No. 05-416

DEC 29 2005

In The Supreme Court of the United States

JEANNE S. WOODFORD and ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Under the Prison Litigation Reform Act, a prisoner cannot bring suit to challenge prison conditions under federal law "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

This case presents the following question:

Does a prisoner satisfy the Prison Litigation Reform Act's administrative exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal that is rejected by prison officials?

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-21, is reported at *Ngo v. Woodford*, 403 F.3d 620 (9th Cir. 2005). The district court's opinion, Pet. App. 22-26, is not reported.

JURISDICTION

The court of appeals issued its opinion on March 24, 2005, Pet. App. 1-21, and denied a timely petition for rehearing on July 1, 2005, Pet. App. 27. The petitioners invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1), filing a petition for certiorari on September 29, 2005. This Court granted the petition on November 14, 2005.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1997e(a) of title 42 of the United States Code mandates: "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."

Under section 3084.6(c) of title 15 of the California Code of Regulations, a prisoner must submit an administrative appeal "within 15 working days of the event or decision being appealed."

STATEMENT OF THE CASE

A. The Prison Litigation Reform Act

Although civil-rights litigants need not, as general rule, exhaust administrative remedies, *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 515-16 (1982), *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971), in 1980, Congress passed a limited exhaustion requirement for prisoner-civil-rights actions. 42 U.S.C. § 1997e(a) (1994). Congress later broadened this exhaustion prescription with its enactment of the Prison Litigation Reform Act of 1995 (PLRA). Under the PLRA, § 1997e(a) directs that "[n]o action shall be brought" under § 1983 or "any other Federal law" by a prisoner "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2000). Through the revised statute, Congress eliminated the district courts' discretion under the original statute to require exhaustion only when it was "appropriate" and "in the interests of justice," and when available administrative remedies were "plain, speedy, and effective." *Compare* 42 U.S.C. § 1997e(a) (2000) *with* 42 U.S.C. § 1997e(a) (1994). In interpreting this exhaustion mandate, this Court has held that exhaustion is required even if the specific relief the prisoner seeks is unavailable through the State's administrative process, *Booth v. Churner,* 532 U.S. 731, 741 (2001), and regardless of the

type of prison-conditions claim the prisoner is alleging, *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

B. California's Administrative Appeals System

In California, there is a four-tier administrative process available for inmates seeking to grieve conditions of confinement. Cal. Code Regs. tit. 15, § 3084.5. In order to prepare an appeal, an inmate must simply "describe the problem and action requested" on an inmate appeal form (CDC form 602). *Id.* § 3084.2(a). The appeal forms are made "readily available to all inmates." *Id.* § 3084.1(c).

The inmate must generally begin the appeals process by seeking review at the "informal" level, at which the inmate contacts the involved staff to attempt to resolve the grievance informally. *Id.* § 3084.5(a). Informal-level review is waived if the appeal concerns certain issues defined in the regulations. *Id.* § 3084.5(a)(3).

If the grievance is not resolved at the informal level, or if the informal level is waived, the inmate must then submit his appeal at the first formal level of review by forwarding the appeal to the prison's appeals coordinator within applicable time limits. *Id.* §§ 3084.2(c), 3084.5(b). This level of review may also be bypassed if the appeals coordinator determines from an initial screening of the appeal that it concerns certain issues. *Id.* § 3084.5(b).

If the inmate receives an adverse decision at the first formal level of review, or if that level has been bypassed, the inmate must proceed to the second formal level of review. *Id.* § 3084.5(c). Second-level review is conducted by the institutional head, the warden. *Id.* § 3084.5(e)(1).

If the inmate is dissatisfied with the response provided at the second formal level of review, the inmate must submit the appeal to the third formal level of review. *Id.* § 3084.5(d). Third-level review constitutes review by the director of the California Department of Corrections and Rehabilitation, and it is conducted by a designated representative of the director under the supervision of the chief of inmate appeals. *Id.* § 3084.5(e)(2).

An inmate is required to submit an administrative grievance within fifteen working days – or three weeks – of the event or decision being appealed. *Id.* § 3084.6(c).[1] Prison officials may reject an inmate appeal if "[t]ime limits for submitting the appeal are exceeded and the appellant had the opportunity to file within the prescribed time constraints." *Id.* § 3084.3(c)(6).

C. Factual History

Respondent Viet Ngo is a life prisoner in the custody of the California Department of Corrections and Rehabilitation who, during the events at issue in this case, was housed at San Quentin State Prison. J.A. 3. Mr. Ngo alleges that prison officials wrongly placed him in administrative segregation as discipline for engaging in "inappropriate activity" with a female volunteer at the San Quentin chapel. J.A. 4, 7. He contends that his confinement

[1] California's administrative filing deadline is substantially similar to that of the federal Bureau of Prisons, which is "20 calendar days" from "the date on which the basis for the [Administrative Remedy] Request occurred." 28 C.F.R. § 542.14(a).

in administrative segregation lasted from October 26, 2000, to December 23, 2000 – a period of about two months. J.A. 27. Mr. Ngo further claims that, as additional discipline for his alleged misconduct, at a classification-committee hearing on December 22, 2000, Defendant Kane "explicitly restricted" him from participating in a variety of prison programs, including evening fellowship and religious study sessions. J.A. 4-5.

Rather than availing himself of the opportunity to file an administrative grievance within fifteen working days of his alleged injuries, Mr. Ngo submitted his first appeal on June 18, 2001 – many months after the contested events. J.A. 26-29. In that appeal, Mr. Ngo challenged both his placement in administrative segregation and Defendant Kane's decision to prohibit him from communicating with a particular volunteer, having a personal relationship with a volunteer, and attending evening activities like education, "Alternatives to Violence," and church. J.A. 27.

