No. 99-1964

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY BOOTH,

Petitioner,

vs.

C.O. CHURNER, *et al*.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, AND THE PRISON REFORM ADVOCACY CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners.

The Legal Aid Society of the City of New York is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of their constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and conducts litigation on prison conditions.

The Prison Reform Advocacy Center (PRAC) is a non-profit organization dedicated to progressive prison reform. Based in Cincinnati, PRAC was founded in 1997 to address the legal needs of Ohio's growing prison population. Through its Grievance Project, PRAC works to improve the grievance process in the prison systems of Ohio and other states.[1]

SUMMARY OF ARGUMENT

The Petitioner alleges that he was the subject of several past incidents of excessive force by prison staff. The question presented is whether 42 U.S.C. § 1997e(a), a portion of the Prison Litigation Reform Act (PLRA) that requires the exhaustion of "available" remedies, requires a prisoner like Petitioner, who seeks only damages, to exhaust

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[1]No counsel for any party authored any part of this brief. No persons or entities other than the amici curiae made any monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court.

administrative grievance procedures that do not provide damages.

As a matter of common sense and plain meaning, an administrative procedure that bars the only form of relief sought–and, in this case of a completed violation, the only relief that could be meaningful–is not an "available" remedy. This view is further supported by decisions applying mandatory exhaustion requirements that have held that relief is not "available" when the agency has no power to grant it; that the availability of one form of relief does not require a litigant to exhaust if he seeks entirely different relief; and that even when a final agency decision is a usual prerequisite to federal court review, the requirement is excused when the administrative process would be futile because it cannot provide the requested relief or resolve the contested issue.

Congress is presumed to know this Court's basic rules of statutory construction, and its enactments should be construed as consistent with those rules absent a clear statement to the contrary. Yet the PLRA language holds no hint that 42 U.S.C. § 1997e(a) was intended as an exception to this Court's interpretation of statutory exhaustion requirements. Indeed, the reference to "available" remedies affirmatively supports Petitioner's argument, particularly because Congress rejected language that would have required exhausting remedies regardless of their availability. Petitioner's damage claim should therefore be allowed to proceed.

This conclusion is buttressed because prison grievance systems are generally not designed to make retrospective findings and judgments of the sort necessary for an award of damages. Rather, they are designed to resolve current problems and ongoing complaints. They are therefore characterized by very short filing and appeal deadlines, generally a matter of days. Requiring exhaustion of such remedies may be appropriate for ongoing or recurrent problems; if a prisoner makes a procedural error and is barred, the issue can be renewed later in a new grievance. But a prisoner who misses a short deadline for a completed violation may find his claim procedurally barred first in the

grievance system, and then in court. This result would be particularly unjust given the low literacy rates and lack of legal sophistication among prisoners. Further, many of the most serious occurrences for which prisoners seek damages–assaults by staff or other prisoners and serious medical problems–may result in the prisoner's incapacitation, hospitalization, or placement in isolated housing during the crucial period when the grievance must be filed. Examination of numerous states' grievance systems shows that there are many other technical rules and requirements that may defeat a grievance. As with time limits, they may not only delay resolution of grievances concerning ongoing problems, but may also forever bar meritorious claims of completed constitutional violations.

Requiring damage claimants to exhaust procedures that do not provide damages also fails to serve the statutory purposes and policy reasons invoked to justify it. This Court previously recognized in McCarthy v. Madigan, 503 U.S. 140 (1992), that the basic policy reasons for exhaustion–protecting agency authority and promoting judicial efficiency–are not served by requiring the futile exhaustion of damage claims. It is unrealistic to suggest that prisoners will omit non-damage claims so they can evade the exhaustion requirement, since it assumes prisoners will value evading exhaustion more than seeking a remedy for their injuries, and since the existence of a viable injunctive claim is not within the litigant's control. It is unpersuasive to cite the burden on federal courts of analyzing the "vagaries" of state grievance processes, since federal courts must construe state law as part of their daily business, and prison grievance procedures have been construed without difficulty by the courts.

Requiring exhaustion of claims that the grievance process cannot resolve will not conserve judicial resources; the cases will still come to court, unless the prisoner makes a technical mistake and is barred. Prison grievance procedures will not create a useful record, since they are rarely on the record and since prisoner claims under 42 U.S.C. § 1983 are heard de novo in federal court. For the same reason, non-

exhaustion in damage cases will neither interrupt the administrative process nor deprive the agency of a chance to remedy its own errors. The administrative proceeding and the § 1983 adjudication are completely independent of each other, and the administrative process is free to correct errors or take other action regardless of what happens in court. Mandating universal exhaustion will not foster improvements in the administrative system, since if prisoners are required to use the system regardless of its efficacy, the incentive to improve it is undermined. Finally, requiring exhaustion in damage cases will do nothing about the volume of prison litigation, since procedures that don't provide damages won't keep damage cases out of court. Other provisions of the PLRA, such as the requirement that prisoners pay filing fees in installments, and the new provisions for early screening that extend the sua sponte dismissal power to cases that fail to state a claim or seek damages against immune defendants, already make litigation substantially more difficult for prisoner plaintiffs than for other litigants.

ARGUMENT

I. TO BE "AVAILABLE" AN ADMINISTRATIVE REMEDY MUST BE CAPABLE OF PROVIDING THE RELIEF THAT IS REQUESTED.

42 U.S.C. § 1997e(a) provides as follows:

> APPLICABILITY OF ADMINISTRATIVE REMEDIES. No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], 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.

