No. 22-6495

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WEBSTER DOUGLAS WILLIAMS, III,

Plaintiff-Appellant,

v.

MICHAEL CARVAJAL,

Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of North Carolina
No. 5:20-ct-03189-FL
Hon. Louise Wood Flanagan

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INTRODUCTION

The question here is simple: Does the Prison Litigation Reform Act ("PLRA") require Mr. Williams, an incarcerated plaintiff with disabilities, to exhaust both the internal prison grievance procedure and the Department of Justice's Office for Equal Employment Opportunity complaint process ("EEO process") before bringing suit under the Rehabilitation Act?

Supreme Court precedent says no. The PLRA's legislative history and intent say no. And, when construing the PLRA consistently with the Rehabilitation Act and the Constitution, the answer is an even more resounding no. Incarcerated plaintiffs with disabilities seeking to enforce their rights under the Rehabilitation Act must do only what any other plaintiff must do: exhaust the internal prison grievance procedure, and nothing more.

Defendant Carvajal's response is most notable for what he does not say. Carvajal does not argue that Supreme Court precedent mandates exhaustion of administrative processes beyond a prison's grievance procedure, because he can't. He does not argue that the PLRA's text or legislative history demonstrates that incarcerated

plaintiffs must exhaust multiple administrative procedures, because he can't. And he does not meaningfully argue that a double-exhaustion requirement for incarcerated plaintiffs with disabilities, but no one else, is permissible under the Rehabilitation Act, because he can't.

In fact, it is unclear what rule Defendant Carvajal asks this Court to adopt. He may seek a ruling that the PLRA requires incarcerated plaintiffs with disabilities to exhaust both the EEO process and prison grievance procedures. Or perhaps the sky is the limit, and the PLRA requires incarcerated plaintiffs to exhaust "any" and "all" conceivable administrative remedies—state and federal—before filing suit.

Either way, Defendant Carvajal's rules "are not required by the PLRA," and "crafting and imposing them exceeds the proper limits on the judicial role." *Jones v. Bock*, 549 U.S. 199, 203 (2007). This Court should reject Defendant Carvajal's arguments and reverse the judgment of the district court.

ARGUMENT

I. The PLRA Requires Incarcerated Plaintiffs To Exhaust Only Internal Administrative Remedies.

The PLRA provides, "No action shall be brought . . . by a prisoner . . . until such administrative remedies as are available are exhausted."

42 U.S.C. § 1997e(a). The term "administrative remedies" is undefined; therefore, the Court must look to Supreme Court interpretation and legislative history when interpreting the statute.[1] Both compel the conclusion that the PLRA mandates exhaustion only of internal prison grievance procedures. Accordingly, once a plaintiff exhausts a prison's grievance procedure, as set forth in the institution's grievance policy, the exhaustion requirement is met. *See Jones*, 549 U.S. at 218.

Here, the district court found that Mr. Williams successfully exhausted the Bureau of Prison's ("BOP's") grievance procedure. JA95. The district court also found that the BOP grievance policy "does not mention the EEO procedure for disability claims[.]" JA96. The district court therefore erred when it dismissed Mr. Williams' Rehabilitation Act claims for failure to exhaust the EEO process—a second, external process applicable only to plaintiffs with disabilities.

[1] The Supreme Court routinely looks to legislative history and intent when interpreting the PLRA. *See, e.g.*, *Ross v. Blake*, 578 U.S. 632, 640-41 (2016); *Porter v. Nussle*, 534 U.S. 516, 527-28 (2002); *Booth v. Churner*, 532 U.S. 731, 740 (2001).

A. Binding Precedent Provides That The PLRA Requires Only The Exhaustion Of Internal Administrative Remedies.

The Supreme Court's directives are clear: "Compliance with prison grievance procedures . . . is all that is required by the PLRA to 'properly exhaust.'" *Jones*, 549 U.S. at 218 (rejecting argument that plaintiff must meet exhaustion requirements not contained in the grievance policy). Therefore, incarcerated plaintiffs must administratively exhaust "in accordance with the applicable procedural rules—rules that are defined not by the PLRA, but by the prison grievance process itself." *Id.* at 218 (citation and quotation marks omitted).

Courts of Appeals, including this one, similarly have limited the PLRA's exhaustion requirement to those procedures contained in a facility's grievance policy. *See Moore v. Bennette*, 517 F.3d 717, 726 (4th Cir. 2008) (rejecting argument that plaintiff must name defendants in grievance when grievance policy had no such requirement); *Jenkins v. Morton*, 148 F.3d 257, 260 (3d Cir. 1998) (rejecting contention that PLRA requires exhaustion of judicial remedies in addition to prison grievance procedures). *See also Alexander v. Hawk*, 159 F.3d 1321,

1326-27 (11th Cir. 1998) (holding that "available" remedies means prison administrative remedies).

