

# Pandemic Rules: COVID-19 and the Prison Litigation Reform Act’s Exhaustion Requirement

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We wish to thank John Boston, whose work tracking the tide of PLRA caselaw he has generously shared with us and many others. More specifically, we worked with John on some legislative reform materials several pages of which are cannibalized here. All errors are our responsibility.

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## Introduction

For over twenty-five years, the Prison Litigation Reform Act (PLRA),<sup>1</sup> one of the few parts of the 1990s Republican Contract with America<sup>2</sup> actually enacted, has undermined the constitutional rights of incarcerated people. For people behind bars and their allies, the PLRA makes civil rights cases harder to bring and harder to win—regardless of merit.<sup>3</sup>

We have seen the result in the wave of litigation relating to the COVID-19 pandemic. When the pandemic began in early 2020, jails and prisons were hard hit. Incarcerated people tend to be quite medically vulnerable; the prevalence of chronic disease and disability is exceptionally high behind bars.<sup>4</sup> (A countervailing statistic is that incarcerated adults average much younger than non-incarcerated, notwithstanding the long-term aging of the American prison population.<sup>5</sup>) Equally important, imprisoned people lack

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1. Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A, 1932; 42 U.S.C. §§ 1997a–1997c, 1997e–1997f, 1997h). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, 110 Stat. 1321.
  2. Contract with America: The Bold Plan by Rep. Newt Gingrich, Rep. Dick Armey and the House Republicans to Change the Nation 53 (Ed Gillespie & Bob Schellhas eds., 1994) (referring to the PLRA's predecessor bill, the Taking Back Our Streets Act of 1995, H.R. 3, 104th Cong. (1995)).
  3. For in-depth examination of the PLRA's impact on damage actions, see Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*]. For in-depth examination of the PLRA's impact on injunctive litigation, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550 (2006) [hereinafter Schlanger, *Civil Rights Injunctions*]. For statistics, see Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 UC Irvine L. Rev. 153 (2015) [hereinafter Schlanger, *Trends in Prisoner Litigation*]; and Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, Prison Pol'y Initiative (Apr. 26, 2021), [https://www.prisonpolicy.org/reports/PLRA\\_25.html](https://www.prisonpolicy.org/reports/PLRA_25.html) [<https://perma.cc/53LL-CXR7>].
  4. Margo Schlanger, *Prisoners with Disabilities*, in 4 *Reforming Criminal Justice: Punishment, Incarceration, and Release* 295, 295 (Erik Luna ed., 2017); Laura M. Maruschak, Marcus Berzofsky, & Jennifer Unangst, U.S. Dep't of Just., No. 248491, *Medical Problems of State and Federal Prisoners and Jail Inmates*, 2011–12, at 1 (2015), <https://bjs.ojp.gov/content/pub/pdf/mpsfj1112.pdf> [<https://perma.cc/V6ST-9AKA>].
  5. In 2019, the last year for which prison data are available, 13.1% of sentenced state or federal prisoners were 55 or over; the corresponding number in the U.S. as a whole was 29.7%. Compare E. Ann Carson, U.S. Dep't Just., *Prisoners in 2019*, No. 255115, tbl.9 (2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> [<https://perma.cc/J3J3-SCPT>], with *Population Distribution by Age*, Kaiser Fam. Found., <https://www.kff.org/other/state-indicator/distribution-by-age> [<https://perma.cc/U8P2-2JTK>] (last visited Nov. 2, 2021). On the long-term aging

most of the methods non-imprisoned people can exercise to minimize their risk. They cannot avoid communal spaces, whether for eating, living, bathing, or anything else. The availability of personal protective equipment—masks, preeminently—is controlled by institutional authorities, as is the level of hygiene in most spaces. In prison and jail, one cannot choose with whom to associate and whether to limit their association with the unprotected or the uninfected; staff contact, in particular, is mandatory. In short, while neither infection rates nor mortality approached the devastation in nursing homes,<sup>6</sup> both were far higher than in the community: infections among incarcerated people have been over five times and mortality triple the non-imprisoned rate.<sup>7</sup>

So beginning March 2020, incarcerated people facing a high risk of infection because of their incarceration, and a high risk of harm because of their medical status, began to bring lawsuits seeking changes to the policies and practices augmenting the danger to them. Among the requests: better sanitation, social distancing, mask use by facility staff, vaccination, and

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trends of the prison population, see, for example, E. Ann Carson & William J. Sabol, U.S. Dep't of Just., No. 248777, *Aging of the State Prison Population, 1993–2013* (2016), <https://bjs.ojp.gov/content/pub/pdf/aspp9313.pdf> [<https://perma.cc/L4SK-XBVW>].

6. In the United States, nursing home residents have been nearly fifty times more likely to die of COVID-19 than the general population. See *COVID-19 Nursing Home Data*, Ctrs. for Medicare & Medicaid Servs., <https://data.cms.gov/covid-19/covid-19-nursing-home-data> (Feb. 12, 2022) [<https://perma.cc/MSL2-TJKF>] (reporting 149,107 total COVID-19 deaths among nursing home residents); *Total Number of Residents in Certified Nursing Facilities*, Kaiser Fam. Found., <https://www.kff.org/other/state-indicator/number-of-nursing-facility-residents/> [<https://perma.cc/TLW6-NMKB>] (last visited Feb. 19, 2022) (1,290,177 residents in certified nursing facilities in the U.S. in 2020); *COVID Data Tracker Weekly Review*, Ctrs. for Disease Control & Prevention (Feb. 18, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html#more-info> [<https://perma.cc/J4MP-HT4W>] (926,497 total COVID-19 deaths in the United States); and *QuickFacts*, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/US#> [<https://perma.cc/SKH8-ZAET>] (last visited Feb. 19, 2022) (estimating U.S. population at 331,893,745 as of July 1, 2021). As of November 25, 2020, “deaths in long-term care facilities account[ed] for 40% of all COVID-19 deaths” nationwide. Priya Chidambaram, Rachel Garfield, & Tricia Neuman, *COVID-19 Has Claimed the Lives of 100,000 Long-Term Care Residents and Staff*, Kaiser Fam. Found. (Nov. 25, 2020), <https://www.kff.org/policy-watch/covid-19-has-claimed-the-lives-of-100000-long-term-care-residents-and-staff/> [<https://perma.cc/N4TL-SU9R>].
7. See Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. Am. Med. Ass'n 602, 602–03 (2020) (making both findings and noting that mortality figures are after adjusting for age and sex distributions).

release. Incarcerated Individuals have won some of these cases,<sup>8</sup> and some of their losses have been due not to the PLRA but to the high bar to

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8. Releases granted in, e.g.: *Torres v. Milusnic*, 472 F. Supp. 3d 713, 718, 746 (C.D. Cal. 2020), *enforcement granted in part, denied in part*, No. 20-cv-4450-CBM-PVCx, 2021 WL 3829699, at \*1 (C.D. Cal. Aug. 27, 2021) (issuing a preliminary injunction ordering defendants to expedite the process for determining prisoners' eligibility for home confinement or compassionate release, taking into account their' age and medical condition in light of COVID-19); *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 453–54 (D. Conn. 2020) (issuing a temporary restraining order "aimed at accelerating the process for evaluating inmates for home confinement and compassionate release," but declining to direct the warden to implement safety measures); *Amaya-Cruz v. Adducci*, No. 1:20-cv-789, 2020 WL 1903123, at \*1–2 (N.D. Ohio Apr. 18, 2020) (concluding that keeping a medically vulnerable ICE detainee in a county jail during the COVID-19 pandemic would violate the Fifth Amendment); *United States v. Kennedy*, 449 F. Supp. 3d 713, 719 (E.D. Mich. 2020), *reconsideration denied*, No. 18-20315, 2020 WL 1547878, at \*1, 3, 4 (E.D. Mich. Apr. 1, 2020) (ordering the defendant immediately released from jail because he was "particularly susceptible to COVID-19").

