No. 23-35082

ORAL ARGUMENT SCHEDULED FOR DECEMBER 8, 2023

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 REPLY BRIEF

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INTRODUCTION

The Montana State Prison Inmate Grievance Process was unavailable for Jory Strizich's allegations against Defendant Palmer. When Mr. Strizich sought to file a grievance he was repeatedly told by prison officials that his complaint was "not grievable." That is because although Mr. Strizich hoped to complain about Defendant Palmer's conduct, which *is* grievable, that conduct formed the basis of prison disciplinary- and classification-related decisions, which are *not* grievable. The grievance process was a "dead end" to Mr. Strizich, and he did all that he was required to do to exhaust. Defendant Palmer points to instances when Mr. Strizich accessed the grievance process—for other issues—but exhaustion is a case-by-case determination. And, notably, Defendant Palmer does not argue that Mr. Strizich's issue here *was* grievable, effectively conceding the "dead end" issue.

Still, even if, theoretically, the grievance process was open to Mr. Strizich for his complaint, the mechanism for relief was "so confusing" that even prison officials, and certainly an "ordinary prisoner," could not "discern or navigate it." *Ross v. Blake*, 578 U.S. 632, 644 (2016). Defendant Palmer's only meaningful response regarding opacity is a

suggestion that a prisoner should always err on the side of exhaustion. But if that were uniformly true, it would eviscerate the Supreme Court's admonition in *Ross* that a grievance system is unavailable when it is opaque—as this one is.

At a minimum, the grievance process was unavailable to Mr. Strizich because prison officials "thwarted" his ability to use the process (assuming it was even an option to begin with), by consistently telling him he couldn't access it. These statements are not inadmissible hearsay as Defendant Palmer would have it; rather, they are exactly the type of evidence that this Court and its sister circuits routinely consider when assessing availability. This makes sense. For availability purposes it doesn't matter whether, in fact, officials would have accepted Mr. Strizich's grievance (though we know that they wouldn't); what matters is that Mr. Strizich was led to believe that he could not grieve this issue. In other words, these statements aren't offered for the truth of the matter, but for their effect on the listener, a well-trod exception to the hearsay rule. Defendant Palmer effectively concedes this point, and therefore has no real response to Mr. Strizich's thwarting argument. *See*

AB 25 (noting it "may be true" that the statements are admissible "to show why [Mr. Strizich] did not immediately file a grievance").

For all of these reasons, Mr. Strizich is entitled to summary judgment on exhaustion. In moving for summary judgment on this issue, Defendant Palmer had an adequate opportunity to put forth evidence as to the process's availability, and failed to meet his burden of doing so. On remand, there would be nothing further to consider regarding exhaustion, and so summary judgment in Mr. Strizich's favor is appropriate.

ARGUMENT

I. No administrative remedies were "available" to Mr. Strizich.

A. The Inmate Grievance Program presented a persistent "dead end" as to Mr. Strizich's disciplinary- and classification-related issue.

At the point the Montana State Prison's (MSP) Grievance Coordinator told Mr. Strizich he could not utilize the Inmate Grievance Program to complain about Defendant Palmer's conduct, no remedies were available, and he had nothing more to exhaust. *See* OB 26-27

(collecting cases).[1] First, the Grievance Coordinator told him that he "could not grieve officer Palmer's conduct because it was disciplinary related." ER-54, 122; *see also infra* Section I.C (response to Defendant Palmer's hearsay argument). Mr. Strizich reasonably relied on the Grievance Coordinator's instructions—after all, he had previously submitted grievances that were tangentially related to disciplinary processes and they had been rejected as unprocessed. OB 9-10, 28 (summarizing four such grievances and officials' responses). This is dead end number one.

After Mr. Strizich did what he was told and tried to pursue his grievance through the disciplinary and classification appeal processes to no avail, *see* OB 8-13, 26-27, *another* Grievance Coordinator returned his informal resolution form as "not processed," because "disciplinary has its own appeal processes." OB 13-14; ER-121-22. Déjà vu: the same dead end.

