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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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Local Appellate Rule 26.1, Plaintiff-Appellant Webster Douglas Williams, III, states that he is an individual and not a publicly held corporation, other publicly held entity, or trade association; that he does not issue shares to the public and has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad; that no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation; and that the case does not arise out of a bankruptcy proceeding.

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INTRODUCTION

This case presents a straightforward question of law: Does the Prison Litigation Reform Act ("PLRA") require federal prisoners with disabilities alleging violations of the Rehabilitation Act to exhaust two separate administrative procedures, while incarcerated plaintiffs bringing any other type of claim need only exhaust one? In other words, should courts interpret the PLRA to discriminate against incarcerated people with disabilities? The answer is clearly no.

Plaintiff-Appellant Webster Williams, III, a 61-year-old man, was punished by prison officials for the most human of behaviors: attending to the urgent need to urinate. At both the time of the incident and during a subsequent disciplinary hearing, Mr. Williams explained to officers that the treatment for his serious medical conditions results in the need to frequently and urgently relieve himself. But his explanations and need for accommodations were brushed aside.

Mr. Williams diligently filed a grievance and two appeals pursuant to the Bureau of Prisons ("BOP") grievance policy, seeking to have the disciplinary infraction removed from his otherwise clean record. But BOP officials failed to address his concerns. Mr. Williams

therefore turned to the courts, bringing a claim under the Rehabilitation Act for disability-based retaliation and discrimination.

The district court, however, dismissed Mr. Williams' claim for failure to exhaust administrative remedies under the PLRA. The district court found that he had successfully exhausted the BOP grievance procedure, but not a second, voluntary procedure administered by the Department of Justice's ("DOJ's") Office for Equal Employment Opportunity and governed by 28 C.F.R. § 39.170 ("EEO process" or "EEO procedure"). The BOP grievance policy does not mention this second, voluntary procedure. And Defendant Carvajal presented no evidence that BOP officials had otherwise informed Mr. Williams of its existence. But under the district court's reasoning, Mr. Williams should have scoured the Internet and the Code of Federal Regulations to uncover external administrative processes before seeking relief in federal court.

The district court therefore held that the PLRA requires incarcerated plaintiffs with disabilities to exhaust this second set of external, voluntary administrative remedies under 28 C.F.R. § 39.170—remedies not applicable to plaintiffs without disabilities, not required

by the Rehabilitation Act itself, and not mentioned by the prison's grievance procedure.

That was error. The district court's rule is at odds with legislative intent and Supreme Court interpretation of the PLRA, which only require exhaustion of internal prison grievance procedures. It discriminates against plaintiffs with disabilities, requiring them to navigate an extra layer of bureaucracy not applicable to their non-disabled peers. And it allows the BOP to play hide-and-seek with grievance procedures, informing plaintiffs of additional requirements only after they have filed suit. The district court's judgment must be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction in this case under 28 U.S.C. § 1331. This appeal arises from orders entered on March 30, 2021 and March 29, 2022, and a final judgment entered on March 29, 2022. JA195. Mr. Williams timely filed a Notice of Appeal on April 25, 2022. JA197. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in holding that incarcerated plaintiffs with disabilities bringing claims under the Rehabilitation Act must exhaust both the internal BOP grievance procedure and a voluntary, external EEO process administered by the DOJ when the PLRA requires only the exhaustion of internal prison grievance procedures.

2. In the alternative, whether the district court erred in dismissing Mr. Williams' claims for failure to exhaust administrative remedies when he fully exhausted the BOP grievance procedure, and the external EEO process was "essentially unknowable" because the BOP grievance procedure made no reference to the process and prison officials never informed him of additional requirements.

3. Whether the district court erred in dismissing additional defendants for failure to name them in their official capacities when all defendants were, in fact, named in their official capacities.

STATEMENT OF THE CASE

I. Factual Background

Webster D. Williams, III, is 61 years old and incarcerated at the Low Security Correctional Institution in Butner, North Carolina ("LSCI

Butner"). JA10 ¶ 11. Mr. Williams has several serious medical conditions including bone marrow cancer, advanced kidney disease, bilateral pitting edema (fluid build-up in the legs), hypertension, amaurosis fugax (episodes of temporary blindness), and severe diverticulosis. JA8 ¶ 7. Mr. Williams is prescribed Furosemide, a powerful diuretic, to treat bilateral pitting edema. JA11 ¶ 14, JA15 ¶ 30. The medication causes the frequent and urgent need to urinate. JA10 ¶ 13, JA15 ¶ 31.

On the morning of February 28, 2019, Mr. Williams was hurrying to the restroom to attend to the urgent need to urinate. As he reached the restroom door, a false "body alarm" was triggered. JA18 ¶ 41-42. Unit Manager Willis, approaching from the opposite direction, indicated that all prisoners should return to their cubes. JA16 ¶ 35. Mr. Williams was forced to decide whether to follow these directions—and as a result urinate on himself and the floor—or proceed to the restroom. JA17 ¶ 40. Mr. Williams also knew that if he didn't relieve himself immediately, he would risk further damaging his kidneys. *See* JA10 ¶ 13, JA21 ¶ 53. Mr. Williams proceeded to the restroom. JA16 ¶ 35.

While he was there, an unidentified person began banging on the stall door and asking Mr. Williams to return to his cube. JA17 ¶ 37. There were two other incarcerated people in the restroom at the same time, but they were not instructed to return to their cubes. JA17 ¶ 37.

Unit Manager Willis confronted Mr. Williams as he exited the restroom and asked why he didn't obey his orders. JA17 ¶ 38. Mr. Williams explained that he takes "water pills" and had to use the restroom. JA17 ¶ 38. He then quickly returned to his cube. JA17 ¶ 38.

The following day, Lieutenants Ngo and H. Cinter issued Mr. Williams a disciplinary report charging him with "Refusing to Obey an Order." JA12 ¶ 21, JA18 ¶ 44. A lieutenant told Mr. Williams that he "should have used the bathroom on the floor[.]" JA18 ¶ 44. The disciplinary report did not include Mr. Williams' contemporaneous explanation for why he proceeded to the restroom. JA12 ¶ 20. The two other incarcerated people using the restroom at the same time as Mr. Williams did not receive disciplinary reports. JA24 ¶ 67.

Mr. Williams sought and received a Uniform Disciplinary Committee hearing. JA19 ¶ 45. Counselors J. Wade and A. Williams conducted the hearing. Mr. Williams attempted to provide Counselors

Wade and Williams with copies of the Americans with Disabilities Act to support his argument that he was a person with a disability seeking accommodations. JA13 ¶ 23, JA19 ¶ 45. The Counselors refused to accept or consider the material. JA13 ¶ 23, JA19 ¶ 45. Mr. Williams also explained that the disciplinary report failed to include the fact that he had immediately explained to Unit Manager Willis that he takes "water pills" and had to use the restroom. JA13 ¶ 23, JA19 ¶ 45. Counselor Wade retorted, "Who do you think we're going to believe, an inmate or one of our own?" JA13 ¶ 23, JA19 ¶ 45.

Mr. Williams was sanctioned with a loss of telephone privileges for one month. JA12 ¶ 21. This disciplinary infraction, on an otherwise clean record, will also subject Mr. Williams to escalating sanctions should he be charged with any future infractions. JA12 ¶ 21. It may also jeopardize Mr. Williams' eligibility for Elderly Offender Home Confinement. JA12 ¶ 21.

Mr. Williams filed a grievance regarding the incident and disciplinary charge, and exhausted his administrative remedies through the BOP Administrative Remedy Program. JA21 ¶ 55. *See also* JA78-85.

