No. 99-1964

In The

Supreme Court of the United States

TIMOTHY BOOTH,

Petitioner,

v.

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

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether 42 U.S.C. § 1997e(a), as amended by the Prison Litigation Reform Act, which provides that a prisoner must exhaust "such administrative remedies as are available" before bringing a federal action, requires a prisoner seeking only monetary damages to exhaust administrative remedies where monetary damages are not available under the applicable administrative process.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner is Timothy Booth, who is currently a prisoner incarcerated at the State Correctional Institution at Graterford in Pennsylvania. Respondents are Corrections Officer Churner, Sergeant Workensher, Lieutenant Rikus, and Captain Gardner.

There are no corporate parties, and, accordingly, no designation of corporate relationships pursuant to Supreme Court Rule 29.6 is required.

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The opinion of the United States Court of Appeals for the Third Circuit is reported at *Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000), and appears in the appendix to the petition at pages 1a-28a.[1] The opinion of the United States District Court for the Middle District of Pennsylvania dismissing Mr. Booth's complaint under 42 U.S.C. § 1997e(a) for failure to exhaust administrative remedies is not reported. It appears in the appendix to the petition at pages 36a-39a.

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Third Circuit entered judgment on March 7, 2000. The petition for a writ of *certiorari* was filed on June 5, 2000, and was granted on October 30, 2000.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1997e(a) (Supp. II 1996) provides:

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

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[1] References to the Appendix to the petition for a writ of *certiorari* are designated "___a." References to the Joint Appendix filed concurrently with this brief are designated "___Ja."

STATEMENT OF THE CASE

This case arises out of allegations by Timothy Booth, a state prisoner in Pennsylvania, that he was physically assaulted by prison guards on four separate occasions while confined at the State Correctional Institution at Smithfield in Huntington, Pennsylvania. Proceeding *pro se* in the district court, Mr. Booth brought a complaint under 42 U.S.C. § 1983 against four prison guards, alleging that they violated his Eighth Amendment right to be free from cruel and unusual punishment. In his complaint, Mr. Booth sought both monetary damages for the alleged violation of his constitutional rights and a transfer to another prison. After he filed his complaint, while the case was pending before the United States Court of Appeals for the Third Circuit, Mr. Booth was, in fact, transferred to another prison, thereby eliminating this claim from the case and leaving Mr. Booth's claim for monetary damages. There is no dispute that Pennsylvania's administrative grievance procedure did not at the time permit the recovery of monetary damages.

The district court nonetheless dismissed the complaint under 42 U.S.C. § 1997e(a) because Mr. Booth had not exhausted administrative remedies. The court of appeals affirmed.

Mr. Booth's Allegations[2]

The first incident of which Mr. Booth complains took place in April of 1996, when Sergeant Robinson and Corrections Officer Thomas assaulted him, causing an injury to his shoulder. He alleges that his shoulder "slips in and out," and that, despite having been told by a prison doctor that he would receive an operation on his shoulder, he was denied an operation. 15Ja.

The second incident occurred in February of 1997, when, having not been given dinner on several occasions, Mr. Booth threw water on Officer Thomas. Mr. Booth alleges that Officer Thomas responded by taking Mr. Booth from his cell in handcuffs and throwing a cup of cleaning material in his face. *Id.*

The third assault occurred the next day. Mr. Booth alleges that Lieutenant Rikus took him from his cell and put him in a storage room. Lieutenant Rikus then shoved Mr. Booth into a storage room shelf, causing Mr. Booth to hit the side of his face on the shelf, and Officer Thomas pushed him into a door, while Sergeant White was looking on. Sergeant White then took Mr. Booth back to his cell, where Officer Thomas tightened and twisted his handcuffs in such a way as to injure Mr. Booth's wrists. Officer Thomas then left Mr. Booth handcuffed in his cell for half an hour. 15-16Ja.

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[2] The court of appeals was reviewing the district court's dismissal of Mr. Booth's complaint for failure to exhaust administrative remedies. Accordingly, we state the facts in the light most favorable to Mr. Booth. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Thereafter, Mr. Booth was relocated to another unit at Smithfield, where, in March of 1997, Officer Churner allegedly assaulted him in the course of a strip search by hitting him in the mouth, splitting his lip, while Sergeant Workensher and Corrections Officer Kuhan watched. Officer Kuhan then grabbed Mr. Booth, put him in a choke hold, and forced him to the floor. Mr. Booth's mouth wounds were sufficiently severe to require stitches. 16Ja.

On February 4, 1988, while Mr. Booth's appeal was pending in the court of appeals, Mr. Booth was transferred from Smithfield to another prison in Pennsylvania.[3]

The Pennsylvania Department of Corrections Grievance Procedure

The Commonwealth of Pennsylvania's Department of Corrections has a complex Consolidated Inmate Grievance Review System that is set forth in a lengthy single-spaced document, with additional pages that amend various aspects of the original document. It governs some, but not all, "problems or other issues of concern arising

[3] The date of Mr. Booth's transfer from the State Correctional Institution at Smithfield does not appear in the district court record. However, based on Mr. Booth's prison records, counsel for Mr. Booth and counsel for Respondents have agreed that Mr. Booth was transferred from the State Correctional Institution at Smithfield to the State Correctional Institution at Pittsburgh on February 4, 1998.

during the course of confinement." 43Ja; *see* 50-51Ja (setting forth various categories of issues that are subject to other procedures).

A careful review of the grievance procedure reveals that it creates the following three-step administrative process (40-53Ja):

- First, grievances are submitted in writing for initial review to the facility's Grievance Coordinator, within fifteen days after the events upon which the grievance is based. 46Ja. The Grievance Coordinator then forwards the grievance to a Grievance Officer for "investigation and resolution." *Id.* Persons having personal knowledge of the subject matter may be interviewed, as may the grievant. 47Ja. Within ten working days of the Grievance Officer's receipt of the grievance, "the grievant shall be provided a written response to the grievance to include a brief rationale, summarizing the conclusions and any action taken or recommended to resolve the issues raised in the grievance." *Id.*

- Second, within five days of the receipt of this initial determination, the prisoner may appeal the determination to the Facility Manager or Regional Director, who then has ten days to notify the prisoner of the decision. 47-48Ja.

- Third, the prisoner who is dissatisfied with the disposition of the appeal from the initial review decision may appeal within seven days to the Central Office Review Committee for final review. 48Ja. Absent good cause, final review is not permitted if the prisoner

> has not complied with all the procedures governing the initial review and the appeal from the initial review. *Id.* The Central Office Review Committee must issue its decision within twenty-one days after its receipt of the appeal. 49-50Ja.

The grievance procedure further provides that "[a]ll proceedings pursuant to this directive are in the nature of settlement negotiations and will, therefore, be inadmissible before any court or other tribunal in support of any claim made against the Commonwealth or any employee." 51Ja.