"Available" is not defined in § 1997e. Where a term is not defined in a statute, this Court construes the term "in

accordance with its ordinary or natural meaning." United States v. Alvarez-Sanchez, 511 U.S. 350, 357 (1994) (citation and internal quotation marks omitted) (considering dictionary definition of "delay" in defining statutory term); cf. Artuz v. Bennett, 121 S. Ct. 361, 363 (2000) (interpreting "properly filed" in Anti-Terrorism and Effective Death Penalty Act consistently with the "commonly understood" meaning of "filed") (citations omitted). In ordinary usage, "available" means "capable of availing; having sufficient power or force to achieve an end." Webster's New International Dictionary 150 (3d ed. 1986). See Whitley v. Hunt, 158 F.3d 882, 887 (5th Cir. 1998) (citing Webster's definition to hold that federal prisoners seeking monetary relief need not exhaust the Bureau of Prisons' administrative grievance system since money damages are unavailable under that system). Under these definitions, a remedy that does not provide damages can hardly be said to be "available" to a litigant who seeks only damages.

Indeed, the Court's past use of "available" in applying statutory exhaustion provisions supports this view. In Reiter v. Cooper, 507 U.S. 258 (1993), this Court considered whether a shipper alleging that a motor carrier's tariff rates were unreasonable was required first to obtain a ruling from the Interstate Commerce Commission on the reasonableness of the rates. This Court rejected that argument:

> Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts, and until that recourse is exhausted, suit is premature and must be dismissed . . . . That doctrine is inapplicable to petitioners' reparations claims, because the ICC has long interpreted its statute as giving it no power to decree reparations relief.

Id. at 269 (citations omitted). Similarly, an administrative remedy is not "available" if it is one that cannot grant the requested relief.

Reiter is consistent with this Court's other exhaustion decisions. In Clayton v. International Union, UAW, 451 U.S. 679 (1981), the Court held that an employee claiming both unlawful discharge by the employer and a breach of the duty of fair representation by the union need not exhaust internal union appeals before suing under § 301(a) of the Labor Management Relations Act. The Court noted that "[r]einstatement is available only from the employer,"[2] and the Court held that "these restrictions on the relief available through the internal UAW procedures render those procedures inadequate." Id. at 691-92 (footnote omitted).[3]

Moreover, in enacting the PLRA, Congress acted against the backdrop of this Court's interpretation of previous statutory exhaustion requirements. Of particular note is this Court's treatment of statutory provisions that limit judicial review to review of the final decision of an administrative agency. At first blush, it would appear that, by definition, to obtain such a final decision, the claimant must always exhaust administrative remedies. But this Court interprets such statutes in light of exhaustion doctrine not to require exhaustion of administrative remedies that cannot provide the requested relief.

For example, in Honig v. Doe, 484 U.S. 305 (1988), the Court considered a provision of the Education of the Handicapped Act. The relevant provision, 20 U.S.C. § 1415(e), provided at the time of the case that any party

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[2]Id. at 690 n.15. Monetary relief in the form of backpay was available through the internal grievance procedure.

[3]Clayton did not involve an explicitly mandatory statutory exhaustion requirement, but exhaustion was required because of congressional intent. Congress had "expressly approved" union grievance procedures as a "preferred method" of resolving contract disputes. Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965), cited in Clayton, 451 U.S. at 681.

aggrieved by a final decision of the state educational agency could seek judicial review. Despite this explicit requirement of a final decision from the state educational agency, the Court stated that "parents may bypass the administrative process where exhaustion would be futile or inadequate." Id. at 327 (citations omitted).

Similarly, in Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399 (1988), this Court rejected an argument that a provision of the Social Security Act providing for review by the Provider Reimbursement Review Board only of a "final determination" of a fiscal intermediary meant that a party must present its claims before the fiscal intermediary even when that intermediary had no authority to declare invalid the regulation that the party wished to challenge. Id. at 404-06.[4] See also Bowen v. City of New York, 476 U.S. 467, 482-85 (1986) (holding that although the Social Security Act made a final agency decision a jurisdictional prerequisite to judicial review, exhaustion of remedies was unnecessary because it would have been futile); McKart v. United States, 395 U.S. 185, 196-197 (1969) (holding that, although Selective Service Act made decisions of local boards final, failure to exhaust administrative remedies did not bar judicial review of questions of statutory interpretation); cf. Shalala v. Illinois Council on Long Term Care, Inc., 120 S. Ct. 1084, 1093, 1097 (2000) (holding that Social Security Act specifically bars resort to general federal jurisdiction statute; this bar "reaches beyond ordinary administrative law principles of ripeness and exhaustion of administrative remedies;" noting that bar does not apply if administrative review system could not consider the claim) (citations and internal quotation marks omitted).

If Congress had intended to reject the well-established common law principle that remedies need not be

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[4]The Social Security Act itself provided for judicial review when the Provider Reinstatement Review Board determined it was without authority to decide a question. See id. at 406 n.4.

exhausted if they cannot provide the relief sought, it would have made this intention explicit in the language of the statute.[5] See McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 496 (1991) (interpreting statute not to foreclose all forms of judicial review in light of presumption that Congress legislates with knowledge of Court's basic rules of statutory construction, including presumption favoring statutory interpretation that allows judicial review of administrative action); accord Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979).

Construing the PLRA exception narrowly is also consistent with the principle that a congressional intention to require exhaustion must be clearly expressed:

> Of paramount importance to any exhaustion inquiry is congressional intent. Where Congress mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.

McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (internal quotation marks and citations omitted).[6] Because Congress

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[5]Explicit language requiring exhaustion of administrative procedures, including those that do not provide remedies that are available in civil actions, was proposed in H.R. 2468 (Prison Lawsuit Efficiency Act of 1995, or "PLEA"), but this language was rejected by Congress when it enacted the current version of 42 U.S.C. 1997e(a) as part of the PLRA. See Brief of Petitioner, § III.B.

[6]The need for a clear expression of congressional intent to require exhaustion follows from the obligation of federal courts to exercise their jurisdiction. "[F]ederal courts are vested with a virtually unflagging obligation to exercise the jurisdiction given them. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Id. at 146 (internal quotation marks and citations omitted).

in 42 U.S.C. § 1997e(a) has not clearly required exhaustion of administrative remedies that cannot provide the requested relief, such exhaustion is not required.

