No. 24-6240

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEJWAN SIMMS,

Plaintiff-Appellant,

v.

EDWARDS, Correctional Officer at North Kern State Prison; CORRECTION OFFICER #1,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of California, No. 1:22-cv-00028-BAM, Hon. Barbara McAuliffe

PLAINTIFF-APPELLANT'S REPLY BRIEF

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INTRODUCTION

Defendants denied Mr. Simms necessary medical care to treat life-threatening surgical complications, ignoring his pleas for help and obvious distress. Mr. Simms challenged that health care misconduct by filing a health care grievance. Challenging the denial of medical care through the health care grievance process was not only intuitively obvious—it was also fully consistent with applicable regulations, which say that the health care grievance process exists for prisoners to challenge actions that impact their health.

Despite that, Mr. Simms' health care grievance was rejected for supposedly being outside health care's jurisdiction. But the rejection notice did not say why that was counterintuitively so, and in fact told Mr. Simms that he could resubmit his complaint as a health care grievance. So Mr. Simms appealed the rejection, explaining, "this is medical jurisdiction and my claim is with medical[.] How is it not medical[?] Was never suppose[d] to let me leave the hospital like that[.] I was coughing up blood before we left the hospital[.] They knew something was wrong." ER-108 (capitalization altered). When the appeal was rejected with directions to resubmit an institutional-level health care grievance, Mr. Simms followed those directions too. But his resubmitted health care grievance was also rejected. Mr. Simms then filed a custody grievance, but by then it was too late. Under California's regulations, he could not exhaust administrative remedies through the

custody grievance process because, during the time he had repeatedly attempted to follow the prison's directions and utilize the health care grievance process, the deadline to file a custody grievance had passed.

Despite Mr. Simms' protracted efforts to grieve his dispute according to the applicable regulations and instructions from the prison, defendants argue that Mr. Simms' Eighth Amendment claims cannot be heard on the merits because he did not exhaust his administrative remedies. That is wrong. As Mr. Simms' persistent efforts to exhaust his administrative remedies demonstrate, the grievance procedures were not available to him for multiple reasons, including because his health care grievance was wrongly rejected on a basis unsupported by any regulation, the process for grieving defendants' misconduct was so confusing that no ordinary prisoner could navigate it, and prison staff affirmatively misled Mr. Simms by telling him his complaint involved a health care issue. As a result, the Prison Litigation Reform Act's exhaustion requirement does not apply.

Defendants do not show that administrative remedies were available to Mr. Simms despite the erroneous rejection of his health care grievance and the perplexing and unwritten rules the prison applied. Defendants assert, with no support, that Mr. Simms' complaint was outside of health care's jurisdiction simply because they are custody staff members. But they do not identify any regulation that says medical misconduct by custody staff cannot be the basis for a health care

grievance, because no such regulation exists. And defendants have no answer—and in fact are completely silent—regarding the multiple federal court decisions concluding that a health care grievance can be submitted regarding misconduct by custody staff. Defendants do not even address those cases.

With no regulation to support their position, defendants instead argue that Mr. Simms should have known his complaint was outside of health care's jurisdiction because, they claim, the prison told him so when it rejected his health care grievances. But in fact, the prison never explained why defendants' denial of medical care was not a health care issue. To the contrary, it told Mr. Simms he could resubmit his claim as a health care grievance if he explained the basis for health care jurisdiction. Mr. Simms reasonably did just that.

Finally, defendants contend that regardless of the erroneous rejection of his health care grievance and the baffling, unwritten rules that some health care issues actually cannot be grieved through the health care grievance process, Mr. Simms failed to exhaust administrative remedies because his appeal from the rejection of his untimely custody grievance was itself a few days late. That too is wrong. Administrative remedies are only available—and thus only need to be exhausted—if they are capable of providing relief. Because Mr. Simms reasonably spent months attempting to grieve defendants' denial of medical care through the health care grievance process—as the regulations and prison told him he could—he had no

opportunity to file a timely custody grievance. And after the deadline to file a custody grievance had passed, Mr. Simms could not use that process to obtain relief or exhaust his administrative remedies. Because the custody grievance process was not available, Mr. Simms was not required to exhaust it to bring this lawsuit.