Yet Defendant Carvajal argues that *Jones* did not mean what it said. He suggests that under *Jones*, incarcerated litigants must comply not only with prison grievance procedures, but also with any number of other potentially applicable administrative procedures not mentioned in a prison's grievance policy. *See* Resp. Br. at 32.[2] This argument runs headlong into the Supreme Court's own language: where a prison's policy make "no mention" of a requirement, a court's "rule imposing such a prerequisite to proper exhaustion is unwarranted." *Jones*, 549 U.S. at 218.

Defendant Carvajal also attempts to sidestep this Court's binding precedent in *Moore*, but again falls short. *Moore*, applying the bright-line rule from *Jones*, squarely rejected an attempt, like that here, to impose exhaustion requirements beyond those found in the prison's grievance procedure. *See* 517 F.3d at 726.

[2] Page citations to briefing before this Court are to the page numbers assigned by the ECF system.

Finally, Defendant Carvajal relies on a series of district court decisions to support his argument that the PLRA requires exhaustion of the EEO process. These cases are uniformly unpublished district court opinions and all but two were litigated by pro se plaintiffs. They run counter to the legal reasoning of *Jones* and *Moore* and are unpersuasive.

Decisions from pro se litigation are "not controlling[,]" even within their own jurisdiction, particularly where pro se plaintiffs have not developed a record or effectively opposed defendants' arguments. *Garner v. Kennedy*, 713 F.3d 237, 244 (5th Cir. 2013). Courts deciding those cases may not have the benefit of fulsome briefing. And courts face an even greater disadvantage when addressing matters, like those here, involving complex issues of law and statutory interpretation.[3]

[3] Further, many of these cases relied on questionable authority, or no authority at all, for the erroneous conclusion that incarcerated plaintiffs with disabilities must exhaust the EEO process. *See , e.g.*, *Wise v. C. Maruka*, No. 1:20-00056, 2021 WL 1603819, at *11 (S.D.W.Va. Jan. 5, 2021), *report and recommendation adopted*, No. 1:20-00056, 2021 WL 1146002 (S.D.W.Va. Mar. 25, 2021) (erroneously relying on *O'Guinn v. Lovelock Corr. Ctr.* for the proposition that the PLRA requires exhaustion of the EEO process, when *O'Guinn* held no such thing); *Elliott v. Wilson*, No. 0:15-cv-01908, 2017 WL 1185213, at *14 (D. Minn. Jan. 17. 2017) (same); *Seina v. Fed. Det. Ctr.-Honolulu*, No. 16-00051, 2016 WL 6775633, at *5 (D. Haw. Nov. 15, 2016) (providing no reasoning or authority for assumption that PLRA requires exhaustion of EEO process).

The two counseled cases cited by Defendant Carvajal fare no better. In one, Carvajal relies on a portion of a magistrate judge's recommendation that was not adopted by the district court. Resp. Br. at 28 (citing *Washington v. Fed. Bureau of Prisons*, No. 5:16-CV-03913-BHH-KDW, 2019 WL 2125246, at *7-8 (D.S.C. Jan. 3, 2019), *report and recommendation adopted in part*, No. 5:16-CV-3913-BHH, 2019 WL 1349516 (D.S.C. Mar. 26, 2019); *Washington v. Fed. Bureau of Prisons*, No. 5:16-CV-3913-BHH, 2019 WL 1349516, at *11 (D.S.C. Mar. 26, 2019) (adopting the magistrate judge's report "with the exception of section III.A.2. ('Exhaustion of RA Claims')").

The second, *William G. v. Pataki*, is inconsistent with other courts in its own jurisdiction, undermining its utility. *Compare William G. v. Pataki*, No. 30-cv-8331, 2005 WL 1949509, at *6 (S.D.N.Y Aug. 12, 2005) (concluding that the PLRA requires exhaustion of the EEO process) *with Veloz v. New York*, 339 F. Supp. 2d 505, 519 (S.D.N.Y. 2004), *aff'd*, 178 F. App'x 39 (2d Cir. 2006) (relying on Supreme Court precedent and legislative intent to conclude that incarcerated plaintiffs need not exhaust disability claims through external processes); *Degrafinreid v. Ricks*, No. 03 CIV. 6645 (RWS), 2004 WL 2793168, at

*14 n.10 (S.D.N.Y. Dec. 6, 2004) (holding PLRA does not require disability claims to be exhausted through external processes); *Shariff v. Artuz*, No. 99 CIV. 0321 (DC), 2000 WL 1219381, at *3 (S.D.N.Y. Aug. 28, 2000) (same).[4]

Defendant Carvajal asks this Court to ignore binding precedent from *Jones* and *Moore*, and instead adopt the abbreviated and faulty analysis in these nonbinding opinions. This Court should decline to do so.