Finally, construing the PLRA exhaustion requirement narrowly is appropriate because § 1997e operates as an exception to the general principle that exhaustion is not required in § 1983 cases.[7] See Commissioner v. Clark, 489 U.S. 726, 739 (1989) (noting that statutory exceptions to general rule are usually read narrowly; where Congress has enacted a general rule, "we should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception").

This is not to argue that the PLRA exhaustion requirement is equivalent to the previous statutory requirement, which allowed courts to continue cases for 180 days "if the court believe[d] that such a requirement would be appropriate and in the interests of justice" to allow exhaustion of "such plain, speedy, and effective administrative remedies as are available." 42 U.S.C. § 1997e(a)(1) (1994).[8] The PLRA requirement eliminates the wide-ranging discretion embodied in the "appropriate and in the interests of justice" standard, and it requires exhaustion of remedies that may not be "plain, speedy, and effective." Similarly, the PLRA exhaustion requirement is more stringent than a judicially-fashioned exhaustion requirement, which also would have considered the speed, fairness, and

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[7]See Patsy v. Boad of Regents of Florida, 457 U.S. 496, 500-02 (1982) (holding that no exhaustion requirement is appropriate in § 1983 actions in the absence of a statute requiring exhaustion).

[8]The PLRA also eliminated the provision that exhaustion could not be required unless the Attorney General of the United States had certified, or the court had determined, that administrative remedies were in substantial compliance with minimum standards promulgated by the Attorney General, or the court had determined that the remedies were otherwise "fair and effective." 42 U.S.C. § 1997e(a)(2) (1994).

effectiveness of the existing administrative remedy. See McCarthy v. Madigan, 503 U.S. at 147-149 (considering delay, effectiveness, and bias in determining whether to impose, absent a congressional directive, an exhaustion requirement in Bivens actions).

Accordingly, in enacting PLRA, Congress intended to narrow the very broad exceptions to the exhaustion requirement under prior law. But nothing in the language or structure of the PLRA suggests a congressional intent to apply the exhaustion requirement more stringently than other statutorily-imposed exhaustion requirements. Indeed, the language and structure of the PLRA provision demonstrate an intent that, consistent with this Court's construction of other statutory exhaustion requirements, only administrative remedies that can actually provide the requested relief are to be considered "available."

In sum, Congress did not intend to require prisoners to exhaust administrative remedies that could not provide the requested relief. It certainly did not clearly express such an intent. In the absence of a clear expression of congressional intent, this Court should not impose such a requirement.

II. REQUIRING DAMAGE CLAIMANTS TO EXHAUST GRIEVANCE SYSTEMS THAT DO NOT PROVIDE DAMAGES POSES A GRAVE RISK THAT MERITORIOUS CLAIMS WILL BE LOST.

There are also sound policy reasons not to require exhaustion of administrative remedies that cannot provide the requested relief. Prison and jail grievance systems are designed primarily to solve ongoing problems and resolve current complaints.[9] They are usually not designed to pass

[9]See Hawaii, at 1 (purposes of grievance system include "establishing a mechanism which will identify institutional problems and afford a means for corrective action"); Montana, at 1 (grievance policy is intended to "afford staff the opportunity to improve facility operations"). For ease of

judgment on past incidents, make findings of historical fact, resolve conflicting testimony, determine fault, and award monetary compensation. Perhaps for this reason, many prison grievance systems include procedural features that may make sense for prospective problem-solving, but constitute technical obstacles and traps for the unwary for a prisoner seeking monetary compensation for a specific past incident of harm. Requiring exhaustion makes little sense when it cannot provide the relief sought, therefore cannot resolve the controversy, and serves only to create a gratuitous risk that a meritorious claim may become barred by a prisoner's technical mistake. It also makes no sense to assume that Congress intended such a result, especially since this precise problem was delineated by this Court years ago, and Congress has indicated no intent to overturn or reject this Court's holding. See note 5, supra.

In McCarthy v. Madigan, this Court held that a prisoner bringing a Bivens action seeking only money damages need not first exhaust the grievance procedure of the Federal Bureau of Prisons. The Court noted that the Bureau's grievance procedure "imposes short, successive filing deadlines that create a high risk of forfeiture of a claim for failure to comply,"503 U.S. 152, and observed that these deadlines "are a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim." Id. at 153. Focusing on prisoners seeking monetary compensation as a remedy, this Court understood that "[a]ll in all, these deadlines require a good deal of an inmate at the peril of forfeiting his claim for money damages." Id.[10]

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reference, grievance procedures are cited by the name of the state or locality where they are in effect. Complete citations for these procedures may be found in Appendix 1. These materials have been lodged with the Clerk.

[10]The Court's analysis was not altered by the fact that these deadlines could be extended for "valid" reasons. "[T]he regulations do not elaborate upon what a 'valid' reason is.

Many prison grievance procedures today include filing deadlines far more onerous than those at issue in McCarthy. A prisoner filing a grievance that pertains to a discrete incident may be required to file within as little as three days of the incident, or have his grievance rejected as time-barred.[11] Thus, while other civil rights plaintiffs enjoy a statute of limitations of one, two, or three years or more,[12] if this Court adopts the position of the court below, prisoners will face a de facto limitations period that is measured in days. Cf. Felder v. Casey, 487 U.S. 131, 139-40 (1988) (limitations period providing "only a truncated period of time within which to file suit" conflicts with the policies of § 1983).

These initial filing deadlines are compounded by deadlines as short as *one day* for appealing from an adverse decision, sometimes through several levels of appeal.[13] In

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Moreover, it appears that prison officials–perhaps the very officials subject to suit–are charged with determining what is a 'valid' reason." 503 U.S. at 153.