The following day, on June 19, 2001, the prison's appeals coordinator advised Mr. Ngo that his appeal was untimely under section 3084.6(c) of title 15 of the California Code of Regulations. J.A. 24-26. The appeals coordinator explained that the events in question had transpired the previous year on October 26, 2000 and December 23, 2000. J.A. 26.

On June 25, 2001, Mr. Ngo filed his second appeal contesting the same events. J.A. 33-37. Mr. Ngo did not restate his grievance but simply incorporated by reference his original appeal. J.A. 33-34. He also challenged the rejection of his original appeal for untimeliness, stating that his exclusion from prison programs was "an ongoing

action" and therefore that the filing deadline under section 3084.6 did not apply to him. J.A. 34. The prison appeals coordinator again rejected the appeal, explaining that even though Mr. Ngo's exclusion from prison programs dated back to 2000, he nonetheless waited six months to address the issue. J.A. 31-33.

D. Procedural History

After Mr. Ngo's two administrative appeals were rejected as untimely, Mr. Ngo filed this lawsuit on July 18, 2001. J.A. 2-14. In the section of his preprinted form complaint entitled "Exhaustion of Administrative Remedies," he wrote in connection with each of his claims that he had filed two inmate appeals, but that the San Quentin appeals office had refused to process them because they were untimely. J.A. 3, 6, 8, 10. He also contended that his rights were still being violated on an "ongoing basis." J.A. 3, 6, 8, 10.

Defendants moved to dismiss, arguing in part that Mr. Ngo had failed to exhaust his available administrative remedies in conformity with 42 U.S.C. § 1997e(a). In the Ninth Circuit, it is the defendant's burden to raise and prove the absence of exhaustion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). *Contra Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) (holding that the prisoner must allege and show that he has exhausted state administrative remedies, and should attach the administrative decision to his complaint). In support of the motion to dismiss, Defendants relied on the complaint's allegation that prison officials rejected Mr. Ngo's two appeals as untimely. *Cf. Wyatt*, 315 F.3d at 1120 (holding that a prisoner's concession to non-exhaustion is a valid ground

for dismissal). In opposition to the motion, Mr. Ngo filed a declaration attaching the two inmate appeals and the prison's screening forms rejecting the appeals. J.A. 23-37. Because Mr. Ngo had not exhausted California's administrative process regarding his claims, the district court granted Defendants' motion and dismissed the case without prejudice. Pet. App. 24-26.

The Ninth Circuit reversed the district court's dismissal, holding that an inmate satisfies the PLRA's exhaustion requirement by filing an untimely appeal that is rejected by prison officials as procedurally deficient. Pet. App. 21. The appellate court reasoned that because Mr. Ngo's two appeals were deemed time-barred and Mr. Ngo was precluded from proceeding any further within the State's administrative system, he had therefore "completed all avenues of administrative review available to him" in conformity with the PLRA's exhaustion mandate. Pet. App. 21.

The court of appeals began its analysis by disparaging Congress's motivation in proposing the PLRA, and by criticizing the legislative process supporting the statute's enactment as insufficiently thorough. Pet. App. 4-6. As the principal basis for its holding that the failure to exhaust administrative remedies should not bar a subsequent federal action, the court relied on the historical distinction in federal habeas between the doctrines of exhaustion and procedural default. Pet. App. 10-17. As the court explained, exhaustion precludes federal review of a claim only if state remedies remain available, while procedural default bars federal review of a state-court judgment if the judgment is supported by an "adequate and independent" state ground. Pet. App. 10, 13-14. Although the court acknowledged this Court's merger of exhaustion with

procedural default, it nonetheless concluded that because state sovereignty is "less threatened" by federal review of a non-criminal, state-administrative process, as opposed to a state court's judgment, no analogy could be made to federal habeas in support of reading a procedural-default mechanism into the PLRA's exhaustion requirement. Pet. App. 14.

The appeals court was additionally persuaded in its holding by the language of the PLRA, observing that nothing in the statute explicitly mentions procedural default, indicates "an intent to bar suits by prisoners who fail to meet administrative time requirements mandated by prisons," or instructs on the applicable standard of review for prison administrative findings. Pet. App. 15. Moreover, the court dismissed Defendants' argument that a procedural-default bar is necessary to ensure compliance with Congress's firm exhaustion mandate, instead taking it on faith that inmates would have "every incentive" to seek administrative review of their claims. Pet. App. 16 ("We have no reason to believe that prisoners will not avail themselves of the most efficient mechanism to remedy a violation of federal law.") (internal quotation marks omitted). Finally, the court extracted support for its holding from this Court's decisions that the unique administrative filing requirements of Title VII and the Age Discrimination in Employment Act (ADEA) do not contain a procedural-default component that could foreclose federal relief. Pet. App. 18-20 (citing *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123 (1988); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761-62 (1979)).

SUMMARY OF ARGUMENT

The PLRA requires inmates to exhaust those administrative remedies "as are available" before they are permitted to file a federal action concerning prison conditions. 42 U.S.C. § 1997e(a). In this case, by disregarding the opportunity to file an administrative appeal within fifteen working days of his alleged injuries, Mr. Ngo failed to avail himself of the administrative remedy that was available to him. Accordingly, he failed to exhaust the available administrative remedies in conformity with § 1997e(a). This conclusion is mandated by the statute's text and context. This Court has concluded that the term "remedies" in § 1997e(a) refers not to a specific form of relief, but to the administrative process itself. *Booth v. Churner*, 532 U.S. 731, 739 (2001). In light of this definition, the question of what remedies are "available" turns on what administrative process the inmate has a right to invoke to internally grieve a claim. In order to exhaust available administrative remedies in compliance with the statute, prisoners must take advantage of the administrative process offered by the State before filing a federal action. If a prisoner instead submits a procedurally defective grievance, he has necessarily not exhausted the available administrative process.