On both occasions, Mr. Strizich was "reliably informed by an administrator that no remedies are available," and he had nothing more to exhaust. *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005). And,

[1] "OB" citations refer to Mr. Strizich's opening brief; "AB" citations refer to Defendant's answering brief.

indeed, Defendant Palmer does not argue that, in fact, Mr. Strizich's issue *was* grievable. To the contrary, he characterizes the denial of Mr. Strizich's complaint of officer conduct that resulted in a classification and disciplinary decision as "predictable." AB 29.

When Mr. Strizich clarified on appeal that pursuant to MSP policy, he could pursue his claim through the grievance process, prison officials rejected his grievance as "untimely." OB 14-15; ER-124-25. When he explained on appeal that he had followed MSP's own policies and received permission from a Grievance Coordinator to file a delayed grievance, it was still rejected because it was "not timely." *See* OB 15-16; ER-88, 127. Another dead end. In short, Mr. Strizich was stuck in an unsolvable labyrinth; each "dead end" Mr. Strizich hit rendered the grievance system "unavailable," and his failure to exhaust excused. *See Ross v. Blake*, 578 U.S. 632, 643 (2016).

Availability is a grievance-by-grievance inquiry. A grievance process may exist, but where prison officials cannot—or will not—apply it to address the specific "subject of the complaint" and "the type of allegations . . . raise[d]," the grievance process is not available for that issue. *Booth v. Churner*, 532 U.S. 731, 736 n.4 (2001). Here, officials

administering the Inmate Grievance Program "disclaim[ed] the capacity to consider" Mr. Strizich's "disciplinary related" grievances in the past, *Ross*, 578 U.S. at 643, and were repeatedly "unable or consistently unwilling," *id.*, to address the retaliatory-false-report claim in this case, OB 8-14, 25-29. The resultant "dead end" that the grievance process posed to "the subject of [Mr. Strizich's] complaint" rendered administrative remedies unavailable. *Booth*, 532 U.S. at 736 n.4. Defendant Palmer's arguments to the contrary are obfuscation.[2]

Fundamentally, Defendant Palmer conflates the existence of a grievance process that addresses *some* issues with the Supreme Court's repeated framing of the proper inquiry: whether the process is "'capable of use' to obtain 'some relief *for the action complained of*.'" *Ross*, 578 U.S. at 642 (emphasis added) (quoting *Booth*, 532 U.S. at 738). "The ability to take advantage of administrative grievances is not an 'either-or' proposition. Sometimes grievances are clearly available; sometimes they

[2] At the outset, it is not clear why Defendant Palmer included reference to the "clearly erroneous" standard of review where the district court makes "factual findings on disputed issues of material fact." AB 12 (quoting *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc)). There are no such factual findings in this case, and the district court's exhaustion ruling is a question of law subject to ordinary *de novo* review. *See Albino*, 747 F.3d at 1171.

are not; and sometimes there is a middle ground where, for example, a prisoner may only be able to file grievances on certain topics." *Kaba v. Stepp*, 458 F.3d 678, 685 (7th Cir. 2006). Where the grievance process will not address a particular issue—either on the face of the regulations or as administered by officials, *see Ross*, 578 U.S. at 643 (availability must account for "the real-world workings of prison grievance systems," whatever might be "officially on the books")—a plaintiff raising that issue has "nothing to exhaust." *Booth*, 532 U.S. at 736 n.4; *see also, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 676 (D.C. Cir. 2008) ("Requiring an inmate to exhaust an administrative grievance process that cannot address the subject of his or her complaint would serve none of the purposes of exhaustion of administrative remedies."); *Snider v. Melindez*, 199 F.3d 108, 113 n.2 (2d Cir. 1999) (The PLRA "does not require the inmate to pursue a grievance procedure that is available but has no application whatsoever to the subject matter of his complaint.").

