IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 23-30026

ASHRAF KHALIL,
Plaintiff–Appellant,

v.

DEPARTMENT OF CORRECTIONS, DUSTIN BICKHAM, PATRICIA WILLIAMS,
Defendants–Appellees.

.

On Appeal from the United States District Court for the Middle District of Louisiana
NO. 3:21-CV-466

APPELLANT'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate any potential disqualification or recusal.

Name of Interested Party	**Connection and Interest**
Dustin Bickham	Defendant-Appellee
Rosalind E. Dillon	Counsel for Plaintiff-Appellant
Brian A. Jackson	U.S. District Court Judge
Scott D. Johnson	U.S. Magistrate Judge
Devi M. Rao	Counsel for Plaintiff-Appellant
Mehwish A. Shaukat	Counsel for Plaintiff-Appellant
Patricia Williams	Defendant-Appellee
Louisiana Department of Corrections	Defendant-Appellee
Roderick & Solange MacArthur Justice Center	Law Firm of Counsel for Plaintiff-Appellant

/ s/ Rosalind E. Dillon
Rosalind E. Dillon
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STATEMENT REGARDING ORAL ARGUMENT

Appellant, who proceeded pro se below, has obtained pro bono counsel on appeal and does not believe that the Court will benefit from oral argument in this case. As appellant's brief makes clear, the district court misapplied established Fifth Circuit precedent to dismiss his complaint. However, since district courts in this circuit regularly misapply that very same precedent, appellant seeks a published opinion on the matter. Because appellant asks this Court only to apply and reaffirm existing caselaw, he does not believe that oral argument is necessary. Moreover, although Defendants did not appear below because of the screening-stage dismissal, this Court regularly publishes opinions without adversarial briefing or oral argument.[1] If this Court believes oral argument would be helpful or is required in this case before issuing a published opinion, however, counsel for appellant would be happy to participate.

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[1] *See*, *e.g.*, *Watkins v. Three Admin. Remedy Coordinators of the Bureau of Prisons*, 998 F.3d 682, 683 (5th Cir. 2021); *Rodgers v. Lancaster Police & Fire Dep't*, 819 F.3d 205, 207 (5th Cir. 2016); *Rogers v. Boatright*, 709 F.3d 403, 405 (5th Cir. 2013); *Hutchins v. McDaniels*, 512 F.3d 193, 194 (5th Cir. 2007); *Geiger v. Jowers*, 404 F.3d 371, 372 (5th Cir. 2005); *Baugh v. Taylor*, 117 F.3d 197, 198 (5th Cir. 1997).

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STATEMENT OF JURISDICTION

Ashraf Khalil brought this action under 42 U.S.C. § 1983. ROA.41. The district court had jurisdiction under 28 U.S.C. § 1331. On December 13, 2022, the district court entered a final judgment dismissing all claims. ROA.100. The district court docketed Mr. Khalil's timely notice of appeal on January 6, 2023. ROA.103. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED

Did the district court err in concluding that Ashraf Khalil failed to exhaust administrative remedies based solely on information it solicited from him via its standard pro se form complaint, even though Fifth Circuit caselaw squarely forbids that practice? *See Coleman v. Sweetin*, 745 F.3d 756 (5th Cir. 2014).

INTRODUCTION

Under the Prison Litigation Reform Act (PLRA), a prisoner may not bring suit challenging their prison conditions until "such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Prisoners aren't required to say *anything* about exhaustion in their complaints. That is because, in *Jones v. Bock*, the Supreme Court confirmed that exhaustion is an affirmative defense that defendants bear the burden of pleading and proving. In keeping with that rule, this Court has repeatedly reversed district courts for soliciting information from prisoner litigants about exhaustion, and turning around and using that information to *sua sponte* dismiss a prisoner's complaint under the PLRA's screening provisions. Yet every single district court in this circuit solicits such information from unsuspecting pro se prisoners, and the district courts regularly dismiss complaints *sua sponte* for failure to exhaust.

In this case, Ashraf Khalil, a prisoner proceeding pro se, fell victim to that unlawful practice when he tried to file a lawsuit about prison officials' unrelenting infringement on his fundamental religious beliefs. At the district court's direction, he completed the court's standard pro se

prisoner form complaint, which included several questions about his efforts to exhaust administrative remedies before filing suit. Little did he know that by complying with that directive, the district court would use his responses, and his responses alone, to dismiss his complaint *sua sponte* for failure to exhaust—before defendants had even appeared to raise the affirmative defense and before anyone considered whether the grievance procedures were actually "available" to him, as required by *Ross v. Blake*. Under this Court's controlling precedent, as well as Supreme Court and sister circuit caselaw, that dismissal was in error and should be the end of the matter.

But even accounting for Mr. Khalil's responses to the exhaustion questions on the standard form complaint, the district court was *still* wrong to dismiss his complaint on its face for failure to exhaust. As the Supreme Court explained in *Ross*, whether or not exhaustion is required turns on whether administrative remedies were actually "available." Availability, in turn, hinges on the real-world workings of the prison's grievance system, as well as the prisoner's personal ability to make use of that system. Such an inquiry will rarely be possible based solely on

information in a complaint, and it is not possible based on the information Mr. Khalil provided.

Because the district court's decision contravenes well-established precedent, it must be reversed.