The textual evolution of § 1997e(a) confirms Congress's intent that inmates not be permitted to "exhaust" by defaulting on state-administrative-grievance procedures. Through the PLRA, Congress eliminated the district courts' discretion to require exhaustion only when it was "appropriate" and "in the interests of justice," and available administrative remedies were "plain, speedy, and effective." *Compare* 42 U.S.C. § 1997e(a) (2000) *with* 42 U.S.C. § 1997e(a) (1994). It further dispensed with the

requirement that administrative remedies satisfy minimum standards of fairness and effectiveness. *Compare* 42 U.S.C. § 1997e(a) (2000) *with* 42 U.S.C. § 1997e(a)(2), (b) (1994). This Court has presumed that these changes were in direct response to its earlier decision in *McCarthy v. Madigan*, 503 U.S. 140, 150-51 (1992), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, sec. 803, § 7(a), 110 Stat. 1321, 1321-71 (codified as amended at 42 U.S.C. § 1997e(a)), in which the Court relied on the former § 1997e(a)'s express wording to hold that a federal prisoner who sought only monetary damages was not required to exhaust administrative remedies. *Booth*, 532 U.S. at 739-40. Thus, as this Court has now twice held in construing the revised statute, by rendering § 1997e(a)'s original statutory scheme "a thing of the past," *id.* at 739, and by substituting in its place a firm exhaustion mandate, Congress has clearly evinced its intent that inmates not be allowed to avoid the exhaustion process, *Porter v. Nussle*, 534 U.S. 516, 530 (2002); *Booth*, 532 U.S. at 740-41.

The PLRA's overall design in deterring frivolous or unnecessary prisoner litigation further underscores the conclusion that § 1997e(a) must be read to bar federal actions by inmates who have not first employed the State's available administrative process. For example, in addition to the exhaustion requirement, § 1997e requires district courts to dismiss, even sua sponte, any suit brought by a prisoner that is "frivolous, malicious, [or] fails to state a claim upon which relief can be granted." 42 U.S.C. § 1997e(c). It also limits an award of attorneys' fees to those fees "directly and reasonably incurred in proving an actual violation of the plaintiff's rights," *id.* § 1997e(d)(1)(A), and prohibits complaints for emotional injury without a prior

showing of physical injury, *id.* § 1997e(e). Viewed in the context of these other restrictions, § 1997e(a) must be construed to effectuate Congress's goal of reducing the enormous volume of unmeritorious prisoner actions filed in the federal courts. Therefore, the exhaustion provision can only be interpreted to mandate an inmate's proper resort to the State's administrative-review process as a condition precedent to filing suit.

Congress's purposes in revising § 1997e(a) reinforce the conclusion that, in order to exhaust, an inmate must comply with available administrative procedures. This Court has confirmed that Congress's objectives with the revised statute were to afford correctional officials "time and opportunity" to: (1) address, and perhaps ameliorate, inmate complaints internally before litigation ensues; (2) filter out frivolous claims; and (3) create an administrative record that would aid adjudication of cases ultimately brought to court. *Porter*, 534 U.S. at 524-25. These goals cannot be realized through an inmate's submission of a procedurally defective administrative grievance that is never considered on the merits because of its deficiencies. Indeed, four circuits have expressly cited the need to serve Congress's policy aims in holding that lawsuits by inmates who fail to properly employ available administrative grievance procedures should be barred. *Johnson v. Meadows*, 418 F.3d 1152, 1158-59 (11th Cir. 2005); *Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7th Cir. 2002).

An analogy to federal habeas law further bolsters the argument that an inmate cannot initiate a federal action

unless he has first properly invoked the State's administrative-review process. The federal-habeas-exhaustion requirement, now codified at 28 U.S.C. § 2254 (2000), is grounded in principles of comity, which dictate that a state prisoner must give the state courts the first opportunity to act on his claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). In order to protect the habeas-exhaustion requirement's efficacy in facilitating these comity concerns, this Court has held that a prisoner who fails to properly comply with state procedural requirements is prohibited from proceeding with a subsequent federal action. *Id.* at 848. Similarly, this Court has recognized that one of the primary objectives of the PLRA's exhaustion mandate is to afford state correctional officials the "time and opportunity" to address inmate complaints before a federal lawsuit is filed. *Porter*, 534 U.S. at 524-25. Because the policy considerations underlying federal-habeas exhaustion are analogous to those underlying PLRA exhaustion, both the rationale for and utility of a procedural-default mechanism in federal habeas apply under the PLRA.

Unlike this Court's federal-habeas jurisprudence, this Court's decisions interpreting the administrative-filing provisions of two other federal statutes – the ADEA and Title VII – do little to inform § 1997e(a)'s proper construction. This Court has held that a state-procedural default does not foreclose federal relief under those two statutes precisely because of those statutes' unique wording and definitions. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123-24 (1988); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 759-61 (1979). Specifically, both the ADEA and Title VII contain a "commencement" requirement. *See* 29 U.S.C. § 633(b) (2000); 42 U.S.C. § 2000e-5(c) (2000). Moreover, state proceedings are "commenced" under the terms of

both statutes solely by the filing of a signed statement of the facts at issue. *See* 29 U.S.C. § 633(b); 42 U.S.C. § 2000e-5(c). This Court has held that, with this special limiting definition of "commencement," Congress necessarily excluded the possibility of a procedural-default bar based on the failure to comply with state procedural requirements. *Oscar Mayer*, 441 U.S. at 759-60. In stark contrast to Title VII and the ADEA, the PLRA contains an exhaustion requirement that does not merely defer a federal action, but is rather a mandatory condition precedent to filing suit. *See Booth*, 532 U.S. at 741; *Porter*, 534 U.S. at 524. Moreover, the PLRA does not qualify this Court's traditional understanding of "exhaustion" with any limiting language.