Viewed through that appropriate lens, Defendant Palmer's citations to Mr. Strizich's processed grievances are window dressing. AB 28. To be sure, Mr. Strizich was able to grieve *certain* issues through the

Inmate Grievance Program: missing property, SER-13, 48, 78,[3] the denial of outdoor exercise in solitary confinement, SER-16, and even staff conduct that was *not* related to any disciplinary proceeding, SER-3-4. But each and every time that Mr. Strizich tried to file an informal resolution form about "the underlying events of a classification, disciplinary, and/or other decision," ER-122, officials refused to process the form and treated the issues as not grievable. *See* OB 9-10, 28 (summarizing four such grievances and officials' responses). Defendant Palmer concedes that these four grievances were not processed "because they dealt with non-grievable issues." AB 28. In other words, Mr. Strizich hit the same dead-end in those similar situations as he did here, with grievances rejected as "non-grievable."

Defendant Palmer quibbles with the wording of Mr. Strizich's first informal grievance and its assertion that two disciplinary officers improperly found him guilty on the basis of Palmer's retaliatory false report. AB 29. As a threshold matter, this has no bearing on the first "dead end" that Mr. Strizich hit when the Grievance Coordinator told him

[3] That the property may have gone missing while Mr. Strizich completed a disciplinary sentence does not turn this grievance into a disciplinary-related issue, as Defendant Palmer seems to suggest. AB 28.

months beforehand that he "could not grieve officer Palmer's conduct." ER-54. At that point, the grievance process was a dead end, and Mr. Strizich had done all he was required to do. *See Brown*, 422 F.3d at 935 ("[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."); *Fordley v. Lizarraga*, 18 F.4th 344, 355-56 (9th Cir. 2021) (rejecting argument that "an inmate's reassertion of a concern . . . somehow operates to unexhaust a previously exhausted claim" and noting "once an administrative remedy is exhausted, a claimant need not do more."). Additionally, the content of this single informal grievance cannot diminish the inference of unavailability drawn from each of Mr. Strizich's four other non-processed grievances about conduct underlying disciplinary or classification decisions. *See* OB 28-29.

But even zooming in narrowly on this single submission, Defendant Palmer's argument is still untenable. The Inmate Grievance Program simultaneously permits a prisoner to describe "a reasonable number of closely related issues on the [informal resolution] form," ER-89, and affirmatively directs the prisoner to "[d]escribe the problem," including "WHAT have you done so far to get the problem repaired?" ER-99. Mr.

Strizich's predicament highlights the absurdity of Defendant Palmer's argument. The "problem" Mr. Strizich was asked to describe implicated the disciplinary and classification processes, as Defendant Palmer's false report harmed Mr. Strizich through its instigation of a wrongful disciplinary infraction for narcotics possession and resulting sanctions and reclassification (ultimately, eight months in solitary confinement). OB 7-8. And the steps Mr. Strizich took "to get the problem repaired" included, *inter alia*, his efforts to plead his innocence through the disciplinary and classification processes. OB 11-13. Mr. Strizich's reference to the disciplinary officers' knowledge of his innocence does nothing to detract from or obscure the central challenge in that grievance: the falsity of Defendant Palmer's underlying report.

Finally, to the extent Defendant Palmer's brief can be read to suggest that Mr. Strizich failed to raise this "dead end" issue before the trial court, that is demonstrably wrong. AB 27. Throughout Mr. Strizich's *pro se* response to Defendant Palmer's summary-judgment motion, Mr. Strizich stressed that prison officials repeatedly treated his instant claim and similar issues as not grievable through the Inmate Grievance Program. *E.g.*, ER-140 ("In practice, the IGP does not permit inmates to

grieve staff conduct issues such as retaliating against a[n] inmate or filing false reports when such staff conduct is related in any way to disciplinary, classification or other proceedings."); ER-144 ("[The Grievance Coordinator's] interpretation of section III.A.2 of the IGP and its application to the fact situation in this case is consistent with how prison staff handled several other staff conduct grievances filed by Strizich alleging, among other things, retaliation and filing false reports that were related to classification, disciplinary, and other proceedings."); ER-145 ("If the Court assumes that [the Program Manager] is correct that Palmer's conduct was grievable, it must also assume that all other MSP staff were wrong in denying or not processing Strizich's numerous other staff conduct grievances as being related to disciplinary or classification."). While Mr. Strizich did not explicitly couch this argument in *Ross*'s "dead end" language, he amply presented the argument that there is at least a genuine factual dispute whether the Inmate Grievance Program was actually usable for his claim. To demand more from a then-*pro se* litigant violates this Court's directive to "construe liberally motion papers and pleadings filed by *pro se* inmates." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010).