STATEMENT OF THE CASE

I. Statutory Background

The exhaustion provision of the PLRA requires that a prisoner exhaust "such administrative remedies as are available" before bringing an action in federal court involving prison conditions. 42 U.S.C. § 1997e(a). Exhaustion is an affirmative defense, not a pleading requirement, so defendants bear the burden of demonstrating both that remedies were available and that the plaintiff failed to exhaust them. *Jones v. Bock*, 549 U.S. 199, 216 (2007). Accordingly, a district court may not dismiss a pro se prisoner's complaint *sua sponte* for nonexhaustion unless it is clear on the face of the complaint. *Id*. Such circumstances will be extraordinarily rare because, by the terms of the PLRA, a prisoner must exhaust only those administrative remedies that are "available" to him, a fact-specific inquiry that requires courts to consider "the *real-world* workings of prison grievance systems," and how a prisoner in the

plaintiff's situation might "discern or navigate it." *Ross v. Blake*, 578 U.S. 632, 643, 644 (2016) (emphasis added).

II. Factual Background[2]

Ashraf Khalil, a devout Muslim, wears a beard as an integral part of his "Islamic culture and religious beliefs." ROA.49. Yet, during his time at Dixon Correctional Center in Jackson, Louisiana, prison officials have consistently ordered him to "shave his beard." ROA.49, 82-83. That is so even though other religious denominations, such as "Christians [and] Rastafarians," are allowed to wear their beards without being punished. ROA.51, 82-83. To make matters worse, Defendants retaliated against Mr. Khalil—through transfers, harassment, and fabricated disciplinary reports—for exercising his right to seek redress for the violations to his religious freedom and for refusing to cut his beard. ROA.53-54, 82-83. That retaliation, along with orders to shave his beard, continued. Just one day after receiving the magistrate judge's report and recommendation, for instance, Mr. Khalil was placed in a disciplinary

[2] The bulk of the facts below are drawn from Mr. Khalil's sworn complaint. Additional facts from Mr. Khalil's pleadings are included for context. The facts are recounted in a light most favorable to Mr. Khalil, as is required at the screening stage. *Brunson v. Nichols*, 875 F.3d 275, 277 (5th Cir. 2017).

segregation cell covered in feces without any sanitation items for over a week, purportedly because of "disobedience" (i.e., his refusal to shave). ROA.81, 90-91.

III. Procedural Background

Mr. Khalil brought suit under 42 U.S.C. § 1983 against Warden Dustin Bickham, Chaplain Patricia Williams, and the Louisiana Department of Corrections. ROA.48. He alleged violations of the First and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act (RLUIPA). ROA.49. Initially, Mr. Khalil submitted a handwritten complaint, ROA.4-13, but the district court deemed it deficient and ordered Mr. Khalil to submit his complaint on the court's pro se civil complaint form, ROA.27. Following that order, Mr. Khalil submitted his complaint on the required form, marking various checkboxes and answering questions, including about his efforts to exhaust administrative remedies. *See* ROA.42-44.

As relevant here, Mr. Khalil answered three exhaustion-related questions:

> (1) "Is there a prison grievance procedure in this institution?" Mr. Khalil checked "Yes."

> (2) "Did you file an administrative grievance based upon the same facts which form the basis of this lawsuit?" Mr. Khalil checked "Yes."
>
> (3) "If 'Yes,' what is the Administrative Remedy Procedure number?" Mr. Khalil wrote: "Officer C. Washington said the matter is backlogged and under review, with an option to withdraw."

ROA.42. And, as directed by the form, Mr. Khalil appended what appears to be a copy of a grievance to Defendant Bickham (the Warden) about the matter. ROA.56.

The magistrate judge screened the amended complaint as mandated by the PLRA, 28 U.S.C. § 1915A, and, despite the fact that defendants had not yet been served—much less raised the affirmative defense of nonexhaustion—concluded that Mr. Khalil had failed to exhaust administrative remedies. ROA.74. In reaching that conclusion, the magistrate judge pointed to Mr. Khalil's responses to questions on the standard form complaint about exhaustion—specifically, Mr. Khalil's statement that an officer told him that "the matter is backlogged and under review, with an option to withdraw." ROA.77. The magistrate judge determined that the backlog was irrelevant because "the backlogging of grievances does not excuse a failure to exhaust." ROA.77 & n.19 (collecting cases). So, because Mr. Khalil "admit[ted] his [matter]

was still pending when he filed suit," the magistrate judge concluded that "his claims are unexhausted on the face of the Complaint and thus, subject to dismissal, without prejudice, for failure to state a claim." ROA.77-78.

Before Mr. Khalil's objections were docketed, the district court agreed and adopted the report and recommendation in its entirety. ROA.79-80. It specifically noted that the dismissal was under both the PLRA's exhaustion provision, 42 U.S.C. § 1997e(a), as well as the statute's screening provisions—which allow a court to dismiss an action if it is frivolous, malicious, or fails to state a claim, 28 U.S.C. §§ 1915(e) & 1915A.[3] ROA.80.

A week later, the district court docketed Mr. Khalil's objections to the report and recommendation. ROA.81-84. At the outset, he explained why his objections were (excusably) late: Just one day after receiving the report and recommendation, he had been thrown into segregation for refusing to shave his beard with no access to writing materials—another

[3] Such dismissals are often referred to as "strikes," and a litigant who has accumulated three strikes cannot proceed *in forma pauperis*, but rather must pay the full filing fee up front to bring a lawsuit in federal court. 28 U.S.C. § 1915(g).

example of the retaliation to which he was subjected. ROA.81. On the exhaustion issue, he urged that he had tried to exhaust administrative remedies, but received no response for nine months, so he filed suit. ROA.82.

When the district court failed to act on Mr. Khalil's objections, he moved for relief from the judgment. ROA.87-88. He included with his motion a sworn affidavit, in which he asked the district court to consider his late objections. ROA.89-95. He explained that, as "a native of Jerusalem, Palestine," his "knowledge of the English language … is very limited," ROA.89, so when he was placed in segregation the day after receiving the report and recommendation, he could not contact the "inmate counsel" who had been helping him litigate to prepare his objections, ROA.93. And once he did connect with the prisoner who had been helping him, that prisoner told Mr. Khalil that "he couldn't file the objections because he didn't want to lose his job." ROA.93-94. Mr. Khalil explained that it was only once he finally found someone to help him that he was able to get his objections filed. ROA.94.

