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

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION AND RULE 35(b)(1) STATEMENT

The panel's decision turns on two questions of statutory interpretation. First, does the Prison Litigation Reform Act's ("PLRA's") exhaustion provision require plaintiffs to exhaust administrative remedies beyond those contained in the prison's grievance policy? Second, do prison officials have to inform incarcerated plaintiffs of these administrative remedies to make them "available"?

The panel's answers to these questions conflict with Supreme Court and this Court's precedent, create a circuit split, and address matters of exceptional importance. En banc review is therefore warranted under Federal Rule of Appellate Procedure 35(b)(1).

The panel first held that the PLRA requires incarcerated plaintiffs to exhaust "all" conceivable remedies before suing in federal court, regardless of whether they are delineated in a prison's grievance policy, or administered by the prison or outside entities. Op.10. This decision conflicts with Supreme Court precedent. *Jones v. Bock* held that "[c]ompliance with prison grievance procedures . . . is all that is required by the PLRA" because it is "the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." 549 U.S.

199, 218 (2007). *See also Moore v. Bennette*, 517 F.3d 717, 726 (4th Cir. 2008) (applying *Jones*). It also dramatically expands the scope of the PLRA's exhaustion requirement, requiring exhaustion of any number of local, state, and federal remedies.

The panel then held that prison officials have no affirmative duty to inform plaintiffs of required administrative remedies. Op.19. This decision creates a circuit split, with this Court the sole outlier. Every other circuit to consider the issue agrees that officials must apprise plaintiffs of administrative remedies; otherwise, those remedies are not "available" under the PLRA. *See Hernandez v. Dart*, 814 F.3d 836, 842 (7th Cir. 2016); *Albino v. Baca*, 747 F.3d 1162, 1177 (9th Cir. 2014) (en banc); *Goebert v. Lee County*, 510 F.3d 1312, 1321–23 (11th Cir. 2007); *see also Huskey v. Jones*, 45 F.4th 827, 833 (5th Cir. 2022); *Small v. Camden County*, 728 F.3d 265, 271 (3d Cir. 2013).

The panel's errors compound one another. Incarcerated plaintiffs must now exhaust an undefined universe of administrative remedies, while officials have no obligation to tell them what those remedies are. And the decision extends far beyond the Rehabilitation Act claims at issue here to every federal lawsuit brought by an incarcerated plaintiff.

Indeed, the panel's decision may make it impossible for many incarcerated plaintiffs to meet the PLRA's exhaustion requirements and enforce their civil rights in federal court.

STATEMENT OF THE CASE

I. Factual and Procedural Background

Plaintiff-Appellant Webster Williams, III, an incarcerated 61-year-old man with disabilities, was punished by prison officials for attending to the urgent need to urinate. Bureau of Prisons ("BOP") staff sanctioned him for "refusing to obey an order" after making him choose between proceeding to the restroom, or returning to his bunk and urinating on himself. JA12 ¶ 21; JA18 ¶ 44. Mr. Williams informed officers that his medication results in the need to frequently relieve himself and requested accommodations, to no avail. JA17 ¶ 38; JA19 ¶ 45. This disciplinary infraction, on his otherwise clean record, will subject Mr. Williams to escalating sanctions, and may jeopardize his eligibility for Elderly Offender Home Confinement. JA12 ¶ 21.

Mr. Williams exhausted the BOP grievance procedure. JA21 ¶ 55. He then filed suit *pro se* under the Rehabilitation Act for disability-based retaliation and discrimination.

The district court dismissed Mr. Williams' claim for failure to exhaust administrative remedies because he did not complete an external remedial process administered by the Department of Justice's Office of Equal Employment Opportunity ("EEO process") and applicable only to disability discrimination claims. JA98. The district court found that he had properly exhausted the BOP grievance procedure. JA95. The district court also found that the BOP grievance policy "does not mention" the EEO process. JA96. And Defendant Carvajal introduced no evidence that Mr. Williams was informed about the EEO process. But the court held that the PLRA nevertheless required incarcerated plaintiffs bringing Rehabilitation Act claims to exhaust this second procedure, which it reasoned was "publicly available." JA97.

Mr. Williams, now represented by counsel, appealed. The panel affirmed, holding that the PLRA required exhaustion of "all" administrative remedies, including the EEO procedure, regardless of whether those procedures are contained in the prison's grievance policy or "who created them." Op.10. The panel held that the EEO procedure was "available" to Mr. Williams because prison officials "cannot be

expected" to affirmatively inform prisoners of administrative remedies, and the EEO process was "publicly available." Op.19.