Mitigation granted: *Chatman v. Otani*, No. 21-cv-00268-JAO-KJM, 2021 WL 2941990, at \*24 (D. Haw. July 13, 2021) (ordering the defendant to immediately implement its COVID-19 Response Plan, including its social distancing, personal protective equipment (PPE), and quarantine measures, and to provide regular access to a working toilet, sink, and drinking water to all incarcerated persons); *Carranza v. Reams*, No. 20-cv-00977-PAB, 2020 WL 2320174, at \*15 (D. Colo. May 11, 2020) (ordering the defendant to institute social distancing policies, enhanced sanitation procedures, and increased monitoring of medically vulnerable individuals detained at a county jail and to obtain a sufficient number of masks); *Mays v. Dart*, 453 F. Supp. 3d 1074, 1099–100 (N.D. Ill. 2020) (requiring the defendant sheriff to provide soap and/or hand sanitizer to all detainees, improve sanitation, and to provide facemasks to all detainees who are quarantined, but declining to order further testing or quarantining of new detainees or to provide facemasks to all detainees), *aff'd*, 974 F.3d 810, 824 (7th Cir. 2020), *cert. denied*, 142 S. Ct. 69, 69 (2021); *Criswell v. Boudreaux*, No. 120-cv-01048-DAD-SAB, 2020 WL 5235675, at \*25 (E.D. Cal. Sept. 2, 2020) (ordering the defendant "to develop written policies on key COVID-19 related issues," but declining to require immediate testing of staff and people in jail); *Banks v. Booth*, 468 F. Supp. 3d 101, 125–26 (D.D.C. 2020) (ordering the defendant to implement a medical care system, comply with social distancing regulations, and continue their sanitation efforts and increased testing), *appeal dismissed, cause remanded*, 3 F.4th 445, 449 (D.C. Cir. 2021); *Smith v. Barr*, 512 F. Supp. 3d 887, 900–01 (S.D. Ind. 2021) (requiring defendants to enforce mask requirements, maintain contact logs, implement rapid testing and conduct contact tracing among prison staff); *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 694 (C.D. Cal. 2020) (ordering defendants to implement social distancing measures, provide plaintiffs with soap and hand sanitizer, provide daily access to showers and clean laundry, require staff to wear PPE and wash their hands, regularly screen and test incarcerated people, and provide adequate medical care to any with COVID-19), *stay denied*, No. 20-55568, 2020 WL 3547960, at \*5 (9th Cir. June 17, 2020), *stay granted*, 140 S.Ct. 2620, 2620 (2020); *Seth v. McDonough*, 461 F. Supp. 3d 242, 264 (D. Md. 2020) (requiring defendant to "develop a comprehensive written plan to address systematic testing and identification of COVID-19 positive detainees; long term

constitutional liability.<sup>9</sup> But time and again, courts have thrown cases out based on the PLRA<sup>10</sup>—especially, on the PLRA’s instruction to dismiss civil rights cases unless “such administrative remedies as are available are exhausted”<sup>11</sup> (that is, unless the incarcerated plaintiff worked the complaint all the way through the prison’s or jail’s grievance system).

The pandemic is far from the first situation in which the PLRA exhaustion requirement has thwarted constitutional oversight of prison and jail conditions. But it has exposed a particularly egregious problem: the mismatch between a mandate to use internal grievance systems and those

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provision of PPE; increased training, education, and supervision of medical staff so that COVID-19 symptomatic and positive detainees receive timely and appropriate care; and prophylactic protections for high-risk detainees”); *Maney v. Brown*, 516 F. Supp. 3d 1161, 1184–85 (D. Or. 2021) (ordering defendants to offer all adults in custody a COVID-19 vaccine); *Weikert v. Elder*, No. 1:20-cv-03646-RBJ, 2021 WL 27787, at \*1 (D. Colo. Jan. 4, 2021) (ordering defendant to require all staff, contractors, and incarcerated individuals to wear masks; continue COVID-19 testing protocols; screen and identify individuals at increased risk of severe illness from COVID-19; provide clean drinking water; monitor incarcerated individuals’ temperatures; isolate and monitor those who test positive; and ensure that isolation occurs in a non-punitive environment).

9. *See, e.g., Cameron v. Bouchard*, 815 F. App’x 978, 985 (6th Cir. 2020) (finding that respondents had responded reasonably to address the risks posed by COVID-19 and petitioners had, therefore, failed to demonstrate that respondents had been deliberately indifferent to their health concerns under the Eighth and Fourteenth Amendments); *Wilson v. Williams*, 961 F.3d 829, 841 (6th Cir. 2020) (“Here, while the harm imposed by COVID-19 on inmates . . . ‘ultimately [is] not averted,’ the BOP has ‘responded reasonably to the risk’ and therefore has not been deliberately indifferent to the inmates’ Eighth Amendment rights.” (alteration in original) (quoting *Farmer v. Brennan*, 511 U.S. 825, 826 (1994))); *Belton v. Gautreaux*, No. 20-cv-00278-BAJ-SDJ, 2021 WL 400474, at \*3 (M.D. La. Feb. 4, 2021) (dismissing action with prejudice because the defendants’ COVID-19 response did not “satisfy the requisite state of mind indicative of subjective deliberate indifference” (quoting Ruling and Ord. on Plaintiff’s Emergency Motion for Temp. Restraining Ord. at 11, *Belton*, No. 20-cv-00278-BAJ-SDJ)); *Maney v. Brown*, 464 F. Supp. 3d 1191, 1196 (D. Or. 2020) (declining to release incarcerated individuals) (“[T]he question currently before this Court is not whether ODOC has responded perfectly to the COVID-19 pandemic, nor even whether it could do more to keep AICs safe. The question before the Court is whether ODOC has acted with *deliberate indifference* toward the health risks that COVID-19 poses to those currently in custody. As the Court learned, quite the contrary is true.”); *Busby v. Bonner*, 477 F. Supp. 3d 691, 704–05 (W.D. Tenn. 2020) (finding that conditions at a jail “may be legally insufficient” but declining to issue a preliminary injunction because “this is an issue that can be remedied if addressed by the Jail, and thus is an inappropriate basis for habeas relief”); *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1132 (N.D. Ill. 2020) (“[O]bjections about the speed or scope of action and suggestions for altering it through a ‘prod’ do not support either half of the phrase ‘deliberate indifference.’”).
10. *See infra* notes 74–75 and accompanying text.
11. 42 U.S.C. § 1997e(a).

grievance systems' systemic inability to address emergency situations. Here, we propose three solutions. To be clear, implementation of these steps would constitute only a limited improvement; the result would merely be to increase the possibility of federal court adjudication of incarcerated plaintiffs' claims on the merits, reducing the collateral litigation of exhaustion efforts. But even these partial fixes seem worthwhile.

The proposals are these: First, incarcerated plaintiffs should be allowed to proceed with their federal lawsuits if the press of an emergency renders a prison's or jail's grievance system "unavailable" because it is unable to process their complaint quickly enough to offer any relief. As we describe below, this is already the right answer under existing case law—but so far, many district courts have declined to follow this path. The second proposal focuses on possible actions at the state and local levels, because it is corrections agencies, not the PLRA, that determine what procedures must be exhausted or whether the defense is raised in litigation. Any prison or jail unhappy with allowing incarcerated plaintiffs to proceed in federal court or amenable to allowing them to access court quickly in emergency circumstances could implement working emergency grievance systems. We provide some parameters to guide any such system. In addition, state legislatures could enact legislation forfeiting or waiving the exhaustion defense in cases seeking emergency relief. The third solution addresses the reluctance of district judges to excuse non-exhaustion when they should; we propose that the PLRA be amended to pretermitt the "availability" inquiry by eliminating the statutory exhaustion requirement in emergency situations. We offer suggested legislative text to accomplish this end.

#### I. The Prison Litigation Reform Act and the COVID Pandemic

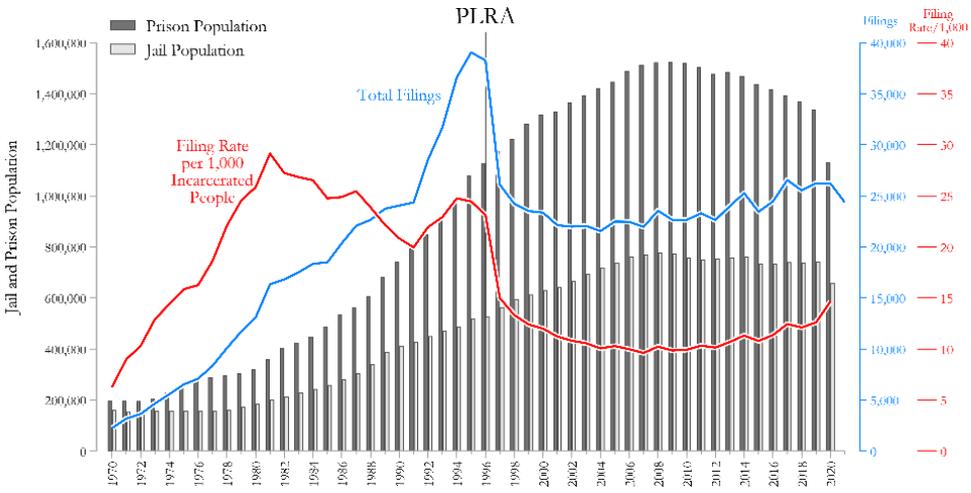
In four periods that together span the past fifty years, federal civil rights filings by incarcerated plaintiffs have followed four very different patterns. After the federal courts opened to such lawsuits in the late 1960s and early 1970s,<sup>12</sup> the volume of the litigation grew steeply for a decade—juiced by slowly increasing prison population and steeply increasing filing rates. From the 1980s to 1990, however, the overall increasing number of cases was driven entirely by increases in both jail and prison population; filing rates actually declined substantially over the period. In the early 1990s, the two factors converged, both increasing: from 1991 to 1995, the filing rate grew by 22.5% from 20 to 24.5 lawsuits per 1000 incarcerated persons, and the

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12. See Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 Mich. L. Rev. 1994, 2000–05 (1999).

incarcerated population increased by about 31% (over 375,000 people).<sup>13</sup> All this is illustrated in Figure A.