The district court denied Mr. Khalil's motion for relief from the judgment. ROA.99. The court explicitly stated that it had reviewed the

objections—apparently excusing the untimely filing—as well as the motion, and it concluded that Mr. Khalil "did not address his failure to exhaust administrative remedies in either[.]" ROA.99. (That was wrong. As noted above, Mr. Khalil did address exhaustion in his objections. ROA.82). The court further observed that it had not, to date, entered a final judgment, and ordered it to issue separately. ROA.99. Final judgment issued on December 13, 2022, ROA.100, and Mr. Khalil filed a timely notice of appeal, ROA.103.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal for failure to exhaust administrative remedies under the PLRA. *Coleman v. Sweetin*, 745 F.3d 756, 763 (5th Cir. 2014).

SUMMARY OF THE ARGUMENT

I. A. Over 15 years ago, the Supreme Court in *Jones v. Bock* established that exhaustion under the PLRA is an affirmative defense that must be pled and proved by defendants. That is, prisoner-plaintiffs are not required to say *anything* about exhaustion in their civil-rights complaints. This Court takes that rule seriously, forbidding a district court from relying on information about exhaustion that it solicited from

a plaintiff in order to *sua sponte* dismiss a complaint for failure to exhaust. Caselaw from other circuits is in accord.

B. Ignoring the mountain of controlling caselaw to the contrary, the district court dismissed Mr. Khalil's complaint *sua sponte* based solely on his responses to questions on the court's standard pro se form complaint. That is reversible error. But even if the district court could have relied on Mr. Khalil's form complaint answers, it *still* would have been wrong to dismiss his complaint. Exhaustion requires courts to assess not just whether a litigant did not exhaust, but also whether administrative remedies were available. So, dismissals on the face of a complaint should be reserved for the extraordinarily rare circumstance where a prisoner explicitly concedes both that he has not exhausted, and also that he did not do so even though administrative remedies were personally available to him. Mr. Khalil's complaint—even with his responses to the exhaustion questions—is simply not in that narrow category.

II. Allowing district courts to routinely dismiss pro se prisoner complaints based on information solicited by courts, either via form complaints or other pre-screening mechanisms, is inequitable and raises serious constitutional concerns. Every district court in this circuit solicits

information from prisoners about exhaustion in standard form complaints, and they regularly dismiss complaints *sua sponte* for failure to exhaust. That practice infringes on the fundamental right of access to the courts by prematurely dismissing prisoners' legitimate claims for failure to exhaust before considering whether administrative remedies were actually "available" and by leading prisoners to accidentally plead themselves out of court in contravention of well-established liberal pleading rules. It has the additional inequitable result of impacting prisoners' ability to bring future lawsuits because such dismissals constitute "strikes" under the PLRA.

ARGUMENT

I. The District Court Improperly Dismissed Mr. Khalil's Complaint *Sua Sponte* For Failure To Exhaust Administrative Remedies.

A prisoner-plaintiff has no obligation to provide *any* information about exhaustion—an affirmative defense—in his complaint. *Jones*, 549 U.S. at 216. Accordingly, this Court and several sister circuits agree that a district court cannot rely on information it solicits from a prisoner about exhaustion to *sua sponte* dismiss his complaint for failure to exhaust.

The district court blatantly ignored that controlling precedent when it asked Mr. Khalil about his efforts to exhaust on its standard form complaint and then used that information, and only that information, to dismiss his complaint. This Court should reverse for that reason alone. But even if the district court were permitted to consider Mr. Khalil's responses to the exhaustion questions, a failure to exhaust is still not apparent on the face of his complaint.

A. Exhaustion Is An Affirmative Defense That Must Be Pled And Proved By A Defendant.

Nearly two decades ago, the Supreme Court held that exhaustion is an affirmative defense to be raised and proved by the defendants and that "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones*, 549 U.S. at 216. In reaching that conclusion, the Court observed that while "exhaustion was a 'centerpiece' of the PLRA, failure to exhaust was notably not added" to the statute's screening provision among other "enumerated grounds justifying dismissal upon early screening." *Id.* at 214-16. As such, there was "no reason to suppose that the normal pleading rules have to be altered to facilitate judicial screening of complaints specifically for failure to exhaust." *Id.* at 214. And imposing such rules would "exceed[] the proper

limits on the judicial role." *Id.* at 203. In other words, because exhaustion is not listed as a reason to *sua sponte* dismiss a lawsuit, courts cannot behave otherwise. *Id.* at 215. That is except in the rare case where nonexhaustion, as with other affirmative defenses, "appears on [the] face" of a prisoner's complaint. *Id.*

A decade later, in *Ross v. Blake*, the Supreme Court revisited the exhaustion provision, this time to offer guidance to courts assessing whether prisoners may be excused from the requirement. Recall that the PLRA requires prisoners to exhaust "available" remedies. 42 U.S.C. § 1997e(a). And although *Ross* rejected atextual, judicially created exceptions to exhaustion, it underscored the importance of the statute's built-in exception: "availability." *Ross*, 578 U.S. at 635-36. The Court held that the availability analysis is not an abstract exercise, but one that instead turns on consideration of particular facts that make a prison's grievance process "accessible" or "capable of use" by an individual prisoner. *Id.* at 642. It gave a nonexhaustive list of circumstances that would render remedies "unavailable," including where prison officials "thwart" a prisoner from using a grievance process, a prison's process is so "opaque" that a prisoner cannot use it, and the prison's process

operates as a "dead end." *Id.* at 643-44. In remanding the case, *Ross* instructed that the availability inquiry must account for "the real-world workings" of a prison's grievance system, as well as how a prisoner in the litigant's situation might make use of it. *Id.* at 643, 648. In short, exhaustion turns on whether administrative remedies were "available." And because availability requires a court to undergo a fact-specific inquiry, the affirmative defense will rarely be apparent on the face of the complaint.