ARGUMENT

A. The Improper Screening Of Mr. Simms' Health Care Grievance Rendered Administrative Remedies Unavailable

As explained in the opening brief, administrative remedies were not available to Mr. Simms because his medical grievance was rejected on a basis unsupported by applicable regulations. Opening.Br.23-26. Administrative remedies are unavailable if (1) the prisoner "actually filed a grievance or grievances that, if pursued through all levels of administrative appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court," and (2) "prison officials screened his grievance or grievances for reasons inconsistent with or unsupported by applicable regulations." *Sapp v. Kimbrell*, 623 F.3d 813, 823-24 (9th Cir. 2010). That rule applies here because Mr. Simms' health care grievance would have exhausted his administrative remedies if it had not been erroneously rejected as outside of health care's jurisdiction. Opening.Br.23-26. Neither of defendants' contrary arguments shows otherwise.

1. The rejection of Mr. Simms' health care grievance was unsupported by applicable regulations.

The prison wrongly rejected Mr. Simms' health care grievance for raising "issues outside the health care jurisdiction." ER-83. But Mr. Simms' health care grievance challenged defendants' unlawful denial of necessary medical care (ER-79-81), and no applicable regulation says that such a complaint cannot be raised as a health care grievance. To the contrary, the regulations provide that the health care grievance process is available for "complaints of applied health care policies, decisions, actions, conditions, or omissions that have a material adverse effect on [a patient's] health or welfare." Cal. Code Regs. tit. 15, § 3999.226(a).

Defendants do not and cannot identify any regulation authorizing the prison's rejection of Mr. Simms' health care grievance. They argue that Mr. Simms' "complaint against a custody officer was beyond health care's jurisdiction." Response.Br.23. But no regulation says that. To the contrary, the only two provisions defendants cite for this claim are consistent with Mr. Simms' conclusion: that a grievance challenging the denial of medical care is within health care's jurisdiction. The first provision merely says that "[t]he patient shall not submit a health care grievance for issues outside the health care jurisdiction." Cal. Code Regs. tit. 15, § 3999.226(a)(4) (cited at Response.Br.23). But that truism does not define what falls inside or outside "the health care jurisdiction," let alone that Mr. Simms' grievance fell outside it. The obvious fact that the Health Care

Grievance Office will not consider issues outside its jurisdiction does not establish that a grievance challenging the denial of medical care by custody staff is outside health care's jurisdiction or otherwise explain the contours of that jurisdiction.

The second provision is even less helpful to defendants: it defines the word "[p]atient" to mean "an incarcerated person who is seeking or receiving health care services." Cal. Code Regs. tit. 15, § 3999.225(t) (quoted at Response.Br.25). But that only supports that Mr. Simms' grievance *was* in health care's jurisdiction because he was unquestionably a "patient" under that definition; his grievance challenged defendants' refusal to provide him with the emergency medical care he told them he needed. ER-79.

Multiple federal court decisions interpreting the same regulations have reached the same conclusion: that complaints against custody staff for health care-related violations are properly brought as health care grievances. *Muhammad v. Orr*, No. 2:19-cv-01289-KJM, 2022 WL 362771, at *8 (E.D. Cal. Feb. 7, 2022); *Muhammad v. Orr*, No. 2:19-cv-01289-KJM, 2022 WL 4226246, at *1 & n.1 (E.D. Cal. Sept. 13, 2022). Defendants have no answer to those decisions. Indeed, they fail to address them entirely.

Defendants also appear to contend that Mr. Simms' health care grievance was properly rejected because the *rejection notice* stated that his grievance was outside of health care's jurisdiction. Response.Br.23-24. But the rejection had to be

supported by applicable regulations, not just the prison's say-so. *Sapp*, 623 F.3d at 823-24. Like defendants, the prison's rejection notices did not cite any regulation supporting its view that Mr. Simms' grievance was outside of health care's jurisdiction. *See* ER-83 (citing the same regulation as defendants' brief). The prison cannot reject a prisoner's grievance based on new rules made up in response to a prisoner's complaint. *Contra* Response.Br.23-24.