II. Regulatory Background

The BOP provides an internal grievance procedure called the Administrative Remedy Program. *See* 28 C.F.R. §§ 542.10–542.18. It requires four steps—an informal resolution, formal grievance, and two appeals. 28 C.F.R. §§ 542.13, 542.14(a), 542.15(a). The last step is described as "the final administrative appeal." 28 C.F.R. § 542.15(a). The policy contains no reference to the EEO process and does not contain any specific requirements for disability claims. *See* 28 C.F.R. §§ 542.10–542.19. *See also* Op.20.

The Department of Justice offers a remedial process, administered by its EEO office, to address complaints of disability-based discrimination in the agency's programs or activities. *See* 28 C.F.R. § 39.170. The EEO process is available to anyone with a complaint of disability-based discrimination, including incarcerated people. The process is voluntary. Complainants "may" choose to use the EEO process or proceed directly to court. *See* 28 C.F.R. § 39.170 (d)(1)(i). Incarcerated complainants who elect to use the EEO process must first

exhaust the BOP grievance procedure. 28 C.F.R. § 39.170(d)(1)(ii). The EEO process includes a complaint, an appeal, and a hearing before an administrative law judge upon request by either party. 28 C.F.R. § 39.170(d), (i)(1), (k). The procedure can take more than a year to complete, and administrative law judges may extend this timeframe further. *See* 28 C.F.R. § 39.170(g)(1), (i)(1), (k)(1), (k)(6), (k)(7), (l)(1).

ARGUMENT

I. The Panel's Rule That The PLRA Requires Exhaustion Of An Undefined Number Of Administrative Remedies Conflicts With Supreme Court And Fourth Circuit Precedent, Meriting En Banc Review.

The PLRA requires incarcerated plaintiffs to exhaust "such administrative remedies as are available" before suing in federal court. 42 U.S.C. § 1997e(a). To "properly exhaust" 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. Compliance with prison grievance procedures, therefore, is all that is required[.]" *Jones*, 549 U.S. at 218 (internal citation and quotation marks omitted). But the panel held that "all administrative remedies" must be exhausted regardless of "who created them," including those *not* required by, or

even mentioned in, a prison's grievance procedure. Op.10. This decision cannot be reconciled with *Jones* or this Court's application of *Jones*.

Jones held that the PLRA requires exhaustion only of those requirements contained in a prison's grievance policy. 549 U.S. at 218. The Court rejected a "judicially created rule" that required plaintiffs to list all potential defendants in their grievances because the prison's grievance policy made "no mention" of the requirement. *Id.* at 217–18. It concluded that "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Id.* at 218. Applying *Jones*, this Court has also rejected exhaustion requirements not contained in the prison grievance policy. *Moore*, 517 F.3d at 726.

These decisions align with the PLRA's legislative history. "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." *Rumbles v. Hill*, 182 F.3d 1064, 1070 (9th Cir. 1999) (rejecting argument that prisoners must exhaust state tort claim procedures in addition to prison grievance procedures), *overruled on other grounds by Booth v. Churner*, 532 U.S. 731 (2001).

Here, as in *Jones* and *Moore*, the BOP's grievance policy makes "no mention" of the EEO process. *See* JA96; *see also* Op.20. The panel's "judicially created rule" imposing this additional exhaustion requirement on plaintiffs with disabilities therefore conflicts directly with *Jones*. The panel does not reconcile, or address, this conflict.

The panel reasoned that limiting exhaustion to the requirements contained in a prison's internal grievance policy would require the Court to place a "gloss on the statute" and would "run[] afoul of the PLRA's text." Op.7, 10. It is not gloss, but rather Supreme Court precedent, that limits exhaustion to prison grievance requirements.

The panel next reasoned that its interpretation furthers the PLRA's purposes. To the contrary, the panel's rationale again conflicts with Supreme Court precedent and dramatically expands the universe of potential procedures that could now be required.

Administrative exhaustion's primary purposes are promoting administrative agency authority and efficiency. *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006). First, the PLRA is intended to "afford[] *corrections officials* time and opportunity to address complaints *internally* before allowing the initiation of a federal case." *Porter v.*

Nussle, 534 U.S. 516, 525 (2002) (emphasis added). *See also Moore*, 517 F.3d at 725 (holding that available administrative remedies are exhausted after "prison officials have been given an opportunity to address the claims administratively"). Prison grievance procedures allow for this internal resolution. But the EEO process removes complaints from corrections officials and hands them to an external entity.