**Figure A: Prison and Jail Population and Federal Civil Rights Filings by Incarcerated Plaintiffs**



It was in this environment that Congress in 1996 passed the PLRA. Its supporters at least stated that their target was abusive lawsuits. As Senator Hatch phrased it in one version of this point made repeatedly in floor speeches in support of the various PLRA versions, “I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system.”<sup>14</sup> In fact, the

13. Litigation figures are calculated using data released periodically by the Administrative Office of the U.S. Courts, available at *Integrated Database (IDB)*, Fed. Jud. Ctr., <https://www.fjc.gov/research/idb> (last visited Feb. 15, 2022). Prison and jail population figures come from a variety of publications by the Bureau of Justice Statistics, a component of the U.S. Department of Justice. Sources are set out comprehensively in Schlanger, *Trends in Prisoner Litigation*, *supra* note 3, at 57, updated by Margo Schlanger, *Prison and Jail Civil Rights/Conditions Cases: Longitudinal Statistics 2–3 tbl.A*, <https://ssrn.com/abstract=3834658> [<https://perma.cc/XHF5-SD3U>], updated appendix to Fenster & Schlanger, *supra* note 3, app. at tbl.A. Data and replication code are available at *Data Update, Incarceration and the Law: Cases and Materials*, <https://incarcerationlaw.com/resources/data-update/> [<https://perma.cc/284N-YTBX>] (last visited February 20, 2022) (reproducing Schlanger, *supra*, tbl.A).

14. 141 Cong. Rec. 27042 (1995) (statement of Sen. Hatch); see also, 141 Cong. Rec. 37797 (1995) (statement of Sen. Hatch); 141 Cong. Rec. 4275 (1995) (statement

PLRA narrowed the possibility of relief for *all* cases brought by incarcerated plaintiffs.<sup>15</sup> The second half of Figure A shows the result—a dramatic and (so far) permanent decrease in filing rates and filing numbers.

One of us (Schlanger) has written at length about the particular PLRA provisions that produced the decline in filing rates and filing numbers.<sup>16</sup> High on the list of contributors is the statute's "administrative exhaustion" requirement, which 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."<sup>17</sup>

The provision abrogated part of the 1980 Civil Rights of Institutionalized Persons Act, which required incarcerated plaintiffs to first have recourse to administrative grievance systems only if those systems were "plain, speedy, and effective."<sup>18</sup>

PLRA exhaustion is the subject of thousands and thousands of district court and court of appeals decisions,<sup>19</sup> and a startling six merits opinions in the Supreme Court.<sup>20</sup> The crucial takeaways from the Supreme Court opinions are these:

- 1) Incarcerated plaintiffs need not plead exhaustion; failure to exhaust is an affirmative defense, with the burden of assertion and proof on the defendants.<sup>21</sup>
- 2) There are no federally prescribed standards requiring that grievance systems be fair; states and localities can set their own rules for how their grievance systems work.
- 3) The PLRA requires "proper exhaustion"—it imposes a procedural bar on claims whose plaintiffs failed to follow applicable grievance

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of Rep. Canady) ("These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit.").

15. See *supra* note 3 and accompanying text.
16. See *supra* note 3.
17. 42 U.S.C. § 1997e(a).
18. See Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7(a), 94 Stat. 349, 352 (1980) (codified as amended at 42 U.S.C. § 1997e(a)), *quoted in* *Ross v. Blake*, 578 U.S. 632, 640–41 (2016).
19. A basic search—*adv*: "42 USC 1997e(a)"—yields more cases than Westlaw will display; it tops out at 10,000.
20. *Ross*, 578 U.S. at 648–49; *Jones v. Bock*, 549 U.S. 199, 202–03 (2007); *Woodford v. Ngo*, 548 U.S. 81, 83–84 (2006); *Porter v. Nussle*, 534 U.S. 516, 520 (2002); *Booth v. Churner*, 532 U.S. 731, 733–34 (2001); *Ramirez v. Collier*, 142 S. Ct. 1264, 1275–77 (2022).
21. *Jones*, 549 U.S. at 216.

rules<sup>22</sup> (though the courts of appeals hold consistently that if the prison or jail chose, notwithstanding such a failure, to address the grievance on the merits, the claim is exhausted<sup>23</sup>).

4) The PLRA does not implement “traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has ‘no power to decree . . . relief,’ or need not exhaust where doing so would otherwise be futile.”<sup>24</sup> In particular, even a litigant who seeks only damages must exhaust a system that has no authority to provide damages.<sup>25</sup>

5) Judges lack discretion to excuse exhaustion based on good cause, special circumstances, or the like. However—and this is the crucial point explored below—the statute requires exhaustion only of “such administrative remedies as are available.”<sup>26</sup>

Accordingly, under the current case law, if the defendants come forward with appropriate evidence, the courthouse doors are closed to incarcerated plaintiffs who did not manage to fully work their pre-complaint grievance through a jail or prison’s grievance system—whether they didn’t file a grievance at all, or filed but had a grievance bounced for some technical error,<sup>27</sup> or didn’t timely pursue every appeal opportunity.<sup>28</sup>

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22. *Woodford*, 548 U.S. at 90–91, 93.

23. *See, e.g.*, *Reyes v. Smith*, 810 F.3d 654, 657–58 (9th Cir. 2016).

24. *Booth*, 532 U.S. at 741 n.6 (alteration in original) (citation omitted).

25. *Id.* at 740.

26. 42 U.S.C. § 1997e(a).

27. *See, e.g.*, *Bracero v. Sec’y, Fla. Dep’t of Corr.*, 748 F. App’x. 200, 203 (11th Cir. 2018) (dismissing for non-exhaustion where plaintiff wrote a small amount below the line that said “Do not write below this line”; noting “that the grievances were still legible and just a few lines were outside the boundaries of the space provided,” and that “the PLRA demands that prisoners complete the administrative process in accordance with the applicable grievance procedure set by the prison”); *Elliott v. Jones*, No. 4:06-cv-00089-MP-AK, 2008 WL 420051, at \*4 (N.D. Fla. Feb. 12, 2008) (noting grievance rejected for “writing outside the boundaries of the form”); *Freeland v. Ballard*, No. 2:14-cv-29445, 2017 WL 337997, at \*6–7 (S.D. W. Va. Jan. 23, 2017) (finding failure to exhaust when plaintiff mailed multiple grievances in a single envelope rather than in separate envelopes); *Thomas v. Parker*, No. 07-cv-599-W, 2008 WL 2894842, at \*12 (W.D. Okla. July 25, 2008), *aff’d*, 318 F. App’x 626 (10th Cir. 2009) (same, when grievance included a “Statement Under Penalty of Perjury” pursuant to state law rather than the notarized affidavit required by grievance policy).

28. *See McCoy v. Goord*, 255 F.Supp.2d 233, 246 (S.D.N.Y. 2003) (“It is well established that to exhaust—literally, to draw out, to use up completely, *see Oxford English Dictionary* (2d ed.1989)—‘[an inmate is required to] grieve his complaint about prison conditions up through the highest level of administrative review’ before filing suit.” (quoting *Porter v. Goord*, No. 01 Civ. 8996(NRB), 2002 WL 1402000, at

The impact is frequently to foreclose redress for violation of constitutional rights.

Moreover, the PLRA sets up awful incentives. The less effective and more cumbersome a grievance system is, the more likely incarcerated people are to either seek to bypass it or mess up its technical requirements. Either path then immunizes staff and systems from subsequent federal court oversight. In other words, the PLRA encourages prison and jail officials to impose burdensome rules that make it easier to reject grievances for technical errors. Courts have commented on this tendency many times.<sup>29</sup>

The problem is particularly acute when an incarcerated person seeks to fend off an urgently looming injury. Federal injunctive practice includes mechanisms to speed up litigation in emergency situations. But these cannot solve imminent problems if the gatekeeping grievance systems are too slow—which most are. Without special emergency speed-ups, grievance systems can take months to complete even when officials comply with their own deadlines. The systems typically require multiple steps, each of which may take weeks or even months to complete. A 2014 survey found a 90–120 day overall maximum time limit among those systems that specify such an aggregate limit.<sup>30</sup> In systems that instead set time limits for each step, just one step can take as long as 100 days in some states.<sup>31</sup> In either event, prison systems often do not follow their own time limits, frequently taking even longer.<sup>32</sup> It's true that most state prisons' grievance systems provide expedited emergency procedures, which in theory would allow

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\*1 (S.D.N.Y. June 18, 2002)); *accord, e.g.*, *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001); *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997).