B. Legislative History And Intent Provide That The PLRA Requires Only The Exhaustion Of Internal Administrative Remedies.

The PLRA's legislative history is also clear: Congress intended the PLRA to require only the exhaustion of internal prison grievance procedures. *See, e.g.*, *Rumbles v. Hill*, 182 F.3d 1064, 1070 (9th Cir. 1999) (reviewing legislative history and holding that Congress intended "administrative remedies" to mean internal prison grievance procedures), *overruled on other grounds*, *Booth v. Churner*, 532 U.S. 731

[4] The Second Circuit has not resolved this intra-district split because in 2005 the New York Department of Corrections withdrew the EEO exhaustion defense "in any pending litigation" and asserted it did "not now intend to assert the defense in any such future litigation." *Rosario v. Goord*, 400 F.3d 108, 109 (2d Cir. 2005).

(2001); *Jenkins*, 148 F.3d at 260 (holding that Congress did not intend the PLRA to require exhaustion of the state judicial system); *Alexander*, 159 F.3d at 1326-27 (holding that Congress intended "available" remedies under the PLRA to mean prison administrative remedy programs). *See also* Op. Br. at 33-39 (collecting legislative history).

Defendant Carvajal points to no legislative history that supports his preferred interpretation of the PLRA. (Indeed, there is none.) He suggests, however, that *Rumbles* is irrelevant. Resp. Br. at 34 n.9. To the contrary, the Ninth Circuit's analysis is directly on point.

Rumbles considered the question at issue here: whether the PLRA requires exhaustion of external administrative remedies in addition to a prison's internal grievance procedure. The court determined that the "language of the PLRA, as well the language of the pre-PLRA version of section 1997e, indicates that Congress had internal prison grievance procedures in mind when it passed the PLRA" and that "the statutory phrase 'administrative remedies' refers exclusively to prison grievance procedures." *Rumbles*, 182 F.3d at 1069, 1070.[5]

[5] Defendant Carvajal also implies that, following *Rumbles*, the Ninth Circuit held that incarcerated plaintiffs with disabilities must exhaust the EEO process. Resp. Br. at 34 n.9 (citing *O'Guinn v. Lovelock Corr.*

Defendant Carvajal also argues that requiring exhaustion of the external EEO process furthers the legislative goals of administrative exhaustion. Resp. Br. at 33. Not so. The two primary purposes of administrative exhaustion are promoting administrative agency authority and efficiency. *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006). The PLRA's exhaustion requirement is intended to "allow[] a prison to address complaints about the program it administers before being subjected to suit, reduc[e] litigation to the extent complaints are satisfactorily resolved, and improv[e] litigation that does occur by leading to the preparation of a useful record." *Jones*, 549 U.S. at 219. These goals are disserved by a requirement that incarcerated plaintiffs use a second, external remedial process.

Ctr., 502 F.3d 1056, 1061 (9th Cir. 2007)). That is inaccurate. *O'Guinn* considered only "whether the PLRA requires prisoners to exhaust available administrative remedies before bringing claims under [federal disability rights laws]." *O'Guinn*, 502 F.3d at 1058. That question is not contested here. *O'Guinn* did not consider whether plaintiffs with disabilities must exhaust both internal prison grievance procedures and the EEO process. To the extent that *O'Guinn* is applicable, however, it supports the conclusion that the PLRA requires only the exhaustion of internal prison grievance procedures. *See id.* at 1061-62 ("[W]e interpret § 1997e(a) as requiring prisoners **to exhaust prison administrative remedies** for claims under [federal disability rights laws.]" (emphasis added)).

First, Congress enacted the PLRA's exhaustion provision to "afford[] *corrections officials* time and opportunity to address complaints *internally* before allowing the initiation of a federal case." *Porter*, 534 U.S. at 525 (emphasis added). The BOP's grievance process does just that. But the EEO process takes complaints out of corrections officials' hands and gives them to an outside entity to investigate and adjudicate.

Second, the goal of efficiency—including reducing the amount of litigation and improving litigation that occurs—is undermined by requiring exhaustion of two administrative procedures managed by two different entities. *See Cent. Tel. Co. of Va. v. Sprint Commc'ns Co. of Va.*, 715 F.3d 501, 515 (4th Cir. 2013) (holding that an exhaustion requirement's goal of efficiency is "disserved" by requiring disputes to be "considered by multiple [entities] with the attendant risk of disparate interpretations and dispositions"). A double-exhaustion requirement involves a second, redundant investigation of the complaint, consumes the resources of a second entity, and adds more than a year of administrative wrangling to the process—not exactly the picture of efficiency. Indeed, this Court has held that incarcerated plaintiffs need not "file multiple, successive grievances raising the same

issue" because "once a prison has received notice of, and an opportunity to correct, a problem," the purpose of exhaustion under the PLRA is satisfied. *Wilcox v. Brown*, 877 F.3d 161, 167 n.4 (4th Cir. 2017) (quoting *Turley v. Rednour*, 729 F.3d 645, 650 (7th Cir. 2013)).