The record shows that Mr. Booth filed at least three initial grievances within the prison grievance system about the assaults, but did not pursue the second and third steps of the grievance procedure. *See* 13-14Ja, 36-37Ja, 38-39Ja.[4] It is uncontroverted that during the

[4] The record is confusing as to whether Mr. Booth in fact filed a grievance or grievances about each – or only certain – of the four assaults that became the basis of his federal lawsuit. What the record does reflect is that, on February 19, 1997, Mr. Booth filed a grievance complaining that he had "put in a slip to Capt. Glenny to be seen for an[ ] assault that happened but was never seen." 13Ja. On March 5, 1997, the Grievance Coordinator denied a grievance that Mr. Booth apparently filed on March 5 (not in the record) on the grounds that the grievance was "a duplicate" of an earlier lodged grievance, and that his request for placement in protective custody was denied because he was "already in disciplinary custody which is[ ] a very secure housing." 12Ja. On March 13, 1997, the Grievance Coordinator denied a grievance that Mr. Booth apparently filed on March 12 (also not in the record). That denial stated that no investigation was conducted because the grievance "mentioned no specific allegations" and that Mr. Booth had "claimed abuse by officers in the past and investigation has always reflected false claims." 10Ja.

relevant period, the Pennsylvania grievance procedure did not permit the recovery of monetary damages.[5]

Mr. Booth's Complaint

In his federal court action filed on April 21, 1997, under 42 U.S.C. § 1983, Mr. Booth sought, in essence, two types of relief: monetary damages for the alleged beatings that he suffered and injunctive relief, primarily in the form of a transfer to another prison. In his complaint, Mr. Booth sought compensatory and nominal damages, along with a "preliminary injunction" and a protective order for transfer to another prison as "my safety and life is at stake." 11Ja, 9Ja.

In subsequent pleadings,[6] Mr. Booth reiterated his requests for both monetary damages and a transfer. In a pleading entitled, "Affidavit for Show of Cause for Emergency Preliminary Injunction and Protective Order," filed

[5] The Commonwealth of Pennsylvania Department of Corrections amended the Consolidated Inmate Grievance Review System, effective May 1, 1998, to provide that, "[t]he Grievant may also include a request for compensation or other legal relief normally available from a court." 60Ja. The Commonwealth conceded in the court of appeals that Mr. Booth could not have obtained monetary damages through the grievance system as it existed during the relevant time. *See* Appellees' Br. at 7, *Booth v. Churner*, 206 F.3d 289 (3d Cir. 2000) (Nos. 97-7487, -7488) (filed July 13, 1999).

[6] Because the defendants did not answer Mr. Booth's complaint, the court of appeals appropriately construed his subsequent filings as, in effect, an amendment to his complaint. *See* 22a n.10.

one week after he filed his complaint, Mr. Booth once again sought "nomi[n]al punitive exemplary and compensatory" damages, and a transfer. 20Ja, 18Ja. Three weeks later, Mr. Booth filed a document entitled, "Petition for Affirmative Order 'Records' Also Relief Plaintiff Seeks." 24Ja. In this pleading, Mr. Booth requested money damages in the amount of $750,000, $400,000, and $300,000; a transfer "to any prison for protection against beating"; an order to upgrade the prison law library; and an order to hire a paralegal, among other things. 24Ja, 25Ja; *see also* 26Ja, 28Ja, 33Ja, 35Ja.

The Proceedings Below

The district court, acting *sua sponte*, dismissed Mr. Booth's complaint without prejudice for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a) because Mr. Booth did not avail himself of the next tiers of the grievance procedure after his initial requests for relief were denied. 36a-39a.

The Court of Appeals for the Third Circuit affirmed, applying to state prisoners the rule it previously had adopted for federal prisoners in *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000). *See* 22a. In *Nyhuis*, the court had held that "the PLRA amended § 1997e(a) in such a way as to make exhaustion of all administrative remedies mandatory – whether or not they provide the inmate-plaintiff with the relief he says he desires in his federal action." *Nyhuis*, 204 F.3d at 67.

Although *Nyhuis* was a so-called "mixed claim" case, in that Mr. Nyhuis sought both injunctive relief and monetary damages, the court chose not to rest its holding on that fact. Rather, as the court explained:

> [U]nder either the across-the-board exhaustion approach or the mixed-claim approach adopted by courts of appeals recognizing a futility exception to § 1997e(a), Nyhuis's action, as pleaded, is barred because of his failure to exhaust his available administrative remedies. That said, we are of the opinion that § 1997e(a), as amended by the PLRA, completely precludes a futility exception to its mandatory exhaustion requirement. Therefore, we will affirm the District Court's judgment not on the ground that the futility exception was not applicable in *this* case, but on the ground that it is not applicable in *any* case.

Id. at 71. With respect to the meaning of "available remedies," the court of appeals concluded that, "by leaving the word 'available' in § 1997e(a) Congress merely meant to convey that if a prison provided no internal remedies, exhaustion would not be required." *Id.* at 73.

In *Booth*, the court of appeals adopted the *Nyhuis* rule for state prisoners, concluding that "the *Nyhuis* rule has even greater force with respect to § 1983 actions," because of both the "additional comity considerations" and the "additional federalism and efficiency considerations" that obtain in the § 1983 context. 23a. The court thus held that, "because Booth 'failed . . . to exhaust his available administrative remedies (rather than those he believed would be effective)' before filing his § 1983 action, the District Court appropriately dismissed his action without prejudice." *Id.* (quoting *Nyhuis*, 204 F.3d at 78) (omission in original).

SUMMARY OF ARGUMENT

This case calls upon the Court to determine whether, in requiring prisoners to exhaust "such administrative remedies as are available" prior to bringing actions with respect to prison conditions, Congress intended to negate the fundamental principle that, "[t]he law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

The plain language of § 1997e(a) shows no such intent. Rather, it shows the opposite. Congress chose to require prisoners to exhaust only "such administrative remedies as are available." The ordinary meanings of "remedy" and "available" demonstrate that Congress intended to require prisoners to exhaust only those prison grievance procedures that actually could provide a remedy for the violation of their rights. Where, as here, a prisoner seeks monetary damages to remedy a past wrong, and the prison grievance procedure cannot provide such damages, there is no "remed[y] . . . available," and the prisoner may seek relief directly in federal court.

This conclusion is confirmed by fundamental administrative law principles, within which Congress was legislating when it chose the words "such administrative remedies as are available." Those principles make clear that litigants need exhaust only those administrative procedures that can provide a remedy for their claims. Further, where an administrative procedure cannot provide such a remedy, the principles underlying the exhaustion requirement are not served by forcing the party to engage in an exercise in futility. And in the prisoner exhaustion context in particular, in view of the short, successive time

frames of the prison grievance procedure and the concomitant high likelihood of forfeiture, requiring exhaustion not only may be futile, but actually may be fatal to the prisoner's claim.