In short, per the first Grievance Coordinator's answer to Mr. Strizich's April 2018 question, the second Grievance Coordinator's response to his August 2018 informal resolution form, and officials' responses to four similar submissions, Mr. Strizich's was consistently led to believe his "disciplinary related" issue was not grievable. And despite following MSP's own guidelines for filing a late grievance, Mr. Strizich's grievance appeals were repeatedly rejected as untimely. These are quintessential dead ends.

B. Any possibility of relief for Mr. Strizich's disciplinary- and classification-related issue through the Inmate Grievance Program was unusably "opaque."

Assuming, in the alternative, that there was any possibility of relief for Mr. Strizich's retaliatory-false-report claim through the Inmate Grievance Program—and Defendant Palmer doesn't argue there was—the mechanism for relief was "so confusing" that even prison officials, and certainly an "ordinary prisoner," could not "discern or navigate it." *Ross*, 578 U.S. at 644. The Inmate Grievance 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 "staff conduct" is. ER-87. No fewer than seven

prison officials applying this language—including two Unit Managers, a Warden, and three Grievance Coordinators—communicated the understanding that staff conduct underlying a disciplinary or classification decision was not grievable. ER-54, 107, 109, 111, 114, 119, 121. Against this record, Defendant Palmer's apparent attempt to characterize this case as simply "[a]n inmate's mistake," AB 29, is counterfactual.

Unable to explain away prison officials' persistent interpretation of the Inmate Grievance Program to preclude grievances about conduct and reports underlying disciplinary or classification decisions, Defendant Palmer has no choice but to speak in generalities. As noted above, because the grievance process may have been clearly available for *some* issues has no bearing on the opacity of the process with respect to *this* one. *See supra* 5-6 (citing *Ross*, 578 U.S. at 642 ("'capable of use' to obtain 'some relief for the action complained of'" (quoting *Booth*, 532 U.S. at 738)). Notably, nowhere in his brief does Defendant Palmer argue that the issue Mr. Strizich attempted to pursue would have been accepted by the prison as grievable—he merely notes that Mr. Strizich's

"clarifi[cation]" of the issue was rejected because his initial grievance was untimely. AB 29.

Defendant Palmer's assertion that a prisoner should just "err on the side of exhaustion," *id.*, is not the panacea he apparently hopes. *Ross* explained that erring on the side of exhaustion may make sense "[w]hen an administrative process is susceptible of multiple reasonable interpretations." 578 U.S. at 644. But, in contrast, "when a remedy is . . . essentially 'unknowable'—so that no ordinary prisoner can make sense of what it demands—then it is also unavailable." *Id.* That's just this case—indeed, the Montana prison officials themselves couldn't even discern an interpretation of the administrative scheme that would allow Mr. Strizich to grieve officer conduct underlying a disciplinary or classification decision. *See* OB 30; *see also* Br. of ACLU as Amicus Curiae at 6-7 (noting policy at issue here includes 12 single-spaced pages, multiple forms, a flowchart, and requires college-level reading skills to understand). What is more, taken to its logical conclusion, the err-on-the-side-of-exhaustion edict would render unnecessary the "opacity" exception to exhaustion. This Court and others have repeatedly

recognized that prisoners do not need to bend over backwards to try to exhaust in the face of contrary instructions by officials. *See* OB 31-32.