II. Regulatory Background

A. The BOP Administrative Remedy Program

The BOP provides an internal Administrative Remedy Program to "allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement." 28 C.F.R. § 542.10(a).[1] Defendant Carvajal concedes, and the district court found, that Mr. Williams successfully exhausted the BOP's Administrative Remedy Program. JA47, JA95.

The grievance procedure requires incarcerated people to complete four steps. First, grievants must attempt an informal resolution. 28 C.F.R. § 542.13. Second, they must file a formal written Administrative Remedy Request on the appropriate form. 28 C.F.R. § 542.14(a). Steps one and two must be completed within 20 days of the incident that gave rise to the concern. *Id.* The facility warden has 20 calendar days to respond, but the response time can be extended to 40 days. 28 C.F.R. § 542.18. Third, grievants must submit an appeal to the appropriate Regional Director within 20 days of the date the warden signed the

[1] This brief refers to the Administrative Remedy Program by the colloquial terms "grievance process" or "grievance policy."

response. 28 C.F.R. § 542.15(a). The Regional Director has 30 days to respond; this can be extended to 60 days. 28 C.F.R. § 542.18. Fourth, grievants must submit an appeal to the BOP General Counsel within 30 days of the date the Regional Director signed the response. 28 C.F.R. § 542.15(a). The General Counsel has 40 days to respond, which can be extended to 60 days. 28 C.F.R. § 542.18. The appeal to the General Counsel is "the final administrative appeal." 28 C.F.R. § 542.15(a). By policy, the process can take between 90 days[2] and 210 days[3] to complete after the formal grievance is filed. *See* 28 C.F.R. §§ 542.15, 542.18.

The BOP grievance policy contains no reference to the EEO process set out at 28 C.F.R. § 39.170, and does not contain any additional, or different, requirements for incarcerated people with disabilities. *See* 28 C.F.R. § 542.10 *et seq*.

B. The Department of Justice's EEO Process

The Department of Justice offers a remedial process to address complaints by individuals alleging disability-based discrimination in

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[2] Assuming BOP officials take the full time allotted and seek no extensions, and the incarcerated person files the next appeal on the same day as receipt of a decision.

[3] Assuming all parties take the full time allotted under the policy.

programs or activities conducted by the agency. *See* 28 C.F.R. § 39.170. The EEO process is voluntary. 28 C.F.R. § 39.170(d)(1)(i) ("Any person who believes that he or she has been subjected to discrimination prohibited by this part *may* . . . file a complaint with the Official." (emphasis added)). Complainants who are incarcerated in a BOP facility and elect to use the EEO process must exhaust the BOP Administrative Remedy Procedure before filing a complaint. 28 C.F.R. § 39.170(d)(1)(ii).

The EEO process includes a complaint and an appeal, and may include a hearing before an administrative law judge. First, an incarcerated complainant may submit a complaint to the DOJ's Equal Employment Opportunity office within 180 days of completing the BOP grievance procedure. 28 C.F.R. § 39.170(d)(3)-(4). The Director has 180 days to conduct an investigation, attempt an informal resolution, and issue findings. 28 C.F.R. § 39.170(g)(1).

A complainant may file an appeal within 30 days of receipt of the findings, and at the same time may request a hearing with an administrative law judge. 28 C.F.R. §§ 39.170(i)(1), (k). If neither party requests a hearing, a Complaint Adjudication Officer has 60 days to

make a final decision. 28 C.F.R. § 39.170(l)(1). The Complaint Adjudication Officer may also request additional information, and must render a decision within 60 days after receipt of that additional information. *Id.*

If either party requests a hearing, it will be scheduled within 60 days. 28 C.F.R. § 39.170(k)(1). The administrative law judge must submit recommended findings of fact and conclusions of law within 30 days of receipt of the hearing transcripts, but this timeframe may be extended indeterminately. 28 C.F.R. § 39.170(k)(6).

Following the administrative law judge's recommendations, there is a 25-day period for the parties to file exceptions and replies. 28 C.F.R. § 39.170(k)(7). The Complaint Adjudication Officer then has 60 days to render a final decision. 28 C.F.R. § 39.170(l)(1). Completing the full process with a hearing may take a minimum of 355 days[4] to 385 days[5]—or more than a year—after a complaint is filed.

[4] Assuming officials take the full time allotted, and the incarcerated person files an appeal on the same day as receipt of the initial findings.

[5] Assuming all parties take the full time allotted under the regulation but no extensions are sought.

III. Proceedings Below

It is undisputed that Mr. Williams exhausted his administrative remedies through the BOP Administrative Remedy Program. JA21 ¶ 55. *See also* JA78-85. Officials denied him relief, so Mr. Williams turned to the courts. He brought suit *pro se* in the Eastern District of North Carolina alleging violations of his Fifth Amendment due process rights, and retaliation and discrimination in violation of the Rehabilitation Act. *See* JA6-25. Mr. Williams sought damages and injunctive relief, including training for BOP staff, expungement of his disciplinary offense, and an order barring BOP officials from punishing him for similar incidents in the future or retaliating against him by transferring him to a different institution. JA24 ¶¶ 69-70.

On screening, the district court found that Mr. Williams had pleaded sufficient facts to proceed on his discrimination and retaliation claims under the Rehabilitation Act. JA35. The district court dismissed the remaining claims and dismissed all defendants except BOP Director Carvajal. JA42. The court denied Mr. Williams' motion for reconsideration. JA92.

Defendant Carvajal moved to dismiss the complaint for failure to exhaust administrative remedies. *See* JA43. He conceded that Mr. Williams fully exhausted BOP's grievance procedure. JA47. He also acknowledged that in "the ordinary prisoner case" this would be sufficient to exhaust administrative remedies under the PLRA. *See* JA47. But he argued that federal prisoners with Rehabilitation Act claims must also exhaust a second, external remedial process, initiated by filing a complaint with the DOJ's Director for Equal Employment Opportunity. *See* JA47-48 (citing 28 C.F.R. § 39.170). Defendant Carvajal submitted a declaration from a Supervisory Attorney in the BOP's Program Review Division who stated she had no records indicating that Mr. Williams filed a complaint with the EEO office. JA52 ¶ 7. Defendant Carvajal did not submit any additional evidence.

Mr. Williams opposed the motion to dismiss. He submitted into evidence copies of the BOP grievance policy and his exhausted grievances. *See* JA59-77, JA78-85. He argued that the BOP grievance policy contains no mention of the EEO process, and that the policy says the BOP will refer plaintiffs to any statutorily mandated procedures. JA54, JA56. He noted, and Defendant Carvajal did not dispute, that no

such referral took place. JA56. He argued that the BOP policy makes clear that the final appeal to the BOP General Counsel is the "final administrative appeal." JA56 (quoting 28 C.F.R. § 542.15(a)). He argued that the EEO process, by its own terms, is not mandatory. JA55. Finally, he argued that the PLRA does not require additional steps to be completed only by incarcerated plaintiffs with disabilities and that interpreting the PLRA to do so would be discriminatory and make these plaintiffs vulnerable to "dismissal by ambush." JA55, JA56.

The district court granted Defendant Carvajal's motion, construed as a motion for summary judgment. JA98. The court found that Mr. Williams exhausted BOP's grievance process and that the BOP grievance policy "does not mention the EEO procedure for disability claims[.]" JA95, JA96. But the court determined this did not render the process "unavailable" to Mr. Williams.

The district court reasoned that 28 C.F.R. § 39.170 is "publicly available." JA97. The district court also independently located another "publicly available" BOP program statement, which it suggested "provides that federal prisoners may file an EEO complaint for disability claims and details the procedures for doing so." JA97 (citing

Program Statement 3713.24, Ch. 12, https://www.bop.gov/PublicInfo/execute/policysearch?todo=query&series=3000). The policy located by the district court applies to "[e]mployees alleging discrimination" and incorporates the language of 28 C.F.R. § 39.170. *See* JA101, JA178. The district court suggested that Mr. Williams "has access to the FBOP law library and he could have determined from these publicly available sources that the EEO process was required before filing this action." JA97.