ARGUMENT

AN INMATE DOES NOT SATISFY THE PLRA'S ADMINISTRATIVE EXHAUSTION REQUIREMENT BY FILING A PROCEDURALLY DEFECTIVE APPEAL THAT IS REJECTED BY PRISON OFFICIALS.

A procedurally defective inmate appeal that is rejected by prison officials does not satisfy the PLRA's exhaustion requirement. Instead, an inmate only exhausts administrative remedies under § 1997e(a) by properly availing himself of the available administrative-review process. The Ninth Circuit has disregarded the exhaustion statute's express mandate and Congress's purposes in invigorating § 1997e(a) by holding that an inmate can "exhaust" administrative remedies by not complying with state filing requirements.

A. The Text of the PLRA's Exhaustion Provision Requires an Inmate to Use, and Not Disregard, Available Administrative Processes.

The PLRA's language requires inmates to fully invoke the administrative process that the State offers. Section 1997e(a) precludes a prisoner from filing unless he has first "exhausted" those administrative "remedies" that are "available." 42 U.S.C. § 1997e(a). Since the verb "exhaust" means to "consume entirely" or "use up," the word "exhausted" in the statute refers to the state of being consumed or used up. Merriam-Webster's Collegiate Dictionary 406 (10th ed. 1999). In conformity with this common understanding of the term "exhaust," this Court has held that "remedies" as used in § 1997e(a) necessarily refers to the State's administrative process because "one 'exhausts' processes, not forms of relief." *Booth v. Churner*, 532 U.S. 731, 739 (2001).

Under this interpretation of the statutory language – that it is the administrative *process* that must be exhausted – the modifier "available" can only refer to those administrative procedures that an inmate has a right to invoke *before* he has rendered those procedures obsolete by defaulting on them. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999) (holding that the exhaustion doctrine "turns on an inquiry into what procedures are 'available' under state law"). In this case, the Ninth Circuit held that Mr. Ngo had "exhausted all remedies available to him as required by the PLRA" by filing an untimely grievance, the rejection of which precluded him from proceeding any further within the State's administrative system. Pet. App. 21. Thus, the appeals court interpreted "available" entirely out of context as referring to what, if any, administrative

procedures can be invoked at the exact moment the inmate chooses to file a lawsuit. This is wholly at odds with § 1997e(a)'s meaning of "remedies" as constituting the administrative process itself. A directive that prisoners must exhaust administrative processes is of course entirely superfluous if prisoners can, by their own conduct, readily render those processes "unavailable" by defaulting on state filing deadlines or other procedural requirements. In this case, because Mr. Ngo filed an untimely grievance that was properly rejected, and thus never considered at any level of administrative review, he did not exhaust the administrative-grievance procedures available for prisoners in California. Thus, Mr. Ngo failed to exhaust his available administrative remedies within the meaning of § 1997e(a).

B. The History and Context of the PLRA's Exhaustion Requirement Reflect Congress's Intent For Inmates to Use, and Not Disregard, Available Administrative Processes As a Condition Precedent to Filing a Federal Action.

Congress's intent that inmates fully avail themselves of administrative-grievance proceedings as a mandatory condition precedent to filing a federal action is confirmed by Congress's sweeping changes to § 1997e(a) with the PLRA's enactment. Before the PLRA, prisoners were not required to exhaust administrative remedies unless a district court first determined that exhaustion would be "appropriate" and "in the interests of justice." 42 U.S.C. § 1997e(a) (1994). Moreover, administrative remedies needed to be "plain, speedy, and effective," *id.*, and satisfy "minimum standards" of fairness and effectiveness, *id.*

§ 1997e(b). But through the 1996 revisions to the exhaustion statute, Congress eliminated both the district court's discretion to excuse inmates from the need to exhaust, and the requirements that administrative remedies meet minimum standards of efficiency and effectiveness. *Compare* 42 U.S.C. § 1997e(a) (2000) *with* 42 U.S.C. § 1997e(a), (b) (1994). This Court has presumed that these changes were in direct response to its earlier decision in *McCarthy v. Madigan*, 503 U.S. 140, 150-51 (1992), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, sec. 803, § 7(a), 110 Stat. 1321, 1321-71 (codified as amended at 42 U.S.C. § 1997e(a)), wherein the Court relied on the expressly conditional nature of the former exhaustion provision to hold that a federal prisoner who sought only monetary damages was not required to exhaust the Bureau of Prisons' administrative grievance procedures before filing a federal action. *Booth v. Churner*, 532 U.S. 731, 739-40 (2001). Therefore, in an apparent effort to "preclude the *McCarthy* result," *id.* at 740, Congress has now "mandated exhaustion clearly enough," *id.* at 741.[2]

This Court's decisions construing the revised statute reflect this Court's recognition that Congress, in broadening the exhaustion prescription, sought to foreclose an inmate's ability to circumvent available administrative processes. In *Booth v. Churner*, 532 U.S. at 741, this Court

[2] Although in *McCarthy*, this Court declined to find an administrative-exhaustion requirement in the former § 1997e(a), the Court assumed that if Congress had mandated exhaustion, a procedural-default rule would necessarily attach to that requirement. 503 U.S. at 152-53 (noting that a cost of failing to comply with administrative filing deadlines is "forfeiture of a claim").

held that the revised statute requires inmates to resort to the administrative process even when they limit their prayer for relief to a form of redress not available through prison-grievance proceedings. In support of this holding, the Court observed that "Congress's imposition of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a strong inducement to skip the administrative process." *Id.* at 740-41. Subsequently, in *Porter v. Nussle*, 534 U.S. 516, 524, 532 (2002), this Court held that an inmate cannot avoid the exhaustion obligation merely by characterizing his complaint as alleging a single incident of excessive force. The Court concluded: "It seems unlikely that Congress, when it included in the PLRA a firm exhaustion requirement, meant to leave the need to exhaust to the pleader's option." *Id.* at 530 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973) ("It would wholly frustrate explicit congressional intent to hold that [prisoners] could evade this [exhaustion] requirement by the simple expedient of putting a different label on their pleadings.")).