29. *See, e.g.*, *Padilla v. Hasley*, No. 15–cv–02693–MWF (KES), 2017 WL 1927874, at \*9 (C.D. Cal. Mar. 9, 2017) (noting grievance body's actions "reflect using procedural rules to avoid addressing the merits of Plaintiff's claims, rather than imposing an orderly structure on proceedings"), *report and recommendation adopted*, 2017 WL 1905963 (May 9, 2017); *Barker v. Belleque*, No. 10–cv–0093–AA, 2011 WL 285228, at \*4 (D. Or. Jan. 26, 2011) ("[T]he record reflects that plaintiff's good faith effort to [exhaust] . . . was stymied by defendants' unreasonable interpretation and hyper-technical application of the grievance rules.").
30. Priyah Kaul, Greer Donley, Ben Cavaturo, Anelisa Benavides, Jessica Kincaid & Joseph Chatham, *Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey 23* (2015), <https://clearinghouse.net/resource/2016/>. In full disclosure, this survey was done by Schlanger's students with her advice and supervision.
31. *Id.*
32. *See, e.g.*, *Gilbert v. Byars*, No. 2:13-cv-2163-MGL-WWD, 2014 WL 4063020, at \*6–7 (D.S.C. Aug. 14, 2014) (holding delays in final decisions from five to nine months past the official deadline do not "represent[] a period of inordinate delay excusing the PLRA's pre-filing requirement" although delays of fifteen months or more would do so), *aff'd*, 590 F. App'x 279 (4th Cir. 2015); *Sweat v. Reynolds*, No. 9:11-cv-1706-MGL, 2013 WL 593660, at \*4–5 (D.S.C. Feb. 15, 2013) (noting delay of 150 days for a response although the deadline was 70 days).

Incarcerated people to exhaust quickly and get into court with minimal delay.<sup>33</sup> While procedures and guidelines on processing time vary widely,<sup>34</sup> “[m]ost policies that specify time frames for emergency grievances require responses within 24 to 72 hours . . . .”<sup>35</sup> Unfortunately, the reality is often different. Recent decisions have documented waits ranging from sixteen days to over two months without a response from the “emergency” grievance procedure.<sup>36</sup>

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33. Many states’ grievance policies specify a time frame within which they will initiate action and respond to emergency grievances. For example, Washington D.C.’s promises a response “within seventy-two (72) hours of [the grievance’s] receipt.” D.C. Dep’t of Corr., Inmate Grievance Procedure 19 (2020), <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/PP%204030.1L%20Inmate%20Grievance%20Procedure%20%28IGP%29%2001-09-2020.pdf> [<https://perma.cc/E8KJ-UQWH>]. Arizona’s states that prisons shall provide “an initial response . . . within 48 hours, and . . . a final decision within five calendar days.” Ariz. Dep’t of Corr. Rehab. & Reentry, Inmate Grievance Procedure 10 (2016) <https://corrections.az.gov/sites/default/files/policies/800/0802.pdf> [<https://perma.cc/P59D-JTXL>]. Alaska’s requires prison staff to “investigate and resolve the emergency grievance the same day or before the end of the shift.” State of Alaska Dep’t of Corr., Policies and Procedures: Prisoner Grievances 11 (2006), <https://doc.alaska.gov/pnp/pdf/808.03.pdf> [<https://perma.cc/UP7H-8YMX>].

Other states have vaguer standards. Kansas, for instance, simply states that: “Emergency grievances shall be forwarded immediately. . . [and] shall be expedited at every level.” Kansas Administrative Regulation § 44-15-106, Kan. Sec’y of State, [https://sos.ks.gov/publications/pubs\\_kar\\_Regs.aspx?KAR=44-15-106&Srch=Y](https://sos.ks.gov/publications/pubs_kar_Regs.aspx?KAR=44-15-106&Srch=Y) [<https://perma.cc/Z583-Q3WJ>] (last visited Apr. 6, 2022).

There can also be a significant lag between when prisons are supposed to take action in response to such grievances and when they must actually respond to the inmate. For example, in Florida, the reviewing authority must review the complaint and initiate action “no later than two calendar days following receipt,” but has up to “15 calendar days” to provide the inmate with a formal response, if an emergency is found to exist. Fla. Admin. Code Ann. r. 33-103.006 (LEXIS through Apr. 14, 2022). See also Prison and Jail Policies: Handbooks, Grievances, Visiting, Mail, Publications, Michigan Law Prison Information Project, <https://clearinghouse.justiapro.com/policy/2/1> (collecting administrative documents, including versions of those referenced in this footnote)

34. See Kaul et al., *supra* note 30, at 23.
35. *Id.* (citing examples of the Federal Bureau of Prisons, Arizona, Hawaii, and Massachusetts). The grievance policies themselves can be downloaded at *Policy Clearinghouse*, *supra* note 33.
36. See Hampton v. Baldwin, No. 3:18-cv-550-NJR-RJD, 2018 WL 5830730, at \*9 (S.D. Ill. Nov. 7, 2018) (twenty-nine days in a case in which a transgender plaintiff alleged danger from being held in a men’s prison and denial of essential mental health treatment); Morris v. Lee, No. 3:17-cv-857-NJR-DGW, 2018 WL 6204975, at \*3 (S.D. Ill. July 18, 2018) (two months and nine days between warden’s receipt of emergency grievance and determination that it was an emergency), *report and recommendation adopted*, 2018 WL 4771017 (S.D. Ill. Oct. 3, 2018); Godfrey v.

Broadly applicable emergencies—the COVID-19 pandemic, floods or hurricanes, and the like—stress grievance systems in three separate ways. First, emergencies create new risks to safety, and those risks are often administratively assigned to grievance systems to address.<sup>37</sup> Second, the risks are particularly time-sensitive, requiring speedy resolution if they are to be averted. Third, emergencies interfere with ordinary staffing and the normal functioning of the prison system itself—which not only augments risk but undermines timely and appropriate grievance processing. The COVID pandemic has had all of these effects. COVID has stressed prison and jail capabilities and, particularly in the pandemic's early months, many entirely shut down functions like grievance processing. Some systems put everyone in lock-down—so that they couldn't obtain grievance forms.<sup>38</sup>

For all these reasons, time after time, prison grievance systems have proven unable to cope with COVID-related complaints.<sup>39</sup> Consider as a case in point the situation of John Dailey, a podiatrist sentenced to serve 2.25 years in federal prison for Medicare fraud.<sup>40</sup> He entered federal custody in 2019 with a congenital heart defect and a terminal form of non-Hodgkins lymphoma; he was immunocompromised due to chemotherapy.<sup>41</sup> He was housed at a special medical prison in North Carolina. Dr. Dailey was 62 in May 2020, when he was one of the named petitioners in a major civil rights lawsuit alleging grievous failures by the federal Bureau of Prisons leading to catastrophic spread of COVID-19 and resulting illness and deaths at his prison.<sup>42</sup> After the district court denied emergency relief for a variety of

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Harrington, No. 13-cv-280-NJR-DGW, 2015 WL 1228829, at \*3, 7 (S.D. Ill. Mar. 16, 2015) (sixteen days where the plaintiff claimed imminent danger from a cellmate noting that the former three-day deadline for responses had been removed from the grievance policy) (“Simply put, Defendants cannot expect to kick Godfrey out of court because he failed to follow an unwritten, nebulous rule, especially when they cannot even articulate the boundaries of the rule. The grievance process is not intended to be a game of ‘gotcha’ or ‘a test of the prisoner’s fortitude or ability to outsmart the system.’” (quoting *Shaw v. Jahnke*, 607 F. Supp. 2d 1005, 1010 (W.D. Wis. 2009))).