Moreover, Defendant Carvajal's rule would result in (even more) protracted litigation over exhaustion in nearly every case brought by an incarcerated plaintiff, requiring significant judicial resources. This very appeal is case in point. And under Defendant Carvajal's rule that "any" and "all" administrative remedies must be exhausted, courts would have to consider a limitless universe of potential remedies, evaluating in each case whether those remedies are required and available under the PLRA. *See* Resp. Br. at 32 (suggesting that exhaustion involves any remedy created by "the prison system, the state government, or the federal government"); Op. Br. at 55 n.10 (collecting administrative remedies that could be argued to apply to incarcerated plaintiffs' civil rights claims).

In short, Defendant Carvajal asks this Court to adopt a view of the PLRA that is inconsistent with congressional intent and defeats the statute's core goals. The Supreme Court has rejected this reckless

approach to statutory construction. *See, e.g.*, *King v. Burwell*, 576 U.S. 473, 494 (2015) (rejecting "implausible" interpretation of the Affordable Care Act that would undermine Congress's goal of expanding access to affordable health insurance). This Court should do the same.

C. This Court Must Interpret The PLRA Consistently With Federal Disability Rights Laws And The Constitution.

The district court's interpretation of the PLRA places unequal burdens on incarcerated plaintiffs with disabilities seeking to enforce their rights in federal court. This interpretation runs afoul of federal disability rights laws and the constitutional right of access to the courts and must be rejected.

First, this Court must construe the PLRA "harmoniously" with the Rehabilitation Act. *See Anderson v. Fed. Deposit Ins. Corp.*, 918 F.2d 1139, 1143 (4th Cir. 1990). But requiring incarcerated plaintiffs with disabilities bringing Rehabilitation Act claims to exhaust two sets of administrative remedies, when everyone else need only exhaust one, is precisely the type of disability-based discrimination that the Act prohibits. *See* 28 C.F.R. § 39.130(b)(1)(ii)-(iv) (prohibiting agencies from providing services to people with disabilities that are "not equal,"

"different or separate," or "not as effective" as services for those without disabilities).

The double-exhaustion requirement forces incarcerated plaintiffs with disabilities to navigate and complete a "different," "separate" and unequal process not applicable to their non-disabled peers. And it requires incarcerated plaintiffs with disabilities to wait at least an additional year before seeking judicial review of civil rights violations while those without disabilities can do so in 90 days. *Compare* 28 C.F.R. §§ 542.15, 542.18 (BOP grievance procedure timeframes) *with* 28 C.F.R. § 39.170 (EEO process timeframes). Accordingly, interpreting the PLRA to require plaintiffs with disabilities to exhaust a second process not applicable to anyone else conflicts with the Rehabilitation Act. Defendant Carvajal does not argue otherwise.[6]

[6] Carvajal addresses this argument only in a parenthetical supporting an unrelated proposition. *See* Resp. Br. at 38. This "passing shot" arguably amounts to waiver. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017). But even if not waived, any implied argument is unavailing. Defendant Carvajal simply quotes at length from an unpublished district court opinion, *Haley v. Haynes*, No. CV210-122, 2012 WL 112946 (S.D. Ga. Jan. 12, 2012). That opinion summarily held that the double-exhaustion requirement was not a "burden" on incarcerated plaintiffs with disabilities but "only a procedural step which must occur before bringing a cause of action in federal court." *Id.* at *1. This conclusion was not supported by any

Second, the PLRA must be construed to avoid conflict with the Constitution. *See Gomez v. U.S.*, 490 U.S. 858, 864 (1989). Requiring incarcerated plaintiffs with disabilities to doubly exhaust impedes meaningful access to the courts by requiring them to overcome additional procedural hurdles and delaying their ability to seek judicial relief by more than a year. *See Lewis v. Casey*, 518 U.S. 343, 353 (1996) (holding that prison officials may not frustrate or impede conditions of confinement claims).

Defendant Carvajal responds that a double-exhaustion requirement will "provide more *meaningful* access to the courts" because claims that survive the EEO process will be factually developed and have an investigative record which could be helpful to the reviewing court. Resp. Br. at 35 n.10 (emphasis in original). But this argument ignores the internal BOP grievance process, which is designed to meet those very goals. BOP staff are responsible for

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evidence or law. As discussed above, the double-exhaustion requirement is, in fact, a burden. And even if exhausting the EEO process is considered only a "procedural step," it is a step required *only* of plaintiffs with disabilities—a clear violation of the Rehabilitation Act. *See* 28 C.F.R. § 39.130(b)(1)(ii)-(iv). *Haley* did not engage with this analysis. It has no persuasive value.

receiving, recording, reviewing, investigating, and responding to grievances and appeals. *See* 28 C.F.R. § 542.11. By utilizing the internal BOP grievance process, as the PLRA requires, a Rehabilitation Act claim will be "factually developed and accompanied by an investigative record[,]" Resp. Br. at 35 n.10, just like any other claim. This process suffices for all other claims brought by incarcerated plaintiffs. Requiring exhaustion of additional procedures only for incarcerated people with disabilities bringing Rehabilitation Act claims is a redundant obstacle that frustrates and impedes access to judicial review.