Although resort to legislative history is unnecessary given the plain language of § 1997e(a), the legislative history of prisoner exhaustion requirements confirms that Congress intended to require exhaustion only where the grievance procedures could provide the remedy the prisoner sought. In the 1996 amendments to § 1997e(a), part of the Prison Litigation Reform Act ("PLRA"), Congress deleted certain words, but, rather than adopting a blanket exhaustion requirement, retained the key phrase ("such administrative remedies as are available") that is directed to the substantive efficacy of the administrative process. Moreover, shortly before it amended § 1997e(a) to its present form, Congress declined to enact another bill that would have required federal prisoners to exhaust administrative procedures even when those procedures could not provide the remedy they sought. Further, Congress's intent in the PLRA to reduce frivolous prisoner litigation is not served by reading § 1997e(a) to require the pursuit of futile administrative remedies.

This Court should reverse the court of appeals and hold that § 1997e(a) does not require prisoners to pursue administrative procedures that cannot afford them a remedy to redress the wrongs of which they complain.

ARGUMENT

SECTION 1997e(a) DOES NOT REQUIRE A PRISONER WHO SEEKS ONLY MONETARY DAMAGES TO EXHAUST ADMINISTRATIVE REMEDIES WHERE MONETARY DAMAGES ARE NOT AVAILABLE UNDER THE APPLICABLE ADMINISTRATIVE PROCEDURE.

Because Pennsylvania's prison grievance procedures at the time did not permit prisoners to recover monetary damages, Mr. Booth was not required to exhaust those procedures prior to bringing his federal court action seeking money damages for the violation of his rights caused by past conduct of the prison guards.[7]

Simply as a matter of common sense, it seems evident that in enacting 42 U.S.C. § 1997e(a), Congress did not intend to require a prisoner to pursue a claim through a prison grievance procedure when the remedy that can redress the wrong done to the prisoner cannot possibly be obtained through that procedure. This conclusion is confirmed by: (1) the plain language of 42 U.S.C. § 1997e(a), which requires a prisoner to exhaust only such "remedies" as are "available"; (2) well-established principles of administrative law, under which Congress was legislating when it chose to use the words "available" and "remedies," which require exhaustion only of those

[7] Mr. Booth initially sought both injunctive relief and money damages. However, his injunctive claims are moot, since he was, in fact, transferred from Smithfield. Accordingly, the case is now solely a damages case. Moreover, his injunctive claims are separate from his damage claim for the violation of his rights as a result of the past assaults, and could not have remedied that violation.

administrative procedures that can provide the relief sought; and (3) the legislative history of prisoner exhaustion requirements.

I. THE PLAIN LANGUAGE OF 42 U.S.C. § 1997e(a) SHOWS THAT CONGRESS INTENDED TO REQUIRE A PRISONER TO EXHAUST ONLY THOSE ADMINISTRATIVE PROCEDURES THAT CAN PROVIDE THE REMEDY THAT THE PRISONER SEEKS.

The court of appeals concluded that because a procedural avenue existed for prisoners to obtain certain relief, exhaustion was "mandatory," even though the prison grievance system could not "provide the inmate-plaintiff with the relief he says he desires in his federal action." 22a. This conclusion flies in the face of the applicable statutory language.

"When interpreting a statute, we look first and foremost to its text." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994). The plain text of the statute at issue here requires the exhaustion only of "such administrative remedies as are available." When a prison grievance system offers no monetary damages, there is no remedy available to a prisoner who, like Mr. Booth, seeks monetary damages for an injurious physical assault. Thus, the § 1997e(a) exhaustion requirement does not apply.

A. The Plain Language of § 1997e(a) Requires a Prisoner to Exhaust Only Such "Remedies" As Are "Available" and an Administrative Procedure That Cannot Provide the Requested Relief Is Not a "Remedy" That Is "Available."

This Court need look no further than the text of § 1997e(a) to conclude that Mr. Booth was not required to pursue his claim for money damages for past conduct through the Pennsylvania grievance procedure, where that procedure could not provide him such relief. When there is a "straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *see also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.").

The exhaustion requirement in § 1997e(a) provides that:

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

42 U.S.C. § 1997e(a) (Supp. II 1996) (emphasis added).

The courts of appeals that have held that § 1997e(a) does not require exhaustion when the remedy that the prisoner seeks is not available properly have based their holdings on the plain language of the statute. *See, e.g., Rumbles v. Hill*, 182 F.3d 1064, 1067 (9th Cir. 1999) (where

administrative grievance process "does not allow for monetary damages, [that] form of relief does not constitute an 'available' remedy that must be exhausted before bringing a section 1983 action"), *cert. denied*, 528 U.S. 1074 (2000); *Whitley v. Hunt*, 158 F.3d 882, 886 (5th Cir. 1998) (plain meaning of § 1997e(a) does not require exhaustion of unavailable remedies); *Garrett v. Hawk*, 127 F.3d 1263, 1267 (10th Cir. 1997) ("[A] prisoner can only exhaust administrative remedies that are actually available.").

The plain language of the statute establishes that these courts are correct. The text of § 1997e(a) requires prisoners to exhaust only "such administrative remedies as are available." While not defined in the statute, the ordinary meaning of the terms "remedies" and "available" shows Congress's intent to require prisoners to pursue only those administrative remedies that are capable of providing them the relief they seek. "When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). There is always a "strong presumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Ardestani v. INS*, 502 U.S. 129, 136 (1991) (internal quotation omitted); *see also Artuz v. Bennett*, 121 S. Ct. 361, 363-64 (2000).

The ordinary meaning of the term "remedy" shows that there can be no remedy in the absence of a mechanism for obtaining the relief desired. "Remedy" is defined as "the legal means to recover a right or to prevent or obtain redress for a wrong." *Webster's Third New International Dictionary* 1920 (1993); *see also Black's Law Dictionary* 1294 (6th ed. 1990) (defining "remedy" as "[t]he means by which a right is enforced or the violation

of a right is prevented, redressed, or compensated"). Pennsylvania's grievance procedure did not provide a remedy for Mr. Booth because it could not provide him with a legal means to "recover a right" or to "prevent or obtain redress" for a wrong. A procedure is not a "remedy" for a particular legal right unless it permits enforcement of that right; and it is not a "remedy" for a particular type of wrong unless it provides redress for that wrong. There was, quite simply, nothing that the Pennsylvania grievance system could have done to give Mr. Booth the monetary compensation he claimed for the injuries he suffered.

The term "available," in turn, is defined as "having sufficient power or force to achieve an end," "capable of use for the accomplishment of a purpose," and "that is accessible or may be obtained." *Webster's Third New International Dictionary* 150 (1993); *see also Black's Law Dictionary* 135 (6th ed. 1990) (defining "available" as "accessible; obtainable; present or ready for immediate use"). But, of course, under the Pennsylvania grievance procedure, there was no remedy "capable" or "ready for immediate use" to redress the wrongs done to Mr. Booth, nor "accessible" to him so that he might recover for the violation of his rights. Only a monetary damages remedy could afford this relief, but this was not an administrative remedy that was "available" to Mr. Booth.

