No. 15-339

In the Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* LEGAL AID SOCIETY OF NEW YORK AND MORNINGSIDE HEIGHTS LEGAL SERVICES, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Legal Aid Society of the City of New York is a private, non-profit organization that has provided free legal assistance to indigent persons in New York City for over 125 years. It is the largest provider of criminal defense services in New York City, and large numbers of its clients are held in City jails. In addition, through its Prisoners' Rights Project (PRP), established in 1971, the Society seeks to ensure the protection of prisoners' constitutional and statutory rights through litigation and advocacy on behalf of prisoners in the New York State prisons and the New York City jails. PRP has been involved in litigation concerning the interpretation of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) virtually since the statute's enactment, both as counsel and as amicus curiae.[2]

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *See, e.g., Amador v. Andrews*, 655 F.3d 89 (2d Cir. 2011) (interpreting PLRA exhaustion requirement in PRP case); *Johnson v. Testman*, 380 F.3d 691 (2d Cir. 2004) (same); *Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir. 1999) (en banc) (interpreting PLRA prospective relief provisions in PRP case), *cert. denied sub nom. Benjamin v. Kerik*, 528 U.S. 824 (1999); Brief for American Civil Liberties Union, The Legal Aid Society, et al. as Amici Curiae Supporting Petitioners, *Jones v. Bock*, 549 U.S. 199 (2007) (Nos. 05-7058, 05-7142), 2006 WL 2364683 (amici brief in Supreme Court concerning PLRA exhaustion requirement); Brief for American Civil Liberties Union, The Legal Aid Society, et al. as Amici Curiae Supporting Respondent, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 284226 (same).

Morningside Heights Legal Services, Inc. (MHLS) is a private, non-profit organization located at Columbia University School of Law. Lawyers and law student interns at MHLS perform legal services in the public interest, provide legal assistance, and assist legal services programs in representation of their clients. MHLS has regularly provided legal representation to prisoners at state and federal prisons and jails for more than twenty-five years. MHLS lawyers accept appointment by federal courts in civil cases challenging conditions of confinement, including actions brought under 42 U.S.C. § 1983, where prisoners are subject to the exhaustion requirements of the PLRA.

SUMMARY OF ARGUMENT

The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), requires exhaustion of available remedies. However, as this Court has held, administrative law principles govern PLRA exhaustion. Administrative law allows exceptions to exhaustion requirements under appropriate, limited circumstances, and lower courts have recognized the applicability of that principle to the PLRA.

The doctrine of administrative exhaustion must be applied with a regard for the particular administrative scheme at issue. Characteristics of the prison environment, coupled with the complexity of many grievance procedures and the distinct disadvantages faced by many prisoners in navigating such systems, mandate that failure to exhaust be excused under certain circumstances, *i.e.* where the prisoner acted objectively reasonably rather than simply failing or refusing to use the administrative procedure. Those circumstances include a case like

this one, where the requirements of exhaustion were not clear but the prisoner gave ample notice to officials of his claim. The purposes of exhaustion are not served by forfeiture of the prisoner's claim under these circumstances.

ARGUMENT

I. ADMINISTRATIVE LAW PRINCIPLES SUPPORT APPROPRIATELY LIMITED EXCEPTIONS TO THE "PROPER EXHAUSTION" REQUIREMENT OF THE PLRA.

The PLRA provides that no prisoner may file suit in federal court "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This Court found in *Woodford v. Ngo*, 548 U.S. 81, 93 (2006), that Congress intended the PLRA's requirement of administrative exhaustion "to mean what the term means in administrative law, where exhaustion means proper exhaustion." Proper exhaustion, however, is not an absolute requirement: administrative law allows for some exceptions where appropriate. *Woodford*, 548 U.S. at 103 (Breyer, J., concurring). This Court has further acknowledged that "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue." *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (citing *Parsi v. Davidson*, 405 U.S. 34 (1972); *McKart v. U.S.*, 395 U.S. 185 (1969)). As lower courts have recognized, within the PLRA context, it is consistent with administrative law to allow limited exceptions in cases where the prisoner's actions were reasonable under the circumstances. In such cases, dismissal for non-exhaustion would not serve the statutory purpose of

allowing prison officials a chance to resolve problems before litigation while preserving meritorious claims.[3] Barring such claims would be fundamentally unfair.

While the PLRA mandates only that prisoners exhaust "remedies [that] are available," § 1997e(a), and courts have denied dismissal for non-exhaustion on the ground that the remedy was not available under specified factual circumstances,[4] some

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[3] The legislative history is replete with statements that the PLRA would not impede but would, in fact, promote legitimate and meritorious claims by prisoners. 141 Cong. Rec. 1480 (1995) (statement of Rep. Charles Canady) ("These reasonable requirements will not impede meritorious claims by inmates."); 141 Cong. Rec. 7526 (1995) (statement of Sen. Jon Kyl) ("[W]e will free up judicial resources for claims with merit by both prisoners and nonprisoners."); 141 Cong. Rec. 14626–27 (1995) (statement of Sen. Orrin Hatch) (introducing an amendment "virtually identical" to the PLRA) ("Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."); 141 Cong. Rec. 14628 (1995) (statement of Sen. Harry Reid discussing amendment identical to entire PLRA) ("If [prison inmates] have a meritorious lawsuit, of course they should be able to file."); 141 Cong. Rec. 14628 (1995) (statement of Sen. Strom Thurmond) (discussing amendment identical to entire PLRA) ("This amendment will allow meritorious claims to be filed.").