The district court therefore held that the PLRA requires federal prisoners to exhaust all "available" remedies, and that the EEO process was "available" to Mr. Williams. JA97-98. Accordingly, the court held, "the PLRA requires plaintiff to exhaust the EEO procedure." JA98.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *Moss v. Harwood*, 19 F.4th 614, 621 (4th Cir. 2021).

SUMMARY OF ARGUMENT

The PLRA requires incarcerated plaintiffs to exhaust "available" administrative remedies before bringing suit in federal court. Here, the parties agree that Mr. Williams fully exhausted the internal BOP

grievance process. But the district court nevertheless held that he failed to exhaust all available administrative remedies because he did not pursue the external EEO process—a requirement applicable only to incarcerated plaintiffs with disabilities bringing Rehabilitation Act claims and not mentioned in the BOP grievance policy. In so doing, the district court committed multiple reversible errors.

First, the district court's decision runs counter to Supreme Court precedent and congressional intent. Supreme Court precedent is unequivocal: Exhaustion of internal prison grievance procedures is all the PLRA requires. *Jones v. Bock*, 549 U.S. 199, 218 (2007). The Court has rejected attempts at judicially created rules, like the one at issue here, that impose exhaustion requirements beyond those found in a prison's grievance process. *See id.* at 217-18. Further, legislative history shows that Congress intended the term "administrative remedies" to refer only to internal prison grievance procedures. As such, the PLRA does not require exhaustion of the EEO process.

Moreover, requiring incarcerated plaintiffs with disabilities to exhaust both the internal BOP grievance process and the external EEO process runs afoul of federal disability rights laws and the Constitution.

Courts must strive to harmonize statutes with other statutes addressing similar subject matter, as well as with the Constitution. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974). The district court's rule imposes separate requirements on plaintiffs with disabilities not placed on others. And it requires plaintiffs with Rehabilitation Act claims to wait at least a year longer to initiate litigation than incarcerated plaintiffs bringing other claims. These unequal burdens are prohibited by the Rehabilitation Act, *see* 29 U.S.C. § 794, and the Constitution's guarantee of meaningful access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 353 (1996).

At base, therefore, the district court's double-exhaustion rule puts the PLRA in direct conflict with federal disability rights law and the constitutional right of access to the courts. The Court must construe the PLRA to avoid this outcome.

Second, and in the alternative, assuming the PLRA requires exhaustion of the EEO process, that external procedure was unavailable to Mr. Williams. As an initial matter, Defendant Carvajal produced zero evidence on the availability of the EEO process, despite his burden to prove this affirmative defense. *Jones*, 549 U.S. at 216. The district court

erroneously placed the burden on Mr. Williams, holding that he failed to prove that the EEO process was *not* available.

Further, Mr. Williams was never informed about the EEO process, rendering it unavailable. *See Ross v. Blake*, 578 U.S. 632, 644 (2016) (holding that a remedy that is "essentially unknowable" is unavailable (quotation marks omitted)). Prison officials must inform prisoners of a remedy and then provide access to it—the PLRA does not require incarcerated plaintiffs to guess at what undisclosed remedies might exist, nor does it require them to engage in a legal scavenger hunt to find any number of external procedures that might apply.

And here the court wrongly assumed that federal prisoners have access to the same legal research tools as federal judges. It reasoned that because the EEO process was "publicly available" it was therefore "available" under the PLRA. This was error. The record evidence demonstrates that BOP officials never informed Mr. Williams about the external process, rendering it unavailable.

Finally, the district court dismissed on screening eleven additional defendants, reasoning that the Rehabilitation Act only permits suits against defendants in their official capacities. All defendants, however,

were named in their official capacities. The district court's dismissal of the additional defendants therefore was erroneous.

For these reasons, the district court's judgment must be reversed.

ARGUMENT

I. The PLRA Requires Only The Exhaustion Of Internal Prison Grievance Procedures.

The PLRA requires incarcerated plaintiffs to exhaust "such administrative remedies as are available" before suing in federal court. 42 U.S.C. § 1997e(a). The district court held that this requirement mandates exhaustion of *both* the internal BOP grievance procedure and the external EEO process, despite finding that "the FBOP program statement addressing the administrative remedy program does not mention the EEO procedure for disability claims[.]" JA96.

The district court's rule conflicts with Supreme Court precedent and legislative intent, which both provide that the PLRA requires only exhaustion of internal prison grievance procedures. And it runs afoul of federal disability rights laws and the Constitutional right of meaningful access to the courts.

A. The District Court's Ruling Conflicts With Supreme Court Precedent.

The Supreme Court has made explicit that the PLRA requires only exhaustion of a prison's internal grievance process. In *Jones v. Bock*, the Court held that "to properly exhaust administrative remedies [under the PLRA] prisoners must complete the administrative review process in accordance with the applicable procedural rules—rules that are defined not by the PLRA, but *by the prison grievance process* itself." 549 U.S. at 218 (emphasis added) (quotation marks and citation omitted). The Court left no room for doubt: "Compliance *with prison grievance procedures*, therefore, is all that is required by the PLRA to 'properly exhaust.'" *Id.* (emphasis added).

Indeed, only an internal prison grievance system can serve the two primary purposes of administrative exhaustion—promoting administrative agency authority and efficiency. *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006). First, exhaustion is designed to give "an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court[.]" *Id.* (quotation marks omitted). When incarcerated plaintiffs "make full use of the prison grievance process" it "provides prisons with a fair opportunity to

correct their own errors." *Id.* at 94. By contrast, "[f]iling a complaint with the DOJ, an external federal agency, does not allow correctional officers to respond directly to inmates' grievances nor does it allow them to remedy the issues raised in the grievance." *Veloz v. New York*, 339 F. Supp. 2d 505, 519 (S.D.N.Y. 2004) (holding that the PLRA did not require plaintiff to file a complaint with the DOJ to fully exhaust disability claim), *aff'd*, 178 F. App'x 39 (2d Cir. 2006).

Second, administrative exhaustion is intended to resolve claims "much more quickly and economically" than litigation in federal court. *Woodford*, 548 U.S. at 89. The BOP grievance process can be resolved in 90 to 210 days. *See* 28 C.F.R. §§ 542.15, 542.18. But requiring exhaustion of the EEO procedure extends the process at least 355 to 385 days. *See* 28 C.F.R. § 39.170. Far from "promoting efficiency," this extra year of redundant bureaucratic entanglement only acts to postpone and delay. As such, "[r]equiring prisoners to grieve with external agencies does not serve the underlying purpose of the exhaustion requirement." *Veloz*, 339 F. Supp. 2d at 519.

Further, the Supreme Court has rejected any "judicially-created rule" that imposed exhaustion requirements not found in the prison's

own grievance procedure. *Jones*, 549 U.S. at 217. So has this Court. *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). But that is exactly what the district court did here—it found that the EEO procedure is "not mention[ed]" in the BOP grievance policy, yet created its own rule that required exhaustion of this external process. This was improper. "[T]hese rules are not required by the PLRA," and "crafting and imposing them exceeds the proper limits on the judicial role." *Jones*, 549 U.S. at 203.

The cases relied upon by the district court provide scant support for its rule that the PLRA requires federal prisoners with disabilities to exhaust twice. *Cooke v. U.S. Bureau of Prisons* did not interpret the PLRA at all; the court held at the outset that the PLRA did not apply to the civilly committed plaintiffs in that case. *See* 926 F.Supp.2d 720, 726 (E.D.N.C. 2013). The remaining district court opinions are all unpublished and nearly all *pro se* cases, and therefore provide little persuasive authority. *See Garner v. Kennedy*, 713 F.3d 237, 244 (5th Cir. 2013) (holding that two prior Circuit cases "are not controlling here" in part because "[i]n both cases, the plaintiffs were pro se").