The panel sidesteps this conflict by suggesting that its rule allows the BOP to take advantage of DOJ expertise. Possibly. But the potential advantage of outside expertise is a policy consideration—not a primary purpose of the PLRA. And "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent." *Patsy v. Board of Regents*, 457 U.S. 496, 513 (1982). *See also Jones*, 549 U.S. at 219 (rejecting policy arguments for additional exhaustion requirement because they were not a "leading purpose[]" of the PLRA). Further, the panel's decision extends far beyond the EEO process to any number of local, state, or federal

procedures—procedures that also take matters away from corrections officials and may not provide specialized expertise.[1]

Second, the PLRA's goal of efficiency is undermined by requiring exhaustion of multiple administrative remedies managed by 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 exhaustion requirement's goal of efficiency is "disserved" by requiring disputes to be "considered by multiple [entities]" and risks "disparate interpretations and dispositions"). The panel suggests that the EEO process may resolve some complaints faster than federal litigation. Perhaps in some cases. But the regulation's timeframes may be extended indeterminately. 28 C.F.R. § 39.170(k)(6). And many plaintiffs will still proceed to federal court—having been delayed at least a year and suffering continued harm during that time—while BOP officials will have devoted resources to not one but two administrative investigations. *See* 28 C.F.R. § 542.11(a)(3) (requiring investigation); 28 C.F.R. § 39.170(g)(2) (requiring agency cooperation).

[1] Notably, holding that the PLRA does not require exhaustion of the EEO process does not preclude the BOP from consulting with experts when addressing grievances internally.

And, again, the panel's broad language—requiring exhaustion of "all administrative remedies" regardless of "who created them"—extends its decision far beyond the EEO process. Op.10. Other non-prison procedures may take even longer, or plaintiffs may be required to complete multiple procedures, turning administrative exhaustion into a multi-year, multi-agency endeavor. This not only results in undue delay, it will consume the time and resources of agencies not equipped or intended to manage prisoner complaints—defeating a core purpose of the PLRA. Indeed, 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 PLRA exhaustion 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)).

Finally, the panel suggests that its interpretation is required to avoid "upset[ting] established case law" or placing a "significant burden" on district courts. Op.7. The case law referenced by the panel includes a handful of unpublished district court cases requiring exhaustion of the EEO process, none of which applied *Jones*.

Regardless, this Court should correct the errors of lower courts, not perpetuate them. *Cf. Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 545 (4th Cir. 2017) ("Given that published district court opinions, like unpublished opinions from our Court, have no precedential value, it follows that we should not consider them."). And the panel's unsupported assertion that limiting exhaustion to a prison's grievance procedure would impose a "large burden on district courts to resolve many insubstantial claims that would not have survived the scrutiny of the EEO[,]" Op.16, fundamentally mischaracterizes the EEO's function. The EEO has no gatekeeper role. Claims may and will proceed to federal court regardless of whether the EEO considers them meritorious.[2]

[2] The panel's decision also creates a conflict between the PLRA and federal disability rights laws, by requiring incarcerated plaintiffs with disabilities to navigate additional requirements that are "different" and "not equal" before bringing suit. *See* 28 C.F.R. § 39.130(b)(1)(ii)–(iv). In the panel's view, these extra requirements should be seen as an opportunity, not discrimination. *See* Op.15. But disability-based discrimination "often occurs under the guise of extending a helping hand[.]" *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372, 1385 (10th Cir. 1981).

II. The Panel's Availability Analysis Creates A Circuit Split And Makes This Court An Outlier, Meriting En Banc Review.

The PLRA requires exhaustion only of "available" administrative remedies. 42 U.S.C. § 1997e(a). Remedies are "unavailable," and need not be exhausted, if they are "essentially unknowable" or part of a system including "blind alleys and quagmires" designed to "trip up all but the most skillful prisoners." *Ross v. Blake*, 578 U.S. 632, 644 (2016) (internal quotation marks and alteration omitted).