In short, when a prisoner seeks monetary damages to recover for a past violation of his or her constitutional rights, as Mr. Booth does, there are no claims he or she could state that the Pennsylvania grievance procedure could redress. Thus, no "available remedy" exists, and, by its plain terms, § 1997e(a) is not applicable.

This conclusion is confirmed by this Court's decisions in which it has used the phrase "available remedy" to describe a mechanism that actually can provide the relief sought, not simply as any mechanism for relief that may exist. It is against this background that the Court should evaluate Congress's meaning of the term "available remedies." "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911).

For example, in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), a locomotive fireman claimed that his union and employer had violated the Railway Labor Act by agreeing to exclude black railway workers from fireman positions. The questions presented were whether the Railway Labor Act imposed a duty of fair representation on the union – which would be violated by the discriminatory practice of the union – and whether the courts had jurisdiction to remedy such a violation. *See id.* at 193-94. After answering the first question in the affirmative, *see id.* at 202-03, the Court turned to the question whether the Act divested federal and state courts of jurisdiction to enforce the duty of fair representation.

In undertaking this analysis, the Court focused on whether the Adjustment Board, which heard disputes between rail carriers and their employees, could provide the plaintiff the "relief here sought" – injunctive, declaratory, and monetary remedies to prevent the continuation of the discrimination. *Id.* at 205. The Court concluded that, in fact, the Adjustment Board had "consistently

declined" to grant such relief. *Id.* Accordingly, although the plaintiff might "resort to such proceedings in order to secure a possible administrative remedy," because of the Board's prior refusal to grant the relief sought, there was not "an administrative remedy available" and the plaintiff could bring his claim directly in court. *Id.* at 206-07.[8]

Similarly here, while Mr. Booth could resort to the Pennsylvania prison grievance proceedings, there "is no

[8] In other contexts, this Court consistently has used the term "available remedy" to describe the specific relief sought by, and available to, a plaintiff – and not simply as a general procedure that might provide some other type of relief. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998); *Lane v. Pena*, 518 U.S. 187, 197-99 (1996); *United States v. Burke*, 504 U.S. 229, 238 (1992); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 (1983); *cf. United States v. Testan*, 424 U.S. 392, 403 (1976) (noting that an "administrative avenue" of relief was "available" to plaintiffs, but "the remedy of money damages" was not "available").

In *West v. Gibson*, 527 U.S. 212 (1999), this Court reviewed the court of appeals' determination that "the EEOC lacked the legal power to award compensatory damages; consequently there was no administrative remedy to exhaust," when a federal employee sought only compensatory damages from his employer under Title VII. *Id.* at 217. This Court vacated that decision on the ground that the EEOC did indeed have the authority to order a federal agency to pay money damages to a federal employee bringing a Title VII claim. *See id.* at 223. Nonetheless, it is noteworthy that neither the Court majority nor the four dissenting Justices (who concluded that the EEOC had no such authority) questioned the court of appeals' commonsense conclusion that, where monetary damages are not available from an administrative agency, the statutory requirement that a claimant exhaust administrative remedies does not apply, as there would be "no administrative remedy to exhaust." *Id.* at 217.

available administrative remedy" for him there, because the prison system cannot award monetary damages. Thus, Mr. Booth's claim falls outside the intended scope of § 1997e(a).[9]

B. Congress's Choice of the Words "Available Remedy" Should Be Given Full Effect in Interpreting § 1997e(a).

Despite the well-accepted meaning of the phrase "available remedy," the courts of appeals that have required exhaustion of futile procedures (including the court below), have read the phrase to mean simply that some administrative procedure is in existence in the prison. *See, e.g., Nyhuis*, 204 F.3d at 73; *Alexander v. Hawk*, 159 F.3d 1321, 1326-27 (11th Cir. 1998). This construction of the words "available remedy" not only is contrary to their plain meaning, but also renders the words superfluous and is belied by the text of the very next section of the statute.

In the 1996 amendments to § 1997e(a), while Congress removed certain words (discussed *infra* Part III.A), it retained the key words – "such administrative remedies

[9] This conclusion is supported by Congress's limitation in § 1997e(a) to "action[s] . . . with respect to prison conditions." The term "prison conditions" commonly refers to ongoing conditions of confinement that a prison grievance system could remedy, not to an isolated incident (or incidents) of abuse for which damages are the only remedy. *Cf. Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (distinguishing between conditions-of-confinement and excessive force claims).

as are available." Had Congress intended to require prisoners to exhaust all administrative procedures in place, without regard to whether those procedures are "available remedies" that can redress the specific wrong done to the prisoner, Congress could have amended the statute to require exhaustion of "all administrative procedures." Instead, Congress was more circumscribed, choosing to limit the exhaustion requirement to "such administrative remedies as are available."

Of course, there would have been no need for Congress to include the qualifier "available remedy" if Congress meant simply to require prisoners to pursue all grievance procedures in existence. Indeed, reading § 1997e(a) simply to state the obvious, *i.e.*, that prisoners need not pursue administrative grievance procedures when no such procedures exist, renders the terms "remedies" and "available" superfluous. However, courts have an "interpretive obligation to try to give meaning to all the statutory language." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 526 U.S. 434, 452 (1999); *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998) ("The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical.").

Moreover, this reading would ignore the actual language chosen by Congress, instead making the statute read, "No action shall be brought with respect to prison conditions . . . until such administrative *procedures* as *exist* are exhausted" – rather than, "until such administrative *remedies* as *are available* are exhausted." This result is contrary to this Court's consistent command that courts

give meaning to the words actually chosen by Congress, not to those that Congress could have, but did not, use. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942, 1947-48 (2000); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991); *62 Cases of Jam v. United States*, 340 U.S. 593, 600 (1951).

Congress's deliberate decision to require exhaustion only of "available remedies," and not of "existing procedures," is further indicated by its use of the term "administrative procedures" in the very next section of the statute, 42 U.S.C. § 1997e(b) (Supp. II 1996). That section provides, "[t]he failure of a State to adopt or adhere to an *administrative grievance procedure* shall not constitute the basis for an action under section 1997a or 1997c of this title." *Id.* (emphasis added). This provision precludes the Attorney General of the United States from taking certain actions on the basis of a state's failure to "adopt or adhere to an administrative grievance procedure." In doing so, subsection (b) focuses on a state's entire "administrative . . . procedure," as opposed to the specific "administrative remedies" that may be available through that procedure. Because an Act of Congress "should not be read as a series of unrelated and isolated provisions," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995), Congress's deliberate choice of different words in the related subsections of § 1997e should be given full effect, and they can be given full effect only if "available remedy" is interpreted to mean just that.