[4] Courts have found remedies unavailable for a variety of reasons. *See, e.g.*, *DeBrew v. Atwood*, 792 F.3d 118, 132 (D.C. Cir. 2015) (holding remedy was not available where officials required prisoner to attach to his grievance a document that other officials failed to provide to him); *Pavey v. Conley*, 663 F.3d 899, 906 (7th Cir. 2011) ("An administrative remedy is not 'available,' and therefore need not be exhausted, if prison officials erroneously inform an inmate that the remedy does not exist or inaccurately describe the steps he needs to take to pursue it."); *Hurst v. Hantke*, 634 F.3d 409, 411–12 (7th Cir. 2011) (holding remedy would be unavailable if prisoner was

scenarios do not fit comfortably within the rubric of availability and unavailability, at least as those words are ordinarily understood.[5]

Within administrative law, courts have identified various strains of exhaustion. Exhaustion requirements may be imposed by federal common law or statute. II Richard J. Pierce, Jr., *Administrative Law Treatise* § 15.3, at 1241 (Wolters Kluwer 2010). Where exhaustion is required by statute, this Court has distinguished between exhaustion requirements that are "simply a codification of the judicially developed doctrine of

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incapacitated by stroke during time when he was required to file grievance, and he was not allowed to file a late grievance), *cert. denied*, 132 S. Ct. 168 (2011); *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) ("Prison officials may not take unfair advantage of the exhaustion requirement . . . and a remedy becomes 'unavailable' if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting."); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) (noting defendants' concession that denial of grievance forms, in a system that required using the form, made the remedy unavailable to the plaintiff).

[5] Some courts have held prison officials estopped to claim non-exhaustion where their actions or omissions prevented or contributed to preventing a prisoner from properly exhausting. However, estoppel is usually thought of as a personal defense, which would not be applicable to instances where the persons who interfered with exhaustion are not the named defendants in the case. *See, e.g.*, *Dillon v. Rogers*, 596 F.3d 260, 270 (5th Cir. 2010) (reasoning that statements by prison captain and inmate counsel could not estop appellees because the former were not defendants in this case, and appellees were being sued in their individual capacities); *Silvagnoli v. Figueroa*, No. 12 Civ. 7761 (AT), 2014 WL 4160213, at *5 (S.D.N.Y. Aug. 19, 2014) ("The actions of a non-defendant . . . do not estop the defendants from asserting the non-exhaustion defense.").

exhaustion" and exhaustion requirements that are "jurisdictional," which deprive federal courts of jurisdiction to hear cases stemming from administrative action in the absence of exhaustion. *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). Accordingly, when a statute requires exhaustion, it may create either an exhaustion requirement that is "jurisdictional, and thus non-waivable, or non-jurisdictional," and thus waivable. *Hettinga v. U.S.*, 560 F.3d 498, 503 (D.C. Cir. 2009).

This Court affirmed in *Woodford* what the lower courts had already agreed upon: that the PLRA exhaustion requirement is not jurisdictional. *Woodford*, 548 U.S. at 101; *see also Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 677–78 (4th Cir. 2005) ("Every court to have considered the question has concluded that [PLRA] § 1997(e)(a)'s exhaustion requirement is not a jurisdictional requirement.") (collecting cases). Thus the PLRA exhaustion requirement does not deprive the federal courts of jurisdiction to hear un-exhausted claims. Rather, the non-jurisdictional exhaustion requirement of the PLRA allows courts to excuse failure to exhaust where circumstances so warrant.

As has been acknowledged in this Court, administrative law "contains well established exceptions to exhaustion." *Woodford*, 548 U.S. at 103 (Breyer, J., concurring).[6] *Amici* do not argue that

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[6] *Woodford* has generated confusion among the lower courts as to what, if any, exceptions may apply to the PLRA's exhaustion requirement. As noted by Judge Kozinski on *Woodford*'s remand, "[i]t is unclear whether we can read exceptions into the PLRA's exhaustion requirement." *Ngo v. Woodford*, 539 F.3d 1108, 1110 (9th Cir. 2008); *see also Parker v. Robinson*, Civil No. 04-214-B-W, 2006 WL 2904780, at *9–10 (D. Maine Oct. 10, 2006) ("the [*Ngo*] majority . . . never mention[ed] [the]

any *a priori* list of exceptions, well-established or otherwise, should be imported wholesale into the PLRA context. Indeed, the Court noted in *Woodford* that one of the well-established exceptions—that for constitutional claims—was grossly inappropriate for the PLRA: "we fail to see how such a carve-out would serve Congress' purpose of addressing a flood of prisoner litigation in the federal courts, when the overwhelming majority of prisoner civil rights and prison condition suits are based on the Constitution." *Woodford*, 548 U.S. at 91 n.2 (internal citations omitted).