37. See Kaul et al., *supra* note 30, at 7–8.
38. See *infra* note 56.
39. On this point, see also Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CAL. L. REV. 117, 169 (2022).
40. *Hallinan v. Scarantino*, 466 F. Supp. 3d 587, 593 (E.D.N.C. June 11, 2020).
41. *Id.* at 592–93; Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 and Class Action Complaint for Injunctive and Declaratory Relief at 8, *Hallinan v. Scarantino*, 466 F. Supp. 3d 587 (E.D.N.C. June 11, 2020) (No. 5:20-hc-02088).
42. *Hallinan*, 466 F. Supp. at 590–92, 596.

technical reasons,<sup>43</sup> his lawyers withdrew the case;<sup>44</sup> the plaintiffs quickly attempted to complete prison grievance processes (which some, including Dr. Dailey, had initiated months earlier).<sup>45</sup> For the other plaintiffs, this took over two additional months.<sup>46</sup> Dr. Dailey, however, did not have time; he died of COVID days after the first case ended. He left a daughter and his life partner, Cathy.<sup>47</sup>

PLRA workarounds, too, often fail. That's what happened to Ira Goldberg, 72, incarcerated in New York to serve an aggregate seven-to-fourteen-year sentence for three third-degree burglary convictions, after several incidents in which he stole camera equipment and other merchandise from stores.<sup>48</sup> He suffered from serious, chronic medical issues: chronic obstructive pulmonary disease, emphysema, asthma, chronic renal failure, gastroesophageal reflux disease, high blood pressure, high cholesterol, and Parkinsonism. His respiratory problems were so severe that the mere act of speaking left him short of breath.<sup>49</sup> He faced obvious and severe risk from COVID, which he alleged his prison did little to mitigate.<sup>50</sup> His lawyers decided there was no point in filing a civil rights action because of the PLRA's restrictions on both exhaustion and release.<sup>51</sup> Instead, in April 2020, they filed a state court habeas petition; it was dismissed at the trial level on the theory that habeas does not allow release based on unconstitutional conditions of confinement (instead, a civil rights action is the appropriate type of lawsuit).<sup>52</sup> Mr. Goldberg died on a ventilator in January 2021 while his appeal of that decision was pending.<sup>53</sup>

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43. *Id.* at 609.

44. Joint Stipulation of Dismissal at 1, *Hallinan v. Scarantino*, 466 F. Supp. 3d 587 (E.D.N.C. June 11, 2020) (No. 5:20-hc-02088).

45. Resp. in Opp. to Mot. to Dismiss, at 9–14, *Hallinan v. Scarantino*, No. 5:20-ct-03333 (E.D.N.C. filed Jan. 29, 2021).

46. *See id.*

47. Press Release, Fed. Bureau of Prisons, Inmate Death at FCI Butner (Low) (July 3, 2020), [https://www.bop.gov/resources/news/pdfs/20200703\\_press\\_release\\_but.pdf](https://www.bop.gov/resources/news/pdfs/20200703_press_release_but.pdf) [<https://perma.cc/K3UH-TXMZ>]; Obituary for Dr. John Dailey, The Bradford Era, <https://www.legacy.com/us/obituaries/bradfordera/name/john-dailey-obituary?id=7822834> [<https://perma.cc/U8PZ-9558>] (last visited Mar. 24, 2022).

48. Brief for Petitioner–Appellant, *People ex rel. Dean v. Reardon*, 138 N.Y.S.3d 442 (N.Y. App. Div. 2021) (No. KAH 20-00549).

49. *Id.* at 3.

50. *Id.* at 5–9.

51. *Id.* at 12–13.

52. *Id.* at 3, 12.

53. *Petitioner's Death Moots Appeal of Dismissed Habeas*, Pro Se, July 4, 2021, at 11, <https://plsny.org/wp-content/uploads/ProSe/>

## II. Solutions

The remainder of this Article canvasses three possible solutions: First, plaintiffs should be allowed to proceed with their federal lawsuits if the press of the emergency renders a prison or jail grievance system “unavailable” because it is unable to process their complaint quickly enough to offer any preventive relief. As we describe below, this is the right answer under existing case law—but so far, one Court of Appeals and many district courts have declined to follow this path. Second, prisons and jails could implement working emergency grievance systems and state legislatures could enact statutes forfeiting the defense in emergency situations. And third, the PLRA could be amended to eliminate the exhaustion requirement in emergency situations. We propose legislative text to accomplish this end.

### A. *Solution 1: Judicial Interpretations of Unavailability*

The PLRA’s exhaustion requirement includes its own limit: it requires exhaustion of “such administrative remedies as are available.”<sup>54</sup> In 2016, in *Ross v. Blake*,<sup>55</sup> the Supreme Court explained: “an inmate is required to exhaust those, but only those, grievance procedures that are ‘capable of use’ to obtain ‘some relief for the action complained of.’”<sup>56</sup> The *Ross* Court elaborated three (non-comprehensive<sup>57</sup>) categories of unavailability: failure to exhaust does not bar a federal civil rights action by an incarcerated plaintiff where the grievance system in question offered only a “dead end,” where it was opaque to the point of being un navigable, or where officials thwarted its use.<sup>58</sup>

The language the Court used to describe the first type of unavailability is worth setting out more fully:

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Pro%20Se%202021%20Vol%2031%20No%2004.pdf [https://perma.cc/DMV7-8BJH]; *People ex rel. Dean*, 138 N.Y.S.3d at 442.

54. 42 U.S.C. § 1997e(a).

55. 578 U.S. 632 (2016).

56. *Id.* at 642 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)).

57. *See, e.g.*, *Williams v. Corr. Officer Priatno*, 829 F.3d 118, 123 n.2 (2d Cir. 2016) (“We note that the three circumstances discussed in *Ross* do not appear exhaustive, given the Court’s focus on three kinds of circumstances that were ‘relevant’ to the facts of that case.”); *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) (describing the three circumstances listed in *Ross* as “a non-exhaustive list”); *West v. Emig*, 787 F. App’x 812, 815 (3d Cir. 2019) (“[N]either the Supreme Court nor this Circuit has held that those three circumstances [listed in *Ross*] are comprehensive, as opposed to exemplary.”); *Ramirez v. Young*, 906 F.3d 530, 538 (7th Cir. 2018) (explaining that the three types of unavailability listed in *Ross* “were only examples, not a closed list”).

58. *Ross*, 578 U.S. at 643–44.

First, as *Booth* [v. *Churner*] made clear, an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates. Suppose, for example, that a prison handbook directs inmates to submit their grievances to a particular administrative office—but in practice that office disclaims the capacity to consider those petitions. The procedure is not then “capable of use” for the pertinent purpose. In *Booth*’s words: “[S]ome redress for a wrong is presupposed by the statute’s requirement” of an “available” remedy; “where the relevant administrative procedure lacks authority to provide any relief,” the inmate has “nothing to exhaust.” So too if administrative officials have apparent authority, but decline ever to exercise it. Once again: “[T]he modifier ‘available’ requires the possibility of some relief.” When the facts on the ground demonstrate that no such potential exists, the inmate has no obligation to exhaust the remedy.<sup>59</sup>

So under *Ross v. Blake*, if a prison system has, say, stopped processing grievances because of a COVID-related staff shortage (or for any other reason), or has locked people in their cells without making provision for collecting grievances, the administrators have rendered the grievance system unambiguously unavailable. Plaintiffs incarcerated in affected jails and prisons should therefore be able to file their lawsuits without first running the gauntlet of the unavailable system. Incarcerated plaintiffs have for this reason prevailed on exhaustion arguments in COVID-19 litigation when administration or staff closed off grievance systems by policy or

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59. *Id.* at 643 (citations omitted) (quoting *Booth*, 532 U.S. at 736 & n.4, 738).

proclamation<sup>60</sup> or by malfeasance.<sup>61</sup> Thus, where officers refused to provide grievance forms to some individuals, threatened to transfer those who complained to COVID-19-infested areas, and made such a transfer in at least one case, the court held that exhaustion had been “thwarted by machination and intimidation.”<sup>62</sup> Other decisions take a similar approach.<sup>63</sup>