Finally, defendants argue that Mr. Simms should have clarified whether his complaint was within health care's jurisdiction before filing it. Response.Br.24. But it is the prison's responsibility—not Mr. Simms'—to ensure the grievance procedure is clear enough to be "capable of use." *See Ross v. Blake*, 578 U.S. 632, 642 (2016).

2. The erroneous rejection of Mr. Simms' grievance rendered both the health care and custody grievance processes unavailable.

The unsupported rejection of Mr. Simms' health care grievance rendered the health care grievance process unavailable because it prevented him from obtaining a final disposition that would have exhausted administrative remedies. Opening.Br.23-24. Headquarters' level review would have "constitute[d] the final disposition on [Mr. Simms'] health care grievance and exhaust[ed] administrative remedies." Cal. Code Regs. tit. 15, § 3999.230(h); *see also* Cal. Code Regs. tit. 15, § 3999.226(g). The erroneous rejection also rendered the custody grievance process unavailable because by the time Mr. Simms' health care grievance was rejected, he

could not file a timely custody grievance that would exhaust his administrative remedies.

Defendants are incorrect that remedies remained available to Mr. Simms despite the erroneous rejection of his health care grievance. They rely primarily on two unpublished decisions, *Wilson v. Zubiate*, 718 F. App'x 479, 482 (9th Cir. 2017), and *Cortinas v. Portillo*, 754 F. App'x 525, 527 (9th Cir. 2018), which held that the erroneous rejection of a prisoner's grievance does not render administrative remedies unavailable if the prisoner could have but failed to appeal the improper rejection. Those decisions recognize that the mistaken screening of a prisoner's grievance does not render administrative remedies unavailable if the prisoner can still ask the prison to reconsider its screening decision. But as defendants acknowledge elsewhere, Mr. Simms *could not* appeal the rejection of his health care grievance. Response.Br.24; Cal. Code Regs. tit. 15, § 3999.234(b). The most he could do was resubmit the health care grievance at the institutional level, which he did to no avail. Cal. Code Regs. tit. 15, § 3999.234(b); ER-78. So, unlike in *Wilson* and *Cortinas*, there was no additional avenue for Mr. Simms to challenge the improper screening of his health care grievance.

Defendants suggest that *Wilson* and *Cortinas* apply because Mr. Simms could have filed a custody grievance despite the erroneous rejection of his health care grievance. Response.Br.21-22. That is wrong. The improper screening of

Mr. Simms' health care grievance rendered the custody grievance process unavailable because by the time Mr. Simms' health care grievance was wrongly rejected, it was too late for him to file a timely custody grievance. Opening.Br.32. When a prisoner cannot file a timely grievance, and the prison will not process an untimely grievance, "the grievance procedures, 'although officially on the books, [are] not capable of use to obtain relief'" and are therefore unavailable. *Rucker v. Giffen*, 997 F.3d 88, 93 (2d Cir. 2021) (quoting *Ross*, 578 U.S. at 642).

Because the prison rejected Mr. Simms' health care grievance only after the deadline to file a custody grievance had passed, the prison ensured he had no opportunity to file a timely custody grievance in lieu of the wrongly rejected health care grievance. Because the applicable regulations provide that an untimely custody grievance does not exhaust administrative remedies, the custody grievance process was unavailable to Mr. Simms. *Id.*; Cal. Code Regs. tit. 15, §§ 3486(m), 3487(a) (repealed 2022). The PLRA therefore did not require Mr. Simms to exhaust that process. *Rucker*, 997 F.3d at 92-93; *Ross*, 578 U.S. at 642. Defendants cite no authority suggesting that the erroneous rejection of a grievance that otherwise would have exhausted administrative remedies leaves administrative remedies available if the prisoner could have initially utilized an entirely separate process that was no longer available by the time the erroneous rejection occurs. Response.Br.21-22.