Every circuit to have considered the question has held that if officials do not inform incarcerated plaintiffs of administrative remedies, they are unavailable. *See Hernandez*, 814 F.3d at 843 (holding remedies unavailable when officials "failed to inform" the prisoner of the grievance process); *Albino*, 747 F.3d at 1177 (holding remedies unavailable where plaintiff not provided grievance manual or otherwise informed of process); *Goebert*, 510 F.3d at 1321–23 (holding remedies unavailable where plaintiff informed only about procedure's first step and "did not know that she should, or could, appeal"); *see also Huskey*, 45 F.4th at 833 (finding genuine disputes of material fact on availability of remedies when plaintiff given documents that "only

partially explained" grievance process); *Small*, 728 F.3d at 271 ("Remedies that are not reasonably communicated to inmates may be considered unavailable for exhaustion purposes.").

Prison officials therefore "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) (internal quotation marks omitted).

The panel reached the opposite conclusion. It held that prison officials have no affirmative duty to inform plaintiffs of required administrative remedies. Op.18, 19. In doing so, it did not acknowledge these other holdings or attempt to reconcile them, creating a lopsided circuit split.

The panel reasoned that given the breadth of statutes, regulations, and caselaw that "may be helpful to any given claim[,]" the government "cannot be expected" to make plaintiffs aware of "each and every legal authority that might be of use." Op.19. But providing plaintiffs with notice of required grievance procedures is a far cry from

"requiring the government to assume a quasi-legal role" supporting a plaintiff's claim. Op.20.[3]

The panel also held that the EEO process was "publicly available" because a different BOP policy mentions it, and therefore Mr. Williams "could have discovered" it. Op.19. The panel's reasoning runs counter to the Supreme Court's decisions in *Ross* and *Jones*.

First, the BOP grievance policy does not mention the EEO process and describes the final step in the grievance procedure as the "final administrative appeal." *See* 28 C.F.R. § 542.15(a). The grievance policy provides no indication that plaintiffs must attempt to "discover" additional grievance requirements. Where policies contain such "misrepresentation[s,]" remedies are unavailable. *Ross*, 578 U.S. at 644.

Second, the panel failed to hold Defendant Carvajal to his burden of proof. Failure to exhaust is an affirmative defense that defendants

[3] The panel's coda encouraging the BOP to "indicate within the ARP the administrative course" required of plaintiffs with disabilities does little to mitigate its broad holding that officials "cannot be expected" to inform plaintiffs of grievance requirements. *See* Op.20, 19. Indeed, this afterthought only confirms the illogic of the panel's holding. And it creates confusion for prison administrators on what their obligations entail.

must plead and prove. *Jones*, 549 U.S. at 216. Defendants must demonstrate both that remedies were available, and that the plaintiff failed to exhaust those remedies. *See Albino*, 747 F.3d at 1172; *Lanaghan v. Koch*, 902 F.3d 683, 690 (7th Cir. 2018). Here, Defendant Carvajal submitted no evidence that the EEO process was available to Mr. Williams. The panel ignored this shortcoming, instead suggesting, without authority, that it was Mr. Williams who should have presented more or different evidence. Op.18. This flipped the burden of proof, again defying Supreme Court precedent and parting ways with sibling circuits.

Finally, there is no record evidence regarding the contents of the LSCI-Butner law library, or Mr. Williams' access to those materials, to support the panel's conclusion that Mr. Williams "could have discovered" the EEO process. Op.19. *Ross* instructs courts to examine "the real-world workings of prison grievance systems"—not just whether a remedy is "officially on the books." *Ross*, 578 U.S. at 643. This analysis requires a fact-intensive, case-specific inquiry. *See id.* The panel failed to heed these instructions. Instead, it relied on evidence

from a different case, discussing a different facility, in a different jurisdiction. *See* Op.19.

The panel also speculated that Mr. Williams could have found the necessary documents, relying on pleadings he filed in 2020 and 2021. But, as other circuits hold, the relevant inquiry is whether the EEO process was knowable to Mr. Williams in 2019, at the time he was required to exhaust—not years later in the midst of litigation. *See Huskey*, 45 F.4th at 833 (holding that evidence from 2019 "does not demonstrate that [plaintiff] knew of the 2016 online handbook at the time that he filed his grievances [in 2016]"); *Goebert*, 510 F.3d at 1322 (holding that remedies must be accessible "by the time they are needed").

III. The Panel's Decision Will Have Adverse Consequences Far Beyond Rehabilitation Act Claims, Making It A Matter Of Exceptional Importance Meriting En Banc Review.