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60. See *Maney v. Brown*, 464 F. Supp. 3d 1191, 1207 (D. Or. 2020) (holding remedy unavailable where officials admittedly were “not accepting grievances relating to COVID-19 emergency operations, nor ‘general grievances regarding social distancing, isolation, and quarantine of other AICs, or modified operations such as the visiting shutdown’ because doing so is ‘inconsistent with ODOC’s rules’”; they had accepted only fourteen of 216 COVID-19-related grievances (quoting Decl. of Jacob Humphreys in Supp. of Defs.’ Resp. to Pls.’ Mot. for TRO and Prelim. Inj. at 5, *Maney*, 464 F. Supp. 3d 1191 (No. 20-cv-00570))); *Gumms v. Edwards*, No. 20-cv-231, 2020 WL 2510248, at \*3 (M.D. La. May 15, 2020) (holding remedy unavailable where defendants had declared their grievance program “non-essential and *suspended*”); *Torres v. Milusnic*, 472 F. Supp. 3d 713, 742–43 (C.D. Cal. 2020) (applying § 1997e(a) even though the case was a habeas corpus proceeding, but excusing non-exhaustion and finding unavailability because Incarcerated Individuals were “instructed by prison officials not to submit grievances and requests for compassionate release because such grievances and requests were not being accepted due to understaffing”).
61. *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 769–70 (E.D. Mich. 2020), *on reconsideration*, No. 20-cv-10949, 2020 WL 2615740 (E.D. Mich. May 22, 2020), *vacated on other grounds*, 815 F. App’x 978 (6th Cir. 2020).
62. *Id.*
63. See *Bonnett v. Comm’r of Corr.*, No. 20-cv-3529, 2021 WL 1516052, at \*7 (D. Md. Apr. 15, 2021) (declining to find remedy available in light of evidence that “forms for seeking an appeal of the Warden’s decision are not available to inmates because officers will not hand them out and because the inmate library is closed”); *Wilson v. Ponce*, No. 20-cv-4451, 2020 WL 5118066, at \*6 (C.D. Cal. July 14, 2020) (holding remedy unavailable based on evidence that staff were not accepting grievance forms, were failing to process grievances that were filed, and were telling incarcerated people they were “too busy with COVID-19 to deal with complaints”); *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 687 (C.D. Cal. 2020) (holding remedies exhausted where defendants “refused to adjudicate some of the grievances and denied others but failed to adjudicate the appeal”), *stay denied*, No. 20-55568, 2020 WL 3547960 (9th Cir. June 17, 2020), *stay granted*, 140 S. Ct. 2620 (2020); *Criswell v. Boudreaux*, No. 20-cv-01048, 2020 WL 5235675, at \*17 (E.D. Cal. Sept. 2, 2020) (finding probability of success on unavailability of the remedy and citing evidence of intimidation and retaliation against individuals who spoke to the ACLU, including repeated questioning about the interviews, transfer to less desirable work assignments with higher risk of COVID-19 exposure, and reclassification and transfer to higher-security units; finding of unavailability concerned access to counsel in COVID-19 case); *J.H. ex rel. N.H. v. Edwards*, No. 20-cv-293, 2020 WL 3448087, at \*42–44 (M.D. La. June 24, 2020) (finding likelihood of success by plaintiffs on exhaustion question where third-party grievants, permitted in this system, sent grievances to the wrong place, but did so per official instructions, and where a named plaintiff completed the emergency grievance process, and the policy did not say he had to then start over with the general grievance process (and in fact suggested the opposite)). *But see Sanchez*

A more general conclusion of unavailability is equally correct: When a grievance seeks time-sensitive prevention of harm, but the grievance system is unable to respond promptly, that deficit renders the grievance system “a simple dead end,” in *Ross v. Blake* terms<sup>64</sup>—such that its use is not a prerequisite to a federal lawsuit. It would be prudent for a would-be plaintiff to try to use the grievance system, but if the process is proceeding too slowly to award “some relief for the action complained of,”<sup>65</sup> the courthouse doors should not be closed. The leading Court of Appeals decision on the interaction of the PLRA with this kind of urgency is *Fletcher v. Menard Correctional Center*,<sup>66</sup> a Seventh Circuit opinion by then-Judge Richard Posner. In *Fletcher*, the Court of Appeals held that a grievance system that cannot grant relief quickly enough to avert serious physical injury to the plaintiff is not an “available” remedy within the meaning of the statute, though it added that if the grievance system provides for emergency relief, the grievant must attempt to use that system before coming to court.<sup>67</sup> Judge Posner wrote (anticipating the *Ross v. Blake* approach):

[A] case in which the prisoner might be killed if forced to exhaust remedies that do not include any remedy against an imminent danger is not a circumvention case and is not controlled by *Booth* [v. *Churner*], which in any event distinguished between a case in which there are remedies but none to the prisoner’s liking (which was the *Booth* case) and a case in which there is no remedy; for the Court said that “without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust.” If it takes two weeks to exhaust a complaint that the complainant is in danger of being killed tomorrow, there is no “possibility of some relief” and so nothing for the prisoner to exhaust.<sup>68</sup>

By contrast, in *Valentine v. Collier*,<sup>69</sup> the Fifth Circuit reached more-or-less the opposite conclusion. Asked by the plaintiffs to excuse non-exhaustion on the theory that the slow process on offer was for that reason “unavailable” under *Ross v. Blake*, the court found for the defendants:

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v. Brown, No. 20-cv-832, 2020 WL 2615931, at \*17 (N.D. Tex. May 22, 2020) (dismissing complaints about functioning of grievance system as “special circumstances” without discussing availability under *Ross*).

64. *Ross*, 578 U.S. at 643.

65. *Booth v. Churner*, 532 U.S. 731, 738 (2001).

66. 623 F.3d 1171 (7th Cir. 2010).

67. *Id.* at 1173–75.

68. *Id.* at 1174 (citations omitted) (quoting *Booth*, 532 U.S. at 736 n.4).

69. *Valentine v. Collier*, 978 F.3d 154 (5th Cir. 2020).

The district court impermissibly applied a “special circumstances” exception, like the one the Supreme Court rejected in *Ross*, under the guise of an availability analysis. Its main rationale was that [the Texas Department of Criminal Justice’s (“TDCJ”)] grievance process is incapable of responding to the rapid spread of COVID-19. In other words, the grievance process is not amenable to current circumstances. But under *Ross*, special circumstances—even threats posed by global pandemics—do not matter. . . .

. . . .

Here, the district court heard evidence that Plaintiffs obtained soap and cleaning supplies, COVID-19 testing, and the halt of transfers into the Pack Unit, which they requested through the grievance process at various points after commencing this litigation. The court discounted that evidence because those changes were not a direct response to Plaintiffs’ grievances. Indeed, the court noted “[i]n some of these instances, TDCJ changed its policies *prior* to a grievance being filed.” . . . From there, the court concluded that the grievance process was unresponsive and thus unavailable. We do not follow the district court’s logic. To the contrary, TDCJ’s conduct shows that it was capable of providing “some relief for the action complained of,” which is enough to render the grievance process “available” under the PLRA.<sup>70</sup>

An earlier motions panel in the case took the same approach when it stayed a district court injunction,<sup>71</sup> provoking Justice Sotomayor’s warning, issued in an opinion (joined by Justice Ginsburg) respecting the Supreme Court’s denial of plaintiffs’ motion to vacate the Court of Appeals’ stay:

The Fifth Circuit seemed to reject the possibility that grievance procedures could ever be a “dead end” even if they could not provide relief before an inmate faced a serious risk of death. But if a plaintiff has established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like Covid-19, the procedures may be “unavailable” to meet the plaintiff’s purposes, much in the way they would be if prison officials ignored the grievances entirely. Here, of course, it is difficult to tell whether the prison’s system fits in that narrow category, as applicants did not attempt to avail themselves of the grievance

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70. *Id.* at 161–62 (citations omitted) (first quoting *Valentine v. Collier*, 490 F. Supp. 3d 1121, 1162 (S.D. Texas 2020), *stay granted*, 978 F.3d 154 (5th Cir. 2020); and then quoting *Ross v. Blake*, 578 U.S. 632, 642 (2016)).

71. *Valentine v. Collier*, 956 F.3d 797, 805–06 (5th Cir. 2020) (staying preliminary injunction mitigating COVID-19 risks where plaintiffs had not exhausted administratively before seeking it).

process before filing suit. But I caution that in these unprecedented circumstances, where an inmate faces an imminent risk of harm that the grievance process cannot or does not answer, the PLRA's textual exception could open the courthouse doors where they would otherwise stay closed.<sup>72</sup>

In this debate, the Seventh Circuit is clearly correct and the Fifth Circuit clearly incorrect. The problem is that, in *Valentine*, the Fifth Circuit mistook the possibility of a non-litigated solution of the plaintiffs' problems for the possibility of a *grievance*-related remedy. Whether the Texas *prison system* was "capable of providing 'some relief'"<sup>73</sup> is not the relevant statutory question; that question is, rather, whether the *grievance system* was so capable. It was not; that's why the district court found the timing so telling.

District courts have written decisions all over the map. In case after case, federal courts have rejected claims by incarcerated people reporting grave preexisting conditions that put them at risk for more serious COVID-19 illness, combined with officials' utter failure to mitigate pandemic risks, because the incarcerated plaintiffs had not followed months-long grievance procedures prior to seeking emergency relief in federal court. When prisons failed to test, did not provide hygienic supplies like soap and sanitizer, failed to provide or require staff and incarcerated people to wear face masks, made social distancing impossible, or failed to treat COVID illness, the PLRA's exhaustion requirement immunized all these failures from civil rights enforcement, regardless of the merits or equities.<sup>74</sup> Courts have

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72. *Valentine v. Collier*, 140 S. Ct. 1598, 1600–01 (2020) (statement of Sotomayor, J., joined by Ginsburg, J.) (citing *Ross*, 578 U.S. at 642–43).