Accordingly, binding precedent from the Supreme Court and this Court requires reversal of the district court's judicially created double-exhaustion rule.

B. The District Court's Ruling Conflicts With Congressional Intent And Legislative History.

The Supreme Court repeatedly has relied on congressional intent and legislative history when construing 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). Here, congressional intent and legislative history of the PLRA, the PLRA's predecessor statute, and the Rehabilitation Act demonstrate that the PLRA only requires exhaustion of internal prison grievance procedures.

1. Congress Intended The PLRA To Require Only The Exhaustion Of Internal Administrative Remedies.

Legislative history makes clear that Congress intended the PLRA to require incarcerated plaintiffs to exhaust internal prison grievance procedures, but not external ones. For example, on introducing the legislation, the PLRA's lead Senate sponsor stated: "Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the

prison grievance system would provide an adequate remedy." 141 CONG. REC. S7526-7527 (daily ed. May 25, 1995) (statement of Sen. Kyl) (emphasis added). Similarly, the lead House sponsor commented on the exhaustion requirement's application to federal prisoners and emphasized that it was intended to allow the BOP to address complaints internally: "[The PLRA requires] all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to [the] administrative remedy process before proceeding to court" which will "return[] these cases to the Federal Bureau of Prisons[.]"141 CONG. REC. H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo).

Courts of Appeals that have considered this legislative history agree: The PLRA requires only the exhaustion of internal prison grievance procedures. *Rumbles v. Hill*, 182 F.3d 1064, 1070 (9th Cir. 1999) (holding that Congress intended the PLRA to require only the exhaustion of internal prison grievance procedures), *overruled on other grounds, Booth v. Churner*, 532 U.S. 731 (2001); *Jenkins v. Morton*, 148 F.3d 257, 260 (3d Cir. 1998) (holding that Congress did not intend to require exhaustion of the state judicial system to exhaust

"administrative remedies" under the PLRA); *Alexander v. Hawk*, 159 F.3d 1321, 1326-27 (11th Cir. 1998) (holding that Congress intended "available" remedies under the PLRA to refer to prison administrative remedy programs). *See also Massey v. Helman*, 196 F.3d 727, 733 (7th Cir. 1999) (holding that the PLRA requires exhaustion of an "internal administrative grievance system").

The most robust analysis of this legislative history comes from the Ninth Circuit, which concluded that incarcerated plaintiffs need not exhaust external administrative procedures in addition to the prison grievance system to satisfy the PLRA. *Rumbles*, 182 F.3d at 1070. The court determined that the statute's legislative history "suggests that the statutory phrase 'administrative remedies' refers exclusively to prison grievance procedures." *Id.* at 1070. The Ninth Circuit further explained,

> The language of the PLRA, as well as 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. That is, while Congress certainly intended to require prisoners to exhaust available prison administrative grievance procedures, there is no indication that it intended prisoners also to exhaust [external] procedures. . . . It thus appears that throughout § 1997e Congress is referring to institutional grievance processes[.]

Id. at 1069-70 (internal quotation marks omitted).

2. The History Of The PLRA's Predecessor Statute Confirms That Congress Intended The PLRA To Require Only Exhaustion Of Internal Remedies.

Legislative history and judicial interpretation of the PLRA's predecessor statute, the Civil Rights of Institutionalized Persons Act ("CRIPA"), further support the conclusion that the PLRA requires only the exhaustion of internal prison grievance procedures. CRIPA also used the term of art "administrative remedies" and therefore examination of its intent and usage is highly relevant when construing the current statute. *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (examining predecessor statute to determine congressional intent).

Under CRIPA, incarcerated plaintiffs could be required to exhaust "administrative remedies as are available" that were "plain, speedy, and effective" before filing suit. 42 U.S.C. § 1997e(a)(1) (1990). Legislative history establishes that the primary purpose of CRIPA's exhaustion requirement was to encourage prison systems to develop internal grievance mechanisms, and the legislative record is replete with references equating "administrative remedies" with internal prison

grievance systems. *See, e.g.*, H.R. REP. NO. 96-897, at 9 (1980) (Conf. Rep.) (stating a purpose of CRIPA is to "stimulate the development and implementation of effective administrative mechanisms for the resolution of grievances in correctional . . . facilities"); *id.* at 15-17 (discussing exhaustion provision in the context of "grievance resolution systems *within correctional institutions*" (emphasis added)); S. REP. No. 96-416, at 34 (1980) ("[The exhaustion] section provides, in certain cases, for exhaustion of *correctional grievance procedures* prior to consideration of a prisoner suit in federal court . . . . Requiring the exhaustion of *in-prison grievances* should resolve some cases[.]" (emphasis added)).[6]

Subsequent judicial interpretation of CRIPA's exhaustion provision similarly made clear that "administrative remedies" meant

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[6] *See also* 124 CONG. REC. 23179 (1978) (statement of Rep. Butler) ("[I]f we had the grievance machinery, and if they were required to go through that grievance machinery, we believe that many of these cases . . . would be quickly resolved, and resolved at the level where they should be resolved and that is where the grievance arises, and that is in the penal institution[.]"); 125 CONG. REC. 12491-92 (1979) (statement of Rep. Drinan) (discussing studies of "prison grievance mechanisms" and benefits of an "effective grievance mechanism"); *id.* at 12492 (statement of Rep. Drinan) (stating CRIPA intended to "encourag[e] the establishment of grievance mechanisms in State correctional systems"); *id.* at 12493 (statement of Rep. Mitchell) (same).

internal prison grievance procedures. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (referring, under CRIPA, to "adequate prison procedures" and "internal prison procedures"); *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992) (stating that CRIPA "imposes a limited exhaustion requirement . . . provided that the underlying *state prison administrative remedy* meets specified standards" (emphasis added)); *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 509 (1982) (noting that Congress intended CRIPA to "encourage the States to develop appropriate grievance procedures").

When drafting the PLRA, Congress carried forward the term of art "administrative remedies." But Congress made the PLRA's exhaustion requirement "mandatory" and "removed the conditions that the administrative remedies be 'plain, speedy and effective[.]'" *Ross*, 578 U.S. at 640-41. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). That presumption has even more force where, as with the PLRA, Congress showed a "willingness to

depart" from other provisions of the predecessor statute. *Id.* Indeed, "Congress gave no indication that it intended to overrule the settled understanding" of the term "administrative remedies." *Rumbles*, 182 F.3d at 1070. As such, "study of the history of the predecessor [statute], which is worth a volume of logic," "compels a conclusion" that Congress intended the PLRA to require only the exhaustion of internal prison grievance procedures. *See Kennedy*, 372 U.S. at 169.

3. The Rehabilitation Act's History, Intent And Implementing Regulations Support The Conclusion That The PLRA Does Not Require Exhaustion Of 28 C.F.R. § 39.170.

Interpreting the PLRA to require only the exhaustion of internal grievance procedures also comports with the language and intent of the Rehabilitation Act and 28 C.F.R. § 39.170. The Rehabilitation Act itself has no exhaustion requirement. *See, e.g.*, *Ott v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 909 F.3d 655, 661 (4th Cir. 2018). Completion of the EEO process is therefore not required by plaintiffs bringing Rehabilitation Act claims. Rather, the EEO process functions as an alternative remedial scheme: Complainants can choose to bring their claims to the EEO or in court.

In its Final Rulemaking, the agency acknowledged that use of the EEO complaint procedure was not required, noting there may be a private right of action "either without invoking our compliance procedures or after the issuance of letters of findings." Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs, 49 Fed. Reg. 35724-01, 35733 (Sept. 11, 1984) (codified at 28 C.F.R. pt. 39).