II. This Court Need Not Consider Availability, But If It Does, The EEO Process Was Not Available To Mr. Williams.

The PLRA does not require exhaustion of the EEO process, so the Court need not consider whether it was "available" to Mr. Williams. But if the Court reaches the question, it should reverse.

First, Defendant Carvajal did not meet his evidentiary burden of proving the EEO process was available to Mr. Williams. The district court therefore erred when it failed to hold Carvajal to his burden. Defendant Carvajal impermissibly attempts to rehabilitate his case on appeal by presenting new evidence and arguments not before the

district court. The new evidence and arguments should be disregarded. *See First Nat'l Bank of North East v. Fockler*, 649 F.2d 213, 215-16 (4th Cir. 1981) ("This court cannot consider materials outside the record[.]").

Second, the EEO process was not available to Mr. Williams. The district court found that the BOP's grievance policy says nothing about it, JA96, and Mr. Williams was not otherwise informed of this requirement. Carvajal's new evidence and arguments, even if they could be considered at this stage, fail to overcome these deficiencies.

A. Defendant Carvajal Did Not Carry His Burden Of Proving That The EEO Process Was Available To Mr. Williams.

Exhaustion is an affirmative defense that a defendant must plead and prove. *Jones*, 549 U.S. at 216. The district court therefore erred when it failed to hold Defendant Carvajal to his burden, and instead improperly shifted the burden to Mr. Williams.

In a footnote, Defendant Carvajal briefly argues that the district court did not improperly shift this burden to Mr. Williams by requiring him to prove unavailability. Resp. Br. 40 n.12.[7] That is hard to square

[7] Defendant Carvajal also appears to misunderstand the argument. Mr. Williams does not contend that the district court turned exhaustion into a pleading requirement, but rather that the district court failed to require Defendant Carvajal to present sufficient evidence

with the district court's own words: "Plaintiff has not established that the EEO process is unavailable under [*Ross*]." JA96.

Defendant Carvajal also contends that he presented evidence on this point, and therefore carried his evidentiary burden. Resp. Br. at 40 n.12. But Defendant Carvajal only presented evidence of a failure to exhaust: a declaration stating that Mr. Williams did not initiate the EEO process. JA52. The question of failure to exhaust a remedy is distinct from whether that remedy was "available" in the first place. Prison officials must carry their burden on both elements to mount a successful defense under 42 U.S.C. § 1997e(a). *See Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc) ("[T]he defendant's burden is to prove that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy."); *see also Lanaghan v. Koch*, 902 F.3d 683, 690 (7th Cir. 2018) (holding that defendants "have not met their burden of establishing that a remedy

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demonstrating that the EEO process was "available" to Mr. Williams under the PLRA.

was available" when they "did not present evidence" that the plaintiff was aware of relevant requirements).[8]

All told, Defendant Carvajal offered *no* evidence before the district court that the EEO process was available to Mr. Williams. But now he seeks another bite at the apple, introducing new evidence and arguments not presented below. Resp. Br. at 40-43. Defendant Carvajal now relies on a BOP program statement regarding prisoners with disabilities that is not in the record.[9] But it is "well established" that evidence "not before the court in making its decision [is] not to be

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[8] Defendant Carvajal, citing *Moore* and *Custis v. Davis*, appears to suggest that this Court has a different rule, and "all that is required" is that plaintiffs have the opportunity to respond to a defendant's affirmative defense. Resp. Br. at 40 n.12. This suggestion misapprehends the law. Neither *Moore* nor *Custis* addressed a defendant's burden of proving the availability of administrative remedies. Indeed, the plaintiff in *Moore* did not argue unavailability, but rather that he had successfully exhausted. *See Moore*, 517 F.3d at 725. And *Custis* addressed only whether courts can *sua sponte* dismiss claims based on a failure to exhaust, holding it is appropriate only in "rare" circumstances. 851 F.3d 358, 361 (4th Cir. 2017).

[9] As discussed further below, even if this program statement could be considered, it is not sufficient to prove that the EEO process was available to Mr. Williams. There is no evidence that Mr. Williams had access to the program statement at the time he was required to exhaust administrative remedies.

considered on appeal." *Kaiser Aluminum and Chem. Corp. v. Westinghouse Elec. Corp.*, 981 F.2d 136, 140 (4th Cir. 1992). Defendant Carvajal's request for a do-over is improper, and this Court should disregard his belated evidence.

