No. 23-35082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORY STRIZICH,

Plaintiff-Appellant,

v.

DUSTIN PALMER,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Montana
Case No. 6:21-cv-00022
Honorable Sam E. Haddon

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Jory Strizich spent eight months in solitary confinement after Defendant Dustin Palmer falsely reported that he had found a suspicious substance in Mr. Strizich's belongings. Within days of the false report, Mr. Strizich asked a natural question: What can I do to seek relief for Defendant Palmer's false report? The prison's Grievance Coordinator, Mr. Strizich's intermediary to the grievance process, explained that he could use the disciplinary process, he could use the classification process, but he could *not* use the grievance process. These answers were familiar, as prison officials had *never* allowed him to grieve conduct underlying disciplinary and classification decisions.

So Mr. Strizich followed those instructions. He used the disciplinary process. He used the classification process. He even used an additional appeal process. After fruitlessly pursuing each of these processes to completion, Mr. Strizich returned to the Grievance Coordinator and made still another attempt to resolve his issue internally. He persuaded her to give him permission to file a late grievance about this matter, suggesting that she and other prison officials had been interpreting the scope of "non-grievable" issues too broadly. Despite that grant of

permission to grieve and an extension to do so, other prison officials *still* prevented Mr. Strizich from grieving his issue when a second Grievance Coordinator refused to process the initial grievance because "disciplinary has its own appeal processes" and another prison official rejected the second-step grievance because the initial form had been "untimely."

The Prison Litigation Reform Act (PLRA) requires prisoners to exhaust "such administrative remedies as are available." 42 U.S.C. § 1997e(a). As to whether the grievance process was "available" for Mr. Strizich's disciplinary-related issue, prison officials answered this question with a resounding chorus of "NO"s: Prison officials repeatedly disclaimed any authority to process grievances about this issue and others like it, thereby imposing dead ends for such grievances, obfuscating any possibility of relief through the grievance process, and thwarting Mr. Strizich's ability to pursue whatever relief might have been possible. Ignoring this mountain of evidence, the district court concluded that the grievance procedure was available to Mr. Strizich and granted summary judgment to Defendant Palmer on exhaustion grounds. Because that conclusion was contrary to the record and to the plain

meaning of "available," this Court should reverse and grant summary judgment to Mr. Strizich on the exhaustion issue.

JURISDICTIONAL STATEMENT

Mr. Strizich filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Montana. The district court had jurisdiction over Mr. Strizich's claims under 28 U.S.C. § 1331. The district court entered summary judgment for Defendant Palmer on September 28, 2022. ER-152; ER-151. Mr. Strizich filed a motion to alter or amend judgment, which the district court denied on January 4, 2023. ER-4. Mr. Strizich timely noticed this appeal on January 31. ER-228; *see* Fed. R. App. P. 4(a)(1)(A), 4(a)(4)(A)(iv). This court has jurisdiction to review the district court's final order under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Under the Supreme Court's decision in *Ross v. Blake*, is an administrative remedy "available" within the meaning of the Prison Litigation Reform Act where:

(A) prison officials repeatedly impose dead ends by disclaiming the ability to process grievances about reports and conduct that relate

to "classification" and "disciplinary" decisions that are "not grievable under the inmate grievance program";

(B) to the extent there existed any potential to use the grievance process in such circumstances, it was so confusing and opaque that even prison officials themselves did not discern it; and

(C) prison officials thwarted the plaintiff's ability to use the grievance process by specifically representing to the plaintiff that he "could not grieve" his issue "because it was disciplinary related," and then, after he has pursued three separate appeal processes and obtained an extension to use the grievance process, rejecting his attempted grievance first because "disciplinary has its own appeal processes" and later because the grievance was purportedly "untimely"?

2. Is an incarcerated plaintiff entitled to summary judgment on the issue of exhaustion, where a defendant fails to present any evidence disputing the plaintiff's evidence that prison officials repeatedly instructed him that his issue and others like it were not grievable through the grievance process?

STATEMENT OF THE CASE

A. Statutory Background

The Prison Litigation Reform Act's exhaustion provision requires that a prisoner exhaust "such administrative remedies as are available" in the jail or prison in which they are confined before bringing an action in federal court involving prison conditions. 42 U.S.C. § 1997e(a). By the terms of the PLRA, then, a prisoner must exhaust only those administrative remedies that are "available" to him. *Id.* A particular remedy is not "available" where, for instance, "it operates as a simple dead end," or it is "so opaque that it becomes, practically speaking, incapable of use," or "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 578 U.S. 632, 643–44 (2016) (presenting nonexhaustive list of instances where a grievance system is not "available"). When a court determines an administrative remedy was not functionally "available" to a prisoner, exhaustion of that process is not required. *Id.*; *see also Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017). Exhaustion is an affirmative defense, not a pleading requirement, so defendants bear the burden of proving that remedies are

available and that a plaintiff failed to exhaust them. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Albino v. Baca*, 747 F.3d 1162, 1171–72 (9th Cir. 2014) (en banc).

B. Factual Background[1]

1. Mr. Strizich is punished when Defendant Palmer plants evidence and writes a retaliatory false report.

On April 20, 2018, while incarcerated at the Montana State Prison, Jory Strizich exited his cell block in compliance with a "shakedown" announced by correctional officers. ER-193. When Mr. Strizich prepared to be frisked by Defendant Dustin Palmer, a correctional officer at the time, Defendant Palmer yanked on Mr. Strizich's ear. ER-194. Mr. Strizich complained about this offensive contact, and Defendant Palmer sneered, "What are you going to do, grieve and sue me like you do everyone else?" ER-194. Mr. Strizich replied that he would. ER-194. Defendant Palmer threatened that he would teach Mr. Strizich a lesson on respecting authority. ER-194.

[1] The facts included herein are drawn from Mr. Strizich's verified complaint and accompanying exhibits, as well as his sworn declaration and the exhibits submitted by both parties at summary judgment.