However, prisoners' failure to exhaust should be excused where it is objectively reasonable. The PLRA exhaustion requirement's purpose would not be served by extinguishing prisoners' claims under such circumstances.

As the Second Circuit stated in the case that the court below relied upon, justification for failure to exhaust in the prescribed fashion "must be determined by looking at the circumstances which might understandably lead usually uncounseled prisoners to fail to grieve in the normally required way." *Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004). That is, the Court must consider the

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concurrence by Justice Breyer . . . [i]n a post-*Ngo* universe it may still be possible for an incarcerated plaintiff to overcome an admitted procedural misstep in the grievance process and survive the assertion of a 42 U.S.C. §1997e(a) defense."). Courts have also noted that a severe interpretation of the PLRA's exhaustion requirement might well create constitutional concerns. *See Ngo v. Woodford*, 539 F.3d 1108, 1112 (9th Cir. 2008) (Pregerson, J., concurring) ("The constitutional rights of prisoners should not be taken away based on a confusing administrative process with such a short timeline.").

characteristics of the prison environment and prison administrative process, along with the purposes of the PLRA exhaustion requirement, in determining when, if ever, prisoners may be allowed to proceed without proper completion of the administrative process.

In *Giano v. Goord*, the plaintiff pursued his claim in an administrative appeal of the disciplinary conviction; the defendants argued he should have filed a grievance instead. *Id.* The court noted that there are some cases in which remedies may be available, but non-exhaustion is justified by "special circumstances"—in Mr. Giano's case, the fact that his misreading of the relevant regulations was "hardly unreasonable" because they did not differentiate clearly between grievable and non-grievable matters concerning disciplinary proceedings. *Id.* at 677–79. Indeed, a "learned federal district court judge" had only recently interpreted the same regulations similarly to Mr. Giano. *Id.* at 679.[7] Other jurisdictions display a

[7] The lack of clarity in these rules is further demonstrated by the fact that, some years later, New York prison officials made precisely the opposite argument as in *Giano* on similar facts, asserting that a prisoner who *had* filed a grievance claiming retaliatory false discipline should instead have filed a disciplinary appeal. *Larkins v. Selsky*, No. 04 Civ. 5900 (RMB)(DF), 2006 WL 3548959, at *9 (S.D.N.Y. Dec. 6, 2006) (stating that *Giano* "nearly mirrors this [case] on all fours"). More recently, the *Giano* scenario was reprised in *Williams v. Doe*, No. 12-CV-1147S (SR), 2015 WL 1567498, at *3 (W.D.N.Y. Apr. 8, 2015), showing that prison authorities had done nothing in the eleven years since *Giano* to clarify their ambiguous rule.

similar lack of clarity in rules governing disciplinary and grievance proceedings.[8]

The *Giano* decision represents a judgment, equally applicable here, that the dismissal of a prisoner's claim because he guessed wrong about unclear regulations does not serve the purpose of the PLRA exhaustion requirement to ensure that prisoners give prison authorities a chance to address their problems before suit is filed. Mr. Giano did his best as he reasonably understood matters, and for that reason it was consistent with the PLRA's purposes to allow him to go forward rather than forfeit his claim.[9]

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[8] *See, e.g.*, *Riggs v. Valdez*, No. 09-CV-010-BLW, 2010 WL 4117085, at *10 (D. Idaho Oct. 18, 2010) (noting lack of clarity in rule barring grievances about disciplinary "'hearing process including findings and sanctions,'" and prison officials' rebuffing of those prisoners who tried to grieve), *on reconsideration in part*, 2010 WL 5391313 (D. Idaho Dec. 22, 2010); *Ortego v. Forcht Wade Corr. Center*, No. 09-cv-0199, 2010 WL 2985830, at *3 (W.D. La. Apr. 29, 2010) (noting conflict over whether retaliatory discipline should be pursued via grievance or disciplinary appeal), *report and recommendation adopted in part, rejected in part*, 2010 WL 2990067 (W.D. La. July 27, 2010); *Cahill v. Arpaio*, No. CV 05-0741-PHX-MHM (JCG), 2006 WL 3201018, at *2 (D. Ariz. Nov. 2, 2006) (stating jail rules concerning what aspects of a disciplinary incident can be grieved are "sufficiently confusing such that Plaintiff's interpretation that he could not grieve his excessive force claim is reasonable"); *Shaw v. Jahnke*, 607 F. Supp. 2d 1005, 1011 (W.D. Wis. 2009) (noting confusion of grievance personnel and state lawyers about the relation of exhaustion to disciplinary appeals, suggesting state clarify its rules).