Defendant Carvajal did not carry his burden of proving that the EEO process was available to Mr. Williams. The district court's grant of summary judgment therefore was error. *See King v. McCarty*, 781 F.3d 889, 895-96 (7th Cir. 2015) (holding defendants not entitled to summary judgment when they failed to demonstrate the availability of administrative remedies), *overruled on other grounds by Henry v. Hulett*, 969 F.3d 769 (7th Cir. 2020) (en banc).

B. The EEO Process Was Not Available To Mr. Williams.

The PLRA only requires exhaustion of "available" administrative remedies. *Ross*, 578 U.S. at 642. And to be "available," a remedy must be "knowable." *Id.* at 648.[10] Here, as the district court found, the EEO

[10] Defendant Carvajal wrongly asserts that there are "only" three circumstances where administrative remedies may be unavailable. Resp. Br. at 36. *Ross* described three situations "as relevant" to that case, but did not purport to provide an exhaustive list. *See* 578 U.S. at 643. Indeed, every circuit court that has addressed the question has held that the three *Ross* scenarios constitute a non-exhaustive list of examples. *See Ramirez v. Young*, 906 F.3d 530, 538 (7th Cir. 2018);

process is not mentioned in the BOP's grievance policy. JA96. And the final step in that procedure is held out as the "final administrative appeal." 28 C.F.R. § 542.15(a). Further, there is no record evidence that Mr. Williams was otherwise informed of the EEO process. The EEO process therefore was not available to Mr. Williams, and he was not required to exhaust it.

Defendant Carvajal's arguments to the contrary fail. First, he relies almost entirely on evidence and arguments not before the district court. As discussed above, this Court does not consider evidence presented for the first time on appeal. And even if the Court considers this evidence, it does not change the outcome.

Second, where remedies are unknown or unknowable, they are unavailable. But Defendant Carvajal asks this Court to impose an affirmative obligation on incarcerated plaintiffs to investigate what unknown administrative remedies might exist. Such a rule flouts the PLRA and endorses the kind of "hiding the ball" behavior that federal courts have broadly condemned.

Andres v. Marshall, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam); *Williams v. Priatno*, 829 F.3d 118, 123 n.2 (2d Cir. 2016).

1. Defendant Carvajal's New Evidence And Arguments Still Fail To Demonstrate Availability.

For the first time in this litigation, Defendant Carvajal presents evidence of a BOP policy on the "Management of Inmates With Disabilities" that includes a reference to the EEO process. Resp. Br. at 41-42. He also argues for the first time that a document filed by Mr. Williams citing to an unrelated portion of that policy—about two years after he initiated the grievance process—demonstrates that the EEO process was available to him. Resp. Br. at 43.

As discussed above, Defendant Carvajal did not present this evidence or argument to the district court. Nor did the district court mention these documents in the order below. This Court's precedent precludes considering arguments and evidence raised for the first time on appeal. *See Kaiser Aluminum and Chem. Corp.*, 981 F.2d at 140; *First Nat'l Bank of North East*, 649 F.2d at 215-16. But even if the Court considers these items, summary judgment is still inappropriate.

Defendant Carvajal's new arguments misconstrue the standard for availability. To be available, an administrative remedy must be "knowable by an ordinary prisoner *in [the plaintiff's] situation*." *Ross*,

578 U.S. at 648 (emphasis added). This fact-specific inquiry must account for the time period in which exhaustion was required. *See Huskey v. Jones*, ---F.4th---, 2022 WL 3366309, at *4 (5th Cir. Aug. 16, 2022) (holding that 2019 staff reference to relevant grievance rules "does not demonstrate that [plaintiff] knew of the 2016 online handbook at the time that he filed his grievances [in 2016]" and denying summary judgement for non-exhaustion); *Goebert v. Lee County*, 510 F.3d 1312, 1322 (11th Cir. 2007) (remedies must be accessible "by the time they are needed").

For example, in *Goebert*, the Eleventh Circuit rejected the argument that the plaintiff's discovery of the relevant policy three years after attempts to grieve rendered remedies "available" to her. 510 F.3d at 1324. *Goebert* mirrors the facts here: The plaintiff grieved based on the information made available to her at the time. *Id*. After she sued, jail officials asserted that she failed to complete an appeals process, which was contained in a separate document not provided to the plaintiff until it was produced during litigation. *Id*. There, like here, remedies were therefore unavailable. *Id*. at 1323. The Supreme Court

endorsed *Goebert*'s reasoning. *Ross*, 578 U.S at 644 & n.3. Despite this, Defendant Carvajal does not even mention *Goebert*.