B. Administrative Remedies Were Unavailable Because The Process For Grieving Defendants' Denial Of Necessary Medical Care Was Opaque And Indiscernible

Even if defendants were correct that Mr. Simms' grievance was outside of health care's jurisdiction, administrative remedies would still be unavailable because the process for grieving custody staff's denial of necessary medical care is indiscernible and impossible to navigate. Administrative remedies are not available if the administrative scheme is "so opaque that it becomes, practically speaking, incapable of use." *Ross*, 578 U.S. at 643-44. That was the case here: no regulation explains—nor would it be clear to any prisoner, much less one with a learning disability—that a grievance that challenges the denial of necessary medical care somehow falls outside of health care's jurisdiction solely because the employee who denied medical care happened to work in the custody unit. The rejection notices the prison sent Mr. Simms also did not clarify why his grievance—which dealt entirely with health care issues—was somehow outside health care's jurisdiction. To the contrary, they told Mr. Simms that he could or should resubmit his complaint as a health care grievance.

1. No regulation states that the denial of medical care cannot be grieved as a health care grievance if the denial was caused by a custody staff member.

The process for grieving the denial of medical care when it is effectuated by a custody staff member is opaque because no regulation says (as defendants now

contend) that such a complaint must be filed solely through the custody grievance process and cannot be filed through the health care grievance process. Opening.Br.28-32. In fact, the regulations suggest the opposite by stating that the health care grievance process is available to challenge "complaints of applied health care policies, decisions, actions, conditions, or omissions that have a material adverse effect on [a patient's] health or welfare." Cal. Code Regs. tit. 15, § 3999.226(a). An ordinary prisoner would find the administrative scheme impossible to discern because there is no indication that a complaint like Mr. Simms'—which challenged actions that had adverse effects on his health—cannot be filed as a health care grievance. That rendered administrative remedies unavailable. *Ross*, 578 U.S. at 643-44.

Defendants misunderstand Mr. Simms' opacity argument as an additional contention "that the health care grievance rejection was improper because the regulations did not give [Mr. Simms] guidance as to the proper channel to grieve his issue." Response.Br.25. But opacity is an independent basis, distinct from improper screening, for finding administrative remedies unavailable. *Ross*, 578 U.S. at 643-44.

Regardless, none of defendants' arguments address Mr. Simms' showing that the applicable regulations were so "unknowable" "that no ordinary prisoner c[ould] make sense of what [they] demand[]." *Id.*; Response.Br.25-27. Defendants identify

no regulation saying that custody staff's denial of medical care cannot be grieved through the health care process. Response.Br.25-27. Nor do they address the two federal court decisions interpreting the health care grievance regulations, as Mr. Simms did, to encompass complaints concerning denials of medical care by custody staff. *Orr*, 2022 WL 362771, at *8; *Orr*, 2022 WL 4226246, at *1 & n.1. Defendants thus have no explanation for how an "ordinary prisoner" could divine a regulatory interpretation that has eluded multiple federal judges. *See Ross*, 578 U.S. at 643-44. Defendants argue only that the rejection notices gave Mr. Simms the guidance needed to navigate the grievance process. Response.Br.25. They did not—and in any event, those directions came too late. Opening.Br.32-36; *infra* pp. 14-18.

Defendants also claim that Mr. Simms seeks to revive a "special circumstances" exception to exhaustion rejected by the Supreme Court in *Ross*. Response.Br.25-26. Not so. Mr. Simms argues that administrative remedies were unavailable because the administrative scheme is so opaque that "no ordinary prisoner can make sense of what it demands." *Ross*, 578 U.S. at 643-44; Opening.Br.26-37. Although *Ross* rejected a judge-made "special circumstances" exception to the PLRA's exhaustion requirement, it recognized that the PLRA contains a "textual exception to mandatory exhaustion" with "real content." *Ross*, 578 U.S. at 642. The availability analysis must consider "whether there is something in [the prisoner's] particular case that made the existing and generally available

administrative remedies effectively unavailable to him." *Eaton v. Blewett*, 50 F.4th 1240, 1244-45 (9th Cir. 2022) (internal quotation marks omitted). That is why this Court has considered the specific guidance and explanations a prisoner received to assess whether the administrative scheme was opaque. *Peasley v. Spearman*, No. 18-56648, 2022 WL 2301992, at *1-2 (9th Cir. Jun. 27, 2022).

Defendants are thus mistaken when they suggest that *Ross* foreclosed consideration of whether the "guidance or explanation in [Mr. Simms'] particular case rendered administrative remedies unavailable to him." Response.Br.25-26. Regardless, Mr. Simms' opacity argument does not depend on the specific "guidance or explanation" he received. The administrative scheme here was opaque because the generally applicable California regulations governing health care and custody grievances would be indecipherable to an ordinary prisoner. Opening.Br.28-32. It is defendants who argue, incorrectly, that the rejection notices Mr. Simms received clarified the confusion. Response.Br.25.