This Court has—time and again—faithfully applied those holdings. Nearly a decade ago, in *Coleman v. Sweetin*, 745 F.3d 756 (5th Cir. 2014), this Court examined whether a district court had erred in dismissing a prisoner's complaint based both upon copies of grievances the prisoner had submitted in response to a question on the form complaint and also testimony from a grievance coordinator at a *Spears* hearing.[4] *Id.* at 761-73. It concluded that the district court's reliance on either "basis constitutes reversible error." *Id.* at 763. In reaching that conclusion, this

[4] "In PLRA cases, district courts in this circuit often hold '*Spears* hearings' to determine whether a case should be dismissed for various reasons before defendants are served." *Carbe v. Lappin*, 492 F.3d 325, 327 & n.7 (5th Cir. 2007) (citing *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985)).

Court pointed to the *Jones v. Bock* rule that, because exhaustion is an affirmative defense, it is error to dismiss a complaint at screening for failure to exhaust unless that failure is clear on the face of the complaint. *Id.* (citing *Jones*, 549 U.S. at 216). It further warned that "[d]istrict courts may not circumvent this rule by … requiring prisoners to affirmatively plead exhaustion through local rules." *Id.*

The *Coleman* decision built off this Court's earlier case *Carbe v. Lappin*, which came down shortly after *Jones*. There, this Court vacated a district court's *sua sponte* dismissal for failure to exhaust and emphasized that "a district court cannot by local rule sidestep *Jones* by requiring prisoners to affirmatively plead exhaustion." *Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007). This Court went on to clarify that if any of its prior opinions "have suggested otherwise, they did not survive *Jones*." *Id. See also Torns v. Miss. Dep't of Corr.*, 301 F. App'x 386, 389 & n.3 (5th Cir. 2008) (holding "the district court erred by using Question 7 of the prisoner's form complaint to prompt [plaintiff] for information about [exhaustion] and by relying on that elicited information[]" to dismiss the complaint for nonexhaustion and noting the "preferable course is to allow [the prison] to produce … evidence" that it made the

grievance process "available to [plaintiff]"); *McDonald v. Cain*, 426 F. App'x 332, 333-34 (5th Cir. 2011) (similar); *Chamberlain v. Chandler*, 344 F. App'x. 911, 912-13 (5th Cir. 2009) (similar).

Other circuits agree. In *Snider v. Melindez*, 199 F.3d 108 (2d Cir. 1999), for example, the Second Circuit considered a district court's dismissal of a plaintiff's complaint because he had "answered 'yes' to a question asking him whether 'there [is] a prisoner grievance procedure in this institution.'" *Id.* at 113. In concluding that answer was not an adequate basis for dismissal, *Snider* reasoned that even where a grievance process exists, whether a plaintiff must have used it (i.e., whether it was "available" to him) is a "question of law" that could not be properly determined based on the plaintiff's concession. *Id.* at 113-14. Although the standard form complaint, as the court put it, "may usefully guide the court's inquiry as to whether the prisoner has fulfilled the prerequisites to suit; … a plaintiff's answers cannot by themselves establish the existence of an administrative remedy." *Id.* at 114 n.3.

And in *Lax v. Corizon Medical Staff*, 766 F. App'x 626 (10th Cir. 2019), the Tenth Circuit considered a plaintiff who had left exhaustion questions on the court's complaint form blank. *Id.* at 627. The district

court ordered the plaintiff to show cause as to why his complaint should not be dismissed for nonexhaustion, and when he failed to do so, the court dismissed his complaint. *Id*. The Tenth Circuit reversed, reasoning that because prisoners do not bear the burden on exhaustion, "'the district court erred in requesting [the plaintiff] to supplement the record on this issue' via its order to show cause." *Id*. at 628 (quoting *Aquilar-Avellaveda v. Terrell*, 478 F.3d 1223, 1225 (10th Cir. 2007)). Although it recognized that a district court may, in some circumstances, *sua sponte* dismiss a prisoner's complaint for nonexhaustion, it explained that such circumstances would be "rare," as facts ordinarily pled in a prisoner's complaint will not usually suffice to assess availability. *Id*. The court also expressed its concern regarding the form complaint issue: "The inclusion of the exhaustion question on the form complaint is concerning because it shifts the burden on this defense, and attempts to achieve indirectly what cannot be achieved directly." *Id*. at 629 n.1 (internal quotations and citations omitted).

Most recently, the en banc Eleventh Circuit considered the issue. *Wells v. Warden*, 58 F.4th 1347 (11th Cir. 2023) (en banc). As relevant here, *Wells* asked whether a district court's dismissal of a prisoner's

complaint for nonexhaustion in a prior case simply because the prisoner had checked a box indicating that he did not file a grievance constituted a strike for "failure to state a claim." *Id*. at 1359; *see also* 28 U.S.C. § 1915(g). Although the Eleventh Circuit recognized there was a question whether the district court had erred by dismissing based on the checkbox answer on the form complaint, it noted that it need not opine on the matter because "the remedy was to directly appeal the dismissal and correct the error" at the time—as Mr. Khalil has here—something the *Wells* plaintiff had failed to do. *Id*. at 1360.