Indeed, by its own terms, the EEO procedure is voluntary: The regulation provides that a person subject to discrimination "may" file a complaint. 28 C.F.R. § 39.170(d)(1)(i).

And nothing in the regulation's language requires incarcerated people to complete the EEO process. The regulation addresses incarcerated complainants only by providing that should a federal prisoner choose to file a complaint under the regulations, that person must first exhaust the BOP grievance process. 28 C.F.R. § 39.170(d)(1)(ii).

The Final Rulemaking similarly supports the conclusion that use of the EEO process is a voluntary alternative to litigation, even for incarcerated plaintiffs. *See* Enforcement of Nondiscrimination on the

Basis of Handicap in Federally Conducted Programs, 49 Fed. Reg. 35724-01, 35733 (Sept. 11, 1984) (to be codified at 28 C.F.R. pt. 39) (distinguishing between the "requirement" that incarcerated people "first exhaust prison administrative remedies" with the "right" to have complaints investigated by the DOJ).

C. The Court Must Construe The PLRA To Avoid Conflicts With Federal Disability Rights Laws And The Constitution.

The PLRA's exhaustion requirement must be interpreted consistently with federal disability rights laws and the Constitution. Here, the district court's ruling runs afoul of both.

Courts must strive to harmonize statutes that address the same subject matter. *See Morton*, 417 U.S. at 551 ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *Anderson v. Fed. Deposit Ins. Corp.*, 918 F.2d 1139, 1143 (4th Cir. 1990) ("[A] court should, if possible, construe statutes harmoniously." (citation omitted)).

The Rehabilitation Act prohibits disability-based discrimination and "reflect[s] broad legislative consensus" toward "making the

promises of the Constitution a reality for individuals with disabilities . . . ." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 510 (4th Cir. 2016). Section 504 of the Act provides:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .

29 U.S.C. § 794(a).

Under the Rehabilitation Act's implementing regulations, federal agencies may not "limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service." 28 C.F.R. § 39.130(b)(1)(vi). The Act's prohibition against disability-based discrimination bars 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. *See* 28 C.F.R. § 39.130(b)(1)(ii)-(iv).

But the district court's interpretation of the PLRA results in just that. The district court recognized that completing the BOP's grievance procedure "ordinarily is all that is required to comply with the PLRA's

exhaustion provision." JA95. Yet, the district court adopted the view that the PLRA requires incarcerated plaintiffs with disabilities to exhaust "an additional procedure" when asserting "discrimination or retaliation on account of a disability." *Id.*[7]

This "additional procedure" requires incarcerated plaintiffs with disabilities to wait significantly longer than those without disabilities to bring suit. A federal prisoner without a disability can seek judicial relief for a civil rights violation as soon as 90 days after the violation occurs. *See* 28 C.F.R. §§ 542.15, 542.18. Meanwhile, a federal prisoner *with* a disability—who must exhaust both the BOP grievance process and the EEO process—may need to wait at least an additional *year* before seeking relief for violations of the Rehabilitation Act. *See* 28 C.F.R. § 39.170.

Under the district court's view, incarcerated plaintiffs with disabilities may also need to incur expenses for the consideration of their EEO complaint. *See* 28 C.F.R. § 39.170(k)(5)(iii) (requiring parties

[7] Defendant Carvajal also concedes that in "the ordinary prisoner case" federal prisoners need only exhaust the BOP's internal grievance procedure. JA47-48. Nevertheless, he argued that incarcerated plaintiffs with disabilities bringing claims under the Rehabilitation Act must meet "additional requirements[.]" *Id.*

to incur the fees and expenses of any person they call to testify at a hearing). Plaintiffs without disabilities incur no such expenses: The BOP's standard grievance procedure has no fee requirements.

Accordingly, the double-exhaustion requirement would impose different and unequal burdens on plaintiffs with disabilities bringing Rehabilitation Act claims and would do so solely because of their disabilities. The Rehabilitation Act forbids such discrimination. This Court must construe the PLRA's exhaustion requirement to avoid that outcome.

Courts must also construe statutes to avoid conflict with the Constitution. *See Gomez v. U.S.*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."); *see also Brown v. Plata*, 563 U.S. 493, 526 (2011) (rejecting a reading of the PLRA that "would raise serious constitutional concerns").

Incarcerated people have a constitutional right of meaningful access to the courts. *Lewis*, 518 U.S. at 351. Prison officials may not frustrate or impede court access for incarcerated plaintiffs bringing

nonfrivolous claims challenging the conditions of their confinement. *Id.* at 353. Nor can they limit court access on the basis of disability. *See Tennessee v. Lane,* 541 U.S. 509, 522 (2004) (discussing "prohibition on irrational disability discrimination" in context of access to the courts).

Here, interpreting the PLRA to impose a double-exhaustion requirement on incarcerated plaintiffs with disabilities would create additional obstacles to filing a claim not placed on plaintiffs without disabilities, impeding meaningful access to the courts in contravention of *Lewis*. The Court should construe the PLRA to avoid this outcome as well.

II. In The Alternative, The EEO Process Was Unavailable To Mr. Williams.

Even assuming that the PLRA requires exhaustion of the EEO procedure, the district court still erred by finding that the procedure was available to Mr. Williams. First, the district court failed to place the burden of proof on Defendant Carvajal to prove that the remedy was available. Second, where incarcerated plaintiffs are not informed of a remedy, it is "unknowable" and therefore unavailable.

A. The District Court Erred By Placing The Burden Of Proof On Mr. Williams.

Exhaustion is an affirmative defense—a defendant must prove that an administrative remedy was in fact available to the plaintiff, and that the plaintiff failed to exhaust it. *Jones*, 549 U.S. at 216. The district court, however, failed to hold Defendant Carvajal to that burden. This was error.

Defendant Carvajal conceded, and the district court found, that Mr. Williams had fully exhausted the prison's administrative remedies. JA47, JA95. The district court also found that the BOP grievance policy does not mention the EEO procedure. JA96. Defendant Carvajal offered no evidence that Mr. Williams was informed of the EEO procedure. Defendant's evidence consisted of a single declaration from a BOP lawyer merely asserting that Mr. Williams had not filed an EEO complaint. JA52. Thus, Defendant Carvajal failed to carry the burden of proving his affirmative defense. *See Lanaghan v. Koch*, 902 F.3d 683, 690 (7th Cir. 2018) (holding defendants "have not met their burden of establishing that a remedy was available" to the plaintiff when they "did not present evidence" that plaintiff was aware of relevant grievance rules).

The district court, however, erroneously flipped the burden of proof to Mr. Williams, holding that "Plaintiff has not established that the EEO process is unavailable under [*Ross*]." JA96. That reasoning defies the Supreme Court's holding that a defendant must prove a failure to exhaust available remedies. *Jones*, 549 U.S. at 216; *Moore*, 517 F.3d at 725.

Some circuits addressing failure-to-exhaust defenses have adopted a burden shifting analysis. *See Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014) (surveying cases). But even applying that rule, a plaintiff need only produce evidence *after* a defendant "prove[s] that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy." *Id.* at 1173. And "as required by *Jones*, the ultimate burden of proof remains with the defendant." *Id.* at 1172. A plaintiff has no obligation to demonstrate unavailability—at least not until the defendant carries its heavy initial burden of proving both availability and non-exhaustion. *See id.*

Accordingly, because Defendant Carvajal submitted no evidence that the EEO process was available to Mr. Williams, he failed to carry his burden of proof on this affirmative defense. The district court

therefore erred when it granted Defendant Carvajal summary judgment.