73. *Valentine*, 978 F.3d at 162 (quoting *Ross*, 578 U.S. at 642).

74. *See, e.g.*, *Coleman v. Jeffries*, No. 20-4218, 2020 WL 6329469 at \*1–2 (C.D. Ill. Oct. 28, 2020) (denying the plaintiffs' motion for a preliminary injunction and dismissing their complaint because they admitted they had not exhausted their administrative remedies); *Askew v. White*, No. 5:20-cv-264, 2020 WL 4194994 at \*2–4 (M.D. Ga. July 21, 2020) (holding that plaintiff's action must be dismissed because, "[o]n its face, Plaintiff's complaint clearly shows that he did not exhaust administrative remedies prior to filing this lawsuit," and "[c]ontrary to Plaintiff's assertions, the Court has 'no discretion to waive this exhaustion requirement'" (quoting *Bryant v. Rich*, 530 F.3d 1368, 1372 (11th Cir. 2008))); *Ball v. Ohio*, No. 20-cv-1759, 2020 WL 1956836 at \*2–4 (S.D. Ohio Apr. 23, 2020) ("[I]t is RECOMMENDED that Plaintiff's Complaint be DISMISSED WITHOUT PREJUDICE in its entirety for failure to comply with the PLRA's exhaustion requirements."), *report and recommendation adopted*, 2020 WL 2468742 at \*1 (S.D. Ohio May 13, 2020); *Abdulaziz/Askew v. Payne*, No. 20-cv-529, 2021 WL 1745514 at \*2 (E.D. Ark. Apr. 20, 2021) (holding the plaintiff's claims "should be DISMISSED, without prejudice, based on his failure to exhaust his administrative remedies prior to filing suit"), *report and recommendation adopted*, 2021 WL 1740081 \* at 1 (E.D. Ark. May 3, 2021); *Nellson v. Barnhart*, 454 F. Supp. 3d 1087, 1093–94 (D. Colo. 2020) (holding that the ninety-day regular grievance process is not a "dead end"

routinely denied requests for temporary restraining orders and preliminary injunctions where the incarcerated plaintiffs appear not to have exhausted or do not show at the outset that they have exhausted.<sup>75</sup>

But other courts (though no appellate courts at this point) have accepted arguments by plaintiffs that a prolonged administrative process is unavailable, for PLRA purposes, when lawsuits complain of a highly contagious, fast-spreading epidemic and seek preventive steps. As one district judge put it:

The Court appreciates that the Connecticut [Department of Correction] grievance procedure is available and capable of offering relief in ordinary times. However, these are not ordinary times. The Connecticut DOC grievance procedure, which lacks an emergency review process, was not set up with a pandemic in mind. Although Defendants' point that not every grievance will require 105 business days to resolve is well taken, the imminent health threat that COVID-19 creates has rendered DOC's administrative process inadequate to the task of handling Plaintiffs' urgent complaints regarding their health. . . . Because COVID-19 spreads "easily and sustainably," Plaintiffs risk contracting the disease while foregoing these hygienic precautions and attempting to exhaust the DOC's administrative grievance procedure, which occurs in four stages and involves an informal resolution process, the filing of an initial formal complaint, and two rounds of appeals. In this context, the DOC's administrative grievance process is thus, "practically speaking, incapable of use" for resolving COVID-19 grievances. As such, the Court concludes that administrative remedies for the relief that Plaintiffs seek are unavailable, and thus exhaustion is not required for Plaintiffs to proceed on their § 1983 claims.<sup>76</sup>

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since "some relief" is available, as defendants had taken some protective actions) (quoting *Ross*, 578 U.S. at 642–43)).

75. *E.g.*, *Pelino v. Sec'y Pa. Dep't of Corr.*, 791 F. App'x 371, 373 (3d Cir. 2020) (per curiam) (stating "exhaustion is a preliminary requirement before addressing the merits of a litigant's claim for relief" in injunctive case alleging constitutional violations); *Coleman v. Jeffries*, No. 20-4218 2020 WL 6329469, at \*2 (holding plaintiffs cannot show likelihood of success if they have not exhausted); *Victory v. Berks Cnty.*, No. 18-cv-5170, 2019 WL 653788, at \*7 (E.D. Pa. Feb. 15, 2019) ("If [Plaintiff] does not carry her burden of showing exhaustion, she cannot demonstrate a likelihood of success on the merits of her claim . . .").
76. *McPherson v. Lamont*, 457 F. Supp. 3d 67, 81 (D. Conn. 2020) (citations omitted) (quoting *Ross*, 578 U.S. at 643) (citing *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010)); *accord* *Smith v. DeWine*, 476 F. Supp. 3d 635, 657 (S.D. Ohio 2020) (denying dismissal for non-exhaustion because court "does not believe the Director has upheld her burden of showing that Plaintiffs failed to exhaust their

Another decision, rejecting *Valentine's* analysis that administrative remedies are available as long as some solution may be implemented sometime (regardless of the connection to the grievance), held that a grievance system was unavailable, in part because it “contain[ed] no deadlines and therefore fail[ed] to assure that an inmate’s grievance w[ould] be reviewed by [Maryland’s Division of Pretrial Detention and Services] before the inmate [was] affected by COVID-19.”<sup>77</sup> And another court held that an incarcerated person who filed an emergency grievance about his COVID-19 complaints, with a seventy-two-hour deadline for response, had exhausted for the class he sought to represent where he had not received a response after six days had passed.<sup>78</sup>

That the PLRA is generally unfavorable to incarcerated Individuals does not justify still more plaintiff-unfriendly applications. The PLRA simply does not require that incarcerated people be stuck with a grievance system incapable of responding timely to them, whatever danger they face and whatever the urgency of relief. *Ross v. Blake's* approach requires that courts consider “real-world workings of prison grievance systems” in assessing whether a prison’s administrative remedy is in fact available to provide relief in emergency situations.<sup>79</sup> This interpretive solution to the PLRA’s emergency problem requires lower courts to carefully consider grievance systems’ ability to address emergencies in a meaningful timeframe in order to give meaning to the one exception to the PLRA’s exhaustion mandate—availability.

*B. Solution 2: State and Local Grievance Systems, and Statutory Waiver*

Although the PLRA is a federal statute, and although it limits the ability of incarcerated people to access the federal courts, there is nonetheless a significant role state and local agencies and legislatures can play in developing solutions to the problem we identify. The rules and requirements of exhaustion under the PLRA are defined by prisons and jails’ grievance processes, not by the PLRA itself. That is, the PLRA requires incarcerated plaintiffs to exhaust the available remedies, but leaves the defendant agencies to determine what remedies and related procedures

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administrative remedies and that doing so would not be a dead end in light of the pandemic”).

77. Duvall v. Hogan, No. 94-2541, 2020 WL 3402301, at \*8 (D. Md. June 19, 2020).
78. Banks v. Booth, 468 F. Supp. 3d 101, 120–21 (D.D.C. 2020), *appeal dismissed, cause remanded*, 3 F.4th 445, 449 (D.C. Cir. 2021); *accord, e.g.*, Frazier v. Kelley, 460 F. Supp. 3d 799, 831–34 (E.D. Ark. 2020) (declining to find for defendants on exhaustion claims given open issues, including whether remedy was sufficiently timely available).
79. *Ross*, 578 U.S. at 643.

will be offered.<sup>80</sup> Prisons and jails are free to implement working emergency grievance systems that could address emergencies in an expedited time frame and, where the systems fail to provide adequate relief, allow incarcerated people who have used them expedient access to the federal courts.<sup>81</sup> Additionally (or alternatively), state legislatures could waive PLRA exhaustion by enacting statutes forfeiting or waiving the affirmative defense of exhaustion in cases in which emergency relief is sought. We discuss each of these in turn.

Grievance systems that allow for the serious consideration of emergency relief must include three key features: (1) appropriate inclusion of urgent matters; (2) speedy processing, with timing able to both prevent looming harm and allow for prompt court access; and (3) procedures simple enough that an incarcerated person facing an emergency can reasonably be expected to follow them.

On the first point—coverage—Delaware, for example, has a formula that makes sense. Its emergency process covers “[a]n issue that concerns matters which under regular policy time limits would subject the inmate to a substantial risk of personal, physical or psychological harm.”<sup>82</sup> What’s good about this text is that its criteria are functional, rather than hinging on an arbitrary time limit. Several other jurisdictions use similarly broad definitions of emergency that focus on the potential harm to the individual or institution.<sup>83</sup> These policies allow prison officials to consider a broad

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80. Jones v. Bock, 549 U.S. 199, 218 (2007).