This conclusion follows a fundamental rule of statutory construction: when Congress uses certain language in one part of a statute, and different language in another, the difference is intentional, and indicates Congress's

intent that the words have different meanings. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Hohn v. United States*, 524 U.S. 236, 250 (1998); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). *See generally* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06, at 194 (6th ed. 2000). Yet, that is precisely what the courts holding that prisoners must exhaust futile grievance procedures have done: ascribe the same meaning to the terms "remedy" and "procedure," despite Congress's decision, in the same enactment, to use the two different words in two related subsections of § 1997e.

* * *

In short, the mere fact that Pennsylvania has a prison grievance procedure in place to redress certain types of wrongs and to provide certain types of relief does not mean that Mr. Booth has an "available remedy" to redress the particular wrong done to him and to provide relief for that wrong. While an administrative procedure exists in Pennsylvania that may offer a remedy for some wrongs, it is not capable of remedying the wrong of which Mr. Booth complains nor of providing him the relief he seeks for that wrong. Therefore, there is no "available remedy" and Mr. Booth may bring his claim directly in federal court.

II. WELL-ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW CONFIRM THAT CONGRESS INTENDED TO REQUIRE A PRISONER TO EXHAUST ONLY THOSE ADMINISTRATIVE PROCEDURES THAT CAN PROVIDE THE REMEDY THAT THE PRISONER SEEKS.

The reading of § 1997e(a) that requires a prisoner to exhaust only those administrative procedures that actually can redress the wrong not only accords with the plain language of the statute, but also is consistent with well-established administrative law principles, as well as with the purposes of administrative exhaustion. This Court has made clear that litigants need exhaust only those administrative procedures that can provide a remedy for their claims. Congress was no doubt aware of these traditional legal concepts when it enacted § 1997e(a), and, of course, "Congress will be presumed to have legislated against the background of [the Court's] traditional legal concepts." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978).

Had Congress intended to alter the well-established administrative law principles discussed below, it would have chosen words to effectuate that intent. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.' " (citation omitted)). Instead, Congress did the opposite: it chose words that reflect and affirm the long-standing principles, which, accordingly, are instructive in

confirming Congress's intent not to require exhaustion where exhaustion would be futile.[10]

A. Administrative Law Jurisprudence Makes Clear That Litigants Need Exhaust Only Those Administrative Procedures That Can Provide a Remedy for Their Claims.

The plain language of § 1997e(a) affirms the long-standing principle of administrative law that exhaustion is not required when exhaustion would be futile – in other words, when the agency to which the litigant must apply for relief has "no power to decree [the] relief." *Reiter v. Cooper*, 507 U.S. 258, 269 (1993). As this Court made clear in *Reiter*:

> 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, however, *because the ICC has long interpreted its statute as giving it no power to decree reparations relief.*

Id. (emphasis added) (citations omitted).

This Court has affirmed this basic principle on numerous other occasions. For example, in *McNeese v. Board of Education*, 373 U.S. 668, 670 (1963), the lower courts had dismissed a civil rights suit challenging segregation in an Illinois school district on the ground that the plaintiffs had failed to exhaust their state administrative remedies. This Court reversed, finding it doubtful that "Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights," because the Superintendent of Public Instruction could only "investigate, recommend and report" and could "give no remedy." *Id.* at 674-75.

Later, in *Clayton v. International Union, UAW*, 451 U.S. 679 (1981), the Court addressed whether an employee alleging that his union violated its duty of fair representation was required to exhaust internal union procedures before bringing a claim in court under section 301 of the Labor Management Relations Act. This Court held that exhaustion was not required because the employee could not obtain "the substantive relief he seeks," and thus, "exhaustion would be a useless gesture." *Id.* at 693. While the Court acknowledged that "a requirement that aggrieved employees exhaust internal remedies might lead to nonjudicial resolution of some contractual grievances," it "decline[d] to impose a universal exhaustion requirement lest employees with meritorious § 301 claims be forced to exhaust themselves and their resources by

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[10] In fact, while resort to legislative history for this principle is unnecessary, it is noteworthy that the Department of Justice described the amendments to § 1997e as having the effect of bringing that statute's exhaustion requirement "more into line with administrative exhaustion rules that apply in other contexts – by generally prohibiting prisoner § 1983 suits until administrative remedies are exhausted." *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, H.R. 667 Before the Senate Comm. on the Judiciary*, 104th Cong. 20-21 (1995) (statement of John R. Schmidt, Associate Attorney General, U.S. Department of Justice).

submitting their claims to potentially lengthy internal union procedures that may not be adequate to redress their underlying grievances." *Id.* at 689.

Similarly, in *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399 (1988), the Court did not require plaintiffs to include their challenge to federal regulations in their initial application for Medicare payments because the applicable administrative entity was "without power" to entertain a challenge to the Secretary's regulations, and, accordingly, "any attempt to persuade the intermediary to do otherwise would be futile." *Id.* at 404. In so holding, the Court made clear that the law does not require parties to follow a "futile" path, and that failure to do so does not constitute the "bypass [of] a clearly prescribed exhaustion requirement." *Id.* at 405.[11]

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[11] *See also Bowen v. City of New York*, 476 U.S. 467, 485 (1986) (noting that exhaustion was "futile" and "there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise," when the agency could not grant the relief sought by the plaintiff); *Smith v. Robinson*, 468 U.S. 992, 1019 n.22 (1984) ("[T]he presumption in a case involving a claim arguably within the [Education of the Handicapped Act] should be that the plaintiff is required to exhaust EHA remedies, unless doing so would be futile."); *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975) (holding that a "hearing," required by statute, was not necessary before a final administrative decision was made because such a hearing would be "futile and wasteful"); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968) (per curiam) (holding that it "would be to demand a futile act" if the Court required exhaustion of internal prison remedies by a prisoner seeking return of legal materials confiscated by authorities who had conceded that such materials would not be returned); *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499, 505 (1928) (holding that

Similarly here, Mr. Booth's failure to pursue Pennsylvania's prison grievance system, where the prison authorities were "without power" to offer him the appropriate remedy, does not constitute a "bypass" of the exhaustion requirement. In limiting the exhaustion requirement to "such administrative remedies as are available," Congress legislated in accordance with well-established administrative principles that show that Mr. Booth's claim does not fall within that requirement.

B. The Policies Underlying the Administrative Exhaustion Requirement Reinforce the Conclusion That a Prisoner Seeking Only Monetary Damages Is Not Required To Exhaust Administrative Procedures That Cannot Provide Such Damages.

In addition to well-established administrative law principles, the purposes underlying the exhaustion requirement confirm that § 1997e(a) does not require a prisoner to exhaust grievance procedures that cannot provide the relief sought. Congress can be presumed to have intended that the exhaustion requirement in § 1997e(a) would serve the traditional purposes of administrative

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plaintiff need not exhaust state remedies because a prior state supreme court decision "would have rendered any such application utterly futile" since the local administrative board "was powerless to grant any appropriate relief in the face of that conclusive decision"); *cf. First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 167 (1946) (declining to require a litigant to comply with "a procedure so futile that it cannot be imputed to Congress in the absence of an express provision for it").

exhaustion. The fact that those purposes would be ill-served by requiring a prisoner to exhaust futile procedures further shows that Congress did not intend for prisoners to exhaust grievance procedures that are incapable of providing relief.