[9] Dismissal for non-exhaustion generally will be the death knell of the prisoner's claim because of the very short time limits that are prevalent in prison grievance systems. *See Woodford v. Ngo*, 548 U.S. 81, 118 (2006) (Stevens, J., dissenting) (noting "strict time requirements [in grievance systems] that are

This judgment is consistent with this Court's holding that non-exhaustion should be excused in a case where the agency was operating under an undisclosed policy so that affected persons literally did not know what they should be appealing. *See Bowen v. City of New York*, 476 U.S. 467 (1986). That decision did not refer to "special circumstances," but did cite the "unique circumstances" under which exhaustion would have served no useful purpose. *Id.* at 485. *Bowen* illustrates the need for a degree of case-by-case play in the joints in exhaustion schemes to respond to unusual situations where strict enforcement of exhaustion rules neither serves the purposes of exhaustion nor respects justice to the individuals involved. *Amici* urge the same result in this case.

II. PRISON GRIEVANCE SYSTEMS PRESENT DIFFICULTIES IN EXHAUSTION DIFFERENT FROM THOSE IN OTHER ADMINISTRATIVE AGENCIES.

There are characteristics of the prison environment and of prison administrative systems that differ sharply from those of the administrative agencies that this Court has more often dealt with, such as the Environmental Protection Agency, National Labor Relations Board, and others. These differences are sometimes not conducive to the fair processing (or in some cases, any processing) of prisoner complaints. Thus they support the recognition of a narrow exception to the exhaustion

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generally no more than 15 days, and that, in nine States, are between 2 and 5 days" (footnote omitted)).

requirement, consistent with the Fourth Circuit's holding.

Under most statutory schemes and agency regulations, parties bring their complaints before an independent Administrative Law Judge (ALJ) who adjudicates disputes either between two separate parties (*e.g.*, the Federal Mediation and Conciliation Service, *see* 29 U.S.C. §§ 171–72 (creating an independent agency with the power to intervene and settle labor disputes between parties)), or between a claimant and an agency (*e.g.*, the Social Security Administration, *see Heckler v. Day*, 467 U.S. 104 (1984) (describing the Social Security Administration's adjudicative and investigative process for disability claims)). In most of these proceedings, parties and claimants are entitled to the central features of a trial proceeding, including representation by counsel, cross-examination of witnesses, presentation of evidence, and sometimes even limited discovery. *See* Administrative Procedure Act, 5 U.S.C. §§ 554, 556, 557 (providing uniform rules for adjudication proceedings in most federal agencies and guaranteeing the right to counsel, present evidence, cross-examine, etc., in most formal adjudication proceedings).

Most of these features are missing in prison. In prison administrative proceedings, the adverse party *and* the judge are prison officials; there is no independent ALJ equivalent. *See Cleavinger v. Saxner*, 474 U.S. 193, 203–04 (1985). Even appeals from first-level decisions are generally brought before higher-ranking officials of the prison system that the prisoner is alleging wronged him or her.[10]

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[10] *See* Michigan Law Prison Information Project, *Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey* 18

The Court has recognized the problems this lack of independence can cause in the context of prison disciplinary proceedings:

> Surely, the members of the [disciplinary] committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality. They are not professional hearing officers, as are administrative law judges. They are, instead, prison officials albeit no longer of the rank and file, temporarily diverted from their usual duties. They are employees of the [prison] and they are the direct subordinates of the warden who reviews their decisions. They work with the fellow employees who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one

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(2015), *available at* http://www.law.umich.edu/special/policyclearinghouse/Site%20Documents/FOIAReport10.18.15.2.pdf ("The appeal stage typically involves review by a higher level of administration . . . . When appeals are decided by someone inside the relevant Department of Corrections, that obviously risks bias."). For example, this lack of independent review is present in the state of Maryland's grievance process. The warden, who is ultimately responsible for all misconduct committed by correctional officials under his or her supervision, is also the first person to review a prisoner's grievance—not an ALJ or equivalently independent official. Pet. Br. at 6–7. If the warden denies relief, the prisoner can appeal the decision to the State Commissioner of Correction, who oversees Maryland's entire prison system, and who is also not independent from the prison. *Id.* at 7.

> between a co-worker and an inmate. They thus are under obvious pressure to resolve the disciplinary dispute in favor of the institution and their fellow employee. It is the old situational problem between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicative performance.

Cleavinger, 474 U.S. at 203–04 (internal citations omitted). This risk of abuse by prison staff is likely to be even greater in the case of grievance systems that must be exhausted before filing civil litigation, since that litigation—usually actions under 42 U.S.C. § 1983 or *Bivens* actions—typically seeks findings of liability and awards of damages against prison employees and officials in their personal capacities. Even where the litigation is purely injunctive in nature, it seeks orders forcing those employees and officials to change their rules, procedures, or practices.

Thus, unlike typical federal agency systems, the incentives surrounding prison grievance systems do not weigh in favor of fair and efficient decision-making on the merits of grievances. Instead, they weigh in favor of procedural dismissals, which, twenty years after the PLRA was enacted, everyone in prison is likely to know will insulate the prison and its personnel from liability and judicial interference. They weigh in favor of unclear rules, over-complicated procedures, and inconsistent administration that favors the prison and its personnel. Even if prison officials do not consciously "create procedural requirements for the purpose of tripping up all but the most skillful prisoners," *Woodford v. Ngo*, 548 U.S. 81, 102–03 (2006), they

have little reason to correct procedural requirements that have that effect. *See, e.g.*, *supra* note 7 (discussing how New York prison officials did not clarify an ambiguous rule eleven years after the Second Circuit found it ambiguous).