B. The District Court Erred By Holding That The EEO Procedure Was Available To Mr. Williams.

The PLRA only requires exhaustion of remedies that are "available." 42 U.S.C. § 1997e(a). *See also Ross*, 578 U.S. at 642 (holding that incarcerated plaintiffs "must exhaust available remedies, but need not exhaust unavailable ones."). The undisputed record evidence and the district court's own findings demonstrate that the BOP grievance policy says nothing about the EEO process, and that Mr. Williams was never informed of that process, rendering it "unavailable." The district court erred by holding otherwise.

Whether a remedy is available hinges on practical considerations. Courts must examine "the real-world workings of prison grievance systems"—not just whether a remedy is "officially on the books." *Ross*, 578 U.S. at 642. Therefore, to be available, a remedy must be "knowable by an ordinary prisoner in [the plaintiff's] situation." *Id.* at 648. In other words, when a remedy is "essentially 'unknowable'" then "it is also unavailable." *Ross*, 578 U.S at 644 (quoting *Goebert v. Lee County*, 510 F.3d 1312, 1323 (11th Cir. 2007)).

Further, officials may not play "hide-and-seek with administrative remedies" or "devise procedural systems" with "blind alleys and quagmires[.]" *Id.* at 644 & n.3 (citing *Goebert*, 510 F.3d at 1323). Remedies are unavailable when such "game-playing" occurs. *See id.* at 644, 648; *see also Moore*, 517 F.3d at 725 ("[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it.").

Goebert v. Lee County, cited with approval by *Ross*, 578 U.S. at 644, is instructive. In *Goebert*, the plaintiff never received the jail handbook explaining the grievance process; nor did she "know that she should, or could, appeal" denial of a grievance. 510 F.3d at 1321-22. The defendants argued "that any remedy that is in place is 'available' to the inmate even if the inmate does not know, and cannot find out, about it." *Id.*

The Eleventh Circuit disagreed: "It is difficult to define 'such remedies as are available' to an inmate in a way that includes remedies or requirements for remedies that an inmate does not know about, and cannot discover through reasonable effort by the time they are needed." *Id.* The court concluded, "That which is unknown and unknowable is

unavailable; it is not 'capable of use for the accomplishment of a purpose.'" *Id.* at 1323 (quoting *Booth*, 532 U.S. at 738).

The Seventh Circuit has echoed this position: "Prisoners are required to exhaust grievance procedures they have been told about, but not procedures they have not been told about. They are not required to divine the availability of other procedures." *King v. McCarty*, 781 F.3d 889, 896 (7th Cir. 2015) (citation omitted), *overruled on other grounds by Henry v. Hulett*, 969 F.3d 769 (7th Cir. 2020) (en banc). So has the Ninth Circuit. *Albino*, 747 F.3d at 1177 (holding that administrative remedy was unavailable where manual describing the process was not shared with detainees, forms were not provided to the plaintiff, and process was not described to him).

Several district courts have addressed this issue in the context of the EEO procedure. They found the EEO procedure unavailable where plaintiffs alleged they did not know about it and could not realistically discover it on their own. *See, e.g.*, *Payne v. United States Marshals Serv.*, No. 15 C 5970, 2018 WL 3496094, at *3 (N.D. Ill. July 20, 2018) (holding that plaintiff "did not need to scour the Code of Federal Regulations" for EEO process he had no notice of); *Woody v. United*

States Bureau of Prisons, No. CV 16-862 (DWF/BRT), 2016 WL 7757523, at *4-5 (D. Minn. Nov. 22, 2016) (similar), *report and recommendation adopted*, No. CV 16-862 (DWF/BRT), 2017 WL 150505 (D. Minn. Jan. 13, 2017).

In sum, prison officials must notify prisoners that an administrative remedy exists and allow access to it. Otherwise, that remedy is unavailable. *See Goebert*, 510 F.3d at 1323 ("If we allowed jails and prisons to play hide-and-seek with administrative remedies, they could keep all remedies under wraps until after a lawsuit is filed and then uncover them and proclaim that the remedies were available all along.").

Here, the BOP administrative remedy program requires a grievant to go through four steps, with the final step described as the "final administrative appeal." *See* 28 C.F.R. § 542.15(a). The policy cross-references three statutorily mandated procedures: those for tort claims, Inmate Accident Compensation claims, and Freedom of Information Act or Privacy Act requests. 28 C.F.R. § 542.10(c). The policy does not include disability claims or the EEO process in this list. It also states that if additional procedures are required by statute, the

BOP will refer the grievant to those procedures. *Id.* But BOP officials did not refer Mr. Williams to any statutorily mandated procedure or inform him that any procedure other than the internal grievance process was available and required.

Indeed, the district court found "that the FBOP program statement addressing the administrative remedy program does not mention the EEO procedure for disability claims[.]" JA96. And Defendant Carvajal never argued or presented evidence that prison staff had informed Mr. Williams of that procedure through any other means. Mr. Williams therefore had no way of knowing that he was required to seek out and navigate additional procedures applicable only to incarcerated plaintiffs with disabilities.

That should have spelled the end of Defendant Carvajal's motion for summary judgment. But, *sua sponte*, the district court reasoned that 28 C.F.R. § 39.170 was publicly available, and therefore available to Mr. Williams. JA97. The district court also conducted its own Internet research to identify another "publicly available" BOP policy, which it erroneously determined "provides that federal prisoners may file an

EEO complaint for disability claims and details the procedures for doing so." *Id.*

Closer examination of that policy reveals that it applies only to BOP *staff,* not prisoners: the policy's "program objectives" are to provide "[e]mployees alleging discrimination . . . access to the government's complaint resolution process." JA101; the document specifies that notification of the policy "will be given to each employee through bulletin board postings[,]" JA101; those bulletin boards are required to be "in locations easily accessible to all Bureau of Prisons staff[,]" JA102, with no regard to incarcerated people; and the document specifies that distribution of the policy is limited to "each current employee and new employee[.]" JA102.[8] The only reference in the 95-page document to any

[8] Notably, the citation provided by the district court includes a hyperlink to a BOP webpage titled, "Personnel and Staff Management Policy." Federal Bureau of Prisons, Personnel and Staff Management Policy, https://www.bop.gov/PublicInfo/execute/policysearch?todo=query&series=3000 (last visited June 10, 2022). The webpage lists a number of policies "related to: staff ethics, recruitment and hiring, security and background investigations of prospective and current employees, affirmative action and upward mobility." *Id.* The webpage includes a link to the specific policy cited by the district court, which is also included in the parties' Joint Appendix for ease of reference. *See* JA100-194.

procedure applicable to incarcerated people is a page that summarizes the EEO procedure. JA178. This summary, like 28 C.F.R. § 39.170, provides that incarcerated people who elect to file a complaint with the Department of Justice must first exhaust the BOP grievance policy. JA178. It gives no indication that incarcerated plaintiffs must complete the EEO process prior to bringing suit.

Nevertheless, the court concluded, "Plaintiff has access to the FBOP law library and he could have determined from these publicly available sources that the EEO process was required before filing this action. His failure to investigate the administrative remedy procedure for disability claims does not render the process unavailable to him." JA97.

This reasoning makes several missteps. The district court *assumed* that (1) Mr. Williams had access to the law library; (2) the law library had a hardcopy of 28 C.F.R. § 39.170 and the BOP program statement, or an unrestricted Internet connection through which Mr. Williams could find them; and (3) ordinary prisoners would have understood the need to conduct exhaustive legal research to locate additional administrative procedures that may apply to their claims.

But there is no evidence in the record for any of these propositions.[9] To the contrary, the record evidence demonstrates that even if "some mechanism exists to provide relief, . . . no ordinary prisoner can discern or navigate it." *Ross*, 578 U.S. at 644. Summary judgment was therefore improper.