This Court's understanding that Congress expected inmates to "exhaust" administrative remedies by actual use of available administrative processes is also evidenced in *Porter's* recognition that Congress's objectives in mandating exhaustion were to afford correctional officials "time and opportunity" to address complaints internally before litigation ensued, to filter out frivolous claims, and to create an administrative record that would facilitate litigation. *Id.* at 524-25. None of these statutory aims can be accomplished through an inmate's submission of an untimely or otherwise procedurally defective grievance that is rejected and thus never considered on the merits

by prison officials. *See id.* at 525 n.4 (noting that Congress's revisions to § 1997e(a) may have indicated Congress's belief that this Court, in the past, had been "shortsighted in failing to adequately recognize the utility of the *administrative process* to satisfy, reduce, or clarify prisoner grievances" (emphasis added) (internal citation omitted)).

Notwithstanding the Ninth Circuit's characterization that an inmate exhausts, as opposed to evades, administrative remedies by filing an untimely appeal that is rejected, the Ninth Circuit's rule nonetheless permits inmates to do exactly what *Booth* and *Porter* held Congress deliberately sought to proscribe by enacting the PLRA's firm exhaustion directive – that is, to circumvent the State's available administrative review process. Pet. App. 21. As this Court concluded in those decisions, such a result runs contrary to both § 1997e(a)'s language in mandating resort to the administrative process and Congress's intent in requiring exhaustion.

Congress's intent to require prisoners to use an available administrative-grievance process is also apparent from the PLRA's overriding objective of deterring frivolous or unnecessary prisoner litigation, evident in numerous of its provisions. For example, § 1997e obligates the district courts to dismiss, sua sponte or on a party's motion, any suit brought by a prisoner that is "frivolous, malicious, [or] fails to state a claim upon which relief can be granted." 42 U.S.C. § 1997e(c). It also limits an award of attorneys' fees to fees that were "directly and reasonably incurred in proving an actual violation of the plaintiff's rights." *Id.* § 1997e(d)(1)(A). And it bars complaints for emotional injury without a prior showing of physical injury. *Id.* § 1997e(e). Concerning proceedings *in forma pauperis*, the PLRA requires prisoners to pay the full amount of their

filing fees when they have funds available, 28 U.S.C. § 1915(b)(1)-(2), denies *in forma pauperis* status for appeals that the district court certifies are not taken in good faith, *id.* § 1915(a)(3), and denies such status to prisoners who have on three or more occasions while in prison brought an action or appeal that was dismissed as frivolous, malicious, or failing to state a claim, *id.* § 1915(g). The PLRA also directs the district courts to perform an initial screening of any prisoner action brought against a public entity, officer, or employee, and to dismiss the complaint if it is frivolous, malicious, or fails to state a claim. *Id.* § 1915A(a), (b)(1). An exhaustion rule that enables inmates to side-step the State's administrative review process – which, as this Court has recognized, might obviate the need for litigation – cannot be reconciled with the design of the PLRA in ensuring that only cases with true merit reach the federal courts. *Porter*, 534 U.S. at 525.

C. Congress's Objectives in Enacting the PLRA's Exhaustion Requirement Would Be Thwarted by a Rule that Allowed Inmates to Disregard Available Administrative Processes.

Congress's objectives in establishing a strict exhaustion mandate would be subverted by a rule that allowed a prisoner to "exhaust" state remedies by failing to use an available administrative process. The PLRA's legislative history reflects that Congress sought to reduce the burden of unnecessary prison litigation on the federal courts and believed that an administrative-exhaustion requirement would be an essential tool in effectuating this goal. As one sponsor of the PLRA stated, the purpose of the Act is to

"help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits," remarking that "it is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners." 141 Cong. Rec. S14408-01, S14418 (1995) (Sen. Hatch). In reciting a number of features of the Act designed to limit frivolous prisoner lawsuits, another of its sponsors specifically identified the requirement of state prisoners "to exhaust all administrative remedies before filing suit." 141 Cong. Rec. S14611-01, S14626 (1995) (Sen. Dole).

Congress also expressed concern about the increasing number of district-court cases filed by federal prisoners following this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992). As one House member explained, "[t]he real problem with these cases came with the Court's decision in 1992 that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only." 141 Cong. Rec. H14078-02, H14105 (1995) (Rep. LoBiondo). "In order to address the problem of *Bivens* actions," Congress sought to "require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to administrative remedy process before proceeding to court." *Id.*; *see also id.* at H14106 (1995) (Rep. Canady) (reasoning that "by forcing prisoners to exhaust all administrative remedies before bringing suit in Federal court," the new legislation would "significantly curtail the ability of prisoners to bring frivolous and malicious lawsuits"). Congress envisioned that an administrative-exhaustion requirement would benefit both prison management and the federal courts:

> By returning these cases to the Federal Bureau of Prisons, we will provide the opportunity for early resolution of the problem, we will reduce the intrusion of the courts into the administration of prisons, and we will provide some degree of fact-finding so that when or if the matter reaches Federal court there will be a record upon which to proceed in a more efficient manner.