Judge Rosenbaum, joined by Chief Judge William Pryor and Judge Jill Pryor, concurred with the judgment but wrote separately "to register … concern about dismissing actions for failure to exhaust based on a pro se prisoner's response to a yes/no check-box on form complaints that ask about exhaustion." *Id*. at 1363 (Rosenbaum, J., concurring). The concurrence laid out three reasons why district courts should not require pro se prisoners to answer such questions: (1) "[A] plaintiff is 'the master of the complaint'"; (2) the PLRA requires exhaustion only if remedies are personally available to the prisoner, but "asking pro se prisoners whether they have exhausted *available* remedies demands too much"; and (3)

exhaustion is an affirmative defense, so district courts "should not be able to circumvent [this rule] by requiring pro se prisoners to fill out a form that directs them to plead exhaustion." *Id.* at 1363-64. In conclusion, the concurrence "urge[d] district courts to cease use of and reliance on the yes/no check-box form asking about exhaustion of remedies." *Id.* at 1364-65.

The controlling precedent of this Court, reinforced by other circuits, is clear: District courts may not solicit information from a pro se prisoner about his exhaustion efforts before defendants have been served, and then use that very information to dismiss *sua sponte* his complaint for failure to exhaust.

B. The District Court Erroneously Used Mr. Khalil's Responses To Exhaustion-Specific Questions On The Form Complaint To Conclude That He Failed To Exhaust.

In light of that precedent, it is clear that the district court committed reversible error. This Court has *five* times, twice in published opinions and three unpublished, held that district courts cannot solicit information about exhaustion before a responsive pleading is filed and then use that information to *sua sponte* dismiss a complaint. *Coleman*, 745 F.3d at 763; *Carbe*, 492 F.3d at 328; *McDonald,* 426 F. App'x at 333-

34; *Chamberlain,* 344 F. App'x 912-13; *Torns*, 301 F. App'x at 389. And in *Torns*, this Court applied that rule in an identical situation—the district court had relied solely on a prisoner's answer to a question on a standard form complaint to dismiss for nonexhaustion. 301 F. App'x at 389. The district court here ignored this Court's precedent when it used Mr. Khalil's answers to questions about exhaustion, and those answers alone, to dismiss his complaint *sua sponte* for failure to exhaust. Without the information solicited about exhaustion, there is nothing about exhaustion in Mr. Khalil's complaint just as in *Torns*. *See id.* ("[T]he remainder of [plaintiff's] complaint does not clearly show a failure to exhaust."). And because he did not need to say anything at all about exhaustion, *Jones*, 549 U.S. at 216, this Court should reverse on that ground alone and send a message that it will not condone such a blatant refusal to follow circuit precedent.

But even if the district court were allowed to consider Mr. Khalil's answers to the exhaustion questions—notwithstanding controlling caselaw to the contrary—a failure to exhaust administrative remedies is *still* not apparent on the face of his complaint. The exhaustion analysis is fact-specific, requiring courts to consider not just whether an

administrative remedy process exists, but also whether it was "personally available to [the prisoner]." *Days v. Johnson*, 322 F.3d 863, 867 (5th Cir. 2003). Only the rarest of complaints will reveal both that a prisoner did not exhaust remedies *and* that those remedies were in fact available. *United States v. Del Toro–Alejandre*, 489 F.3d 721, 723 (5th Cir. 2007) (recognizing it will only be the "rare instance where the prisoner's failure to exhaust appear[s] on the face of his complaint"); *Custis v. Davis*, 851 F.3d 358, 362 (4th Cir. 2017) ("[Plaintiff's] complaint did not present the rare, exceptional instance where administrative exhaustion was apparent on the complaint's face.").

A look at Mr. Khalil's complaint reveals that it does not fall in that "rare" category of complaints. *See Del Toro-Alejandre*, 489 F.3d at 723. In response to the form complaint's exhaustion questions, Mr. Khalil explained that he had tried to exhaust administrative remedies, but at some point, an officer told him that "the matter was backlogged and under review, with an option to withdraw." ROA.42. Standing alone, that statement reveals little, if anything, about exhaustion and the availability of administrative remedies to Mr. Khalil personally. For starters, that officer's statement is profoundly confusing: How is it that

Mr. Khalil's matter could be both "backlogged" *and* "under review" at the same time? Under the prison's administrative remedy process, it seems that a prisoner may only have one grievance pending at a time and that additional grievances "will be logged and set aside for handling at such time as the request currently in the system has been exhausted."[5] In other words, it doesn't appear that a grievance can be under review while also in a backlogged position.

As for the district court's suggestion that a backlog, in and of itself, cannot raise an availability problem, it is mistaken. Recent caselaw from the Fourth and Ninth Circuits confirms that a prison's backlogging rule can, in fact, create availability problems where there is no misconduct on the part of a prisoner. In *Griffin v. Bryant*, 56 F.4th 328 (4th Cir. 2022), the Fourth Circuit reversed a district court's entry of summary judgment for defendants on exhaustion where the grievance process contained a substantially similar provision allowing only one grievance at a time. The

[5] Although the prison's grievance process is not in the record, all state prisons in Louisiana use the same administrative remedy procedure (ARP). La. Admin. Code tit. 22 § I-325. The district court pointed to the process, apparently taking judicial notice of it. ROA.76, 79, 98; *see also Cantwell v. Sterling*, 788 F.3d 507, 509 (5th Cir. 2015) (per curiam) (taking judicial notice of applicable grievance procedure posted on the Texas Department of Justice's website).