What's more, the district court's rule requires incarcerated plaintiffs with disabilities seeking to file a Rehabilitation Act claim to divine the existence of external administrative remedies not mentioned by the prison grievance procedure or explained by prison staff.[10] The

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[9] In fact, BOP policy states that "[i]nmates do *not* have access to the Internet." Program Statement 4500.11, Ch. 14.1, https://www.bop.gov/policy/progstat/4500_011.pdf (emphasis added).

[10] And by the district court's rationale, incarcerated people filing other types of claims may also have to scour the Code of Federal Regulations to uncover procedures that may be "available," creating an expansive universe of possible remedies requiring exhaustion. For example, complaints about discrimination on the basis of race, color, or national origin may need to be filed with the Department of Justice or the relevant funding agency. *See* 28 C.F.R. § 42.107(b)-(e) (establishing complaint procedures for individuals subjected to discrimination prohibited by Title VI of the Civil Rights Act of 1964). Concerns about gender or race discrimination in prison work assignments may have to be filed with the Equal Employment Opportunity Commission. *See* 29 C.F.R. § 1691 *et seq.* (implementing procedures for processing and resolving complaints of employment discrimination). Similarly, concerns about gender discrimination in prison education programs may need to be filed with the Department of Education. *See* 31 C.F.R. §

PLRA, however, does not require that prisoners have clairvoyance about what remedies might exist in an undisclosed policy. Nor does it require that prisoners conduct exhaustive legal research—using tools they may not have—to uncover those remedies and figure out how to use them. Rather, the PLRA only requires exhaustion of remedies that are made known and accessible by prison officials. *See Hernandez v. Dart,* 814 F.3d 836, 842 (7th Cir. 2016) (not providing grievance forms or "failing to inform the prisoner of the grievance process" renders that process unavailable).

To require Mr. Williams to intuit the existence of the EEO procedure and the need to exhaust it is to require the impossible. The district court erred by finding that the EEO procedure was available to him.

28.610 (establishing complaint procedure for Title IX). Indeed, incarcerated people may need to first report complaints to administrative agencies in *any* case where the federal government may provide relief, such as the Religious Land Use and Institutionalized Persons Act. *See* 42 U.S.C. § 2000cc-2(f) (providing that the United States has enforcement authority).

III. The District Court Dismissed Additional Defendants Based On A Clearly Erroneous Factual Premise, And Those Defendants Should Be Reinstated.

Mr. Williams brought suit against twelve BOP officials, naming all defendants in their official capacities. *See* JA6. The district court dismissed all but one—BOP Director Carvajal—in its screening order, reasoning that "the Rehabilitation Act does not permit suits against prison officials in their individual capacities." JA35. That rationale rests on the clearly erroneous factual premise that each defendant was named in his or her individual capacity only. But Mr. Williams appropriately named all defendants in their official capacities, as made clear by the face of the complaint. The district court's dismissal of these defendants was therefore error and the remaining defendants should be reinstated on remand.

Mr. Williams named the following individuals in his complaint: National Inmate Appeals Ian Connors; Regional Director D.J. Harmon; Regional Officer Matthew W. Mullady; Butner LSCI Warden Donna Smith;[11] Butner LSCI Associate Warden Engle; Butner LSCI Unit

[11] Warden Tamara Lyn was substituted for Warden Smith. *See* JA31 (granting motion to amend complaint).

Manager D. Willis; Butner Granville A Counselor A. Williams; Butner LSCI Wake Unit Counselor J. Wade; Butner LSCI Lieutenant H. Cintry; and Butner LSCI Lieutenant Ngo. JA6. Each was sued in his or her "official and individual capacities." JA6. Mr. Williams also named BOP Director Inch[12] and BOP Assistant Director Thomas R. Kane, in their "official capacities as supervisor to the above named staff and as individuals." JA6. No defendant was listed solely in his or her individual capacity.

Nevertheless, the district court erroneously treated all defendants except BOP Director Carvajal as if they had been sued in their individual capacities only. The court explained that the Rehabilitation Act only permits suits against defendants in their official capacities and stated "the only properly named defendant with respect to plaintiff's Rehabilitation Act claim is defendant Carvajal, the FBOP director, in his official capacity." JA35. The district court did not acknowledge that the other defendants had been named in both their individual and official capacities. On reconsideration, the district court upheld its prior

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[12] BOP Director Carvajal was substituted for Director Inch. *See* JA31 (granting motion to amend complaint).

determination, again because "the Rehabilitation Act does not permit suits against defendants in their individual capacities." JA92. Again, the district court did not acknowledge that Mr. Williams also named all defendants in their official capacities.

The district court's dismissal of all but one defendant was based on a mistaken and clearly erroneous factual premise. Defendants Connors, Harmon, Mullady, Lyn, Engle, Willis, Williams, Wade, Cintry, Ngo, and Kane should be reinstated on remand. *See Castle v. Wolford*, 165 F.3d 17 (4th Cir. 1998) (vacating and remanding where district court dismissed claims "based on its erroneous conclusion" about the capacities in which defendants were sued).

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT

Mr. Williams respectfully requests oral argument under Fourth Circuit Rule 34(a). This case presents a question of first impression in

this Court, and in any Court of Appeals: whether the PLRA requires incarcerated plaintiffs with disabilities to exhaust both the BOP grievance process and the EEO complaint procedure before bringing a Rehabilitation Act claim. Oral argument will materially advance this Court's resolution of this novel question of law.

Dated: June 13, 2022

Respectfully submitted,

/s/ Jennifer Wedekind

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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 9,221 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: June 13, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 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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ADDENDUM:

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Prison Litigation Reform Act, 42 U.S.C. § 1997e

Suits by Prisoners.

(a) Applicability of administrative remedies
No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

* * * * *

Bureau of Prisons, Institutional Management, Administrative Remedy Program, 28 C.F.R. § 542.10 *et seq*.

§ 542.10 Purpose and scope.

(a) Purpose. The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement. An inmate may not submit a Request or Appeal on behalf of another inmate.

(b) Scope. This Program applies to all inmates in institutions operated by the Bureau of Prisons, to inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons responsibility, and to former inmates for issues that arose during their confinement. This Program does not apply to inmates confined in other non-federal facilities.

(c) Statutorily-mandated procedures. There are statutorily-mandated procedures in place for tort claims (28 CFR part 543, subpart C), Inmate Accident Compensation claims (28 CFR part 301), and Freedom of Information Act or Privacy Act requests (28 CFR part 513, subpart D). If an inmate raises an issue in a request or appeal that cannot be resolved through the Administrative Remedy Program, the Bureau will refer the inmate to the appropriate statutorily-mandated procedures.

* * * * *

§ 542.13 Informal resolution.

(a) Informal resolution. Except as provided in § 542.13(b), an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy. Each Warden shall establish procedures to allow for the informal resolution of inmate complaints.

(b) Exceptions. Inmates in CCCs are not required to attempt informal resolution. An informal resolution attempt is not required prior to submission to the Regional or Central Office as provided for in § 542.14(d) of this part. An informal resolution attempt may be waived in

individual cases at the Warden or institution Administrative Remedy Coordinator's discretion when the inmate demonstrates an acceptable reason for bypassing informal resolution.

§ 542.14 Initial filing.

(a) Submission. The deadline for completion of informal resolution and submission of a formal written Administrative Remedy Request, on the appropriate form (BP–9), is 20 calendar days following the date on which the basis for the Request occurred.

* * * * *

§ 542.15 Appeals.

(a) Submission. An inmate who is not satisfied with the Warden's response may submit an Appeal on the appropriate form (BP–10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the response. An inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form (BP–11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response. When the inmate demonstrates a valid reason for delay, these time limits may be extended. Valid reasons for delay include those situations described in § 542.14(b) of this part. Appeal to the General Counsel is the final administrative appeal.