This Court has identified two primary purposes of administrative exhaustion requirements: to protect the authority of the administrative agency and to promote judicial efficiency. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992); *see also McKart v. United States*, 395 U.S. 185, 194 (1969);[12] *cf. Nyhuis*, 204 F.3d at 75-78. It was these purposes that served as a primary underpinning of the court of appeals' decision in *Nyhuis*. However, neither of these purposes is served by requiring a prisoner seeking

[12] This Court has invoked the policies outlined in *McKart* many times, including in contexts such as this one involving an express statutory exhaustion requirement. For example, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court considered the Social Security Act's strict exhaustion requirement, which precluded claimants from bringing any court action prior to the issuance of a "final decision" by the administrative agency. *See id.* at 756-57 & nn.4-5 (citing 42 U.S.C. § 405(g), (h)). The Court, citing *McKart*, described the principal policies behind exhaustion, *see id.* at 765, and determined that, despite the fact that a hearing had not taken place and no final decision had been issued, the named plaintiffs sufficiently had met the exhaustion requirements under the circumstances of their case, as further adherence to the strict exhaustion requirement would be "futile and wasteful." *Id.* at 766-67; *see also Mathews v. Eldridge*, 424 U.S. 319, 330-31 & n.11 (1976) (noting that the administrative agency would not have been required to consider the plaintiff's claim – a Due Process challenge to the agency's review system – and that "the nature of the claim being asserted" is an important factor "in determining whether a statutory requirement of finality has been satisfied").

to recover damages for past wrongs to exhaust administrative procedures that cannot provide such redress for those wrongs. Moreover, the burden on the prisoner of having to exhaust a futile procedure greatly outweighs any benefit to the system that might arguably exist.

1. Requiring Exhaustion Would Not Protect the Prison's Authority.

First, requiring exhaustion of administrative remedies that cannot provide the relief sought would not protect the prison's authority because, where the prison has no authority to grant relief, there is nothing to protect. *Cf. McKart*, 395 U.S. at 195 (noting that exhaustion of administrative remedies gives the agency "a chance to discover and *correct* its own errors," and, relatedly, that a litigant "may be successful in *vindicating his rights* in the administrative process" (emphasis added)). This policy does not apply when the administrative process does not offer a remedy, and so can neither "correct" nor "vindicate" a right. In such circumstances, the governmental entity in effect has abdicated its authority, rendering this rationale irrelevant.

Moreover, as the Court noted in *McCarthy*, regarding the prisoner's claim of inadequate medical care, "[t]he Bureau's alleged failure to render medical care implicates only tangentially its authority to carry out the control and management of the federal prisons." *McCarthy*, 503 U.S. at 155. Similarly here, Mr. Booth seeks monetary damages to compensate him for past injuries inflicted on him by prison guards. The prison authorities to whom Mr. Booth must submit his grievances have neither expertise nor

authority in the area of awarding damages for intentional abuse that would justify exhaustion of unavailable remedies. *See id.* ("[T]he Bureau does not bring to bear any special expertise on the type of issue presented for resolution here.").

2. Requiring Exhaustion Would Not Promote Judicial Efficiency.

Nor is the goal of judicial efficiency served by requiring the exhaustion of futile procedures. The courts have identified two general ways in which exhaustion of administrative remedies might promote judicial efficiency: (1) the administrative agency might be able to offer relief that would obviate the individual's need to seek judicial redress; and (2) even if the individual still brings a lawsuit, a factual record will have been developed in the administrative process that will facilitate and expedite the judicial process. *See, e.g., McKart*, 395 U.S. at 194-95; *Nyhuis*, 204 F.3d at 76. Neither of these rationales is served by requiring a prisoner to pursue futile administrative procedures.

The first rationale is not served because there is no legitimate reason why a prisoner simply would drop his or her claim after going through a grievance procedure that, by definition, is incapable of addressing his or her cause of action, providing the relief sought, and remedying the wrong. Nor does the possibility that a prisoner might accept substitute relief from the prison and not pursue his or her federal claim justify requiring the exhaustion of futile procedures. Almost by definition, there is no "substitute" relief available where a procedure

is incapable of remedying a wrong. In fact, the Court rejected this very argument in *Clayton*, when it held that a plaintiff seeking reinstatement to his job did not have to exhaust administrative procedures that could not provide that remedy, even though the administrative procedures could have resulted in a settlement that might have obviated the need for the lawsuit. *See Clayton*, 451 U.S. at 689, 693.

As to the second rationale, a primary policy underlying exhaustion is to promote efficiency by having administrative bodies "develop the necessary factual background upon which decisions should be based." *McKart*, 395 U.S. at 194; *see also McCarthy*, 503 U.S. at 145. This policy, while frequently invoked throughout administrative exhaustion jurisprudence, does not apply in this situation for one very simple reason: whatever facts that may be found through Pennsylvania's grievance process are subject to strict policies precluding their use in a later court action. *See* 51Ja (providing that all proceedings under the grievance system are "inadmissible before any court or other tribunal in support of any claim made against the Commonwealth or any employee"). Thus, by its own terms, the grievance process is not permitted to serve any fact-finding role at all for use in later judicial proceedings.

Moreover, the policy of developing a factual background is at odds with the unique structure of prison grievance systems. In the typical non-prison administrative procedure, the development of facts is an integral part of the process and the facts so found by the administrative body are given great (if not conclusive) weight in a later court proceeding. *See, e.g.*, 42 U.S.C. § 405(g) (1994)

("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . . "). By contrast, to the extent that any factual investigation does occur in the prison context, there is little assurance that the facts so developed will be accurate or impartial. *Cf. Cleavinger v. Saxner*, 474 U.S. 193, 203-04 (1985) (noting that members of a prison disciplinary committee are not independent, their findings may be influenced by the fact that their decisions are reviewed by their superiors, and the "credibility determination they make often is one between a co-worker and an inmate").

Some courts have expressed an additional judicial efficiency concern specifically in the prison exhaustion context: that allowing a prisoner who cannot obtain the relief he or she seeks to proceed directly to federal court will encourage other prisoners to frame their complaints in similar fashion just to avoid the exhaustion requirement. *See, e.g., Nyhuis*, 204 F.3d at 74; *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 537 (7th Cir. 1999); *Alexander*, 159 F.3d at 1326. However, this concern ignores the fact that state legislatures and prison authorities have complete control over the remedies that are available to those with injuries or grievances within their prison systems. Any supposed "loophole" in the exhaustion requirement – really just a plain reading of the requirement that prisoners exhaust only available remedies – easily can be closed by making monetary damages available in the grievance procedure, which is, in fact, precisely what the Commonwealth of Pennsylvania subsequently did. *See* 60Ja.