Finally, defendants' effort to distinguish *Peasley* misses the key import of that decision. Response.Br.26-27. *Peasley* was an opacity case—it found administrative remedies unavailable because no ordinary prisoner could navigate the process for grieving misconduct by custodial staff involving a medical issue. *Peasley*, 2022 WL 2301992, at *2. That was so because, as in Mr. Simms' case, no guidance provided to prisoners explained whether their complaint fell within health care's or custody's

jurisdiction. *Id.* That the appeals offices themselves could not agree on the answer to that question simply confirmed that the absence of such guidance rendered the administrative scheme so opaque that no ordinary prisoner could navigate it. *Id.* Mr. Simms confronted the same problem—the regulations and rejection notices from the prison did not explain whether a grievance regarding custodial staff's denial of medical care fell within health care or custody's jurisdiction. Opening.Br.26-36.

2. The prison's rejection notices came too late, did not explain the opaque administrative scheme, and only further confused the issue.

a. By the time Mr. Simms received the rejection notices, it was too late for him to file a timely custody grievance.

The rejection notices Mr. Simms received in response to his health care grievance could not have rendered administrative remedies available because by the time Mr. Simms received those notices, it was too late to file a timely custody grievance. Opening.Br.32. Because an untimely grievance will be rejected and thus does not exhaust administrative remedies, Mr. Simms could not have exhausted administrative remedies through the custody grievance process based on the guidance contained in the rejection notices. Cal. Code Regs. tit. 15, §§ 3486(m), 3487(a) (repealed 2022). The indiscernible administrative scheme that led Mr. Simms to file his complaint as a health care rather than a custody grievance in the first instance thus rendered the custody grievance process unavailable to Mr. Simms. *Rucker*, 997 F.3d at 93.

Defendants attempt to escape this conclusion by blaming Mr. Simms for the notice's timing. Response.Br.27-28. They complain that Mr. Simms filed his health care grievance 27 days after they denied him crucial medical care, so when the Health Care Grievance Office responded four days later, the deadline to file a custody grievance had passed. Response.Br.27-28. But defendants cannot and do not dispute that Mr. Simms' health care grievance was timely under the applicable regulations. Cal. Code Regs. tit. 15, § 3999.227(b). Regardless, even if Mr. Simms had somehow submitted his health care grievance the very same day that defendants denied him medical care, the Health Care Grievance Office could have taken 45 days to respond—well past the 30-day deadline for a custody grievance. Cal. Code Regs. tit. 15, § 3999.228(i); Cal. Code Regs. tit. 15, § 3482(b) (repealed 2022). Defendants' failure to provide clear and timely guidance to Mr. Simms when he needed it—*before* filing his grievance—is what rendered administrative remedies unavailable.

Defendants are also incorrect to suggest that administrative remedies were still available to Mr. Simms when he received the first rejection notice because, if he had filed just "one day late," the Office of Grievances might have "excuse[d] his short tardiness." Response.Br.28. The regulations provide that a prisoner "shall submit" a custody grievance within 30 days; failure to do so means the grievance will be rejected. Cal. Code Regs. tit. 15, §§ 3487(a)(1), 3482(b) (repealed 2022).

Although there are exceptions to the normal deadline, there is no exception for grievances that are one day late. Cal. Code Regs. tit. 15, § 3482(b)(1)-(3) (repealed 2022). And defendants themselves argue that Mr. Simms' custody grievance appeal was properly rejected even though it was only a few days late. *E.g.,* Response.Br.20; ER-72. But, contrary to the hard and fast rule they argue must apply to Mr. Simms' appeal, defendants argue that the custody grievance process was somehow still available because it contained an unwritten exception for almost-timely initial submissions even after the deadline to file the grievance had passed. Response.Br.28.