Id. at H14105 (1995) (Rep. LoBiondo). Indeed, in *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002), this Court held that Congress had "beyond doubt" invigorated the exhaustion statute in order to "reduce the quantity and improve the quality of prisoner suits" by affording correctional officials the time and opportunity to take corrective action that might satisfy the inmate and obviate the need for litigation, to filter out frivolous claims, and to create an administrative record that would be beneficial in the event that litigation ultimately ensues.

A comparison of the number of prisoner suits filed before and after the PLRA's enactment suggests that the Act has resulted in Congress's intended effect of reducing the volume of prisoner litigation in the federal courts. For example, in 1995, a total of 41,679 prisoner-civil-rights suits were filed. U.S. Dep't of Justice, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000 (Jan. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/ppfusd00.txt. But by 2000, that number had dropped precipitously to 25,504. *Id.* Even more dramatic was the decline in the *rate* that inmate suits were filed, with 37 prisoner-civil-rights suits per 1,000 inmates filed in 1995, compared to 19 suits per 1,000 inmates in 2000 – roughly a 50 percent decrease. *Id.* Since 2000, the reduction in both the overall number of prisoner-civil-rights suits and the rate at which such suits are filed has remained

fairly consistent, with an overall continued slight drop. In 2004, 23,449 prisoner-civil-rights suits were filed, Administrative Office of the U.S. Courts, Judicial Facts and Figures: Multi-year Statistical Compilations of Federal Court Caseload Through Fiscal Year 2004 at Table 2.9 (Mar. 2005), *available at* http://www.uscourts.gov/judicialfactsfigures/alljfftables.pdf, which computes to approximately 16 suits per 1000 inmates, *see* U.S. Dep't of Justice, Prison and Jail Inmates at Midyear 2004 at 1 (Apr. 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf (recording a total of 1,494,216 state and federal prisoners in mid-year 2004).

Congress's success under the PLRA in reducing the burden of prisoner litigation on the federal courts will undoubtedly be reversed if inmates are permitted to file suit without first fully invoking the administrative review process. In financial terms alone, the impact on the federal courts of an increase in prisoner litigation will be profound. Although the federal judiciary's funding level for fiscal year 2005 was $5.426 billion, in 2004, the Director of the Administrative Office of the courts reported that the federal judiciary faced "unprecedented funding challenges" over the next several years due to overall budget constraints, and that estimates show a funding gap for the federal judiciary approaching $848 million by fiscal year 2009. Administrative Office of the United States Courts, Annual Report of the Director 2004 at 4, 7, *available at* http://www.uscourts.gov/library/dirrpt04/2004AnnualReport_Full.pdf. The Director further reported that budget cuts left six percent of federal-court jobs vacant that year. *Id.* at 8.

Beyond purely financial considerations, the facts in this case illustrate other ways in which Congress's goals

are undermined by an inmate's failure to properly resort to administrative grievance procedures. Because Mr. Ngo filed his first appeal many months after the time limits imposed by California regulations, prison officials did not review the merits of his claims before they reached the federal-court system. By that point, it was far too late for the prison to investigate his allegations and take any remedial action that might have obviated the need for litigation – for example, Mr. Ngo's contested confinement in administrative segregation had ended approximately seven months earlier. J.A. 27. In addition, there is no administrative record that could have facilitated the litigation by assisting the trial court in delineating the contours of the controversy – whether at the initial screening stage, upon dispositive motion, or at trial.

Despite the overwhelming statistical and anecdotal evidence suggesting that without a procedural-default bar, inmates do not readily avail themselves of the administrative-grievance process, the Ninth Circuit declared in this case that a procedural-default mechanism is not necessary to effectuate Congress's policy objectives because prisoners nonetheless "have every incentive to seek administrative review before suing in federal court." Pet. App. 17. This speculative proposition, however, is undermined not only by those cases that have led the Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits to rule on the issue whether an untimely appeal satisfies the PLRA's exhaustion mandate, but by the facts of this case. *See Williams v. Comstock*, 425 F.3d 175 (2d Cir. 2005); *Johnson v. Meadows*, 418 F.3d 1152 (11th Cir. 2005); *Spruill v. Gillis*, 372 F.3d 218 (3d Cir. 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004); *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003); *Pozo v. McCaughtry*, 286 F.3d 1022

(7th Cir. 2002). For example, the record in this matter demonstrates that Mr. Ngo did not file his first administrative appeal concerning his complained-of placement in administrative segregation until eight months after that confinement began, and six months after it concluded. J.A. 26-29. Accordingly, notwithstanding the Ninth Circuit's curious remark to the contrary, this case evidences exactly the kind of "protracted delay," if not "deliberate[] bypass[]," of the administrative system that Congress intended to prevent through a strict exhaustion mandate. Pet. App. 17.

Moreover, the Ninth Circuit's assumption that inmates will be inherently inclined to comply with state administrative-grievance procedures because they "offer prisoners the fastest route to a remedy" rests on the unsubstantiated premise that all inmates seeking to file a federal lawsuit are pursuing legitimate claims in good faith. Pet. App. 16. Such a presumption, however, "disregards the finding of Congress that prisoners all too often were *not* acting in good faith, and the judgment of Congress this problem could best be addressed through a requirement of mandatory exhaustion." *Thomas*, 337 F.3d at 753 (emphasis in original) (Rosen, J., dissenting in part and concurring in judgment). It is precisely those inmates who have no legitimate expectation of receiving relief from prison officials who would be most motivated to ignore state filing deadlines and other procedural requirements.