Furthermore, unlike typical federal agency systems, which contain centralized and routine adjudicative safeguards and rights, there are dozens of independent prison systems on the city and state levels, each with its own internal procedures and rules for exhausting claims.[11] Such fragmentation heightens the risk of defective procedures, proliferating and increasing the need for a safety valve exception to prisons' exhaustion requirement, as the court below recognized.

Lastly, experience with prison grievance systems generally shows that they are considerably less orderly and reliable than most non-prison administrative systems. The clearest indication of this point is the very large number of cases in which it appears that a prisoner received no response *at all* to a grievance or a grievance appeal.[12]

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[11] *See* Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondent, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 304573 (providing a table in the appendix illustrating the different rules and procedures for filing grievances and appeals in the various city and state correctional agencies).

[12] The collection in this note identifies only cases where multiple grievances were ignored. *See, e.g.*, *Small v. Camden Cnty.*, 728 F.3d 265, 273 (3d Cir. 2013) (observing that "[t]here is no dispute" that prisoner received no response to multiple grievances); *Davis v. Corr. Corp. of Am.*, 463 F. App'x. 748, 749–50 (10th Cir. 2012) (noting concession that prison staff did not respond to five informal complaints about prisoner's housing

III. THERE ARE CIRCUMSTANCES THAT MAY THWART EXHAUSTION OF PRISON GRIEVANCE SYSTEMS BY PRISONERS.

Nearly two decades after enactment of the PLRA, there is an extensive body of federal case law—reflecting a large amount of experience with prison administrative systems—that demonstrates that prisoners are unable to raise meritorious claims in federal court despite their efforts to exhaust. Those cases demonstrate the need for a narrowly tailored

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assignment, as prison rules required); *Mann v. Scott*, Civ. No. 14-3474-RMG, 2015 WL 5165198, at *4–5 (D.S.C. Sept. 1, 2015) (finding non-responses to more than six "requests to staff," which are prerequisites to filing grievances); *Salcedo-Vazquez v. Nwaobasi*, No. 3:13-CV-00606-NJR-DGW, 2014 WL 2580517, at *5 (S.D. Ill. June 9, 2014) (finding it "clear that Plaintiff complained about his medical condition throughout the relevant time period" based on his prison counselor's notes and stating the "Court is not convinced that he ever received a response such that he could then take the next step of submitting the matter to a grievance officer."); *Castellanos v. Pfister*, No. 12-1452, 2014 WL 377742, at *3 (C.D. Ill. Feb. 3, 2014) (observing that defendants "have presented no arguments or evidence in opposition to Plaintiff's position regarding [two] August emergency grievances that named Defendant Durbin and that went unanswered."); *Raybon v. Totten*, No. 2:12-cv-1008 EFB P, 2013 WL 3456968, at *3–4 (E.D. Cal. July 9, 2013) (declining to dismiss for non-exhaustion where it was undisputed there was no response to plaintiff's second and third level grievance appeals), *report and recommendation adopted*, 2013 WL 4407268 (E.D. Cal. Aug. 14, 2013); *Garcia v. Heath*, No. 12 CV. 4695 (CM), 2013 WL 3237445, at *1–2 (S.D.N.Y. June 25, 2013) (dismissing for non-exhaustion although the prisoner's two grievances and five follow-up letters had all gone unanswered); *Nassar v. Warden, Butler Cnty. Jail*, No. 1:10-cv-031, 2011 WL 7268004, at *5 (S.D. Ohio Sept. 1, 2011) (finding that prisoner properly pursued grievance at two stages but did not receive responses consistently with policy at either stage).

exception to exhaustion. *Amici* set forth below a sampling of circumstances where non-exhaustion of arguably available remedies may be justified and non-exhaustion may appropriately be excused.

A. Hyper-Technical Errors

There are numerous district court decisions that declare a prisoner failed to properly exhaust because of minor, hyper-technical deviations from the complicated and stringent procedures required by prison systems to grieve properly.