Courts have rightly rejected similar arguments that administrative remedies remained available based on hypothetical exceptions to the prison's rules concocted for purposes of litigation. "Prison officials cannot defeat a prisoner's suit after hiding existing remedies by the simple expedient of saying that they would have forgiven the procedural noncompliance and entertained a late grievance." *Ramirez v. Young*, 906 F.3d 530, 539-40 (7th Cir. 2018). "If such a work-around were permissible, prisons could always defeat prisoner suits by announcing impossible procedural hurdles beforehand and then, when they are sued, explaining that they would have waived the requirements for the plaintiff." *Id.* at 539 (internal quotation marks omitted). So, if a prisoner cannot file a timely grievance because the

grievance procedures are indiscernible, the grievance process is unavailable, even if the prison later claims it might have accepted the untimely filing. *Id.* at 539-40.

It is therefore irrelevant that Mr. Simms' custody grievance was submitted months rather than days after the deadline. *Contra* Response.Br.28. Because the custody grievance process was unavailable and did not need to be exhausted at all, the fact that Mr. Simms' custody grievance was *more* untimely than it could have been does not affect the exhaustion inquiry. *See Rucker*, 997 F.3d at 94. In any event, the delay is attributable to the months Mr. Simms reasonably spent trying to grieve the denial of necessary medical care through the health care grievance process. His custody grievance was filed only after he had received multiple rejection notices from the prison, spread over the course of months, that directed him to resubmit his complaint to the Health Care Grievance Office. Opening.Br.8-11. Only the last rejection notice, which Mr. Simms received months after the custody grievance deadline had passed, even attached a "green CDCR 602 (for custody issues)." ER-78.

Finally, defendants argue that even though Mr. Simms' untimely custody grievance would necessarily be rejected, administrative remedies remained available because he could appeal the rejection. That too is incorrect. Administrative remedies are not available—and thus need not be exhausted—if they are not "capable of use to obtain some relief for the action complained of." *Ross*, 578 U.S.

at 642 (internal quotation marks omitted). The grievance process is not capable of use to obtain relief if it is not possible to file a timely grievance the prison would accept. *Rucker*, 997 F.3d at 93. Once the administrative scheme's opacity prevented Mr. Simms from filing a timely custody grievance, that process—including the possibility of appeal—was unavailable, and Mr. Simms was not required to exhaust it. *See Ramirez*, 906 F.3d at 539-40 (no need for prisoner to exhaust administrative remedies by filing untimely grievance after being informed of grievance procedures). That is not a "futility" argument but a straightforward application of the PLRA's exhaustion requirement, which applies only to administrative remedies that are available. *Ross*, 578 U.S. at 642*; contra* Response.Br.28-29.

b. The rejection notices did not explain how Mr. Simms should grieve staff misconduct related to medical care.

Regardless, the rejection notices Mr. Simms received were themselves opaque and confusing because they never explained why Mr. Simms' health care-related grievance was outside of health care's jurisdiction or that he needed to submit the health care-related complaint as a custody grievance. Instead, the notices compounded the confusion by suggesting that Mr. Simms could resubmit his health care grievance with an explanation of the basis for health care jurisdiction.

Defendants contend that the responses were "clear" and "unambiguous[]" that Mr. Simms needed to submit his complaint as a custody grievance but, tellingly, they never quote the notice's actual language. Response.Br.29-30. The first notice said

that Mr. Simms' grievance was being "rejected for the following reason(s)": "**Not Health Care Jurisdiction**: California Code of Regulations, Title 15, Section 3999.226(a)(4) states, 'The grievant shall not submit a health care grievance for issues outside the health care jurisdiction.'" ER-83 (original emphasis). The notice went on to say, "Your concerns regarding custody staff should be addressed through the appropriate custody channels or explain why you believe this issue is within the health care jurisdiction." ER-83. Far from being "clear" and "unambiguous" (Response.Br.29), this notice failed to explain why Mr. Simms' grievance was outside health care's jurisdiction and even directed him to resubmit the grievance to the Health Care Grievance Office. The other two notices were similar. ER-78; ER-85.