court explained that the plaintiff had made "a compelling case" that the one-grievance-at-a-time policy "presented him with 'a simple dead end,' that the facts invite at least an inference of 'thwarting' and 'machination' by prison officials, and even that … 'no ordinary prisoner can discern or navigate' the grievance procedure because it is 'so opaque.'" *Id.* at 338 (quoting *Ross*, 578 U.S. at 643-44). And in *Eaton v. Blewett*, 50 F.4th 1240 (9th Cir. 2022), the Ninth Circuit concluded that Oregon's rule allowing a prisoner to pursue only four grievances at a time rendered remedies unavailable to a prisoner where a prison's "delays in processing and failures to respond to pending grievances" thwarted the plaintiff's efforts to exhaust. *Id.* at 1246. In so concluding, the court rejected defendants' position that the plaintiff's "option to withdraw" a pending grievance would cure the unavailability problem, noting that such a withdrawal would "likely forfeit any relief for the claim underlying the dismissed grievance," presenting the plaintiff "with a real world 'Catch 22.'" *Id.* at 1243; *see also Griffin*, 56 F.4th at 338 (noting "the actual possibility that [plaintiff] faced a 'real world Catch-22'" (quoting *Eaton*, 50 F.4th at 1243)).

In addition, the two unpublished Fifth Circuit cases the district court cited for the proposition that a backlog cannot make administrative remedies unavailable are irrelevant given the limited information about exhaustion in Mr. Khalil's complaint. In both, the district court's decision that the backlog did not constitute unavailability hinged on the fact that the prisoner had "violated the grievance policy by filing multiple grievances during the step-one review and that his abuse of the procedure resulted in a backlog of unanswered grievances." *Thomas v. Prator*, 172 F. App'x 602, 603 (5th Cir. 2006); *Moran v. Jindal*, 450 F. App'x 353, 354 (5th Cir. 2011) (explaining that the prisoner had caused the backlogging issue by improperly filing "numerous grievances"). Here, on the other hand, there isn't enough information to glean what occurred—that is, there is no information about whether Mr. Khalil was misusing the grievance process by filing frivolous grievances, or if the backlog is instead the prison's fault. In fact, we do not even know for sure whether there was a backlog. Recall that Mr. Khalil was told the matter was under review *and* backlogged—as was explained above, it does not seem that both could be true at once under the grievance process.

A consideration of additional availability issues further illustrates why availability cannot be determined on the face of Mr. Khalil's complaint—and indeed why it can almost never be discerned from the face of a complaint. We cannot know, for example, whether Mr. Khalil's personal limitations might have impacted his ability to understand the prison's grievance process. Indeed, Mr. Khalil wrote in his motion for relief from the judgement that he is not a native English speaker and that his English language skills are "very limited." ROA.89. And his objections evince some level of confusion about what he was supposed to do when he tried to exhaust but the matter was left pending for nine months. ROA.82. This Court and its sister circuits regularly find that a prisoner's personal limitations can render administrative remedies unavailable. *See Days*, 322 F.3d at 867 (finding administrative remedies not "personally available" to a prisoner who had a broken hand); *Ramirez v. Young*, 906 F.3d 530, 535 (7th Cir. 2018) (holding administrative remedies not available to a Spanish-speaking prisoner where the process was explained to him only in English); *Smallwood v. Williams*, 59 F.4th 306, 316-19 (7th Cir. 2023) (noting factual dispute as to whether plaintiff with "low IQ and lack of access to anyone who might help him" could

"understand or make use of the grievance process"); *Braswell v. Corr. Corp. of Am.*, 419 F. App'x 622, 625 (6th Cir. 2011) (finding fact issue as to whether a prisoner suffering a mental health crisis "was capable of filing a grievance" and noting that "one's personal inability to access the grievance system could render the system unavailable" (quoting *Days*, 322 F.3d at 867)); *Beaton v. Tennis*, 460 F. App'x 111, 113-14 (3d Cir. 2010) (citing evidence that staff took advantage of plaintiff's confused mental state resulting from a skull fracture and post-concussion syndrome as a basis for denying summary judgment for non-exhaustion).

Nor can we know, for instance, whether prison officials "thwarted" Mr. Khalil "from taking advantage of [the grievance process] through machination, misrepresentation, or intimidation," one of the circumstances that the Supreme Court in *Ross* explained would render grievance procedures "unavailable." *Ross*, 578 U.S. at 644 (providing nonexhaustive list of examples of unavailability); *see also Aquilar-Avellaveda*, 478 F.3d at 1225 ("The facts ordinarily pled in allegations concerning prison conditions frequently will not give a definitive answer as to whether a prisoner has completed his internal grievance process or whether he was thwarted in his attempts to do so."). Courts often invoke

the thwarting exception to conclude that the grievance process is not available where prison officials fail to respond to grievances, mislead prisoners about what steps they need to take to exhaust, or otherwise interfere with a prisoner's ability to navigate a grievance process. *See Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) ("Prison officials may not take unfair advantage of the exhaustion requirement, however, and a remedy becomes 'unavailable' if prison employees do not respond to a properly filed grievance."); *Hardy v. Shaikh*, 959 F.3d 578, 586-87 (3d Cir. 2020) (concluding that a "misleading or deceptive instruction" may qualify as misrepresentation under *Ross*). Based on the officer's statement to Mr. Khalil that "the matter is backlogged and under review," ROA.42, it is at least plausible that he was misled about the status of his grievances.

In short, there is simply insufficient information in Mr. Khalil's complaint—even considering, impermissibly, his exhaustion answers—to conclude that he both failed to exhaust administrative remedies *and* that those remedies were personally available to him given his own limitations and the real-world operation of the grievance policy. Defendants, if they raise an exhaustion defense after they are served, will

have a chance to meet their burden to prove otherwise at a hearing meant to resolve any exhaustion-related factual issues.[6] But at the screening stage, the district court was wrong to read the face of Mr. Khalil's complaint as demonstrating that the grievance process was "available" to him and that he failed to exhaust.