Defendant Palmer then entered the cell block to participate in the shakedown. ER-194. Afterward, he produced a bundle of plastic wrap containing "a large amount of a white crystal substance." ER-202. He wrote up an incident report claiming that he had found the substance in Mr. Strizich's dresser. ER-203, ER-211. This was false. ER-194–95. Several months after the incident, in June 2018, Defendant Palmer admitted to Mr. Strizich that he had planted the substance and written a false report. ER-195. He added, "I told you I'd teach you a lesson on respecting authority." ER-195; ER-220. That July or August, soon after being questioned about fabricating evidence and filing false reports against prisoners, Defendant Palmer stopped showing up for work at the prison. ER-196.

Defendant Palmer's false report caused Mr. Strizich to be charged with and found guilty of a disciplinary infraction for narcotics possession. ER-64, ER-66. Prison officials also referred the incident to the Investigations Unit for further investigation and possible criminal charges. ER-64, ER-66; *see also* ER-195; ER-76. Mr. Strizich also lost visiting privileges, and was reclassified from unrestricted medium custody to maximum custody. ER-74, ER-76, ER78–80, ER-82, ER-84. As

a result of his disciplinary sanctions and reclassification, Mr. Strizich spent nearly eight months in solitary confinement. ER-195.

After that lengthy stint in solitary, prison officials reversed Mr. Strizich's disciplinary infraction in December 2018 because the substance tested negative for narcotics. ER-135.

2. Mr. Strizich pursues recourse for Defendant Palmer's conduct.

Montana State Prison has, among other processes, an Inmate Grievance Program. ER-86. The Program distinguishes between "non-grievable issues" and "grievable issues." "Classification, disciplinary, and any other decision which is subject to a separate appeal procedure or administrative review process, are *not* grievable under the inmate grievance program." ER-87 (emphasis added). "All *other* issues including . . . staff conduct . . . are grievable." ER-87. (emphasis added). When an issue is grievable, a prisoner must initiate the grievance process by filing an informal resolution form "within five working days," ER-89, although "extensions may be granted by the [Grievance Coordinator] for good cause," ER-88.

Mr. Strizich produced several of his grievances pre- and postdating the instant incident, including prison officials' responses to each. These

documents illustrate how prison officials interpret the Program's distinction between "grievable" and "non-grievable" issues as applied to reports and staff conduct underlying disciplinary and classification matters:

- In 2014, Mr. Strizich tried to grieve correctional officers' inspection and seizure of his legal work, and the labeling of such as "a threat to safety and security." The Unit Manager responded, "This was investigated, and it was handled as a disciplinary matter. You had a hearing. As such it is not grievable per policy 3.3.3." ER-107.

- Months later, Mr. Strizich attempted to grieve that prison officials were keeping him in solitary confinement in retaliation for his litigation. Another prison official responded, "Your grievance is denied, classification decisions are nongrievable and the same information was provided in your appeal to the Unit Manager." ER-109–10. When he appealed to the next step, with the clarification that he was grieving prison officials' retaliatory noncompliance with his existing custody level and not the classification decision itself, the Grievance Coordinator reiterated, "Movement is a classification issue which has its own administrative remedies. As such, it is not grievable under procedure 3.3.3 as you were told." ER-111–12.

- In 2019, following a disciplinary hearing, Mr. Strizich attempted to grieve that the reviewing prison official had retaliated against him and exceeded the scope of the disciplinary procedure by directing the Disciplinary Hearing Officer to hold a rehearing that found him guilty of a heightened infraction and imposed more severe sanctions. He noted that he had also filed a disciplinary appeal. The Unit Manager responded to the grievance, "This is a disciplinary issue. [T]herefore you need to use the disciplinary appeal form." ER-114–15.

- Finally, Mr. Strizich tried to grieve that several prison officials had conducted a "sham investigation" and "fil[ed] false disciplinary and other reports" against him, causing him to be kept in solitary confinement. The Warden eventually denied the grievance, stating, "It appears you are appealing your disciplinary which is not grievable. . . . Not processed. Disciplinary issue." ER-117–19.

Citing these grievances, Mr. Strizich explained in a declaration under penalty of perjury that, "[i]n practice, [Montana State Prison] staff routinely refuse to permit me to grieve staff conduct (namely, retaliation and filing false reports) when the same is related in any way to disciplinary, classification or other proceedings." ER-57.

In the instant case, three days after Defendant Palmer's report, Mr. Strizich—then in solitary confinement and without access to the written grievance policy[2]—asked the Grievance Coordinator how he should proceed with respect to Defendant Palmer's "retaliatory fabrication of evidence." ER-54. The Grievance Coordinator is "[t]he staff member assigned to administer, investigate, and respond to inmate grievances," ER-86, and through whom (or a designee) "[a]ll formal grievances and appeals will be processed," ER-87. The Grievance Coordinator responded

[2] While in "disciplinary detention" (i.e., solitary confinement), prisoners "are locked inside of their cell 24 hours per day and do not have access to the library, or grievance policies and procedures." ER-54.

that Mr. Strizich "could not grieve officer Palmer's conduct because it was disciplinary related." ER-54. Instead, she instructed, he "must ut[i]lize the disciplinary process to address officer Palmer's conduct" and, if his custody level were to increase, he "should also ut[i]lize the classification process." ER-54. Mr. Strizich did that and more.

On April 24, Mr. Strizich pled not guilty to the narcotics-possession infraction at a disciplinary hearing. ER-66. He denied possessing narcotics and asserted several defenses, including that the substance was actually laundry detergent and that, alternatively, "either an inmate or officer . . . willfully or inadvertently put it there." ER-67–68. The Disciplinary Hearing Officer found him guilty and imposed two sanctions: solitary confinement and "[r]efer[ral] to investigations." ER-66. Mr. Strizich appealed, asserting that he was "being framed" and imploring the Warden or his designee to "[l]ook at this closer and delve into things a little deeper." ER-72. On April 30, just ten days after the underlying incident, the Associate Warden affirmed. ER-72.

Following the disciplinary hearing, the Visiting Supervisor suspended Mr. Strizich's visiting privileges for six months. ER-74. Mr. Strizich appealed to the Associate Warden of Security. ER-74. In his

appeal, Mr. Strizich maintained that Defendant "Palmer brought the meth into the prison to plant it and then take all the credit and acknowledgement for 'finding' it. . . . [H]e specifically targeted me that day because of a confrontation we had regarding inappropriate contact he made with me during a pat search and his strong dislike for my litigious and outspoken behavior (filing grievances and lawsuits)." ER-76. Mr. Strizich requested that "C.O. Palmer should be investigated and fired; not me punished for his actions." ER-76. The Associate Warden affirmed. ER-76. He noted, however, that "this information has been sent to the Investigations Unit for review." ER-76.