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

Finally, to the extent the grievance program was ever a viable option, *but see supra* Sections I.A, I.B, the Grievance Coordinator and other prison officials thwarted Mr. Strizich's access to any possibility of relief through the grievance procedure by first telling him that he could not grieve staff conduct that, like Defendant Palmer's, was "disciplinary related," and then refusing to allow him to file a late grievance after he spent months pursuing other appeal processes in reliance on the Grievance Coordinator's statement. ER-54, ER-121-22, ER-124-25, ER-127. Defendant Palmer does not deny that such official conduct constitutes thwarting. AB 30-32.

Palmer's own citations recognize that officials render an administrative remedy unavailable where, as here, officials *tell* the prisoner something about the grievance process that induces their reliance, and that ultimately prevents the prisoner from utilizing the process. *E.g.*, *Albino v. Baca*, 747 F.3d 1162, 1173 (9th Cir. 2014) (en banc) (observing a prisoner is "not required to exhaust a remedy that he

had been reliably informed was not available to him"); *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) ("Rational inmates cannot be expected to use grievance procedures to achieve the procedures' purpose when they are misled into believing they must respond to a particular document in order to effectively pursue their administrative remedies and that document is then not available."); *Swisher v. Porter Cnty. Sheriff's Dep't*, 769 F.3d 553, 555 (7th Cir. 2014) ("When jail personnel mislead inmates about how to invoke the procedure the inmates can't be blamed for failing to invoke it."); *see also Snyder v. Riverside Cnty.*, 819 F. App'x 514, 516 (9th Cir. 2020) (holding that prisoner's "consistent[] assert[ions] that he was dissuaded from following the detention center's grievance policy by information that he received from detention center officials" rendered "the generally available process effectively unavailable" and precluded summary judgment). The jurisprudence of this Circuit and others abounds with cases holding remedies unavailable based on officials' representations about the grievance process—true or untrue, innocent or malicious. *See Nunez*, 591 F.3d at 1226 (relying on warden's "erroneous citation," "innocent or otherwise"); OB 26-27, 34-36

(collecting cases). Mr. Strizich's case falls within the heartland of this caselaw.

Nonetheless, Defendant Palmer appears to argue that this jurisprudence is inapplicable where the evidence of officials' misrepresentations of the grievance process comes from an incarcerated plaintiff's sworn statement under penalty of perjury. AB 26. He attributes this Court's reliance on such declarations to hold remedies unavailable in *Williams v. Paramo*, 775 F.3d 1182, 1191-92 (9th Cir. 2015), and *Albino*, 747 F.3d at 1175-76, simply to defendants' failures to raise hearsay objections. He is mistaken. Even courts directly confronted with the hearsay argument *and* reviewing the exclusion of evidence for abuse of discretion have rejected Defendant Palmer's position out of hand. *E.g.*, *McIntosh v. Wexford Health Sources, Inc.*, 987 F.3d 662, 666 (7th Cir. 2021) (detainee affidavits were "not inadmissible hearsay because they were submitted not for their truth—not to prove as a matter of fact that [the plaintiff] would have to await the conclusion of the investigation before proceeding further with the grievance process—but instead to establish what [the officer] said and what effect his words may have had on [the plaintiff]"); *Stine v. U.S. Fed. Bureau of Prisons*, 508 F.

App'x 727, 729 (10th Cir. 2013) (prisoner affidavits about plaintiff's request for forms and officials' refusals to provide them were not hearsay because "they [we]re offered to prove that such exchanges took place").

For good reason. Defendant Palmer's hearsay argument falls decisively on the wrong side of well-entrenched principles recognizing the competency of declarations and affidavits as summary-judgment evidence and the transparent nonhearsay purpose of statements offered to prove the effect induced in the listener. OB 36-39. Plainly, Mr. Strizich's declaration under penalty of perjury about what he perceived—what he physically heard—is proper summary-judgment evidence. *E.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 666 (9th Cir. 2021); *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 846 (9th Cir. 2004).[4] And the Grievance

[4] Despite nominally recognizing the competency of declarations based on personal knowledge, *see* Fed. R. Civ. P. 56(c)(4), Defendant Palmer repeatedly misstates the hearsay issue as a question of whether the statements were made in the first place. *E.g.*, AB 24-25; *see also* ER-27-28, 182 (making the same argument to the district court). That is wrong. The correct inquiry is, and always has been, whether the Grievance Coordinator's statements, to which Mr. Strizich can competently testify based on his firsthand perception, are "offer[ed] in evidence to prove the truth of the matter asserted in the statement[s]." Fed. R. Evid. 801(c)(2); *see also McIntosh*, 987 F.3d at 666 (explaining this distinction).