[11]See, e.g., Tennessee, at 2 (7 calendar days); Utah, § 3.03 (7 calendar days); Kentucky, at 9, 11 (5 working days); Georgia, at 6 (5 calendar days); Metro Dade (Florida), at 2 (3 working days); Rhode Island, at 3 (3 days); City of New York, Inmate Grievance Form #7101-5 (3 days); Oklahoma, § IV.A. (must attempt "informal resolution" within 3 days).

[12]See Wilson v. Garcia, 471 U.S. 261, 280 (1985) (federal court hearing § 1983 action is to apply personal injury statute of limitations of forum state).

[13]See, e.g., Mississippi, at 3 (appeal must be received within 5 days); Ohio, AR 5120-9-31(H)(8) (5 working days); Virginia, at 11 (5 days); Tennessee, at 2-3 (5 days); Colorado, at 3 (5 days); Georgia, at 8-9 (appeal must be received within 4 calendar days); Kentucky, at 11 (3 working days); Washington, FAC 110, 120 (2 working days); Metro Dade, at 4-5 (48 hours); City of New York, Inmate Grievance Form #7101-5 (1 day).

some systems, it is simply unclear how much time a prisoner has to file a grievance or appeal. See, e.g., Virginia, at 7 (providing that a prisoner has 30 calendar days to file a grievance, "except ... where a more restrictive time frame has been established in Division Procedures"); Tennessee, at 2 (grievances must be filed within 7 calendar days, "with the exception of Title VI complaints," which must be filed within 180 days).

These short deadlines would be a substantial problem in any administrative remedy system. They are especially problematic in connection with the prison population, which is generally legally unsophisticated, poorly educated, and often functionally illiterate.[14]

This problem is particularly worrisome in light of the nature of many prisoner damage claims. The most serious such cases typically involve allegations of physical injury resulting from the use of force by staff, assaults by other prisoners occasioned by the deliberate indifference or complicity of staff, and deliberate indifference to serious medical needs. The realities of prison life militate against prisoners' ability to meet the short deadlines of grievance procedures in such cases. Prisoners involved in altercations, either with staff or with other prisoners, are generally placed immediately in segregation units pending disciplinary hearings, or in cases where prison staff accept that they have been victimized, in protective custody. See, e.g., Farmer v. Brennan, 511 U.S. 825, 830 (1994) (prisoner transferred to segregation after reporting assault by another prisoner); Hudson v. McMillian, 503 U.S. 1, 4 (1992) (prisoner moved to "administrative lockdown" after verbal confrontation with staff). Access to grievance rules, necessary forms, and

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[14]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. Dept. of Educ., Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey xviii, 17-19 (1994).

grievance personnel whose advice or cooperation may be necessary is likely to be greatly delayed or restricted in such units.

Prisoners are also often transferred after violent or disruptive incidents, which may interfere with their ability to file a grievance, to file it at the right institution, or to appeal timely if they file at one prison and are then transferred to another. Prisoner-staff altercations by nature result in heightened tensions regardless of who was at fault, and in the initial days after such an incident, prisoners are likely to be fearful even of asking staff for necessary assistance in filing grievances, and the risk of staff retaliation to obstruct or divert grievances is very real.[15] In cases of altercations with serious injury or serious medical problems, prisoners may also be hospitalized and lack access to the grievance system, or may be too incapacitated to make use of it.[16] In such cases, a prisoner is unlikely to succeed in complying with a grievance filing deadline of three, five, or seven days.

But multiple, short, and sometimes unclear filing deadlines are only the tip of the iceberg. Many grievance systems, like that at issue in McCarthy, provide that a prisoner may not file a grievance unless he first attempts to

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[15]The staff response to the Attica Correctional Facility rebellion, which included massive extralegal retaliatory abuse against prisoners, is the paradigm case. See Inmates of Attica v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); see also Blyden v. Mancusi, 186 F.3d 252 (2d Cir. 1999). The same pattern is familiar in cases arising from smaller-scale prison disturbances or feared disturbances. See, e.g., Meriwether v. Coughlin, 879 F.2d 1037, 1047-48 (2d Cir. 1989); Bolin v. Black, 875 F.2d 1343, 1350 (8th Cir.), cert. denied, 493 U.S. 993 (1989).

[16]See Cruz v. Jordan, 80 F.Supp.2d 109, 123-24, 126 (S.D.N.Y. 1999), in which prison officials refused the court's request to allow the prisoner to file a late grievance, notwithstanding that the prisoner had been unconscious, in pain, or in the hospital during the 14-day period for filing.

resolve the issue informally. See, e.g., Kentucky, at 11 (requiring that the prisoner both attempt informal resolution before filing a grievance, and file the grievance within 5 working days of the incident grieved).[17] This requirement, in conjunction with short filing deadlines, allows staff either intentionally or inadvertently to prevent the prisoner from filing a grievance at all. For example, at Virginia's Wallens Ridge State Prison, the prisoner must attempt informal resolution by submitting a "Request for Services/Complaint" form "to the appropriate staff."[18] If the form is not submitted to "appropriate staff," it is returned to the prisoner. If the person receiving the form forwards it to another staff member, the prisoner must await a response from the latter. Prison staff have 15 days to respond "from the date that that [sic] the Complaint form is *received* by the department or staff person who is responsible for answering the Request for Services/Complaint form" (emphasis added). A prisoner is required to file the completed Request for Services/Complaint form with his grievance. WRSP, at 4-5.

In short, if a prisoner does not correctly guess who is the "appropriate staff," or if prison staff decide (innocently or otherwise) to forward the complaint to another staff person for response, or if a response is delayed for any other reason, the prisoner's 30-day period to file a grievance may run before he receives the required response to his informal complaint.[19]

This problem is compounded by the likelihood, discussed above, that after incidents of conflict with prison staff, prisoners will be fearful of approaching those same staff or their co-workers to "resolve informally" a claim that

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[17]See also Virginia, at 7; Colorado, at 3; Texas, at 1; Ohio, Policy 203-01, § VI.F.

[18]Virginia's informal resolution process varies from institution to institution. Virginia, at 7.