Based on the disciplinary infraction, prison officials also reclassified Mr. Strizich's custody level from unrestricted medium custody to maximum custody. ER-78–80. Mr. Strizich appealed to the Associate Warden of Housing. ER-78. Yet again, he "maintain[ed] his innocence" and requested that "C.O. Palmer should be investigated." ER-82 ("I shouldn't have to go to segregation because C.O. Palmer planted the drugs to retaliate against me."). The Associate Warden denied his appeal. ER-82. Mr. Strizich further appealed to the Warden. ER-84 (reasserting that the "guilty finding was based on the fabricated evidence

of C.O. Palmer (i.e., he planted the meth in my property to retaliate against me for grievances and a lawsuit)"). On July 30, the Warden denied his appeal. ER-84.

By August 2018, Mr. Strizich had fully utilized the disciplinary and classification appeal processes, as the Grievance Coordinator directed, as well as the visiting-suspension appeal process. Although he remained in solitary confinement, he was "finally able to obtain" the written grievance procedure. ER-56. On August 25, Mr. Strizich tried to persuade the Grievance Coordinator that "she may have applied section III.A.2 of the [Inmate Grievance Program] too broadly" when she told him that he could not grieve Defendant Palmer's conduct. ER-58. He requested permission to file a late grievance, which the Grievance Coordinator granted. ER-58; *see also* ER-122.

The same day, Mr. Strizich filed an informal resolution form, in which he stated that Defendant Palmer "deliberately fabricated evidence against me," resulting in Mr. Strizich's disciplinary infraction and sanctions. ER-121–22. Mr. Strizich's submission highlighted Defendant Palmer's retaliatory motive (his statement that "he was going to teach [Mr. Strizich] a lesson about respecting authority" because he "whine[d]

too much"), his retaliatory conduct ("plant[ing]" the substance), and the consequences for Mr. Strizich through the now-completed disciplinary process. ER-121–22. Mr. Strizich requested an "investigation" and "other meaningful remedial action." ER-121. He also noted his prior conversation with the Grievance Coordinator and invited prison officials to contact her with any questions. ER-122. A second Grievance Coordinator returned this form as "not processed," because "disciplinary has its own appeal processes." ER-121.

Mr. Strizich timely filed a grievance at the next step of the Inmate Grievance Program. ER-124–25. He reiterated his claim that Defendant Palmer "deliberately fabricated evidence" and his request for an "investigation" and "other meaningful remedial action." ER-124. He further asserted that both Grievance Coordinators had incorrectly interpreted the grievance procedure to mean that "the underlying events of a classification and disciplinary decision are non-grievable." ER-124–25. Based on this understanding, he "respectfully request[ed]" that his "grievance be processed." ER-125. Without acknowledging what the Grievance Coordinators had told Mr. Strizich, the Program Manager

returned the grievance as "untimely" because the underlying incident took place in April. ER-124.

Mr. Strizich made two last attempts to resolve his issue through the Program. First, he filed a request form asking the Program Manager to allow his grievance to proceed because the Grievance Coordinator had "permitted me to file it late as a result of her prior misleading advice that I couldn't grieve the matter." ER-127. The Program Manager acknowledged that she had "overlook[ed]" this information in her response to his grievance, but concluded, "Regardless of what [the Grievance Coordinator] told you your grievance is not timely." ER-127. She added, "You've already addressed these concerns on your disciplinary appeal and you[r] visiting suspension appeals." ER-127. (emphasis in original); *see also* ER-96 ("An investigation request is the *only* acceptable action in regard to all staff conduct issues." (emphasis added)). Second, Mr. Strizich filed an informal resolution form regarding the return of his grievance as untimely. He requested that his grievance be processed and that prison officials "decide whether the staff conduct is grievable or non-grievable." ER-129. Prison officials refused to process this form, telling

Mr. Strizich, "You proceed forward to litigation if you choose to do so." ER-129.

C. Procedural History

Having pursued the grievance process as far as prison officials would allow, Mr. Strizich turned to the federal courts. He filed a civil action against Defendant Palmer under 42 U.S.C. § 1983, alleging a First Amendment claim for retaliation and a Fourteenth Amendment claim for deprivation of due process at his disciplinary hearing. ER-197. Defendant Palmer moved for summary judgment, arguing that Mr. Strizich failed to exhaust available administrative remedies because his second-stage grievance had been denied as untimely. ER-187; ER-175.

After the deadline for Mr. Strizich to respond, but before his response arrived at the court, the district court granted Defendant Palmer's motion for summary judgment. ER-152. It reasoned that prison officials had denied Mr. Strizich's informal resolution form as untimely, *but see* ER-121 (declining to process because "disciplinary has its own appeal processes"), and that they then denied his formal grievance as untimely, so "[h]is claims [we]re barred by his failure to exhaust administrative remedies." ER-154–56.

Mr. Strizich's response and statement of disputed facts arrived after the district court entered its order. ER-136; ER-41.[3] He argued that the Inmate Grievance Program was not "available" to his claims against Defendant Palmer under each of the Supreme Court's examples of unavailability in *Ross v. Blake*, 578 U.S. 632 (2016). ER-139. He argued that there was a genuine dispute whether Defendant Palmer's conduct was actually grievable under the Inmate Grievance Program, ER-139–40, ER-146–47; ER-42–43; that, even if the issue was grievable, the process was so opaque that not even prison officials, much less an ordinary prisoner, could "discern or navigate it," ER-139, ER-144–45 (quoting *Ross*, 578 U.S. at 644); and that prison officials "thwarted" his ability to use the Inmate Grievance Program through their inconsistent interpretations and misleading instructions, ER-139–40, ER-145–47. The district court noted that Mr. Strizich's documents "appear[ed] timely under the mailbox rule" and set a deadline for Defendant Palmer to file a reply. ER-39.