Accordingly, the question here is not whether Mr. Williams discovered a policy referencing the EEO process years after his injury. Rather, the question is whether the EEO process was knowable to Mr. Williams in 2019—and, again, Defendant Carvajal presented no evidence that Mr. Williams was informed of the EEO process at the time he was required to exhaust his administrative remedies. *See Huskey*, 2022 WL 3366309, at *4 ("[B]ased on the lack of record evidence that [plaintiff] was aware of the 2016 online handbook or that he had access to the internet at all, there is a genuine dispute of material fact as to whether [relevant grievance rule] was available to him."); *Goebert*, 510 F.3d at 1323 ("Having kept Goebert in the dark about the path she was required to follow, the defendants should not benefit from her inability to find her way.").[11] At most, Defendant

[11] Defendant Carvajal's suggestion that Mr. Williams' citation to 28 C.F.R. § 39.170 in his response to Defendant's Motion to Dismiss fails for the same reason—Mr. Williams' discovery of the regulations *after* Defendant Carvajal asserted the affirmative defense in this litigation does nothing to demonstrate that the procedure was available to him two years prior. *See Goebert*, 510 F.3d at 1324.

Carvajal has raised a genuine dispute of material fact rendering summary judgment inappropriate.

2. Failure To Inform Incarcerated Plaintiffs Of Administrative Remedies, Even Without Affirmative Staff Misconduct, Renders Remedies Unavailable.

When a remedy is "essentially 'unknowable'" then "it is also unavailable." *Ross*, 578 U.S at 644 (quoting *Goebert*, 510 F.3d at 1323). Thus, where prison officials fail to inform incarcerated plaintiffs of administrative remedies, they are not available. *See, e.g.*, *Huskey*, 2022 WL 3366309, at *3-4; *Goebert*, 510 F.3d at 1322-23.

Such a rule makes good sense. Prison officials who administer grievance systems are best positioned to inform prisoners of that system. Doing so benefits everyone involved, as prisoners will know how to raise problems for prompt resolution without the need for litigation—a core purpose of the PLRA. *See Ross*, 578 U.S. at 643 (noting "prisons' own incentives to maintain functioning remedial processes").

But Defendant Carvajal disclaims this basic obligation. In his view, incarcerated plaintiffs are entirely responsible not just for filing and exhausting grievances, but for discovering the *existence* of grievance procedures in the first place. Defendant Carvajal argues that no

evidence indicates that Mr. Williams asked about additional administrative remedies or that he was "deceived or misled." Resp. Br. at 40. This argument fails on two fronts.

First, nothing in the PLRA or binding precedent imposes such a requirement on plaintiffs. Indeed, case law points the other way: "Prisons must affirmatively provide the information needed to file a grievance. If it were otherwise a prison could shroud the prisoner in a veil of ignorance and then hide behind a failure to exhaust defense to avoid liability." *Ramirez v. Young*, 906 F.3d 530, 538 (7th Cir. 2018) (rejecting argument that plaintiff could have asked about the grievance procedure because "it was not his burden to do so" (quotation marks omitted)).

Nor must a plaintiff prove that he was intentionally deceived by prison staff. "[U]navailability extends beyond affirmative misconduct to omissions by prison personnel, particularly failing to inform the prisoner of the grievance process." *Hernandez v. Dart,* 814 F.3d 836, 842 (7th Cir. 2016) (quotation marks omitted). *See also Lanaghan*, 902 F.3d at 688 ("[A] grievance procedure can be unavailable even in the absence of affirmative misconduct.").

Defendant Carvajal also argues that the BOP grievance system "serves as means for inmates to seek relief or redress directly from the BOP, not as guidance to inmates seeking to file federal lawsuits." Resp. Br. at 41. Maybe so. But if BOP officials wish to assert a failure-to-exhaust defense once litigation is filed, the law requires them to make the remedies available in the first place. *See Ramirez*, 906 F.3d at 539 (noting that prison officials are free to "keep the prisoner in the dark about the grievance procedure . . . at the potential cost of forfeiting an exhaustion defense should litigation arise").

Finally, Defendant Carvajal relies on three unpublished, out-of-circuit district court decisions to support his claim that the EEO process must be considered generally available, despite the lack of evidence that the procedure was available to Mr. Williams specifically. *See Barrett v. Fed. Bureau of Prisons*, No. 19-CV-3250, 2022 WL 93504 (N.D. Ill. Jan. 10, 2022); *Seina*, 2016 WL 6775633; and *Haley*, 2012 WL 112946. None are persuasive.

Barrett considered evidence showing that the "Program Statement [referencing the EEO process] is available to inmates through the Electronic Law Library." 2022 WL 93504, at *9. Here, Defendant

Carvajal offered no evidence—and the district court made no findings—concerning the contents of the Butner law library and whether Mr. Williams had access to it.