[19]As noted above, in some unspecified cases, a Virginia prisoner has less than 30 days to file a grievance.

prison staff unlawfully abused them. For example, Minnesota requires that, as the first step in the grievance process, the prisoner "submit a written grievance to the staff who is directly responsible for the issue being grieved." Minnesota, at 2. Presumably this would require Petitioner to submit his grievance directly to the corrections officers he accuses of assaulting him, or risk forfeiting his damages claim for failure to comply with the grievance procedure.

There are many other barriers to exhausting a prison grievance system with respect to a claim for monetary damages. Grievances or appeals may be rejected for myriad reasons, such as filing at the wrong institution, "insufficient information,"[20] failure to attach the response from the level below, submitting copies rather than originals, "inappropriate/excessive attachments," or simply "inappropriate."[21] It is often unclear whether a timely filed grievance rejected for a technical defect may later be resubmitted, with the defect cured, if the filing deadline has run. See also Oklahoma, § VII.A., B. (allowing appeal only on limited grounds, and requiring payment of $2 for each appeal filed).

In some cases, the prison system may simply refuse to process the prisoner's grievance for reasons beyond his control. The Texas grievance form states that grievances seeking monetary damages will be returned unprocessed, thus making exhaustion impossible for a prisoner in Petitioner's situation. In the Bureau of Prisons, the practice apparently varies from prison to prison on this point. See Nyhuis v. Reno, 204 F.3d 65, 74 (3d Cir. 2000). In Colorado, grievances deemed to be of general interest are answered by posting the response in a common area. "Once such a grievance response has been published, no further grievances on the matter shall be processed in that facility for six (6) months, unless the underlying procedure or regulation is substantially changed." Colorado, at 3. See also

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[20]Virginia, Attachment 2, at 2.

[21]Texas, at 1.

Kentucky, at 3 (similarly providing that a grievance deemed identical to those filed by other prisoners will not be processed). Such policies may make good sense for the purpose of prospective problem-solving, but it makes no sense to relegate damage claimants to a system in which their grievances may be dismissed simply because they are shared by others.

Moreover, a prisoner who has suffered an injury for which he wishes to seek damages may be barred from filing a grievance because he is alleged to have engaged in "abuse" of the grievance system, a term that may be defined vaguely or not at all. See, e.g., Virginia, at 5 (access to grievance system may be limited for "excessive filings" or "habitual misuse," terms which are not defined). In Colorado, a prisoner who has filed "excessive grievances" (again, the term is not defined) may be restricted to one grievance per month. Colorado, at 2. In Utah, a prisoner who files a "frivolous" grievance may be entirely barred from using the grievance system for up to six months. Utah § 02.08.B.6.c.3. "Frivolous" grievances include those that a prisoner "knows or reasonably should know" are "without merit" or "irresponsible." Id., § 01.03. Oklahoma allows grievance restriction for up to *one year* for "abuse or misuse" of the grievance process, which includes "grievances about de minimis . . . issues" and "repetitive grievances by multiple inmates/offenders about the same issue." Oklahoma, § IX. Clearly, a prisoner who is barred from using the grievance system may be unable to file a timely grievance about an incident for which he seeks compensation.

In some systems, even prisoners who are not alleged to have abused the grievance system are severely limited in the number of grievances they can file. See, e.g., Tennessee, at 4 (prisoners are not permitted to have more than one grievance pending at the first level of review); Georgia, at 10 (prisoners may only have two non-emergency grievances pending at the institutional level).[22]

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[22]The Mississippi system creates a Catch-22 for prisoners wishing to grieve multiple incidents. On the one hand, a

Transfer to another facility may also make it difficult or impossible to exhaust the grievance system. In Kentucky, if a prisoner is transferred while his grievance is pending, his only option is to "appoint another inmate to act in his stead with full power to appeal or not, as the second inmate may decide." If the grievant fails to do so, "the grievance shall be moot at all levels of appeal." Kentucky, at 12. Moreover, in some systems, the grievance system varies from institution to institution.[23] Thus, a recently transferred prisoner who understandably relies on his knowledge of the grievance process at his former institution may fail to comply with the procedures at his new location.

Finally, the requirements of the grievance process are often not explained clearly, or even accurately, to prisoners. At the outset, it is unlikely to occur to prisoners, uneducated and legally unsophisticated as many of them are, that a grievance process that does not provide damages is indeed an "available" remedy for their damage claims. Moreover, some grievance procedures are incomprehensible even to corrections officials. A 1999 survey by the Missouri Department of Corrections of state prison grievance systems found the Washington state procedure "very lengthy and very detailed. Certain issues are not always in one area in the procedure, making it difficult to find." Missouri Department of Corrections, Inmate Grievance Task Force Evaluation Report, September 1999, at 16.[24] The same report described

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grievance will be rejected if "[t]he offender has requested a remedy for more than one incident." Mississippi, at 2. On the other hand, "[i]f an offender submits multiple requests, the first request will be accepted and handled. The others will be logged and set aside for handling at the Adjudicator's discretion. A maximum of ten (10) requests will be logged. Requests above that number will be returned to the offender and not filed." Id. at 5.

[23]See, e.g., Virginia, at 1, 6, 7; Ohio, Policy 203-01, § VI.F.1.

[24]The relevant portion of this report has been lodged with the Clerk.

the Hawaii procedure as "difficult to follow." Id. at 10. And sometimes the information provided to prisoners is affirmatively misleading. For example, the Ohio State Penitentiary Inmate Handbook, in its section titled "Grievance Procedures," does not advise the prisoner that there is a time limit for filing grievances; it also makes no mention of the appeal process.[25]

These time limitations and other procedural and substantive obstacles do not pose the same problems for prisoners seeking a prospective change in the conditions of their confinement–for example, the failure of staff to provide necessary medical care, or unsafe conditions in the living unit. As long as the conditions persist, such grievances will never be time-barred; nor will any lawsuit. Filing a grievance that runs afoul of the grievance system's often arcane procedural requirements will not bar filing another after the first has been rejected. A transfer to another facility may moot the underlying problem; if not, the prisoner can file a grievance at the new location.