[3] At the time, Mr. Strizich was proceeding *pro se* and incarcerated in Connecticut. ER-190. The parties had previously forecasted that "delays in the prison mail system" were to be expected. ER-157.

After Defendant Palmer filed a reply, the district court received Mr. Strizich's motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). ER-17. The motion was dated after the district court entered its original order granting summary judgment but before it entered its subsequent order regarding Mr. Strizich's response. The parties proceeded to brief this motion. ER-17; ER-12; ER-10.

The district court ultimately reaffirmed its grant of summary judgment to Defendant Palmer and denied Mr. Strizich's Rule 59 motion. ER-4. It first stated that Mr. Strizich "presented no evidence that he was granted an extension of time within which to file a grievance or that he was prevented or thwarted from filing a timely grievance." ER-7. It further stated that Mr. Strizich "could not have filed an inmate/offender informal resolution form within five working days of the act or omission that caused the complaint, because at that time, Strizich had not made any allegation against Palmer." ER-7. Therefore, it held that Mr. Strizich "failed to timely file his grievance under set policy." ER-8.

Mr. Strizich timely appealed. ER-228.[4]

[4] Consistent with this Court's February 1 order, Mr. Strizich filed a statement explaining why his appeal should be allowed to proceed,

SUMMARY OF THE ARGUMENT

I. The Inmate Grievance Program was not available to Mr. Strizich for his claims against Defendant Palmer for writing a retaliatory false report because prison officials repeatedly informed him that his classification- and disciplinary-related issue and others like it were not grievable. As a result, Mr. Strizich was not required to exhaust the Program under the PLRA.

A. The Program was a "dead end" for Mr. Strizich's claims against Defendant Palmer. *Ross v. Blake*, 578 U.S. 632, 643 (2016). Prison officials repeatedly refused to process Mr. Strizich's grievances when they related to a classification or disciplinary decision in some way, including when they pertained to the conduct underlying a disciplinary infraction, as here. And Grievance Coordinators twice labeled Mr. Strizich's particular issue in this case as non-grievable—first, when Mr. Strizich asked how he was supposed to proceed, and again when Mr. Strizich's informal resolution form was rejected. At each of these steps,

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notwithstanding the district court's certification that "any appeal . . . would not be taken in good faith," ER-9; 9th Cir. Dkt. Entry 8-1. This Court discharged the show-cause order and set a briefing schedule. 9th Cir. Dkt. Entry 9.

Mr. Strizich was "reliably informed by an administrator that no remedies [we]re available" through the Program, rendering the process unavailable. *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005).

B. The Program was unusably "opaque" with respect to any potential for relief on Mr. Strizich's classification- and disciplinary-related issues. *Ross*, 578 U.S. at 643. Prison officials themselves repeatedly interpreted the Program policy to foreclose grievances about such issues, and they communicated those interpretations to Mr. Strizich. Whatever relief theoretically might have been possible through the Program, "no ordinary prisoner" in Mr. Strizich's position could have discerned the opposite conclusion that he actually could, and needed to, grieve these issues. *Id.* at 644.

C. Even assuming that the possibility of relief existed through the Program, prison officials "thwart[ed]" Mr. Strizich's use of that process. *Ross*, 578 U.S. at 644. First, the Grievance Coordinator steered Mr. Strizich away from the Program by telling him he "could not grieve" his claims against Defendant Palmer. Then, after Mr. Strizich heeded the Grievance Coordinator's instructions to pursue relief through other processes, prison officials continued to obstruct Mr. Strizich by again

refusing to process his grievance because it was disciplinary-related and then refusing to honor the Grievance Coordinator's grant of an extension in light of her earlier instructions. These acts by prison officials prevented Mr. Strizich from using the Program, through no fault of his own. *Nunez v. Duncan*, 591 F.3d 1217, 1224–26 (9th Cir. 2010).

D. The district court erroneously disregarded evidence that the Program was not available, including Mr. Strizich's declaration. *Fraser v. Goodale*, 342 F.3d 1032, 1036–37 (9th Cir. 2003).

II. Despite a "full and fair opportunity" to prove the affirmative defense of exhaustion, Defendant Palmer failed to put forward evidence sufficient to meet his burden. *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014) (en banc). He failed to meet his burden to establish that the Program was actually available for the substance of Mr. Strizich's claims against Defendant Palmer, and he failed to create a genuine dispute as to Mr. Strizich's evidence that prison officials prevented him from using the Program through their interpretations and instructions regarding the issues he "could not grieve." This Court should not only reverse, but also grant summary judgment to Mr. Strizich on the issue of exhaustion. *See Albino*, 747 F.3d at 1176–77.

STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment *de novo*. *Gordon v. Cnty. of Orange*, 6 F.4th 961, 967 (9th Cir. 2021). Summary judgment is appropriate only where, viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in favor of that party, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Gordon*, 6 F.4th at 967. In addition, the obligation to construe a *pro se* prisoner's pleadings and motion papers liberally is well-established. *Wilk v. Neven*, 956 F.3d 1143, 1147 (9th Cir. 2020).

ARGUMENT

I. The Inmate Grievance Program was not "available" for Mr. Strizich's claims.

Before a prisoner brings an action in federal court, the PLRA requires exhaustion of only "such administrative remedies as are *available*." 42 U.S.C. § 1997e(a) (emphasis added). If an administrative remedy is not available, the prisoner "need not exhaust" it. *Ross v. Blake*, 578 U.S. 632, 642 (2016).

Availability is a practical, "real-world" determination; existence "on the books" is not enough. *Id.* at 643. To be "available," an administrative remedy must be actually "'capable of use' to obtain 'some relief for the action complained of.'" *Id.* at 642 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)).

In *Ross*, the Supreme Court identified at least "three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief." *Id.* at 643; *see also Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam) (recognizing this as a "non-exhaustive list"). First, "an administrative procedure is unavailable 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." *Ross*, 578 U.S. at 643. Second, "an administrative scheme might be so opaque" that "no ordinary prisoner can discern or navigate it," and it thus "becomes, practically speaking, incapable of use." *Id.* at 643–44. Third, an administrative remedy is not available "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 644.