For instance, in *Fischer v. Smith*, a prisoner's claim alleging inadequate medical care in violation of the Eighth Amendment was dismissed because the prisoner submitted a carbon copy of his grievance form instead of the original form. No. 10-C-870, 2011 WL 3876944, at *2 (E.D. Wis. Aug. 31, 2011). Although the prisoner promptly submitted the original form after his initial carbon copy grievance was denied, it was then deemed untimely, permanently preventing the prisoner from grieving through either the prison administrative system or the federal courts. *Id.*

In another case, a prisoner pursued multiple grievances and appeals complaining of inadequate medical care, which were procedurally denied. *Elliott v. Jones*, No. 4:06-cv-00089-MP-AK, 2008 WL 420051 (N.D. Fla. Feb. 12, 2008). They were denied because the prisoner "wrote outside the boundaries of the form" and filed the medical grievances as emergency grievances, rather than non-emergency grievances. *Id.* at *5. In denying the defendant's motion to dismiss for failure to properly exhaust administrative remedies, the district judge stated that "[p]laintiff gave fair notice of his claims and provided sufficient detail to the corrections staff to

facilitate some relief for his circumstances, if such was warranted. He was not attempting to flout the system or improperly bypass procedural rules . . . . This[], in the opinion of the undersigned, constitutes an attempt to complete, i.e. exhaust his administrative remedies." *Id.* Had it not been for this judge's understanding of the core principles behind the doctrine of exhaustion, this potentially meritorious complaint would likely have been dismissed on minor technicalities.[13]

B. Interference by Prison Officials

Courts have been presented with a range of institutional conduct that has interfered with a prisoner's ability to exhaust available remedies. That conduct has run the gamut from failing to provide necessary forms and providing erroneous information about available remedies and procedures to overt threats and hostility.

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[13] Other scenarios which could result or have resulted in meritorious complaints being dismissed on hyper-technicalities include: submitting a statement under penalty of perjury, rather than by notarized affidavit, *Thomas v. Parker*, No. CIV-07-599-W, 2008 WL 2894842, at *12 (W.D. Okla. July 25, 2008) (dismissing claim), *aff'd,* 318 F. App'x. 626 (10th Cir. 2009), *cert. denied*, 558 U.S. 899 (2009); filing a new grievance rather than seeking reinstatement of an already filed grievance, *Whitney v. Simonson*, No. CIV-S-06-1488 FCD GGH P, 2007 WL 3274373, at *2 (E.D. Cal. Nov. 5, 2007) (dismissing for non-exhaustion; admitting defendants' approach is "hypertechnical" but holding *Woodford* requires dismissal nonetheless), *report and recommendation adopted*, 2007 WL 4591593 (E.D. Cal. Dec. 28, 2007), *aff'd*, 317 F. App'x. 690 (9th Cir. 2009); and writing in pink ink instead of blue or black ink, *Ramsey v. McGee*, No. Civ 06-313-RAW-SPS, 2007 WL 2744272, at *2 (E.D. Okla. Sept. 19, 2007) (noting grievance returned unprocessed).

For example, erroneous direction by prison staff was found to justify non-exhaustion in *Brownell v. Krom*, 446 F.3d 305 (2d Cir. 2006). In that case, a prisoner claimed that corrections officers hindered his right of access to the courts by losing eleven of his fourteen bags of property. *Id.* at 307–08. Misinformed by prison staff, the prisoner decided to abandon his lost property claim and file a grievance instead, and was later time-barred from appealing his lost property claim. *Id.* at 308–09. Recognizing the role that prison staff played in misguiding the prisoner, the Second Circuit found that special circumstances excused the prisoner's failure to exhaust. *Id.* at 312. And relevant grievance forms were not provided in *Jones v. Fed. Bureau of Prisons*, No. 11-CV-4733 (KAM)(MDG), 2013 WL 5300721, at *8 (E.D.N.Y. Sept. 19, 2013). There, in addition to refusing to supply grievance forms, prison officials also placed a prisoner in solitary confinement for demanding those forms. *Id.* Fortunately for Jones, the district court and magistrate judges found that special circumstances may justify his failure to exhaust, and accordingly denied defendants' motion for summary judgment for non-exhaustion. *Id.*

Prison grievance systems are poorly insulated from what this Court has acknowledged as "the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance." *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985). In many instances the filing of grievances, or the anticipation of them, has led to threats, and the

actuality, of violent confrontation and retaliation by prison staff against the complaining prisoners.[14]

Explicit and egregious staff misconduct excused non-exhaustion in *Gibson v. Rosati*, No. 9:13-cv-503 (GLS/TWD), 2014 WL 3809162 (N.D.N.Y. Aug. 1, 2014). There, a prisoner—in retaliation for prior civil rights litigation—was placed in a choke hold, told that officers would kill him, forced to the ground, repeatedly kicked, handcuffed and chained, and punched, "'for taking [defendants] to court.'" *Id*. at *2. Recognizing that "an individual of ordinary firmness" might have acted in the same way as the prisoner under the circumstances, the district court

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[14] *See, e.g.*, *Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576, 577 (6th Cir. 2014) (noting allegation on summary judgment that a captain told plaintiff that if he continued with his grievances about an attack she would have him "transferred to a penitentiary and [he would] more than likely be attacked and not just beat up," and said that she transferred him to the Security Housing Unit "because of the fuckin' Tort Claim [he] filed!"), *cert granted on other grounds sub nom*. *Simmons v. Himmelreich*, 136 S. Ct. 445 (2015); *King v. Zamiara*, 680 F.3d 686 (6th Cir. 2012) (directing entry of judgment against officials who increased prisoner's security classification based on his pursuit and instigation of complaints and grievances), *cert. denied*, 133 S. Ct. 985 (2013); *Haynes v. Stephenson*, 588 F.3d 1152 (8th Cir. 2009) (awarding nominal and punitive damages for disciplinary charges filed in retaliation for statements in a grievance); *Kaba v. Stepp*, 458 F.3d 678, 682 (7th Cir. 2006) (citing "specific and detailed" allegations of threats and assault for pursuing grievances); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation), *cert. denied sub nom*. *Beauclair v. Gomez*, 534 U.S. 1066 (2001); *Maurer v. Patterson*, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program).

and magistrate judges denied defendants' motion to dismiss for failure to exhaust. *Id*. at *9.