But for the prisoner like Petitioner who seeks monetary compensation for a discrete incident of harm in the past, prison and jail grievance procedures pose serious, unnecessary, and sometimes insurmountable barriers. The exhaustion requirement imposed by the court below poses a grave danger that the Petitioner's damage claim may be forever barred not because it lacks merit, but because he was unable to navigate the procedural intricacies of a grievance system that was unable to provide him with a remedy.

III. REQUIRING DAMAGE CLAIMANTS TO EXHAUST ADMINISTRATIVE GRIEVANCE SYSTEMS THAT DO NOT PROVIDE DAMAGES WILL NOT ADVANCE

[25]Compare Ohio State Penitentiary Inmate Handbook, at 10, with Policy 203-01, § VI.D (setting forth filing deadlines), § VI.F.6 (appeal procedure).

STATUTORY PURPOSES OR OTHER POLICY GOALS.

While requiring exhaustion of remedies that cannot provide damages will arbitrarily prevent the presentation of meritorious claims, it will do little to further the asserted purposes of PLRA, or the policy goals that underlie the exhaustion doctrine. Those purposes were considered by the Third Circuit in Nyhuis v. Reno, 204 F.3d 65 (3d Cir. 2000), on which the holding below is based. In Nyhuis, the court relied upon its view of the congressional purpose to reduce frivolous litigation by prisoners, and also upon "myriad policy considerations," for requiring damage claimants to exhaust remedies that do not provide damages. 204 F.3d at 73-77. But the stated congressional purpose is not realized or advanced by imposing such a broad exhaustion rule, and the policy justifications are variously exaggerated, unrealistic, or insubstantial–especially in cases such as this, alleging completed injurious acts by line officers rather than an ongoing course of conduct or an institutional policy. See Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 538 (7th Cir. 1999) ("It is possible to imagine cases in which the harm is done and no further administrative action could supply any remedy").

Broadly speaking, the policies cited in Nyhuis are those recognized by this Court in McCarthy v. Madigan as generally promoted by an administrative exhaustion requirement, namely "protecting administrative agency authority and promoting judicial efficiency." 503 U.S. at 145.[26] However, the McCarthy Court understood that neither of those purposes is usefully served by requiring prisoners seeking damages to exhaust grievance systems where damages could not be obtained in a grievance. Id. at 155-56.

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[26]Nyhuis categorizes these polices as avoiding interruption of the administrative process, conserving scarce judicial resources, and improving the efficacy of the administrative process. 204 F.3d at 75.

Moreover, nothing in the legislative history of the PLRA shows any congressional concern for the furtherance of these policies.[27]

The Nyhuis court noted the congressional purpose to reduce frivolous litigation, and said that "[e]xempting claims for monetary relief from the exhaustion requirement in § 1997e(a) would frustrate this purpose. It would enable prisoners, as they became aware of such an exemption, to evade the exhaustion requirement, merely by limiting their complaints to requests for money damages." 204 F.3d at 74. This argument rests on two unsupported assumptions. First, it assumes that prisoners will frame their lawsuits so as to avoid the exhaustion requirement rather than to seek the relief that they believe their complaints merit. Since filing suit solely for damages would not bring prisoners expedited relief, prisoners would have nothing to gain by such a strategy.[28] Moreover, what most prisoner litigants want is no different from what any other litigant with a personal injury claim wants, namely, just compensation for the injury– to be made whole.

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[27]Nyhuis analyzes policy considerations at length because in its view, "Congress seems to have had [them] in mind in enacting the PLRA." Nyhuis, 204 F.3d at 75. But this assertion is unsupported by any legislative history.

[28]Equally speculative is the notion that "[a] prisoner may use the threat of money damages as a bargaining chip to obtain relief that he really wants, and may then be satisfied when he gets that relief from the prison." 204 F.3d at 76, quoting Beeson v. Fishkill Correctional Facility, 28 F.Supp.2d 884, 895 (S.D.N.Y. 1998). Attributing this degree of Machiavellian skill to litigants who are usually uneducated, legally unsophisticated, and appearing pro se is unrealistic. Moreover, a damage claim large enough and certain enough of success to be effective as a "bargaining chip" is the least likely sort of claim to be abandoned based on some other action by prison officials.

Second, this argument assumes that prisoners can effectively manipulate their claims for relief to avoid exhaustion. But a case either is or isn't susceptible to injunctive relief, and most prisoner damage cases–exemplified by this one–are not. A prisoner who, as Mr. Booth alleges, has been beaten by staff generally does not have a claim for injunctive relief. See, e.g., Hollimon v. DeTella, 6 F.Supp.2d 968, 970 (N.D. Ill. 1998) (holding that prisoner lacked standing for injunctive relief because he did not allege it was likely he would be beaten again); see also City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (applying same rule to police encounters). The same rule is true of prisoners subjected to other sorts of completed injuries, such as a prisoner who wishes to challenge an injury suffered at one prison but who now has been transferred to a second facility. See, e.g., Johnson v. Boreani, 946 F.2d 67, 72-73 (8th Cir. 1989) (denying prisoner injunctive relief based on past staff conduct); see also Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991) (denying transferred prisoner injunctive relief even though the condition that caused the injury continued at the original facility).

Thus, cases in which prisoners drop viable injunctive claims to avoid exhaustion will necessarily be rare. Cases of such manipulation should be dismissed on their own facts, see, e.g., Barbara v. New York Stock Exchange, 99 F.3d 49, 57 (2d Cir. 1996), rather than by adopting an unnecessarily broad exhaustion rule that would require dismissal of meritorious cases.