Here, by the plain definition of "available" and under all three examples identified by the *Ross* Court, the Inmate Grievance Program was not available to Mr. Strizich for his claims against Defendant Palmer based on Defendant Palmer's retaliatory false report. Prison officials repeatedly "disclaim[ed] the capacity to consider" Mr. Strizich's grievances that related to the classification and disciplinary processes, including his grievance in the instant case, establishing that the Program was a "dead end" with no possibility of relief. *Id.* at 643. These officials' interpretations and instructions rendered the grievance process "so opaque" as to be unnavigable by an "ordinary prisoner." *Id.* And, even assuming the Program could provide relief, prison officials "thwart[ed]" Mr. Strizich's access to the Program when they specifically instructed him that he could not grieve *this* issue, leading him to spend months pursuing three other appeal processes, only for another official eventually to reject his grievance as untimely. *Id.* at 644. For each of these reasons, the district court's grant of summary judgment was error.

A. The Inmate Grievance Program operated as a "dead end."

An available administrative remedy must be "'capable of use' to obtain 'some relief for the action complained of.'" *Ross*, 578 U.S. at 642

(quoting *Booth*, 532 U.S. at 738). As the Supreme Court explained, "'[s]ome redress for a wrong is presupposed by the statute's requirement' of an 'available' remedy; 'where the relevant administrative procedure lacks authority to provide any relief,' the inmate has 'nothing to exhaust.'" *Id.* at 643 (quoting *Booth*, 532 U.S. at 736 & n.4). This ability or inability to provide relief is specific to "the subject of the complaint" and "the type of allegations . . . raise[d]." *Booth*, 532 U.S. at 736 n.4. And what matter are "the facts on the ground," regardless of "what regulations or guidance materials may promise." *Ross*, 578 U.S. at 643. When prison officials lack authority to provide relief on the books, or they "disclaim[]" such authority "in practice," or they "decline ever to exercise it," the result is the same: The administrative remedy is not available. *Id.*

Here, the Inmate Grievance Program was unusable for Mr. Strizich's claims that Defendant Palmer retaliatorily falsified a report against him, resulting in, among other harms, his disciplinary infraction, disciplinary sanctions, suspension of visiting privileges, and reclassification to maximum custody. Under the Program policy, "Classification, disciplinary, and any other decision which is subject to a

separate appeal procedure or administrative review process, are *not* grievable under the inmate grievance program." ER-87 (emphasis added). Prison officials repeatedly and consistently applied this provision to bar Mr. Strizich from grieving issues that "relate" to these decision and appeal processes.

When Mr. Strizich attempted to use the grievance procedure in this case, he repeatedly hit dead ends when prison officials twice informed him that his specific issue was not grievable. Days after the underlying incident, the Grievance Coordinator told him he "could not grieve officer Palmer's conduct because it was disciplinary related." ER-54. As soon as the Grievance Coordinator told Mr. Strizich that he could not use the Inmate Grievance Program, that remedy was not available and the PLRA's exhaustion provision was satisfied. As this Court has held, "a prisoner need not press on to exhaust further levels of review once he has . . . been reliably informed by an administrator that no remedies are available." *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005). This Court has repeatedly recognized that such a statement by a prison official that a prisoner cannot or need not take a particular step renders that step unavailable. *See, e.g.*, *Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir.

2009) (per curiam) (prisoner was not required to take additional appeal after he "had been informed that the appeals process was unavailable to him"); *White v. Hall*, 384 F. App'x 560, 561 (9th Cir. 2010) (mem.); *Roby v. Stewart*, 368 F. App'x 830, 830–31 (9th Cir. 2010) (mem.).

Nonetheless, after following the Grievance Coordinator's instructions to utilize other appeal processes, ER-54, Mr. Strizich tried again to use the Program. *See Valoff*, 422 F.3d at 935 n.10 (the PLRA allows, though does not require, "over-exhaustion"). And again—this time confronted with Mr. Strizich's explanation of how he believed the Program policy allowed him to grieve Defendant Palmer's conduct, his assertion that the first Grievance Coordinator had granted him permission to file a grievance, and his suggestion to contact the first Grievance Coordinator with any questions, ER-122—a second Grievance Coordinator still refused to process the grievance because "[d]isciplinary has its own appeal processes." ER-121. For a second time, Mr. Strizich was "reliably informed by an administrator that no remedies [we]re available" to him through the Program. *Valoff*, 422 F.3d at 935. Had there been any doubt before, at this point the Program was certainly an unavailable dead end.

Indeed, in addition to these two direct disclaimers of authority over Mr. Strizich's instant issue, the official responses to Mr. Strizich's similar grievances establish that prison officials consistently declined to process such classification- and disciplinary-related issues. As Mr. Strizich explained in his declaration, prison officials "routinely refuse[d] to permit [him] to grieve staff conduct (namely, retaliation and filing false reports) when the same is related in any way to disciplinary, classification or other proceedings." ER-57. He provided four examples, each a slightly different attempt to obtain redress. *See supra* pp. 9–10. He tried to grieve underlying conduct in the examination and seizure of his legal work. "Not grievable." ER-107. He tried to grieve failure to follow the disciplinary policies. "[D]isciplinary issue." ER-114. He tried to distinguish a classification decision itself from officers' subsequent failure to follow it. Again, "not grievable." ER-111–12. He tried to grieve a "sham investigation" and retaliatory "false disciplinary and other reports." ER-117–18. Per the Warden: "Not processed. Disciplinary issue." ER-119.

Despite Mr. Strizich's persistent efforts to use the Inmate Grievance Program for these disciplinary- and classification-related issues, the responses he obtained from prison officials were uniformly

fruitless. Substantively, they are little different from the literal "rubber stamp" that contributed to the unavailability concerns in *Ross*. 578 U.S. at 647 ("Dismissed for procedural reasons…. This issue is being investigated by IIU case number: ____. No further action shall be taken within the ARP process."). Because prison officials routinely disclaimed the authority to process grievances they judged to be classification- or disciplinary-related—and twice disclaimed such authority over this specific issue—the Program was not available.