II. Allowing District Courts To Dismiss Pro Se Prisoner Complaints Based On Information Solicited By The Courts Is Inequitable And Raises Serious Constitutional Concerns.

If the clarity of the law weren't enough, constitutional concerns counsel against allowing district courts to use screening mechanisms to shift the exhaustion burden to prisoner-plaintiffs.

As a preliminary matter, the practice is widespread among district courts in the Fifth Circuit, despite caselaw clearly forbidding it. *See supra* at 15-17. Every single district court in this circuit uses a standard pro se prisoner form complaint which instructs a prisoner to provide a substantial amount of information about his exhaustion efforts. In

[6] *See Dillon v. Rogers*, 596 F.3d 260, 272-73 & n.2 (5th Cir. 2010) (explaining that when the facts regarding the availability of administrative remedies do not overlap with facts regarding the merits of the plaintiff's claims, district courts may hold an evidentiary hearing and "resolve factual disputes concerning exhaustion").

Louisiana[7] and Mississippi,[8] for instance, each court uses some variation of a form that not only asks multiple exhaustion-related questions—such as whether a grievance process exists at the institution, whether the prisoner used it and exhausted it, and, if not, why—but also instructs prisoners to attach any relevant documentation. Texas district courts use an even more problematic form which, without giving prisoners any opportunity to explain or address a grievance process's "unavailability," merely asks them to check "Yes" or "No" in response to a question asking if they have exhausted remedies, along with an instruction to append relevant documentation.[9] And even after this Court's *Coleman* decision, those courts have continued to use that information to *sua sponte* dismiss

[7] *See* Eastern District of Louisiana Prisoner Complaint Form, available at https://www.laed.uscourts.gov/sites/default/files/forms/1983.pdf; Middle District of Louisiana Prisoner Complaint Form available at https://www.lamd.uscourts.gov/local-forms/all-local-forms/pro_se_forms; Western District of Louisiana Prisoner Complaint Form, available at https://www.lawd.uscourts.gov/civil-rights-complaint-prisoner.

[8] Mississippi "Form 3" Complaint Challenging Conditions of Confinement, available at https://www.msnd.uscourts.gov/sites/msnd/files/5a_complaints_1983_prisoner_final.pdf.

[9] Texas Prisoner Civil Rights (Sec. 1983) Complaint Form, available at https://www.txs.uscourts.gov/sites/txs/files/cviilrights1983form_0.pdf.

complaints for failure to exhaust with regularity.[10] That is so despite the fact that, as described above, the information a prisoner provides in his

[10] *See*, *e.g*, *Johnson v. Guillot*, No. 22-00584, 2023 WL 2531478 (M.D. La. Mar. 15, 2023); *Hallman v. Dir., TDCJ*, No. 6:20CV160, 2022 WL 10177692, at *8 (E.D. Tex. Sept. 19, 2022), report and recommendation adopted, No. 6:20-CV-160, 2022 WL 10177667 (E.D. Tex. Oct. 17, 2022); *Simmons v. LeBlanc*, No. CV 21-378, 2021 WL 4190642, at *2 (M.D. La. Aug. 9, 2021), report and recommendation adopted, No. CV 21-378, 2021 WL 4189941 (M.D. La. Sept. 14, 2021), appeal dismissed, No. 21-30610, 2022 WL 1617865 (5th Cir. May 23, 2022), cert. denied, 143 S. Ct. 501 (2022); *Jackson v. Overstreet*, No. 9:21-CV-61, 2021 WL 4272009, at *2 (E.D. Tex. Apr. 6, 2021), report and recommendation adopted in part, No. 9:21-CV-61, 2021 WL 4263156 (E.D. Tex. Sept. 20, 2021); *Brown v. LeBlanc*, No. CV 21-463, 2021 WL 4130182, at *2 (M.D. La. Aug. 19, 2021), report and recommendation adopted, No. CV 21-463, 2021 WL 4130510 (M.D. La. Sept. 9, 2021); *Fisher v. Rheams*, No. CV 21-45, 2021 WL 2878567, at *1 (M.D. La. June 7, 2021), report and recommendation adopted, No. CV 21-45, 2021 WL 2878524 (M.D. La. July 8, 2021); *Jimerson v. Rheams*, No. CV 21-119, 2021 WL 2005492, at *3 (M.D. La. Apr. 15, 2021), report and recommendation adopted, No. CV 21-119, 2021 WL 2006294 (M.D. La. May 19, 2021); *Shokr v. LeBlanc*, No. CV 20-488, 2020 WL 8093228, at *7 (M.D. La. Dec. 14, 2020), report and recommendation adopted, No. CV 20-00488, 2021 WL 53175 (M.D. La. Jan. 6, 2021); *Ricks v. Louisiana State Penitentiary*, No. CV 19-701, 2020 WL 5047412, at *3 (M.D. La. Aug. 3, 2020), report and recommendation adopted, No. CV 19-701, 2020 WL 5046301 (M.D. La. Aug. 26, 2020); *Naquin v. Larpenter*, No. CV 18-14199, 2019 WL 3229358, at *3 (E.D. La. July 18, 2019); *Guy v. LeBlanc*, No.13-2792, 2015 WL 65303, at *11 (E.D. La. Jan. 5, 2015); *Bean v. Vaughn*, No. H-15-0799, 2015 WL 3617744, at *5 (S.D. Tex. June 9, 2015).

complaint will rarely be enough to assess whether administrative remedies were personally available to him.