Nyhuis makes the assumption, unsupported by legislative history, "that Congress intended to save courts from spending countless hours, educating themselves in every case, as to the vagaries of prison administrative processes, state or federal." 204 F.3d at 74. This concern is without any apparent basis. Federal courts routinely interpret state law both in diversity cases and pursuant to their supplemental jurisdiction, 28 U.S.C. § 1367, as well as in cases in which state law is challenged as unconstitutional and must be construed. In cases involving administrative proceedings, federal courts frequently determine whether

such procedures can provide requested relief. See § I, supra, at 7-8. This Court has no difficulty examining, understanding, and describing prison grievance procedures. See McCarthy v. Madigan, 503 U.S. at 142-43 (summarizing Federal BOP procedure); see also Nyhuis, 204 F.3d at 77 n.12 (same); Miller v. Tanner, 196 F.3d 1190, 1193 (11th Cir. 1999) (description of Georgia Department of Corrections grievance procedure). Amici are aware of no decision among the large body of PLRA exhaustion case law in which a court could not determine, or expressed doubts concerning its conclusion, whether the procedure did or did not provide for an award of damages.

In a similar vein, Nyhuis cites, as a policy justifying exhaustion, "conserving scarce judicial resources, since the complaining party may be successful in vindicating his rights in the administrative process and the courts may never have to intervene." 204 F.3d at 75. That prospect has little relevance here, where, by hypothesis, we deal with a completed act–the alleged beatings by staff–for which the only meaningful vindication is an award of damages that the grievance system does not provide.[29] Damage claims will simply come to court after a period of useless delay–except

[29]Nyhuis stated that "'even if the complaining prisoner seeks only money damages, the prisoner may be successful in having the [prison] halt the infringing practice' or fashion some other remedy, such as returning personal property, reforming personal property policies, firing an abusive prison guard, or creating a better screening process for hiring such guards." 204 F.3d at 76 (citations omitted). For a prisoner like Mr. Booth, who complains of completed assaults, measures such as firing an abusive guard or improving hiring procedures, or any other change in policy, simply do not provide a remedy. See Perez v. Wisconsin Dept. of Correction, 182 F.3d at 538. For him, as for a victim of completed acts of police misconduct, it is "damages or nothing." Bivens v. Six Unknown Named Agents, 401 U.S. 388, 410 (1971) (Harlan, J., concurring).

for those cases that do not come back because they are now time-barred. Moreover, this Court has already rejected the proposition that, under a statutory exhaustion requirement, claimants must exhaust a procedure that does not provide the relief they seek because there is a chance they might settle for something else. See Clayton, 451 U.S. at 693 (declining to require "useless gesture" of exhaustion of a procedure that did not provide reinstatement). Nyhuis states that where plaintiffs exhaust and then sue, "there is still much to be gained" because the administrative process "can serve to create a record for subsequent proceedings, it can be used to help focus and clarify poorly pled or confusing claims, and it forces the prison to justify or explain its internal procedures." 204 F.3d at 76. In fact, most prison grievance systems are not conducted "on the record" in any meaningful sense. This Court, in rejecting the notion that forcing a prisoner through the administrative grievance procedure would advance the interests of judicial economy and efficiency, understood that

> [n]o formal factfindings are made. The paperwork generated by the grievance process might assist a court somewhat in ascertaining the facts underlying a prisoner's claim more quickly than if it has only a prisoner's complaint to review. But the grievance procedure does not create a formal factual record of the type that can be relied on conclusively by a court for disposition of a prisoner's claim on the pleadings or at summary judgment without the aid of affidavits.

McCarthy v. Madigan, 503 U.S. at 155-56; See also Lynn S. Branham, The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts, and Correctional Officials Can Learn From It, 86 Cornell L. Rev. 101, 134-35 (2000) (in press) (citing survey showing that most grievance systems do not make a written report in cases where the prisoner seeks relief the system

does not provide).[30] Indeed, the Pennsylvania grievance procedure makes all proceedings in the grievance system "inadmissible before any court or other tribunal in support of any claim made against the Commonwealth or any employee," JA 51, thus barring any fact-finding role that might benefit later judicial proceedings.

Another reason cited for requiring exhaustion is "avoiding premature interruption of the administrative process and giving the agency a chance to discover and correct its own errors." Nyhuis, 204 F.3d at 75. This is largely inapplicable to prison disputes like this one, although it might be highly relevant to agency decisions subject to administrative review in the usual course of agency procedure, and later subject to judicial review on the administrative record. There, the progression through administrative process to court is integral to the entire statutory scheme. But this is not such a case. Any proceeding in federal court under § 1983 will be de novo, independent of prior administrative proceedings. Conversely, a decision awarding damages in Mr. Booth's § 1983 case will in no way interrupt any administrative process, reverse any completed administrative process, or preclude the agency from discovering and correcting its own errors as it chooses.

The last reason cited by the Third Circuit is the notion that a broad exhaustion rule, requiring prisoners to exhaust procedures incapable of providing proper relief, will effect improvements in the administrative scheme. See Nyhuis, 204 F.3d at 76-77. But as a matter of common sense, making grievance exhaustion universal, even for claims that cannot be resolved by the system, does not in any way "promote the efficacy of the administrative process." In fact it does the opposite; if prisoners have no choice but to use the procedure, there is no incentive for officials to expand the scope of relief available or to transform existing rudimentary

[30]This article has been lodged with the Clerk.

procedures into something fairer and more helpful both to the prisoner and to the court in any subsequent litigation.