B. The Inmate Grievance Program was unusably "opaque."

An administrative remedy is also not available when the mechanism for any relief that might exist is "so confusing" that "no ordinary prisoner can discern or navigate it." *Ross*, 578 U.S. at 644. Here, Mr. Strizich faced the question of where to seek relief for his claims: Defendant Palmer's retaliatory false report was "staff conduct" in a literal sense, but it was conduct that *directly resulted* in disciplinary and classification decisions, which are "non-grievable" through the Inmate Grievance Program. So could Mr. Strizich use the Program for such an issue? The district court thought so, ER-5, but prison officials repeatedly told Mr. Strizich otherwise. If issues relating to officer reports underlying

disciplinary and classification decisions really are grievable—as the district court necessarily held, contrary to what Mr. Strizich was repeatedly told—then the Program policy was too confusing even for the prison officials tasked to administer it.

Recall that the Program policy states that "[c]lassification, disciplinary, and any other decision which is subject to a separate appeal procedure or administrative review process, are *not* grievable," whereas "other issues including . . . staff conduct . . . are grievable." ER-87 (emphasis added). The policy itself offers no further guidance on the scope of the disciplinary and classification issues that may not be grieved.

As stated above, officials routinely interpreted the policy to preclude grievances that related to these classification and disciplinary decisions in some way, including through underlying staff conduct. *E.g.*, ER-107. Even counsel for Defendant Palmer, in the statement of undisputed facts, characterized the policy similarly: "The [Program] does not permit inmates to grieve issues *related to* '[c]lassification, disciplinary, and any other decision which is subject to a separate appeal procedure or administrative review process.'" ER-163 (emphasis added) (quoting Program policy, *see* ER-87). And when Mr. Strizich sought

clarification for his issue in this case, the Grievance Coordinator specifically told him he "could not grieve" Defendant Palmer's retaliatory false report through the Program "because it was disciplinary related," and directed him instead to search for a remedy elsewhere: the disciplinary process and the classification process. ER-54.

Prison officials' instructions to Mr. Strizich were consistently antithetical to the possibility of relief: They pointed in one direction, away from the Program. The PLRA did not mandate that Mr. Strizich engage in the "Orwellian doublethink" necessary to draw the opposite conclusion that he could, and needed to, use the Program from which officials had steered him away. *Does 8–10 v. Snyder*, 945 F.3d 951, 963 (6th Cir. 2019); *see also Ross*, 578 U.S. at 644 ("Remedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes and so are not available." (quoting *Turner v. Burnside*, 541 F.3d 1077, 1084 (11th Cir. 2008))); *Swisher v. Porter Cnty. Sheriff's Dep't*, 769 F.3d 553, 555 (7th Cir. 2014) ("[C]an one imagine the plaintiff's telling the warden: 'you tell me I don't need to file a grievance but I know better'?"). Because prison officials' prior interpretations and instructions rendered any possibility of relief for Mr. Strizich's claims through the

Program "essentially 'unknowable,'" *Ross*, 578 U.S. at 644 (quoting *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1323 (11th Cir. 2007)), the Program was not available.

C. Prison officials "thwarted" Mr. Strizich's ability to use the Inmate Grievance Program.

Finally, assuming *arguendo* that the Inmate Grievance Program actually could process Mr. Strizich's claims against Defendant Palmer, prison officials "thwart[ed]" Mr. Strizich's ability to use that procedure. *Ross*, 578 U.S. at 644. An administrative remedy is not available when a prisoner is "precluded from exhausting, not through his own fault but by" the actions of prison officials. *Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010). When prison officials prevent a prisoner from using a process—irrespective of their motivations[5]—they have thwarted the prisoner's access to that process, rendering it unavailable.

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[5] This Court has repeatedly identified the thwarting effect of officials' actions without evaluating subjective intent. *See, e.g.*, *Eaton v. Blewett*, 50 F.4th 1240, 1246 (9th Cir. 2022) (prison officials' delay in processing a grievance that blocked the prisoner from filing a new grievance thwarted the prisoner's effort to grieve); *Fordley v. Lizarraga*, 18 F.4th 344, 355 (9th Cir. 2021) (prison's failure to respond to a grievance "thwarted the inmate from taking advantage of the grievance system"); *Andres*, 867 F.3d at 1079 (prison officials thwarted a prisoner's access to the grievance system by "improperly fail[ing] to process a prisoner's grievance"); *see*

Here, when Mr. Strizich asked how to proceed with respect to Defendant Palmer's "retaliatory fabrication of evidence," the Grievance Coordinator diverted him away from the Program by instructing that he "could not grieve officer Palmer's conduct because it was disciplinary related" and that he must instead use the disciplinary and classification appeal processes. ER-54. Then, after Mr. Strizich spent months completing these processes, he obtained permission from the Grievance Coordinator to file a grievance, only for a second Grievance Coordinator still to refuse to process this grievance because "disciplinary has its own appeal processes," ER-121–22, and another prison official to "overlook" and then disregard the first Grievance Coordinator's grant of an extension and refuse to process the grievance based on untimeliness, ER-124–25, ER-127. Even assuming that the Program was an "otherwise proper procedure[]" for addressing Mr. Strizich's claims against Defendant Palmer, prison officials "prevented [Mr. Strizich's] use" of that procedure and so rendered it unavailable. *Ross*, 578 U.S. at 644.

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also Lanaghan v. Koch, 902 F.3d 683, 688 (7th Cir. 2018) ("[A] grievance procedure can be unavailable even in the absence of affirmative misconduct. The term 'available' . . . does not include any requirement of culpability on the part of the defendant.").

This Court's decision in *Nunez* is directly on point. There, the warden cited the wrong policy in his response to the plaintiff's grievance. 591 F. 3d at 1220, 1225. This "innocent mistake" misled the plaintiff into believing he needed the cited regulation to appeal and led him on a monthslong "wild goose chase," after which prison officials rejected his eventual grievance appeal as untimely. *Id.* at 1221, 1226. This Court held that the warden's representation, even absent "bad faith or deliberate obstruction," rendered remedies "effectively unavailable." *Id.* at 1226.

Here, the Grievance Coordinator's representation to Mr. Strizich did not even require an inferential step; he "could not grieve officer Palmer's conduct because it was disciplinary related." ER-54. Mr. Strizich relied on the Grievance Coordinator's representation, followed her instructions to utilize his other appeal processes, and was ultimately barred from using the Program precisely because he heeded her instructions. Applying *Nunez*, the Program was not available.