In addition, even if a prison system does not offer monetary relief, many forms of relief that a prisoner might seek, such as a transfer to a new prison or cell block, would be available through the prison grievance system and exhaustion of such remedies therefore would be required. Changing the nature of their complaints to ask for money damages will allow prisoners to avoid the exhaustion requirement only at the cost of forgoing the actual relief they desire.

3. The Burden on the Prisoner of Having To Exhaust Unavailable Remedies Outweighs Any Benefit to the Federal Courts of Requiring Exhaustion.

In contrast to the lack of benefit to either the prison or the courts, requiring that a prisoner exhaust unavailable remedies "heavily burdens the individual interests of the petitioning inmate." *McCarthy*, 503 U.S. at 152. First, there is a grave risk that a prisoner, typically proceeding without counsel or other legal assistance, will miss one of the short deadlines (as short as five days in Pennsylvania) for filing a complaint or an appeal under the prison grievance system, thereby risking dismissal of a later-filed federal suit for failure fully to exhaust administrative remedies (despite the unavailability of the relief sought by the prisoner). *See id.* at 152-53. As the Court in *McCarthy* aptly noted, the combination of short, successive filing deadlines and the inability of the prison to grant monetary damages "means that the prisoner seeking only money damages has everything to lose and nothing to gain from being required to exhaust his claim under the internal grievance procedure." *Id.* at 152.

Second, while Mr. Booth's complaint was dismissed *without prejudice* for failure to exhaust, such a dismissal effectively may be a dismissal with prejudice, as the prisoner likely will have missed the short deadline for filing a grievance at that point, and, accordingly, may never be able to cure the defect. *See, e.g.*, 8a n.3 ("[B]oth parties agree that the time is long past for Booth to pursue his normal administrative remedies; therefore, he cannot cure the defect in his complaint on which the District Court based its dismissal."). In fact, one court explicitly has held that such a dismissal is with prejudice, creating a permanent barrier to relief for the relevant injury. *See Underwood v. Wilson*, 151 F.3d 292, 296 (5th Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999). Thus, requiring exhaustion of unavailable remedies not only fails to serve the purposes of administrative exhaustion, but also is extremely burdensome on prisoners seeking redress for violations of their rights that cannot be remedied by prison grievance procedures.

* * *

None of the policies underlying exhaustion in general, nor the specific policies in favor of requiring prisoner litigants to exhaust prison remedies, is implicated when the administrative procedures at issue cannot provide the only remedy that the prisoner seeks. Together with the statute's plain language, as well as the administrative law background against which Congress was legislating when it adopted that language, consideration of these policies confirms that Congress did not intend to require prisoners to pursue remedies for injuries that prison authorities are unable to redress.

III. THE LEGISLATIVE HISTORY OF PRISONER EXHAUSTION REQUIREMENTS CONFIRMS THAT CONGRESS INTENDED TO REQUIRE A PRISONER TO EXHAUST ONLY THOSE ADMINISTRATIVE PROCEDURES THAT CAN PROVIDE THE REMEDY THAT THE PRISONER SEEKS.

Given the plain text of § 1997e(a), it is not necessary to resort to legislative history in order to attempt to glean Congress's intent. *See United States v. Gonzales*, 520 U.S. 1, 6 (1997). Nonetheless, the legislative history of prisoner exhaustion requirements supports the view that Congress intended to require exhaustion only where the administrative remedy can provide the relief sought.

A. Congress's Deletion of the Phrase "Plain, Speedy, and Effective" from § 1997e(a) Was Intended To Eliminate Federal Oversight of State Prison Grievance Procedures, Not To Require a Prisoner To Exhaust Futile Remedies.

Many of the courts that require a prisoner to exhaust prison grievance procedures that cannot provide the monetary damages that the prisoner seeks base their holdings on Congress's deletion in the Prison Litigation Reform Act of 1995 ("PLRA"),[13] of the requirement that, prior to bringing a federal lawsuit, prisoners exhaust "such plain, speedy, and effective administrative remedies as are available," 42 U.S.C. § 1997e(a)(1) (1994),

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[13] Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 to -77 (1996).

and insertion in its stead the requirement that prisoners exhaust "such administrative remedies as are available." *See, e.g., Nyhuis*, 204 F.3d at 72-73; *Perez*, 182 F.3d at 537; *Alexander*, 159 F.3d at 1326. These courts reason that the elimination of the words "plain, speedy, and effective" indicates "that Congress no longer wanted courts to examine the effectiveness of administrative remedies." *Alexander*, 159 F.3d at 1326. In addition to ignoring the plain meaning of the statute, this approach misapprehends both the pre-amended statute and the purpose and effect of the 1996 amendment.

The pre-amended statute provided in subsection (a)(1) that courts had the *discretion* to require prisoners to exhaust "such plain, speedy, and effective administrative remedies as are available." 42 U.S.C. § 1997e(a)(1) (1994). The statute further provided that exhaustion could not be required unless the administrative remedies were certified to be "in substantial compliance with the minimum acceptable standards promulgated [by the Attorney General] or [were] otherwise fair and effective." *Id.* § 1997e(a)(2).

Subsection (b)(1), in turn, required the Attorney General to promulgate minimum standards "for the development and implementation of a plain, speedy, and effective system for the resolution of grievances." *Id.* § 1997e(b)(1). As enumerated in subsection (b)(2), those minimum standards were to include solely procedural requirements and did not require prison systems to make available any

particular substantive remedy.[14] Accordingly, review of the pre-amended statutory scheme indicates that Congress intended the words "plain, speedy, and effective" in the former statute – the words it eliminated in the 1996 amendments – to refer to the fairness and efficacy of the

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[14] The former § 1997e(b)(2) provided that the "minimum standards" promulgated by the Attorney General "shall provide":

> (A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;
>
> (B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;
>
> (C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;
>
> (D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and
>
> (E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

42 U.S.C. § 1997e(b)(2) (1994) (emphasis added).

The first minimum standard under § 1997e(b)(2) relates to the requirement that the procedure be "plain" and "fair." The second and third standards relate to whether the grievance procedure is "speedy." The last two standards relate to whether the procedures are "effective" because a system that does not attempt to prevent reprisals or require independent review would not likely be effective in hearing inmate grievances.

procedural aspects of the administrative remedy, whereas, in contrast, Congress intended the words "such administrative remedies as are available" – the words it preserved – to refer to the substantive aspect of whether the remedy could provide the relief sought.[15]

In other words, what Congress eliminated when it amended § 1997e(a) in 1996 was the requirement, created by former § 1997e(a)(1)'s plain language and the detailed provisions of former § 1997e(b)(2), that an administrative remedy be available through "plain, speedy, and effective" procedures. What it did not eliminate was the requirement that the remedy be available at all. Prisoners may no longer avoid administrative procedures on the ground that they are slow, unfair, or ineffective, as long as the procedures can provide the remedy that the prisoner seeks. This is the "real and substantial effect" of

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[15] This Court's observation in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), concerning Congress's intent in tying the discretionary exhaustion requirement of § 1997e(a) to the certification procedures, is particularly instructive in this regard:

> Congress hoped that § 1997e would improve prison conditions by stimulating the development of successful grievance mechanisms. To further this purpose, Congress provided for the deferral of the exercise of federal jurisdiction over certain § 1983 claims only on the condition that the state prisons develop adequate procedures. This purpose would be frustrated by judicial discretion to impose exhaustion generally: the States would have no incentive to adopt grievance procedures capable of certification, because prisoner § 1983 cases could be diverted to state administrative remedies in any event.