In addition, a rule that inmates can satisfy the administrative-exhaustion requirement as long as they, at some point, offer the prison a chance to pass on their claims, Pet. App. 17, utterly disregards that administrative-filing deadlines are established for specific reasons – such as, to ensure prompt investigation of an inmate's grievance

when memories are still fresh, the evidence and involved parties are still accessible, and remedial action that could satisfy the inmate is still possible, *see Thomas*, 337 F.3d at 753 (Rosen, J., dissenting in part and concurring in judgment); *see also Porter*, 534 U.S. at 525 (holding that a court action could be facilitated by "an administrative record that clarifies the contours of the controversy"). These concerns have particular force in the prison setting, where correctional staff may deal with hundreds, if not thousands, of inmates during their careers in an equal number of situations, many of which are virtually identical, and thus indistinguishable with the passage of time. For example, if an inmate accuses an exercise-yard-control officer of denying the inmate entrance to the yard on a particular day out of retaliation, the officer could be hard-pressed to recall several months after the fact why he denied the inmate access or even if he denied the inmate access.

Moreover, administrative-filing deadlines establish clear guidelines and standards that enable prison officials to respond to the never-ending barrage of inmate complaints in a consistent, orderly, and fair manner. The assumption that prison officials could readily address an inmate appeal whenever the inmate finally sees fit to file one altogether ignores the utility of these deadlines in facilitating prison management and, in turn, benefitting the inmates by ensuring that their grievances receive thorough review on the merits.[3] In other words, the

[3] In the third quarter of 2005, there were over 166,000 offenders in the custody of the California Department of Corrections and Rehabilitation. California Department of Corrections, Facts And Figures, Third Quarter 2005, http://www.corr.ca.gov/CommunicationsOffice/facts_figures.asp.

supposed "opportunity" cited by the Ninth Circuit to address an inmate appeal filed many months, or even years, after the event is, for all practical purposes, no such thing. Pet. App. 17.

D. This Court's Federal Habeas Jurisprudence Supports the Argument that a Prisoner's Failure to Use the Available Administrative Process Bars a Federal Action.

An analogy to the federal-habeas context lends support to the argument that an inmate's failure to comply with the available administrative process should prevent the inmate from proceeding in federal court. Under 28 U.S.C. § 2254, relief in federal habeas is prohibited "unless" the prisoner "has exhausted the remedies available in the courts of the State," 28 U.S.C. § 2254(b)(1)(A), just as the PLRA mandates that no federal prison-conditions action shall be brought "until such administrative remedies as are available are exhausted," 42 U.S.C. § 1997e(a). In order to protect the integrity of the exhaustion requirement in federal habeas, this Court has repeatedly held that the failure to exhaust the available state-court process bars a federal action. The policy concerns that form the basis for a so-called "procedural-default" mechanism in federal habeas similarly underlie the PLRA's comparable exhaustion requirement and favor the reading of a procedural-default bar into § 1997e(a) when an inmate does not employ the State's administrative grievance procedures.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court held that the prisoner – who had been sentenced to death by the trial court – had forfeited his claims in

federal habeas because he missed the State's deadline for filing a notice of appeal by a mere three days. *Id.* at 726-27, 757. While explaining that procedural default in federal habeas derives from the independent-and-adequate-state-ground doctrine, the Court emphasized that when the independent state ground is a state procedural default, "an additional concern comes into play." *Id.* at 731. That additional concern is this Court's longstanding rule requiring dismissal of a state prisoner's federal habeas petition if available state remedies have not been exhausted. *Id.* The Court noted that this exhaustion requirement "is also grounded in principles of comity," whereby in a federal system "the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Id.*

In *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), this Court relied on the comity concerns it identified in *Coleman* to hold that a prisoner must seek discretionary review with the state supreme court in order to exhaust administrative remedies and thus preserve the right to a forum in federal habeas:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.

In reaching this conclusion, the Court rejected a technical reading of exhaustion as referring to the mere absence of state remedies at the time the prisoner petitions in federal

court because, under such a narrow interpretation, a prisoner could "evade" the exhaustion obligation, and thus "undercut the values that it serves," by "letting the time run" on state remedies. *Id.* at 848 (internal quotation marks omitted). Instead, in order to "protect the integrity" of the federal exhaustion rule, the Court held that a prisoner must "*properly*" exhaust his state remedies by "*fairly*" presenting his claims to the state courts. *Id.* at 848 (emphasis in original) (internal quotation marks omitted).

In *Edwards v. Carpenter*, 529 U.S. 446 (2000), this Court again affirmed "the inseparability" of the exhaustion rule and the procedural-default doctrine, *id.* at 452, by holding that the presentation of an ineffective-assistance-of-counsel claim to the state court in noncompliance with the State's procedural rules was insufficient to exhaust state remedies for that claim, *id.* at 453-54. The Court reasoned that, just as the exhaustion mandate's comity objectives would be "utterly defeated" if a prisoner were able to render state remedies unavailable by allowing filing deadlines to expire, those objectives "would be no less frustrated were we to allow federal review to a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it." *Id.* at 453 (emphasis in original) (internal citation and quotation marks omitted).