Coordinator's representations to Mr. Strizich—most notably, that he "could not grieve officer Palmer's conduct because it was disciplinary related," ER-54—are properly offered for the nonhearsay purpose to establish the "effect on the listener," Mr. Strizich. *United States v. Payne*, 944 F.2d 1458, 1472 (9th Cir. 1991); 2 McCormick on Evidence § 249 (8th ed. 2022) ("A statement that D made a statement to X is not subject to attack as hearsay when its purpose is to establish the state of mind thereby induced in X ...."); *see also Orsini v. O/S Seabrooke O.N.*, 247 F.3d 953, 960 n.4 (9th Cir. 2001) (statements recited in plaintiff's summary-judgment affidavit were "not hearsay because they [we]re relevant to [plaintiff's] state of mind and the effects those statements had on him, not the truth of the matters asserted").

Defendant Palmer all but concedes error when he acknowledges that it "may be true" that the Grievance Coordinator's statements are admissible "to show why [Mr. Strizich] did not immediately file a grievance." AB 25. Correct. Mr. Strizich argued that before the district court that he did not file a grievance *because he was told not to* and because he *perceived* that to mean the prison would not process his

grievance (as in fact came true). ER-139, 143, 147; *see also* ER-124-30. It was therefore not hearsay.

Indeed, under both the Supreme Court's formulation in *Ross* that a grievance process is unavailable where a prison authority "disclaims the capacity to consider" certain grievances, *Ross*, 578 U.S. at 643, and this Court's repeated holding that remedies are exhausted once a prisoner is "reliably informed by an administrator that no remedies are available," *Fordley*, 18 F.4th at 367; *Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009); *Brown*, 422 F.3d at 935, the import of the Grievance Coordinator's disclaimer of the ability to process Mr. Strizich's disciplinary-related grievance lies in the fact that this representation was made to Mr. Strizich by "[t]he staff member assigned to administer, investigate, and respond to inmate grievances," ER-86. At any rate, Defendant Palmer's hearsay objections, even if valid, cannot negate Mr. Strizich's *other* evidence of thwarting: that the second Grievance Coordinator refused to process his grievance based on untimeliness. OB 33.

Defendant Palmer's last-ditch efforts to save his manifestly incorrect hearsay challenge—a waiver argument (at 25) and an invocation of policy (at 26)—are equally unavailing.

As stated above, this Court is appropriately cautious against reading waiver into a *pro se* litigant's papers. *See Thomas*, 611 F.3d at 1150. And Mr. Strizich's argument to the trial court on hearsay was reasonably responsive to Defendant Palmer's barebones *counseled* hearsay argument. Palmer's discussion of hearsay in the brief to which Mr. Strizich responded reads, in its entirety: "Strizich has never produced any non-hearsay evidence, either that any [Grievance Coordinator] told him he could not file a grievance, or of this supposed permission to file a late grievance." ER-182; *cf. Sandoval*, 985 F.3d at 665 (holding district court abused its discretion in sustaining defendants' "boilerplate one-word objections for 'relevance,' 'hearsay,' and 'foundation,'" and noting that the objections appeared to be "meritless, if not downright frivolous"). Accordingly, Mr. Strizich focused his attention principally on the Grievance Coordinator's statements, including the fact that Mr. Strizich's declaration evidencing these statements was undisputed. ER-143-44. Defendant Palmer should not be rewarded for

throwing out a citationless, "one-word objection[]," *Sandoval*, 985 F.3d at 665, where his *pro se* opponent argued that the challenged evidence is not hearsay and devoted most of his attention to what he reasonably understood to be the crux of the objection.