Id. at 511-12 (citations omitted).

Congress's amendment, not the unprecedented (and illogical) requirement that prisoners exhaust remedies that cannot possibly give them the relief they seek or provide redress for the wrong inflicted upon them. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

B. Congress's Rejection of Language That Would Have Required Exhaustion Regardless of the Remedy Sought Confirms That Congress Did Not Intend To Require a Prisoner To Exhaust Futile Remedies.

As discussed above, had Congress intended the words "available" and "remedies" to mean something other than their plain meaning, and had Congress meant to reverse established administrative exhaustion jurisprudence, it would have done so explicitly. But what the legislative history shows is that, not only did Congress not do so, but shortly before enacting the amendments to § 1997e(a) in 1996, it expressly rejected other legislation that would have required federal prisoners to exhaust all grievance procedures, regardless of whether those procedures could provide the relief sought.

Prior to the enactment of the PLRA, Representative LoBiondo introduced the Prisoner Lawsuit Efficiency Act of 1995 ("PLEA"). This bill would have amended title 18 of the United States Code to require federal prisoners (who were not then covered by § 1997e(a)) to exhaust available administrative procedures, with the caveat that even procedures not providing all possible forms of

recovery were required to be pursued. The proposed section was as follows:

> No action shall be brought in any court, by a prisoner in the custody of the Federal Bureau of Prisons, concerning any aspect of such prisoner's incarceration until any administrative remedy procedures available are exhausted. This section applies to all actions regardless of the nominal party defendant. *The fact that the administrative remedies do not include all the possible procedures and forms of recovery that are available in the civil action does not render such administrative remedies inadequate or excuse the failure to exhaust them.*

Prisoner Lawsuit Efficiency Act of 1995, H.R. 2468, 104th Cong. § 4048 (emphasis added).

Congress's failure to adopt this broad exhaustion requirement implies that it was unwilling to require a prisoner to exhaust every administrative procedure available, without regard to whether that procedure could provide the forms of recovery sought in the federal action. Instead, when it amended § 1997e(a), Congress chose to require state and federal prisoners to exhaust only "such administrative remedies as are available." *Cf. Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").[16]

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[16] Interestingly, the only piece of PLRA legislative history directly on point is a statement of Representative LoBiondo, in which he expressed his displeasure with this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992), not to require exhaustion where a federal prisoner sought monetary damages that could not be obtained through the prison grievance process. After referring to his own proposal (the PLEA, discussed *supra* in the text), Representative LoBiondo then expressed his belief that the PLRA "will require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to [an] administrative remedy process before proceeding to court." 141 Cong. Rec. H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo). The fact that Congress did not enact Representative LoBiondo's own, more expansive version of the exhaustion requirement provides at least some evidence that Congress not only did not share Representative LoBiondo's intent, but affirmatively rejected the extreme exhaustion position that he espoused.

C. The Purpose of the PLRA Is Not Served By Requiring Exhaustion Where the Administrative Procedure Cannot Provide the Remedy That the Prisoner Seeks.

It is undisputed that a driving concern prompting the enactment of the PLRA was the growing number of prisoner civil rights lawsuits, and that the amendment to § 1997e(a) was part of Congress's efforts to curb this trend. However, the words of Senator Kyl of Arizona, a co-sponsor of the bill, are instructive, in that they indicate that Congress intended that the exhaustion requirement apply only where the prison grievance system could provide a remedy that is adequate for the prisoner's claim. Senator Kyl stated:

> Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an *adequate* remedy.

141 Cong. Rec. S7527 (daily ed. May 25, 1995) (statement of Sen. Kyl) (emphasis added).

Moreover, the PLRA's legislative history reveals that, while Congress certainly wanted to reduce prisoner litigation in general, a primary concern was to reduce frivolous prisoner lawsuits. *See, e.g.*, 141 Cong. Rec. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (stating that the PLRA "addresses the flood of frivolous lawsuits brought by inmates"); *see also id.* at S14626-27 (citing specific examples of frivolous lawsuits). Section 1997e(a) does little, if anything, to effectuate this specific intent.

A number of specific provisions in the PLRA give federal courts the authority to dismiss frivolous prisoner cases quickly and permanently. One of these, 42 U.S.C. § 1997e(c) (Supp. II 1996), permits a district court to dismiss a case as frivolous, malicious, or for failure to state a claim, "without first requiring the exhaustion of administrative remedies." Significantly, this provision permits a district court to dismiss a case even before it considers the exhaustion issue, rendering § 1997e(a) unnecessary as a tool to reduce frivolous lawsuits.[17]

[17] Other portions of the PLRA directed to reducing frivolous prisoner litigation include 28 U.S.C. § 1915(g) (Supp. II 1996) (precluding prisoners from bringing suits *in forma pauperis* after they have had three or more cases dismissed as frivolous, malicious or for failure to state a claim); *id.* § 1915(e)(2)(B) (providing that the district court "shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious [or] (ii) fails to state a claim on which relief may be granted"); *id.* § 1915A (requiring the district court to "review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity" and to dismiss the complaint if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted").

Because frivolous or factually meritless lawsuits can be dismissed without district courts even addressing the exhaustion issue, § 1997e(a) does not serve that purpose.

* * *

The legislative history of prisoner exhaustion requirements supports what the plain language of the statute mandates – that § 1997e(a) requires prisoners to exhaust only those procedures that can provide a remedy for the wrong. Congress deleted in § 1997e(a) the words "plain, speedy, and effective" that were directed to the procedural efficacy of prison grievance procedures and preserved the words "such administrative remedies as are available" that were directed to substantive efficacy; it rejected a blanket exhaustion requirement for federal prisoners; and it chose other methods to effectuate its goal of reducing frivolous prisoner litigation. Taken together with the language of § 1997e(a) and the fundamental administrative law principles within which it was adopted, this history confirms that Congress did not intend to require prisoners to exhaust futile procedures.

CONCLUSION

For the foregoing reasons, petitioner Timothy Booth respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit and remand for further proceedings under which the district court is required to consider the merits of Mr. Booth's complaint.

Respectfully submitted,

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