As any ordinary prisoner would have, Mr. Simms understood those notices to give him two options—*either* resubmit the health care grievance, explaining why the issue was within health care's jurisdiction, *or* submit a custody grievance. Defendants suggest that the notices were clear that the custody grievance process was the only appropriate channel, and that Mr. Simms therefore should have known that he could not really resubmit a health care grievance notwithstanding the stated option to do so, because the notices stated that his complaint was outside of health care's jurisdiction. Response.Br.29-30. But no notice or any other guidance explained why the denial of medical care fell outside health care's jurisdiction when

it happened to be by custody staff. Mr. Simms thus reasonably believed that resubmission as a health care grievance was a viable option—one the notices explicitly gave him. Indeed, he had no other choice because it was, by then, too late to file a timely custody grievance that would exhaust his administrative remedies. *Supra* pp. 14-18. He thus submitted a healthcare grievance appeal, and, after this appeal was rejected, resubmitted his initial health care grievance, explaining that his complaint was within health care's jurisdiction because defendants denied him necessary emergency medical care. ER-80. The rejection notices failed to explain, as defendants now contend, that Mr. Simms actually had only one viable option—to submit a custody grievance.

3. The district court erred by failing to consider whether Mr. Simms' learning disability rendered administrative remedies unavailable.

The complete lack of guidance in the regulations and affirmatively confusing language in the rejection notices, which would have rendered the administrative scheme indecipherable for any ordinary prisoner, were especially perplexing to Mr. Simms, who has a learning disability. Opening.Br.36-37. To determine whether administrative remedies were available, the district court was required to assess whether "the relevant administrative procedures were explained in terms intelligible to lay persons," and "also account for individual capabilities." *Ramirez*, 906 F.3d at 535 (internal quotation marks omitted); *Eaton*, 50 F.4th at 1245. As defendants

do not dispute, that analysis needed to account for the possibility that "mental or intellectual impairment can make a grievance process . . . unavailable." *Smallwood v. Williams*, 59 F.4th 306, 319 (7th Cir. 2023). Defendants also do not dispute that Mr. Simms has a learning disability or that it would impact his ability to parse the applicable regulations and rejection notices. Response.Br.30-32.

Defendants instead respond with the irrelevant argument that the evidence did not show that the prison violated California regulations intended to ensure effective communication with inmates. Response.Br.30-32. That argument misses the mark. Mr. Simms' undisputed learning disability could render administrative remedies unavailable regardless of whether the prison violated the applicable California regulations. Either way, the *district court* was required to consider Mr. Simms' learning disability and whether it would have made the already indecipherable regulations and rejection notices even more opaque. *Ramirez*, 906 F.3d at 535; *Eaton*, 50 F.4th at 1245.

The record evidence showed that it would have, even if, as defendants argue, the prison was not required to accommodate Mr. Simms' disability until it was formally documented in his file. ER-38; ER-143. Mr. Simms submitted prison documentation, dated May 14, 2021, stating that he was "listed as Learning Disabled." ER-143. It is an obvious, and certainly reasonable, inference from that evidence that Mr. Simms had that same learning disability when he filed his original

health care grievance just a few months earlier. That learning disability would have made the indecipherable administrative scheme here even more opaque. At a minimum, the district court was required to draw those inferences in Mr. Simms' favor on summary judgment. *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014). It failed to do so.

C. Mr. Simms' Evidence And Argument Supported The Reasonable Inference That Prison Officials Thwarted His Attempt To Grieve Defendants' Misconduct

Even assuming that Mr. Simms' complaint about the denial of medical care had to be submitted as a custody grievance, prison officials thwarted Mr. Simms' efforts to grieve by telling him to submit his complaint as a health care grievance. Opening.Br.37-38; *Ross*, 578 U.S. at 644.

The evidence supported a reasonable inference that prison staff thwarted Mr. Simms' attempt to grieve. Mr. Simms stated in his March 19, 2021 appeal: "I submit[t]ed my claim on time[.] It was not my fault[.] I did not know that it was a custody issue[.] I was told that it was a health care issue[.]" ER-93. Although he did not specify who "told" him it "was a health care issue," the most obvious inference—and the one the district court was required to draw at summary judgment—was that it was a prison staff member. Defendants speculate that Mr. Simms might have instead been "told" his complaint involved "a health care issue" by another prisoner. Response.Br.32-33. While that is one inference that

could be drawn from the evidence, it is not the only one, nor is it necessarily the most plausible. Mr. Simms' statement that he was "told" his complaint involved a health care issue suggests the statement came from a person in a position of authority, and it is more likely that Mr. Simms would have gone to such a person—not a fellow prisoner—to clarify the confusing grievance procedures. The rejection notices do not defeat that inference. *Contra* Response.Br.33. If prison staff affirmatively misdirected Mr. Simms' efforts to grieve, the later rejection notices would not have rendered administrative remedies available. *Supra* pp. 14-20. In any event, at summary judgment, all reasonable inferences must be drawn in Mr. Simms' favor. *Albino*, 747 F.3d at 1168.