Finally contrary to Defendant Palmer's argument, AB 26, policy interests do not support upending black-letter law on summary judgment and the hearsay rule just to make it more difficult for incarcerated plaintiffs to have their day in court. The PLRA is not a blanket directive to rewrite procedural rules to exclude proper evidence simply because it might allow a prisoner to litigate a civil-rights claim on the merits. "[A]dherence to the PLRA's text runs both ways: The same principle applies regardless of whether it benefits the inmate or the prison." *Ross*, 578 U.S. at 640 n.1. Mr. Strizich, like any competent party, may give sworn testimony in support of his case, including testimony that prison officials steered him away from the grievance process and thereby rendered administrative remedies unavailable. That Defendant Palmer did not make even a minimal effort to dispute Mr. Strizich's account does not render Mr. Strizich's testimony suddenly improper. To the contrary, consideration of such evidence fulfills an instrumental role in ensuring

that prison officials do not manipulate and infringe prisoners' fundamental right of access to the courts. *See Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005).

In short, Defendant Palmer's (perhaps conceded) hearsay concerns are wide of the mark, and he makes no other meaningful arguments as to thwarting.

II. Mr. Strizich is entitled to summary judgment on exhaustion.

As explained in the opening brief, Defendant Palmer failed to create a genuine dispute of material fact in support of his exhaustion defense, despite the opportunity and incentive to do so. OB 40-45. The undisputed evidence reflects that the Inmate Grievance Program was not available to Mr. Strizich's retaliatory-false-report claim, and summary judgment in Mr. Strizich's favor on this issue is appropriate. *See Albino*, 747 F.3d at 1173-77.

Defendant Palmer fails to distinguish *Albino*. There, and here, the defendants failed to create a genuine dispute as to the facts contained in each plaintiff's declaration, which demonstrated that administrative remedies were not available. *Cf. id.* at 1175-76 (summarizing plaintiff's declaration, "without contradiction," that he received no orientation or

guidance on the complaint process or how to use it). Here, notably, Mr. Strizich's uncontradicted declaration that the Grievance Coordinator told him that he could not grieve his "disciplinary related" issue is corroborated by other officials' consistent refusals to process similar grievances about the conduct and reports underlying disciplinary or classification decisions.

Defendant Palmer asserts that *Albino* is different because Mr. Albino's undisputed testimony established "that defendants . . . failed to carry their initial burden of proving their affirmative defense that there was an available administrative remedy that Albino failed to exhaust." *Id.* at 1176. Palmer is twice mistaken. First, Mr. Strizich's case is just like *Albino* in that regard. On this record, Defendant Palmer failed "to prove that there was an available administrative remedy" for Mr. Strizich's claim. *Id.* at 1172. It is undisputed that prison officials told Mr. Strizich, both in the context of this specific claim and with respect to similar issues, that this type of claim was not grievable through the Inmate Grievance Program—to wit, the Program "was [not] an available administrative remedy" for that issue. *Id.*

In any event, Defendant Palmer bears "the ultimate burden of proof" to show that Mr. Strizich did not exhaust an *available* administrative remedy, *id.*, and he cannot meet that ultimate burden on this record. Looking to uncontradicted evidence, Mr. Strizich was at least thwarted from using the Inmate Grievance Program to grieve his retaliatory-false-report claim, if that was ever a possibility at all. Because Defendant Palmer failed to create a genuine dispute of material fact, Mr. Strizich is entitled to summary judgment on this issue, and Defendant Palmer should not be given a second bite of the apple. *Albino*, 747 F.3d at 1177; *see also Does 8-10 v. Snyder*, 945 F.3d 951, 967 (6th Cir. 2019).

CONCLUSION

For the foregoing reasons, 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.

Dated: October 11, 2023

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 4,812 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/ Devi M. Rao
Devi M. Rao

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 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/ Devi M. Rao
Devi M. Rao