The widespread practice of improperly dismissing pro se prisoner complaints at screening after wrongly shifting the burden to the prisoner to plead exhaustion infringes on the fundamental right of access to the courts. The importance of a prisoner's right of access to the courts in our constitutional scheme cannot be overstated: "Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most fundamental political right, because preservative of all rights." *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992). Accordingly, the Supreme Court long ago recognized that the fundamental right of incarcerated persons to access the courts "may not be denied or obstructed." *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *see also Lewis v. Casey*, 518 U.S. 343, 354 (1996). The district court's practice renders that right a nullity: Courts cannot provide relief for wrongs if plaintiffs are induced by form complaints to—perhaps erroneously—plead themselves out of court.

Luring pro se prisoner plaintiffs into accidentally pleading themselves out of court is also antithetical to the well-established rule

that pro se complaints must be "read very liberally." *Covington v. Cole*, 528 F.2d 1365, 1370 (5th Cir. 1976) (citing *Hains v. Kerner,* 404 U.S 519, 520-21 (1972)). That rule makes sense—pro se prisoners often lack a sufficient understanding of the procedural and substantive law to initiate a lawsuit, warranting special deference at the pleading stage. As one court put it, "[f]ew issues … are more significant than pleading standards, which are the key that opens access to courts." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008). Prisoners must already maneuver through the increasingly complex jurisprudence under section 1983 and the PLRA. *See* David Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2021 (2018) (describing the "confluence of legal and situational factors—doctrinal reference, statutory hurdles, and the many difficulties associated with litigating a civil rights case against one's jailers"). Shifting the burden to prisoners to plead the affirmative defense of exhaustion in their complaints is one hurdle prisoners cannot be required to clear.

There is one additional problematic result of allowing district courts to prematurely dismiss prisoner complaints under the PLRA's screening

provisions: The practice has catastrophic consequences for any future cases that a prisoner tries to bring. That is because the Supreme Court has stated—in dicta—that where exhaustion appears on the face of the complaint, it "is subject to dismissal for failure to state a claim."[11] *Jones*, 549 U.S. at 215; *see also Carbe*, 492 F.3d at 328 (interpreting *Jones* to allow district courts to dismiss *sua sponte* a case for failure to state a claim, predicated on failure to exhaust, if nonexhaustion appears on the face of the complaint). And, under the PLRA's screening provisions, a dismissal for failure to state a claim qualifies as a "strike." 28 U.S.C. § 1915(g). Once a prisoner has accumulated three strikes, he may no longer proceed *in forma pauperis* and must instead pay the full filing fee—

[11] That *Jones* dicta is arguably inconsistent with the general rule of civil procedure that a dismissal for "failure to state a claim upon which relief can be granted operates as an adjudication on the merits," *Hall v. Tower Land and Investment Co.*, 512 F.2d 481, 483 (5th Cir. 1975), whereas administrative exhaustion is a non-merits determination, *see Banks v. United States*, 796 F. App'x 615, 616 (11th Cir. 2019) (in the context of habeas corpus: "[i]f a previous § 2254 petition was dismissed as premature or for failure to exhaust, the dismissal was not on the merits"); *see also Snider*, 199 F.3d 108, 112 (2nd Cir. 1999) ("We do not think that Section 1915(g) was meant to impose a strike upon a prisoner who suffers a dismissal because of the prematurity of his suit but then exhausts his administrative remedies and successfully reinstitutes it.").

$420.00[12]—up front, a cost few incarcerated plaintiffs can afford.[13] 28 U.S.C. § 1915(g). In other words, under this Court's current doctrine, dismissals for failure to exhaust based (erroneously) on the face of a complaint count as "strikes" for purposes of the PLRA's three-strikes provision—further exacerbating the access-to-courts issue inherent in this practice. *See Wells*, 58 F.4th at 1360 (noting a prisoner's dismissal at screening for failure to exhaust ten years earlier, while potentially erroneous, still constituted a strike).

* * *

The district court's *sua sponte* dismissal of Mr. Khalil's complaint for failure to exhaust based solely on information it solicited from him was wrong. The Supreme Court, this Court, and sister circuits say so.

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[12] Middle District of Louisiana Fee Schedule, available at: https://www.lamd.uscourts.gov/fee-schedule.

[13] For those like Mr. Khalil who are incarcerated in Louisiana, money is difficult, or impossible, to earn. A recent report into captive labor from the University of Chicago and the American Civil Liberties Union found that incarcerated people in Louisiana prisons earn just 2 to 40 cents per hour. *ACLU Report Finds Incarcerated Workers Earn Between $0.02 And $0.40 Per Hour In Louisiana*, ACLU of Louisiana (June 22, 2022), https://www.laaclu.org/en/press-releases/aclu-report-finds-incarcerated-workers-earn-between-002-and-040-hour-louisiana. With a $420.00 filing fee, even a prisoner earning the top of that range would need to work 1,005 hours to afford to pay the fee—for a single case—up front.

And *even if* the district court could have properly considered the information Mr. Khalil provided about his efforts to exhaust, dismissal was *still* inappropriate. Exhaustion turns on availability, and availability requires a fact-intensive analysis considering how the grievance process operates in practice and whether a prisoner could actually make use of it. Accordingly, a failure to exhaust appearing on the face of a prisoner's complaint will be an extraordinarily rare occurrence not present here.

This Court should reverse in a published opinion to send a message that it will not tolerate district courts continuing to improperly shift the burden to pro se prisoners to plead exhaustion so that their complaints can be unfairly, and prematurely, dismissed. A failure to do so will embolden district courts to continue to flout this Court's precedent and that of the Supreme Court—an intolerable result.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and 5th Cir. R. 32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,369 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) but including the Appendix.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolhouse typeface.

Date: March 27, 2023

/s/ Rosalind E. Dillon
Rosalind E. Dillon

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth 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.

Date: March 27, 2023

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