C. Complex and Ambiguous Procedures

The rules and procedures of prison administrative systems are often ambiguous and difficult for laypersons without counsel to navigate correctly.[15] As the Court has acknowledged in a related context, "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman*, 404 U.S. 522, 527 (1972) (addressing Title VII's requirement of filing a charge with the Equal Employment Opportunity Commission before filing suit). That observation is true *a fortiori* for the prison population, which is characterized by low levels of literacy,[16] high levels of

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[15] A number of federal courts have so observed. *See, e.g.*, *Brooks v. Roy*, 776 F.3d 957, 961 (8th Cir. 2015) (stating "we recognize the confusion caused to Brooks, and likely to other inmates, by MDOC's complex, multiple-layered grievance system . . . ."); *Frasier v. McNeil*, No. 13 Civ. 8548(PAE)(JCF), 2015 WL 1000047, at *8 (S.D.N.Y. Mar. 5, 2015) (court "unable to discern the exhaustion requirements"); *Hairston v. LaMarche*, No. 05 Civ. 6642(KMW)(AJP), 2006 WL 2309592, at *9–10 (S.D.N.Y. Aug. 10, 2006) (noting the lack of clarity in New York State administrative appeal procedures in cases where a Superintendent has referred a complaint to the Inspector General for investigation).

[16] The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dep't. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17–19 (1994), *available at* http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102.

mental illness[17] and cognitive disability,[18] and limited proficiency in English.[19]

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[17] *See, e.g.*, Doris J. James & Lauren E. Glazem, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* 1 (2006), *available at* http://www.bjs.gov/content/pub/pdf/mhppji.pdf ("At midyear 2005 more than half of all prison and jail inmates had a mental health problem . . . . More than two-fifths of State prisoners (43%) and more than half of jail inmates (54%) reported symptoms that met the criteria for mania. About 23% of State prisoners and 30% of jail inmates reported symptoms of major depression. An estimated 15% of State prisoners and 24% of jail inmates reported symptoms that met the criteria for a psychotic disorder."); Council of State Governments, *Criminal Justice/Mental Health Consensus Project* xii (2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf ("Each year, ten million people are booked into U.S. jails; studies indicate that rates of serious mental illness among these individuals are at least three to four times higher than the rates of serious mental illness in the general population.").

[18] Data compiled by the Department of Justice's Bureau of Justice Statistics shows that 20% of prison inmates and 31% of jail inmates report having a cognitive disability, as compared with only 5% of the general population reporting the same. Jennifer Bronson et al., U.S. Dep't. of Justice, *Disabilities Among Prison and Jail Inmates, 2011–12*, 3 (2015).

[19] *See* Haigler et al., *supra* note 16, at xx ("Inmates who come from homes where only a non-English language was spoken demonstrate significantly lower proficiencies than those who come from homes where English was spoken. The proficiencies of these inmates from a non-English language background . . . indicate that they demonstrate skills associated with only the most basic literacy tasks."). *Cf.* Human Rights Watch, *Barred from Treatment: Punishment of Drug Users in New York State Prisons* 30–31 (2009), *available at* https://www.hrw.org/report/2009/03/24/barred-treatment/punishment-drug-users-new-york-state-prisons (noting language barriers as obstacle to medical treatment).

There are numerous cases in which prisoners are found to have failed to properly exhaust their claims because of procedural complexities created by prison systems.

For instance, in *Ferguson v. Bizzario*, No. 09 Civ. 8106 (PKC), 2010 WL 4227298 (S.D.N.Y. Oct. 19, 2010), the court denied the defendants' motion to dismiss for non-exhaustion. There, a prisoner alleged that he was confined with more than ten general population inmates during a facility fire drill, was assaulted by these inmates, and was subsequently exposed to chemical agents excessively discharged by prison staff, causing swelling in his right hand and loss of sensation in his finger and palm. *Id*. at *1. The court found that special circumstances existed to justify non-exhaustion because the Inmate Handbook did not detail the five day filing period within which prisoners must grieve. *Id*. at *5–7. Without an objective reasonableness exception, this potentially meritorious complaint would have been dismissed even though the prisoner could not have discovered the time bar.[20]