The scope of the panel's opinion is unprecedented. It extends far beyond the applicability of the EEO process to Rehabilitation Act claims and expands the PLRA's exhaustion requirement in all litigation brought by incarcerated plaintiffs. Compounding this expansion of the statute's scope, the panel held that officials have no affirmative duty to

inform incarcerated plaintiffs of required grievance procedures. Together, these determinations will make it impossible for many plaintiffs to successfully exhaust all possible procedures, barring untold numbers of meritorious cases from court. And rather than minimizing the judicial resources consumed by prisoner litigation, this decision will multiply them.

The Code of Federal Regulations is rife with administrative remedies that could arguably apply to prisoner claims under the panel's broad rule.[4] And state and local remedies previously considered by courts to fall outside the PLRA's scope—such as state declaratory

[4] For example, complaints about race, color, or national origin discrimination may need to go through 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. §§ 1691.1–1691.10 (implementing procedures for processing and resolving complaints of employment discrimination). Similarly, concerns about gender discrimination in prison education programs may need to go through the Department of Education. *See* 31 C.F.R. § 28.610(b)–(e) (establishing complaint procedure for Title IX).

judgment procedures,[5] state tort remedies,[6] or petitions for rulemaking under a state's Administrative Procedures Act[7]—could now be required as well.

Under the panel's reasoning, any number of administrative remedies could be stacked upon one another, creating a never-ending administrative review process. If "dual exhaustion," Op.13, falls within the PLRA's scope, so too could "quad exhaustion" or "hexa exhaustion," with no requirement that prison officials share the rules of the game. Incarcerated plaintiffs thus will be turned away from the courthouse for unknowingly failing to discover and complete the third, fourth, or fifth administrative remedy argued to apply to their claims. This was not the

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[5] *See, e.g.*, *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1074 (W.D. Wis. 2000) (the PLRA "does not require that prisoners do more than exhaust the prison's internal administrative grievance system").

[6] *See, e.g.*, *Rumbles*, 182 F.3d at 1069 ("[W]hile Congress certainly intended to require prisoners to exhaust available prison administrative grievance procedures, there is no indication that it intended prisoners also to exhaust state tort claim procedures.").

[7] *See, e.g.*, *Jean-Denis v. Inch*, No. 3:19CV575-RV-MAF, 2020 WL 3001933, at *4 (N.D. Fla. May 11, 2020), *report and recommendation adopte*d, No. 3:19CV575-RV-MAF, 2020 WL 3001392 (N.D. Fla. June 4, 2020) (rejecting argument that plaintiffs must file a petition to initiate rulemaking when not contained in prison's grievance procedure).

PLRA's intent. Congress intended to "improve the quality of prisoner suits," *Porter*, 534 U.S. at 524, not bar them completely. *See also Brown v. Plata*, 563 U.S. 493, 526 (2011) ("Courts should presume . . . that Congress did not leave prisoners without a remedy for violations of their constitutional rights.").

Further, while the panel's decision rests in large part on a desire to shield district courts from the burden of adjudicating prisoner rights suits, the decision does just the opposite. District courts already devote considerable resources to prison officials' near-automatic motions to dismiss for failure to exhaust administrative remedies. Courts must conduct extensive factual review to determine what grievance procedures require and whether the plaintiff complied. If the plaintiff did not exhaust, courts must continue their factual inquiry to determine whether remedies were available to the individual plaintiff. *See, e.g.*, *Ross*, 578 U.S. at 648 (admonishing lower courts to "perform a thorough review" of relevant materials regarding availability). All of this must happen before a court can consider the merits of a case.

With the panel's decision, exhaustion-related litigation will be even more protracted. In cases, like here, where the plaintiff

successfully exhausted prison grievance procedures, defendants, like here, may nevertheless argue a failure to exhaust by pointing to any number of additional administrative processes. And in all cases, courts will be tasked with making complex factual and legal determinations about whether any number of administrative procedures identified by officials were "available" to the individual plaintiff.

If permitted to stand, the panel's decision will make administrative exhaustion a complete barrier to judicial redress for many incarcerated plaintiffs, and will create significant additional burdens on district courts.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc.

Dated: May 12, 2023

Respectfully submitted,

/s/ Jennifer Wedekind

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 35(b)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 3,880 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: May 12, 2023

/s/ Jennifer Wedekind
Jennifer Wedekind

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2023, 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.

/s/ Jennifer Wedekind
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