Finally, the policy concern that lurks, often unarticulated, behind the argument that damage claimants should be required to exhaust administrative procedures that cannot help them, is the view that the large volume of prisoner litigation,[1] primarily pro se, is mostly frivolous,[2]

PLRA's legislative history contains reference to frivolous cases involving the wrong kind of peanut butter and the like, see, e.g., 141 Cong. Rec. S7524 (May 25, 1995)

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[1]In fact, any belief that prisoners have become progressively more litigious is contrary to fact. The growth in prisoner litigation is largely accounted for by the growth in the number of prisoners. From 1980 to 1995 (the last full year before the PLRA was enacted), the total jail and prison population in the United States increased from 501,886 to 1,577,842 (a 214% increase). The number of civil rights suits filed by state and federal prisoners in federal courts increased from 12,998 to 41,679 (a 221% increase). U.S. Dept. of Justice, Bureau of Justice Statistics, Correctional Populations in the United States, 1980-99, http://www.ojp.usdoj. gov/bjs/glance/corr2.txt; John Scalia, Prisoner Petitions in the Federal Courts, 1980-96 at 4, Table 3 (U.S. Dept. of Justice, Bureau of Justice Statistics, October, 1997). Focusing on state and local prisoners, one commentator found that the growth rate of the state prison population between 1980 and 1995 (237%) exceeded the rate of increase in the number of civil rights suits filed by state and local prisoners combined (227%). Branham, supra,86 Cornell L. Rev. at 163 n. 257.

[2]A major survey of federal court prisoner cases, done a few years before the PLRA's enactment, found that only 19% of the cases sampled were dismissed as frivolous. U.S. Dept. of Justice, Bureau of Justice Statistics, Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation at 20-21 and Table 5 (n.d.).

(statement of Senator Dole), but detached examination has suggested that such allegations are often no more than urban legends. See Jon O. Newman, Pro Se Prisoner Litigation: Looking for Needles in Haystacks, 62 Brooklyn L. Rev. 519, 520-22 (1996) (showing that descriptions by Attorneys General of allegedly frivolous cases were "highly misleading and, sometimes, simply false"); Jim Thomas, The "Reality" of Prisoner Litigation: Repackaging the Data, 15 N.E. Journal of Civil and Criminal Confinement 27, 29 (1989) (citing one attorney general's complaints about two atypical frivolous cases "repeated by the media to convey to the public an image of frivolousness"). In fact, the claims most frequently raised in prisoner § 1983 suits concern physical security (21%) and medical care (17%). Challenging the Conditions of Prisons and Jails, supra, at 17. is an insupportable burden on the federal courts,[3] and must be curbed. This view is

[3]Prisoner cases impose a considerably smaller burden than their numbers might suggest; the above-cited summary found that the vast majority of prisoner cases (74%) were dismissed by the court without adversary proceedings, and another 20% were dismissed on defendants' motion or by stipulation. Challenging the Conditions of Prisons and Jails, supra, at 19, Table 4. Only 3% required evidentiary hearings. Id. at 20-21 and Table 6. Similarly, the Federal Judicial Center has developed a case weighting system to measure "the different amounts of time judges require to resolve various types of civil and criminal actions." Administrative Office of the United States Courts, Judicial Business of the United States, 1999 Annual Report of the Director, at 29, http://www.uscourts. gov/judbus1999/contents.html. The average case weight is approximately 1.0, id., but prisoner civil rights actions are assigned much lower weights: 0.28 for state prisoner cases and 0.48 for federal prisoner cases, indicating that they require substantially less of a court's time than most other types of cases. Federal Judicial Center, New Case Weights For Computing Each District's Weighted Filings Per Judgeship (undated report).

exaggerated, as shown in the preceding footnotes. Moreover, Congress through the PLRA has enacted multiple, redundant measures that make it more difficult for prisoners than other litigants to file suit. The requirement that indigent prisoners proceeding in forma pauperis pay partial filing fees initially, and the entire filing fee and any award of costs eventually in installments, 28 U.S.C. § 1915(b), creates significant economic incentives not to litigate. In addition, the "three strikes" provision, 28 U.S.C. § 1915(g), which bars prisoners from using in forma pauperis procedures in most cases after they have had three dismissals as frivolous, malicious, or failing to state a claim, further raises the cost of filing non-meritorious litigation. In addition, new provisions that extend initial screening and sua sponte dismissal to cases (including fee-paid ones) that fail to state a claim or that seek damages against immune defendants, as well as to malicious and frivolous cases,[4] permit the early disposition of even more prisoner claims. Thus, "[p]risoners generally have everything to lose and nothing to gain by filing a frivolous lawsuit for monetary relief."[5] In light of these provisions, it is unfair to read PLRA to bar from court substantial constitutional claims because the litigants failed to pursue an administrative remedy that could not have resolved those claims.

This case is about whether Mr. Booth, having failed to exhaust a system that could not resolve his claim, should be barred from court. And ultimately, when the courts refuse to hear particular types of claims, "we implicitly express a value judgment on the comparative importance of classes of

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[4]See 28 U.S.C. § 1915(e)(2) (providing for such dismissals in all in forma pauperis cases); 28 U.S.C. § 1915A (providing for such dismissals, and requiring initial sua sponte screening for that purpose, in all cases in which prisoners seek relief against governmental agencies or personnel); 42 U.S.C. § 1997e(c)(1) (providing for such dismissals in any prisoner suit concerning prison conditions).

[5]Branham, supra, 86 Cornell L. Rev. at 137.

legally protected interests." Bivens, 403 U.S. at 411 (Harlan, J., concurring). Mr. Booth's claim, alleging that prison staff "punched him in the face, threw cleaning material in his face, shoved him into a shelf, and tightened and twisted his handcuffs in such a manner as to injure him," App. Pet. Cert. 2a, is one that strikes at the heart of the values protected by the Bill of Rights. See Hudson v. McMillian, 503 U.S. 1, 9 (1992) ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated"). Amici therefore respectfully submit that Mr. Booth should be allowed the chance to prove his claims and recover damages, notwithstanding his failure to complete the futile exhaustion of a remedy that could not have helped him.

CONCLUSION

The judgment of the court of appeals should be reversed.

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December 2000

APPENDIX 1

PRISON AND JAIL GRIEVANCE PROCEDURES CITED

Colorado Department of Corrections, Regulation No. 850-04, October 1, 2000

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