Other circuits agree: Prison officials' instructions that a prisoner cannot use a certain process thwart the prisoner's access to that process and render it unavailable. *E.g.*, *Hardy v. Shaikh*, 959 F.3d 578, 590 (3d Cir. 2020) (holding "[a]ll 'available' remedies were exhausted," where

prison "provided misleading instructions on which a reasonable inmate would rely and on which the undisputed record shows [plaintiff] did rely to his detriment"); *Davis v. Fernandez*, 798 F.3d 290, 295–96 (5th Cir. 2015) ("Grievance procedures are unavailable to an inmate if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process."). Prisoners cannot be expected, and are not required, to use processes that officials say they cannot use. "If you are an inmate and you speak to senior jail officers up to and including the Warden of the jail and are told *not* to file a grievance . . . you are entitled to assume that you don't have to file a written grievance." *Swisher*, 769 F.3d at 555; *see also, e.g.*, *Townsend v. Murphy*, 898 F.3d 780, 783 (8th Cir. 2018) (plaintiff was thwarted by correctional sergeant's advice "not to file a formal grievance . . . without first receiving a response to his informal complaint"); *Toomer v. BCDC*, 537 F. App'x 204, 206 (4th Cir. 2013) (plaintiff was not required to file appeal that prison's "instructions essentially diverted [him] from filing"); *Brownell v. Krom*, 446 F.3d 305, 312 (2d Cir. 2006) (plaintiff was not responsible for failure to timely exhaust that was "directly traced to a prison official's advice to [plaintiff] to follow that course"); *Brown v.*

Croak, 312 F.3d 109, 111–13 (3d Cir. 2002) (plaintiff was "thwarted" by "security officials who told him that he must 'wait until [an indefinite] investigation was complete before filing a formal grievance'").

Consistent with these authorities, prison officials thwarted Mr. Strizich's access to whatever relief might have been possible through the Program, so it was not available.

D. The district court erroneously disregarded the evidence of unavailability in granting summary judgment.

In granting summary judgment to Defendant Palmer, the district court did not identify any evidence that the Inmate Grievance Program was ever actually available to process Mr. Strizich's claims against Defendant Palmer on the merits. Moreover, it disregarded affirmative evidence that the Program was not available for these claims, including the Grievance Coordinator's refusal to process Mr. Strizich's informal resolution form because "disciplinary has its own appeal processes," ER-121, and the similar responses to Mr. Strizich's other attempts to grieve conduct and reports underlying disciplinary and classification decisions, *see supra* pp. 9–10.

Most notably, the district court erroneously asserted that Mr. Strizich "presented no evidence that he was granted an extension of time

within which to file a grievance or that he was prevented or thwarted from filing a timely grievance." ER-7. This is contrary to the record and black-letter law. At the summary judgment stage, Mr. Strizich's declaration under penalty of perjury, ER-54, ER-58; *see also* 28 U.S.C. § 1746, and contemporaneous references to the Grievance Coordinator's instructions in his grievance submissions, ER-122, ER-124–25, ER-127, ER-129–30, are plainly evidence of the Grievance Coordinator's statements to him. *Cf. Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003) (holding that the "contents of [plaintiff's] diary" could be considered in opposition to summary-judgment motion because plaintiff "could testify to all the relevant portions of the diary from her personal knowledge"); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (a party may oppose summary judgment with "any of the kinds of evidentiary materials listed in Rule 56(c)," including affidavits or declarations).

And the contents of this evidence—the Grievance Coordinator's instruction that Mr. Strizich "could not grieve [Defendant-Appellee's] conduct because it was disciplinary related" and her later grant of Mr. Strizich's request for an extension to file a grievance, ER-54, ER-58—

constitute "facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4); *see also Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 666 (9th Cir. 2021). Statements of prison officials inform prisoners' understanding of their administrative remedies and induce their reliance, and are therefore admissible for the nonhearsay purpose of establishing the "effect on the listener." *United States v. Payne*, 944 F.2d 1458, 1472 (9th Cir. 1991); *see also McIntosh v. Wexford Health Sources, Inc.*, 987 F.3d 662, 666 (7th Cir. 2021) (summary-judgment affidavits about prison official's grievance instructions were "not inadmissible hearsay because they were submitted not for their truth . . . but instead to establish what [the official] said and what effect his words may have had on [plaintiff]"). Accordingly, this Court routinely relies upon incarcerated plaintiffs' declarations about such statements in its review and reversal of summary-judgment decisions on exhaustion. *E.g.*, *Williams v. Paramo*, 775 F.3d 1182, 1191–92 & n.11 (9th Cir. 2015) (relying on incarcerated plaintiff's sworn complaint, treated as affidavit, stating that prison officials refused her attempts to file a grievance); *Albino v. Baca*, 747 F.3d 1162, 1175–76 (9th Cir. 2014) (en banc) (granting summary judgment to an incarcerated plaintiff on the exhaustion issue, based on his

uncontradicted declaration that he "repeatedly sought, and was denied, help from the prison staff" and that "staff members repeatedly told [him] that he should seek relief by talking to his criminal defense attorney"). In ignoring this evidence of unavailability, the district court committed error.

* * *

Ross decides this case, three times over. Defendant Palmer failed to demonstrate that the Inmate Grievance Program was anything other than a dead end for Mr. Strizich's claims relating to reports and conduct underlying the disciplinary and classification processes. To the extent there was any possibility of relief, prison officials obfuscated it behind facially ambiguous language and directly, and repeatedly, contrary practices and instructions. And prison officials thwarted Mr. Strizich's effort to use the Program by telling him he could not use it to grieve his issue, and sending him on a monthslong project to utilize three other appeal processes, only for another official to hold that delay against him and for Defendant Palmer to try to argue that the grievance process was available all along. The Program was plainly unavailable to Mr. Strizich

for his claims against Defendant Palmer for filing a retaliatory false report.

II. Mr. Strizich is entitled to summary judgment on the issue of exhaustion.

For the reasons stated above, Defendant Palmer failed to show beyond genuine dispute that the Inmate Grievance Program was an "available" administrative remedy that Mr. Strizich failed to exhaust. More than that, however, he failed even to create a genuine dispute.