* * * * *

§ 542.18 Response time.

If accepted, a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received. Once filed, response shall be made by the Warden or CCM within 20 calendar days; by the Regional Director within 30 calendar days; and by the General Counsel within 40 calendar days. If the Request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond not later than the third calendar day after filing. If the time period for response to a Request or Appeal is

insufficient to make an appropriate decision, the time for response may be extended once by 20 days at the institution level, 30 days at the regional level, or 20 days at the Central Office level. Staff shall inform the inmate of this extension in writing. Staff shall respond in writing to all filed Requests or Appeals. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.

* * * * *

Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Justice, 28 C.F.R. § 39.170.

Compliance procedures.
(a) Applicability. Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) Employment complaints. The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsible Official. The Responsible Official shall coordinate implementation of this section.

(d) Filing a complaint—

(1) Who may file.

(i) Any person who believes that he or she has been subjected to discrimination prohibited by this part may by him or herself or by his or her authorized representative file a complaint with the Official. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a complaint with the Official.

(ii) Before filing a complaint under this section, an inmate of a Federal penal institution must exhaust the Bureau of Prisons Administrative Remedy Procedure as set forth in 28 CFR part 542.

(2) Confidentiality. The Official shall hold in confidence the identity of any person submitting a complaint, unless the person

submits written authorization otherwise, and except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or proceeding under this part.

(3) When to file. Complaints shall be filed within 180 days of the alleged act of discrimination, except that complaints by inmates of Federal penal institutions shall be filed within 180 days of the final administrative decision of the Bureau of Prisons under 28 CFR part 542. The Official may extend this time limit for good cause shown. For purposes of determining when a complaint is timely filed under this subparagraph, a complaint mailed to the agency shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the agency.

(4) How to file. Complaints may be delivered or mailed to the Attorney General, the Responsible Official, or agency officials. Complaints should be sent to the Director for Equal Employment Opportunity, U.S. Department of Justice, 10th and Pennsylvania Avenue, NW., Room 1232, Washington, DC 20530. If any agency official other than the Official receives a complaint, he or she shall forward the complaint to the Official immediately.

* * * * *

(f) Acceptance of complaint.

(1) The Official shall accept a complete complaint that is filed in accordance with paragraph (d) of this section and over which the agency has jurisdiction. The Official shall notify the complainant and the respondent of receipt and acceptance of the complaint.

(2) If the Official receives a complaint that is not complete, he or she shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete the complaint within 30 days of receipt of this notice, the Official shall dismiss the complaint without prejudice.

(3) If the Official receives a complaint over which the agency does not have jurisdiction, the Official shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(g) Investigation/conciliation.

(1) Within 180 days of the receipt of a complete complaint, the Official shall complete the investigation of the complaint, attempt informal resolution, and, if no informal resolution is achieved, issue a letter of findings.

* * * * *

(h) Letter of findings. If an informal resolution of the complaint is not reached, the Official shall, within 180 days of receipt of the complete complaint, notify the complainant and the respondent of the results of the investigation in a letter sent by certified mail, return receipt requested, containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right of the complainant and respondent to appeal to the Complaint Adjudication Officer; and

(4) A notice of the right of the complainant and respondent to request a hearing.

(i) Filing an appeal.

(1) Notice of appeal to the Complaint Adjudication Officer, with or without a request for hearing, shall be filed by the complainant or the respondent with the Responsible Official within 30 days of receipt from the Official of the letter required by paragraph (h) of this section.

(2) If a timely appeal without a request for hearing is filed by a party, any other party may file a written request for hearing within the time limit specified in paragraph (i)(1) of this section or within 10 days of the date on which the first timely appeal without a request for hearing was filed, whichever is later.

(3) If no party requests a hearing, the Responsible Official shall promptly transmit the notice of appeal and investigative record to the Complaint Adjudication Officer.

(4) If neither party files an appeal within the time prescribed in paragraph (i)(1) of this section, the Responsible Official shall certify that the letter of findings is the final agency decision on the complaint at the expiration of that time.

(j) Acceptance of appeal. The Responsible Official shall accept and process any timely appeal. A party may appeal to the Complaint Adjudication Officer from a decision of the Official that an appeal is untimely. This appeal shall be filed within 15 days of receipt of the decision from the Official.

(k) Hearing.

(1) Upon a timely request for a hearing, the Responsible Official shall appoint an administrative law judge to conduct the hearing. The administrative law judge shall issue a notice to all parties specifying the date, time, and place of the scheduled hearing. The hearing shall be commenced no earlier than 15 days after the notice is issued and no later than 60 days after the request for a hearing is filed, unless all parties agree to a different date.

(2) The complainant and respondent shall be parties to the hearing. Any interested person or organization may petition to become a party or amicus curiae. The administrative law judge may, in his or her discretion, grant such a petition if, in his or her opinion, the petitioner has a legitimate interest in the proceedings and the participation will not unduly delay the outcome and may contribute materially to the proper disposition of the proceedings.

* * * * *

(5) The costs and expenses for the conduct of a hearing shall be allocated as follows:

(i) Persons employed by the agency, shall, upon request to the agency by the administrative law judge, be made available to participate in the hearing and shall be on official duty status for this purpose. They shall not receive witness fees.

(ii) Employees of other Federal agencies called to testify at a hearing shall, at the request of the administrative law judge and with the approval of the employing agency, be on official duty status during any period of absence from normal duties caused by their testimony, and shall not receive witness fees.

(iii) The fees and expenses of other persons called to testify at a hearing shall be paid by the party requesting their appearance.

(iv) The administrative law judge may require the agency to pay travel expenses necessary for the complainant to attend the hearing.

(v) The respondent shall pay the required expenses and charges for the administrative law judge and court reporter.

(vi) All other expenses shall be paid by the party, the intervening party, or amicus curiae incurring them.

(6) The administrative law judge shall submit in writing recommended findings of fact, conclusions of law, and remedies to all parties and the Complaint Adjudication Officer within 30 days after receipt of the hearing transcripts, or within 30 days after the conclusion of the hearing if no transcript is made. This time limit may be extended with the permission of the Complaint Adjudication Officer.

(7) Within 15 days after receipt of the recommended decision of the administrative law judge, any party may file exceptions to the decision with the Complaint Adjudication Officer. Thereafter, each party will have ten days to file reply exceptions with the Officer.

(l) Decision.

(1) The Complaint Adjudication Officer shall make the decision of the agency based on information in the investigative record and, if a hearing is held, on the hearing record. The decision shall be made within 60 days of receipt of the transmittal of the notice of appeal and investigative record pursuant to § 39.170(i)(3) or after the period for filing exceptions ends, whichever is applicable. If the Complaint Adjudication Officer determines that he or she needs additional information from any party, he or she shall request the information and provide the other party or parties an opportunity to respond to that information. The Complaint Adjudication Officer shall have 60 days from receipt of the additional information to render the decision on the appeal. The Complaint Adjudication Officer shall transmit his or her decision by letter to the parties. The decision shall set forth the findings, remedial action required, and reasons for the decision. If the decision is based on a hearing record, the Complaint Adjudication Officer shall consider the recommended decision of the administrative law judge and render a final decision based on the entire record. The Complaint Adjudication Officer may also remand the hearing record to the administrative law judge for a fuller development of the record.

(2) Any respondent required to take action under the terms of the decision of the agency shall do so promptly. The Official may require periodic compliance reports specifying—

(i) The manner in which compliance with the provisions of the decision has been achieved;

(ii) The reasons any action required by the final decision has not yet been taken; and

(iii) The steps being taken to ensure full compliance.

The Complaint Adjudication Officer may retain responsibility for resolving disagreements that arise between the parties over interpretation of the final agency decision, or for specific adjudicatory decisions arising out of implementation.