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[20] Other examples of cases involving procedural complexities created by prison systems are: *Thomas v. Hernandez*, No. 09cv1336-LAB (PCL), 2012 WL 4496826, at *3 (E.D. Cal. Sept. 28, 2012) (prison rule stating that appeal must be "forwarded to the appeals coordinator" did not, as defendants contended, clearly exclude giving it to other staff for forwarding); *Rahim v. Holden*, 882 F. Supp. 2d 638, 642–43 (D. Del. 2012) (instructions stating that parole decisions are "non-grievable" did not, as defendants argued, clearly distinguish between procedural complaints against State defendants in the parole process and substantive complaints against the Board of Parole in making its parole decision); *Smith v. Maypes-Rhynders*, No. 07 Civ. 11241 (PAC)(MHD), 2011 WL 4448944, at *11 (S.D.N.Y. July 28, 2011) (prisoner's grievance appeal was returned without instructions as to correcting defects or other steps to be

As explained above, the "special circumstances" exception at issue herein originated in *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004), a case involving a distinction between the scope of grievances and of disciplinary appeals so murky that judges as well as the plaintiff had difficulty understanding it. *See supra* p. 7–9 (discussing *Giano*).

In other cases, prisoners have not been as fortunate as Mr. Giano, losing their claims because they guessed wrong in interpreting grievance rules. For example, in *Marshall v. Knight*, No. 3:03-CV-460 RM, 2006 WL 3714713, at *1 (N.D. Ind. Dec. 14, 2006), an Indiana prisoner alleged that he had been retaliated against in classification and disciplinary matters, but did not file a grievance because classification and disciplinary matters were excluded from the grievance system. The court held that he had failed to exhaust because retaliation claims might be grievable, even if their subject matter was not. *Id*.

Unlike *Giano*, the *Marshall* decision gave no consideration to the reasonableness of Mr. Marshall's interpretation of the rules. *See also Williams v. McGrath*, No. C 04-5069 MMC (PR), 2007 WL 3010577, at *6 (N.D. Cal. Oct. 12, 2007) (holding a

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taken), *report and recommendation adopted*, 2011 WL 4444214 (S.D.N.Y. Sept. 26, 2011); *Lemons v. Dragmister*, Civ. Action No. 3:08-CV-423 JVB, 2010 WL 530073, at *2 (N.D. Ind. Feb. 9, 2010) (refusing to enforce rule requiring signing of grievances where grievance form did not have a signature line because to do so "would effectively sand-bag unsuspecting inmates"); *Warren v. Purcell*, No. 03 Civ. 8736 (GEL), 2004 WL 1970642, at *6 (S.D.N.Y. Sept. 3, 2004) (prisoner received "return of grievance" form saying that prisoner's grievance "is being returned" to him, that the grievance "needs to be investigated," and that "[i]t will take a minute before a response").

prisoner whose grievance was rejected for failure to provide necessary documentation, and who was then denied access to the documentation, should have resubmitted his appeal without the documentation, or should have filed a new grievance, despite prisoner's concerns that his grievance had already been rejected once for lack of the documentation and that if he filed a second grievance he would be in violation of the rule against duplicative grievances), *aff'd*, 320 F. App'x. 728 (9th Cir. 2009).

D. Mental and Physical Incapacity

Unsurprisingly, courts have found debilitating physical conditions or mental incapacity to present unique circumstances. For example, transfer to a mental hospital after filing a grievance precluded filing a timely appeal in *Petty v. Goord*, No. 00 CIV 803 JSR, 2007 WL 724648, at *8 (S.D.N.Y. Mar. 5, 2007) (finding special circumstances). Multiple medical issues that were complicated by other factors also justified non-exhaustion in *Perry v. Rupert*, No. 9:10-CV-1033 (LEK/TWD), 2013 WL 6816795 (N.D.N.Y. Dec. 20, 2013). In that case, a prisoner wished to file a grievance for denial of medical care but claimed that he was unable to do so because of multiple medical issues including: "onset of symptoms . . . repeated refusal of care, refusal of access to a Sergeant, wrongful transfer to the psychiatric ward, transfer by ambulance to Claxton Hepburn Medical Center for emergency consultation, transfer to multiple other hospitals for eight surgeries, hospitalization for a total of six months, release to a medical RNU, and finally a surgery to have the infected mesh removed fifteen months later." *Id.* at 5. Had the judge not recognized the prisoner's struggles and found that special

circumstances might exist to justify non-exhaustion, this seemingly meritorious claim would have been dismissed for failure to exhaust. *Id*.

CONCLUSION

The Court should acknowledge that under the administrative law principles that *Woodford* held govern PLRA exhaustion, appropriate, limited exceptions that are consistent with the statutory purpose should be allowed. An exception is appropriate in this case where the relevant grievance rules were unclear,[21] the prisoner's actions were objectively reasonable and the prisoner made his complaint well known to prison authorities. The court below properly applied this "special circumstances" exception to allow the Respondent's meritorious claim to go forward.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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[21] *Amici* note that Respondent's initial claim of unclarity has now been amplified by a showing that the prison system's practice at the time was consistent with the Respondent's understanding, and that even now Petitioner cannot say with certainty what the correct course of action for Respondent was. Resp. Br. at 34.