Moreover, this Court has expressly held that the principle of federal-state comity underlying § 2254's exhaustion rule "has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked." *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973). In *Preiser*, the Court held that a writ

of habeas corpus is the sole federal remedy available for prisoners seeking release from imprisonment for an alleged error in the fact or duration of their confinement. *Id.* at 500. The Court rejected the prisoners' argument that the concerns that require affording a state court the first opportunity to correct its own errors do not apply in the context of prison administrative proceedings. *Id.* at 491. The Court explained: "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Id.* at 491-92. Because the "internal problems of state prisons involve issues so peculiarly within state authority and expertise," the Court concluded that the States "have an important interest in not being bypassed in the correction of those problems." *Id.* at 492. For these reasons, the Court held that the "strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require the States the first opportunity to correct the errors made in the internal administration of their prisons." *Id.*

The rationale for a procedural-default bar is equally compelling under the PLRA. As in the federal-habeas context, the PLRA's exhaustion mandate is rendered meaningless by a rule that permits prisoners to "exhaust" state remedies by not complying with the available state process. Furthermore, the comity concerns underlying federal-habeas exhaustion animate PLRA exhaustion. Just as comity dictates that the State must have the "first opportunity" to review and perhaps provide relief for a habeas petitioner's claim, *O'Sullivan*, 526 U.S. at 844, analogous concerns require that state correctional officials

be afforded the "time and opportunity" to address, and possibly rectify, inmate complaints before a § 1983 action can be filed. *Porter v. Nussle*, 534 U.S. 516, 525 (2002). Moreover, this Court has repeatedly held that the federal courts are required to accord substantial deference to the informed discretion of prison officials in making the difficult judgments concerning prison administration, just as in federal habeas they must yield to the state courts in initially passing on a prisoner's claims. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). Accordingly, the rule in federal habeas that an inmate's failure to avail himself of the remedies offered by the State applies with equal force under the PLRA for the identical purposes of protecting the integrity of the federal exhaustion mandate and ensuring its purposes are fulfilled.

E. This Court's Decisions Construing the Administrative-Filing Requirements of Title VII and the ADEA Do Not Inform the Proper Construction of the PLRA's Exhaustion Mandate.

The Ninth Circuit improperly relied on this Court's decisions interpreting the unique administrative-filing requirements in the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act as support for its holding that an inmate's failure to comply with state-grievance procedures cannot bar federal relief. Pet. App. 18. Because the statutory language on which those decisions were based is inapposite to the PLRA's exhaustion requirement, those decisions are not instructive.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court addressed the ADEA's requirement that no

federal action be brought "before the expiration of sixty days after proceedings have been commenced under state law." *Id.* at 759 (citing 29 U.S.C. § 633(b)). In holding that Congress did not intend to foreclose federal relief to grievants who had not satisfied state filing deadlines, the Court placed principal reliance on the wording of the statute itself. *Id.* at 759-61. The Court concluded that Congress's use of the term "commenced" "strongly implies . . . that state limitations periods are irrelevant," *id.* at 759, and emphasized that the statutory language "does not stipulate an exhaustion requirement," *id.* at 761. The Court further found that the statute's express definition of commencement necessarily excludes the possibility of a procedural-default bar based on noncompliance with state filing requirements. *Id.* at 760. Specifically, § 14(b) of the ADEA provides:

> If any requirement for the commencement of [state] proceedings is imposed by a State authority other than a requirement of the filing of written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

29 U.S.C. § 633(b). As this Court noted, state limitations periods are "of course" requirements "'other than a requirement of the filing of written and signed statement of the facts upon which the proceeding is based.'" *Oscar Mayer*, 441 U.S. at 760 (citing 29 U.S.C. § 633(b)).

In *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123 (1988), this Court likewise held that an untimely administrative filing under state law does not preclude a

federal action under Title VII. As in *Oscar Mayer*, this conclusion was premised first and foremost on the express language of the statute's state-filing provisions which, the Court noted, are "'virtually *in haec verba*'" with the filing provisions of the ADEA. *Id.* (citing *Oscar Mayer*, 441 U.S. at 755). Specifically, § 706(c) contains identical commencement language and the same limiting definition of "commencement." 42 U.S.C. § 2000e-5(c) (2000). Therefore, just like the ADEA, Title VII provides exclusively for the bare *initiation* of state proceedings.

In direct contrast with the ADEA and Title VII, the PLRA does contain an exhaustion requirement. 42 U.S.C. § 1997e(a). And unlike the ADEA and Title VII, the PLRA does not include any language that would exclude a procedural-default bar. This Court presumes that Congress "expects its statutes to be read in conformity with this Court's precedents." *Clay v. United States*, 537 U.S. 522, 527 (2003) (internal citation omitted). In 1991, in *Coleman v. Thompson*, 501 U.S. 722, 731-32, 750 (1991), this Court held in the federal habeas context that the exhaustion requirement necessitated compliance with state procedural rules, including filing deadlines. Accordingly, as Judge Rosen reasoned in his partial dissent in *Thomas v. Woolum*, in light of this precedent, "[i]t seems reasonable to assume . . . that Congress meant for prisoners to 'exhaust' their remedies under § 1997e(a) in precisely the same way that they must 'exhaust' their remedies under 28 U.S.C. § 2254(b)(1)(A)." *Thomas v. Woolum*, 337 F.3d 720, 756 (6th Cir. 2003) (Rosen, J., dissenting in part and concurring in judgment).

In addition to the plain language of the statute, the history of § 1997e(a) further confirms that Congress intended for prisoners to do much more than simply resort

to state remedies at some point before initiating a federal action. Like the ADEA and Title VII, which require initiation of state proceedings that merely results in the deferral of a subsequent federal action, *see Oscar Mayer*, 441 U.S. at 756 (holding that "prior resort" to state proceedings "is required under § 14(b), just as under § 706(c)"), the former version of § 1997e(a) also contained the semblance of a "prior resort" requirement. Although the earlier statute employed the term "exhaustion," it nonetheless expressly limited a district court's ability to impose that requirement to a period "not to exceed ninety days," for which time the inmate's federal case was merely "continue[ed]." 42 U.S.C. § 1997e(a) (1994). But in revising § 1997e(a) through the PLRA, Congress jettisoned the ninety-day continuance language and replaced it with an unqualified exhaustion mandate. Therefore, it is evident that Congress intended to bar a federal action for prisoners who had not first exhausted the State's available administrative process.

CONCLUSION

The judgment of the court of appeals should be reversed.

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