Defendants misstate the law when they suggest that only "machination, misrepresentation, or intimidation" could constitute thwarting that would render administrative remedies unavailable. Response.Br.33. As this Court has recognized, a prison official's "innocent mistake" about the correct grievance procedures may render administrative remedies unavailable when it sends a prisoner on a "wild goose chase." *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010). A showing of "bad faith or deliberate obstruction" is not required. *Id.*; *see also Eaton*, 50 F.4th at 1245-46 (finding that delay in processing grievance thwarted prisoner's attempt to grieve without considering whether delay reflected bad faith). So even if Mr. Simms received misleading advice from a prison staff member who was

genuinely (but understandably) confused by the confounding scheme for grieving medical misconduct by custody staff—as multiple federal judges have likewise been—that would still constitute thwarting.

Finally, defendants' argument that Mr. Simms failed to raise his thwarting argument below is meritless. Response.Br.32. Mr. Simms adequately preserved this argument in his opposition to summary judgment. He argued that he reasonably understood his complaint should be submitted as a health care grievance (ER-35) and referenced the grievance (attached to defendants' motion for summary judgment) that explained he had been told his complaint involved "a health care issue" (ER-36, referencing ER-93-96). That was sufficient to preserve the argument, especially in light of the liberal construction afforded "motion papers and pleadings filed by *pro se* inmates." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010).

D. Mr. Simms' Untimely Appeal From The Rejection Of His Custody Grievance Does Not Demonstrate Failure To Exhaust

Although Mr. Simms did not file a timely appeal from the rejection of his custody grievance, that does not show that he failed to exhaust available administrative remedies for two reasons. First, as previously explained, Mr. Simms was not required to exhaust administrative remedies that were unavailable. The custody grievance process was not available because the erroneous rejection of Mr. Simms' health care grievance, the opaque administrative scheme, and/or the affirmative misdirection from prison staff prevented him from filing a timely

custody grievance that could exhaust his administrative remedies. Because that process was not available, the PLRA did not require its exhaustion. *Supra* pp. 8-9, 14-18. Thus, contrary to defendants' arguments, the timeliness of Mr. Simms' appeal is irrelevant. Response.Br.29.

Second, and independently, Mr. Simms reasonably believed that he did not need to appeal the rejection of his custody grievance because his complaint was being investigated. Opening.Br.40-42. Defendants' argument that Mr. Simms' failed to preserve this argument fails here, too. *Contra* Response.Br.34. Mr. Simms' opposition to summary judgment emphasized the language in the rejection notice stating that "an inquiry only!! will be conducted," followed by citation to legal authority for the proposition that if "there is no possibility of any further relief, the prisoner's duty to exhaust available administrative remedies is complete." ER-35 (capitalization altered, original emphasis). That was sufficient to preserve this argument, especially given the liberal construction afforded to pro se prisoners' filings. *Ponder*, 611 F.3d at 1150.

Mr. Simms reasonably believed that his complaint was being investigated internally and that therefore no appeal was necessary. The rejection notice stated that although Mr. Simms' grievance was rejected as untimely, "due to you [*sic*] allegation of staff misconduct, an inquiry only will be conducted." ER-77. As this Court held on similar facts in *Brown v. Valoff*, which defendants do not address, it

was reasonable to conclude that the promise to investigate the complaint indicated that it was being addressed and that no further action was needed by Mr. Simms to exhaust his administrative remedies. 422 F.3d 926, 937-40 (9th Cir. 2005); Opening.Br.41-42.

CONCLUSION

This Court should reverse the district court's grant of summary judgment and remand for further proceedings.

Dated: June 17, 2025

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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