Barrett is also inconsistent with binding precedent from its own circuit. *See, e.g.*, *King*, 781 F.3d at 896;[12] *Hill v. Snyder*, 817 F.3d 1037, 1040 (7th Cir. 2016) (rejecting argument that plaintiff should have "figured out" grievance rules not contained in the policy and reaffirming that plaintiffs are not required to exhaust "procedures they have not been told about" (quotation marks omitted)). And, like Defendant Carvajal, *Barrett* misunderstands the standards for unavailability, suggesting remedies are only unavailable if staff commit affirmative misconduct. 2022 WL 93504, at *9 (explaining that no "mischief" had

[12] Defendant Carvajal suggests *King*'s lessons do not apply here. Resp. Br. at 37 n.11. *King* held that incarcerated plaintiffs must "exhaust grievance procedures they have been told about, but not procedures they have not been told about." 781 F.3d at 896 (citation omitted). The court found remedies unavailable when the grievance policy at issue said one thing, and prison officials said another. *Id.* Such is the case here. The BOP grievance policy says that its last step is the "final administrative appeal." 28 C.F.R. § 542.15(a). But when faced with litigation, BOP officials claimed that there were in fact additional procedures to follow. *See id.* ("If authorities could . . . simply keep prisoners in the dark about the real rules, they could always defeat prisoner suits[.] . . . The [PLRA] was not meant to impose the rule of 'heads we win, tails you lose' on prisoner suits.").

occurred to deceive the plaintiff). As explained previously, that is not the law.

In *Seina*, the plaintiff did not argue that the EEO process was unavailable, but that he had successfully exhausted it. 2016 WL 6775633, at *6. This appeal, however, concerns availability—not exhaustion.

And *Haley* was decided four years before *Ross*, so it carries even less persuasive value. The court rejected the argument that incarcerated plaintiffs "have no way to discover" the EEO process because "[i]t has been this Court's experience that inmates have a keen regard for their rights and a fairly firm grasp of the law." 2012 WL 112946, at *1.

Part of that statement is certainly true—prisoners, like anyone else, care about their civil rights. But incarcerated plaintiffs, like anyone else, might not have such legal acumen that they can readily unearth obscure administrative rules, especially when they have no reason to think doing so is necessary. Moreover, the district court improperly substituted its generalized musings about incarcerated litigants for any actual evidence of availability.

The Court should not require Mr. Williams to have "divine[d] the availability of other procedures" never indicated by prison officials. *King*, 781 F.3d at 896.

III. The Erroneously Dismissed Defendants Should Be Reinstated On Remand.

The district court clearly erred when it dismissed several defendants on the basis that they were named only in their individual capacities, when in fact they were named in both their individual and official capacities. Defendant Carvajal does not dispute the error, but rather defends the district court's dismissal of these defendants on alternate grounds.

Defendant Carvajal suggests that only an agency head is a proper defendant under the Rehabilitation Act. To the contrary, circuit courts, including this one, have determined that individual employees may be named as defendants in their official capacities under the Rehabilitation Act or the Americans with Disabilities Act ("ADA").[13] *See, e.g.*, *Constantine v. Rectors & Visitors of George Mason Univ.*, 411

[13] This Court construes the requirements of the ADA and the Rehabilitation Act consistently. *See Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 214 (4th Cir. 2002).

F.3d 474, 497 (4th Cir. 2005) (allowing Rehabilitation Act claims to proceed against university and individual law professors); *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002) (permitting ADA claims for injunctive relief to proceed against individual doctors named in their official capacities even though they are not "public entities"); *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1233 (10th Cir. 2001) (permitting ADA claims for injunctive relief to proceed against individuals in their official capacities). And this Court has considered the merits of Rehabilitation Act claims against individual defendants as a matter of course. *See, e.g.*, *Doe v. Univ. of Maryland Med. Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995) (ruling on the merits of a Rehabilitation Act claim brought against several individual administrators in their official capacities).

Further, the district court's error was not harmless. Mr. Williams seeks injunctive relief, including staff training on interacting with people with disabilities; the expungement of the disciplinary action taken in this case; and an order prohibiting future punishment in similar circumstances and prohibiting further retaliation, such as transfer to another institution. JA24. At this early stage in the

litigation, it is too soon to know which defendants are able to carry out that injunctive relief. The erroneously dismissed defendants should be reinstated on remand.

CONCLUSION

This Court should reverse the district court's judgment, hold that the PLRA does not require exhaustion of the EEO process, reinstate the additional defendants, and remand for further proceedings.

Dated: September 6, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 6,271 words.

2. 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 proportionally spaced typeface with 14-point Century Schoolbook font.

Dated: September 6, 2022

/s/ Jennifer Wedekind
Jennifer Wedekind

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2022, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit, causing notice of such filing to be served upon all parties registered on the CM/ECF system.

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