him that his grievance in this case failed to comply with the four-active-grievance limit, he ignores that he did not need to wait for defendants' response to recognize that noncompliance—he does not dispute that the relevant rules and policies were available to him, and the status of his pending grievances was within his personal knowledge. Certainly, requiring him to track his compliance with the four-active-grievance limit is less onerous than many of the procedural requirements that incarcerated plaintiffs are required to navigate in federal litigation. *See Woodford*, 548 U.S. at 103 ("Respondent argues that requiring proper exhaustion is harsh for prisoners, who generally are untrained in the law and are often poorly educated. This argument overlooks the informality and relative simplicity of prison grievance systems like California's, as well as the fact that prisoners who litigate in federal court generally proceed *pro se* and are forced to comply with numerous unforgiving deadlines and other procedural requirements."); *compare also Moss v. Harwood*, 19 F.4th 614, 621–22 (4th Cir. 2021) (concluding that administrative relief was "available" to a plaintiff even when his "jail officials refused his requests for forms or access to" the electronic grievance-filing kiosk; explaining that the plaintiff "nevertheless was able to submit grievances . . . by having other inmates use his kiosk pin number to file grievances for him").

And to the extent that plaintiff complains of defendants' delay in processing his previous grievances, it bears repeating that between August 2017 and September 2020, plaintiff had filed no fewer than 63 separate grievances, on all manner of issues. (*See* SER-31–34). Further, although the oldest of the four open grievances had been pending since it was received by defendants on March 23, 2020, (*see* SER-32), defendants had resolved many newer grievances in that period, including five filed in the month of April 2020 alone, (*see* SER-31–32). Plaintiff should not be excused from exhaustion simply because defendants needed time to separate the grievances that might have merit from those that did not. Indeed, plaintiff's argument about delay illustrates the very problem that defendants sought to solve by promulgating the four-active-grievance rule.

C. *Amici*'s arguments are not well taken.

Arguing in support of plaintiff, *amici* appear to contend that courts have applied the PLRA's exhaustion requirement more strictly than is prudent, and more stringently than Congress intended. (*See* Brief of *Amici* at 5–6). But *amici* tacitly recognize that the prevailing interpretation they criticize is one that is mandated by the Supreme Court's decisions. (*See* Brief of *Amici* at 5–6 (citing, *inter alia*, *Woodford v. Ngo*, 548 U.S. 81, and *Jones v. Bock*, 549 U.S. 199, discussed above)). Indeed, the entire thrust of *amici*'s brief is difficult to

square with *Woodford*'s rejection of an argument "that requiring proper exhaustion is harsh for prisoners, who generally are untrained in the law and are often poorly educated." *See* 548 U.S. at 103. In light of those binding precedents, *amici*'s arguments are not well taken in this court.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Appellees' Brief is proportionately spaced, has a typeface of 14 points or more and contains 7,799 words.

DATED: February 23, 2022

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON DALE EATON,

Plaintiff-Appellant,

v.

T. BLEWETT, Two Rivers Correctional Institution Superintendent, Sued in his individual and Official Capacity as Appropriate; VANDERWALKER, First name unknown; Two Rivers Correctional Institution Correctional Officer, Sued in his individual and Official Capacity as Appropriate; RIDLEY, First name unknown; Two Rivers Correctional Institution Asst. Superintendent of General Services, Sued in her individual and Official Capacity as Appropriate; ROSSI, First name unknown; Two Rivers Correctional Institution Grievance Coordinator, Sued in his individual and Official Capacity as Appropriate; EYNON, First name unknown; Two Rivers Correctional Institution Grievance Coordinator, Sued in his individual and Official Capacity as Appropriate; TWO RIVERS CORRECTIONAL INSTITUTION,

Defendants-Appellees.

U.S.C.A. No. 21-35728

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for Appellees, certifies that he has no knowledge of any related cases pending in this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2022, I directed the Appellees' Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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