Because exhaustion is an affirmative defense, not a pleading requirement, a defendant bears the ultimate burden of proving that remedies are available and that a plaintiff failed to exhaust them. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Albino*, 747 F.3d at 1171–72. A defendant falls short of this burden by "show[ing] that remedies merely existed in a *general* sense where a plaintiff has specifically alleged that official action prevented her from filing a *particular* grievance." *Williams*, 775 F.3d at 1192 (emphases added).

This Court has "long recognized that, where the party moving for summary judgment has had a full and fair opportunity to prove its case, but has not succeeded in doing so, a court may enter summary judgment *sua sponte* for the nonmoving party." *Albino*, 747 F.3d at 1176. The

conditions identified in *Albino*, itself a PLRA exhaustion case, are present here. As the movant for summary judgment, Defendant Palmer was "on notice of the need to come forward with all [his] evidence in support of this motion, and [he] had every incentive to do so." *Id.* He "had ample opportunity to conduct discovery" and to put that evidence before the district court. *Id.* And although Mr. Strizich, acting *pro se*, did not file a cross-motion for summary judgment on the exhaustion issue, he would have succeeded. *Id.*

Equipped with all the evidence he could muster, Defendant Palmer failed to create a genuine dispute that the Inmate Grievance Program was available for Mr. Strizich's "particular" claims, rather than in some "general" and unavailing sense. *Williams*, 775 F.3d at 1192. Notably, Defendant Palmer's submissions to the district court did not include any evidence establishing that Mr. Strizich's claims against Defendant Palmer for writing a retaliatory false report were actually grievable through the Program. His statement of undisputed facts acknowledges that the Program "does not permit inmates to grieve issues *related to* '[c]lassification, disciplinary, and any other decision which is subject to a separate appeal procedure or administrative review process.'" ER-163

(emphasis added) (quoting Program policy, *see* ER-87). In both affidavits submitted by Defendant Palmer, the Program Manager refrained from stating that Mr. Strizich actually could have grieved his claims in this case. *See generally* ER-169 (stating merely that Mr. Strizich "has not completed the grievance process in accordance with the Grievance Procedure with respect to his claims in this lawsuit," before acknowledging that Mr. Strizich's informal resolution form "was not processed since it applied to disciplinary actions, which have their own appeal process"); ER-36. The eventual return of Mr. Strizich's second-level grievance as untimely similarly says nothing about whether prison officials ever would have processed a grievance about this disciplinary-related issue on the merits. ER-124. And Defendant Palmer submitted no evidence that prison officials have ever allowed a prisoner to grieve staff conduct and reports underlying a classification or disciplinary decision. Simply put, at the outset, Defendant Palmer failed to establish that the Inmate Grievance Program was "an available administrative remedy" for Mr. Strizich's claims. *Albino*, 747 F.3d at 1172; *see also id.* (favorably citing *Westefer v. Snyder*, 422 F.3d 570, 580 (7th Cir. 2005), for the proposition that a defendant "failed to meet its burden of proving that

[the prisoners] failed to exhaust an *available* administrative remedy" where the record was unclear "whether any administrative remedy remained open for the prisoners to challenge their transfers through the grievance process" (emphasis and alteration in original)); *Hubbs v. Suffolk Cnty. Sheriff's Dep't*, 788 F.3d 54, 59 (2d Cir. 2015) ("[D]efendants bear the initial burden of establishing . . . that a grievance process exists *and applies to the underlying dispute*" (emphasis added)).

More than that, Defendant Palmer failed to create any dispute as to Mr. Strizich's evidence establishing unavailability in his particular circumstances, leaving this evidence uncontradicted. Defendant Palmer could not dispute that the Grievance Coordinator made the statements identified in Mr. Strizich's declaration under penalty of perjury, so he labeled them, incorrectly, "hearsay allegations." ER-27–28; *but see supra* Section I.D. He could not dispute that prison officials have consistently declined to process Mr. Strizich's grievances relating to the disciplinary or classification processes, so he declared those grievances "not before th[e] Court" and dismissed them as irrelevant. ER-25–26; *but see Ross*, 578 U.S. at 646 (highlighting administrative dispositions drawn even from "other prisoner suits" for their insights into how the grievance

procedure actually worked). And he could not dispute that a Grievance Coordinator refused to process this specific grievance because "[d]isciplinary has its own appeal processes," so he recast the grievance as "not clear" because it described, in addition to Defendant Palmer's retaliatory motive and conduct, the actions of two other prison officials that enabled Defendant Palmer's report to inflict its intended harm on Mr. Strizich. ER-181; *but see* ER-89 (a prisoner may grieve "a reasonable number of closely related issues"), ER-99 (informal resolution form instructing prisoner to "[d]escribe the problem" and answer, inter alia, "WHAT have you done so far to get the problem repaired?").

Allowing Mr. Strizich to finally litigate his claims against Defendant Palmer on the merits in the district court fully comports with the purpose of the PLRA exhaustion requirement to "afford[] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). Mr. Strizich diligently and repeatedly afforded prison officials such an opportunity with respect to his claims against Defendant Palmer. Through his efforts to use the disciplinary, visiting-suspension, classification, and grievance processes consistent with prison officials'

directions, Mr. Strizich put his requests for an investigation into Defendant Palmer's conduct in front of many prison officials, from the Grievance Coordinators up to the Warden and Associate Warden. As the Program Manager eventually told him, "You've already addressed these concerns on your disciplinary appeal and your visiting suspension appeals." ER-127 (emphasis in original); *see also* ER-76 ("[T]his information has been sent to the Investigations Unit for review."). Under these circumstances, denying Mr. Strizich his day in court is inconsistent with the text of the PLRA and its purpose.

This Court has previously directed the award of summary judgment to an incarcerated plaintiff on exhaustion, based on his uncontradicted declaration. *Albino*, 747 F.3d at 1175–76. It should do so again today, based on even more.

CONCLUSION

This Court should reverse the judgment of the district court and remand the case with the instruction to grant summary judgment to Mr. Strizich on the issue of exhaustion.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of 9th Circuit Rule 32-1(a) because this brief contains 8,770 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

s/ Benjamin Gunning
Benjamin Gunning

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Benjamin Gunning
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