81. For a recent proposal that, like our Solution 2, emphasizes state responses to the PLRA, see Melissa Benerofe, Note: Collaterally Attacking the Prison Litigation Reform Act’s Application to Meritorious Prisoner Civil Litigation, 90 Fordham L. Rev. 141 (2021) (recommending that states process prison grievances electronically, and give access to the resulting electronic records to legal aid organizations litigating prisoner civil rights cases).

82. State of Del. Dep’t of Corr., Policy No. 4.4, Inmate Grievance Policy 1 (2011), [https://bidcondocs.delaware.gov/DOC/DOC\\_1205Commiss\\_INFO2.pdf](https://bidcondocs.delaware.gov/DOC/DOC_1205Commiss_INFO2.pdf) [<https://perma.cc/2TNX-EKW2>].

83. See, e.g., State of Alaska Dep’t of Corr., Index No. 808.03, Prisoner Grievances 1 (2006) <https://www.law.umich.edu/special/policyclearinghouse/Documents/Alaska%20-%20808.03.pdf> [<https://perma.cc/FV7C-BYK6>]; Fla. Admin. Code r. 33-103.001 (LEXIS through Apr. 14, 2022) <https://www.flrules.org/gateway/RuleNo.asp?title=INMATE%20GRIEVANCE%20PROCEDURE&ID=33-103.002> [<https://perma.cc/RA5J-UL2Z>]; Ill. Dep’t of Corr., DR 504, Grievance Procedures 12 (2003), <https://www.law.umich.edu/special/policyclearinghouse/Documents/Illinois%20Grievance%20Procedures.pdf> [<https://perma.cc/UT8N-L7M5>]; Miss. Dep’t of Corr., S.O.P. 20-08-01, Grievance Procedures - Offender 4 (2012) [https://www.law.umich.edu/special/policyclearinghouse/Documents/Mississippi\\_SOP.pdf](https://www.law.umich.edu/special/policyclearinghouse/Documents/Mississippi_SOP.pdf) [<https://perma.cc/SH7F-BYJT>]; State of Vt. Dep’t of Corr., Directive: 320.01, Offender Grievance System 2 (2006),

range of circumstances that constitute an emergency. Note, however, that they simultaneously give significant discretion to prison officials to determine whether the individual's complaint is truly of an emergency nature. Typically, where the issue is found non-emergent, these policies require the grievance to be refiled or routed back into the standard, lengthier process.<sup>84</sup> In our view, if a prison grievance officer inappropriately fails to treat a grievance as an emergency, that renders the (slower, ordinary) grievance process unavailable under *Ross v. Blake*. This approach finds some support in the case law,<sup>85</sup> but some courts instead—and we think erroneously—simply dismiss those claims for non-exhaustion.<sup>86</sup>

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<https://doc.vermont.gov/sites/correct/files/documents/policy/correctional/320-Grievance-System-Rule.pdf> [<https://perma.cc/X7BM-2HLX>].

84. See, e.g., Colo. Dep't of Corr., Regul. No. 850-04, Grievance Procedure 8 (2022), <https://cdoc.colorado.gov/about/department-policies> [<https://perma.cc/9P9T-CH7K>]; Kan. Admin. Regs. § 44-15-101 (Westlaw through Apr. 7, 2022); Nev. Dep't of Corr., Admin. Regul. 740, Inmate Grievance Procedure 8–9 (2018), [https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative\\_Regulations/AR%20740%20-%20Inmate%20Grievance%20Procedure%20-%20Temporary%20-%2011.20.2018.pdf](https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/AR%20740%20-%20Inmate%20Grievance%20Procedure%20-%20Temporary%20-%2011.20.2018.pdf) [<https://perma.cc/5J8N-F63V>]; Okla. Dep't of Corr., OP-090124, Inmate/Offender Grievance Process 17–18 (2022), <https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-09/op090124.pdf> [<https://perma.cc/G99E-6HWQ>]; Tenn. Dep't of Corr., Index No. 501.01, Inmate Grievance Procedures 5 (2021), <https://www.tn.gov/content/dam/tn/correction/documents/501-01.pdf> [<https://perma.cc/3PAE-XZS7>]; Admin. Rev. & Risk Mgmt. Div., Tex. Dep't of Crim. Just., Offender Grievance Operations Manual 16–17 (2012), <https://www.law.umich.edu/special/policyclearinghouse/Documents/TX%20Offender%20Grievance%20Manual.pdf> [<https://perma.cc/7A5M-BN6Z>] [hereinafter *Tex. Dep't of Crim. Just.*]; Wash. State Dep't of Corr., Offender Grievance Program 7 (2013), <https://www.law.umich.edu/special/policyclearinghouse/Documents/Washington%20Grievance%20Manual%202013.pdf> [<https://perma.cc/SF3P-PBBG>]; see also *Policy Clearinghouse*, *supra* note 33 (archiving state policy documents, including offender grievance policies).
85. See, e.g., *Williams v. Wexford Health Sources, Inc.*, 957 F.3d 828, 832–34 (7th Cir. 2020) (allowing a case to proceed after a prison declared emergency grievance petition non-emergent, but state law failed to tell the individual what his next steps should be).
86. See, e.g., *Thornsberry v. Kerstein*, No. 20-cv-00182, 2021 WL 4784817, at \*4 (E.D. Ark. Aug. 31, 2021), *report and recommendation adopted*, No. 20-cv-00182, 2021 WL 4785791 (E.D. Ark. Oct. 13); *Williams v. Buchanan*, No. 19-cv-1192, 2021 WL 488099, at \*5 (S.D. Ill. Feb. 10, 2021) (dismissing for non-exhaustion where the plaintiff did not resubmit a grievance that had been rejected as an emergency grievance); *Rachel v. Troutt*, No. CIV-15-141-R, 2017 WL 9802855, at \*5–6 (W.D. Okla. Oct. 31, 2017) (dismissing for non-exhaustion where prison officials disputed grievance's emergency designation, finding that the determination of whether a plaintiff has raised an "emergency" is within the discretion of prison officials),

As to the second point—speedy processing—a functional emergency grievance process is one that can be exhausted expeditiously. Some jurisdictions appropriately require emergency grievances to be answered within a few days or even hours. For example, Colorado and Wyoming require grievances deemed emergencies to be answered within three business days.<sup>87</sup> Virginia and Washington require a response within eight hours.<sup>88</sup> By contrast, some jurisdictions have an emergency grievance process only in name, without any specific timeframes or with timeframes almost as lengthy as for regular grievances.<sup>89</sup>

In addition, an expedited response time is not all that is needed to guarantee that incarcerated plaintiffs will be able to access courts quickly. The standard appeal process in most grievance systems is a multi-level, time-consuming process, and unless otherwise specified, is available to those seeking relief under emergency procedures. This means that, before bringing a claim for emergency relief to federal court, a prospective plaintiff would need to exhaust the entire appeal process. So expedited second level review is just as important as expedited first level response. Moreover, the need for speed demands that emergency grievance processes allow for no more than a two-step process (e.g., an initial grievance and an expedited appeal). Washington's emergency grievance system provides a helpful model, at least with regard to its timeline. Its policy is unique in that it requires an appeal of an emergency grievance to be answered within twenty-four hours and clearly specifies that a third level appeal, which would be available for standard grievances, is not available for

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*report and recommendation adopted*, 2018 WL 1173000 (Mar. 6, 2018), *aff'd*, 764 F. App'x 778 (10th Cir. 2019).

87. Colo. Dep't of Corr., *supra* note 84, at 8; Wyo. Dep't of Corr., Pol'y & Proc. No. 3.100, Inmate Communication and Grievance Procedure 18 (2019), <https://docs.google.com/a/wyo.gov/viewer?a=v&pid=sites&srcid=d3lvLmdvdnxb2N8Z3g6NjZmYzgyNDY2OGFhODc1YQ> [<https://perma.cc/Z2N2-P3XV>].
88. Va. Dep't of Corr., Operating Proc. 866.1, Offender Grievance Procedure 14 (2021), <https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-866-1.pdf> [<https://perma.cc/69D3-GYH2>]; Wash. State Dep't of Corr., *supra* note 84, at 8.
89. New York and Illinois, for example, include no specific timeframe for response to emergency grievances. N.Y. State Dep't Corr. & Cmty. Supervision, No. 4040, Inmate Grievance Program 14 (2016), <https://doccs.ny.gov/system/files/documents/2020/11/4040.pdf> [<https://perma.cc/5UZN-LF59>]; Ill. Dep't of Corr., *supra* note 83, at 12 (2003), <https://www.law.umich.edu/special/policyclearinghouse/Documents/Illinois%20Grievance%20Procedures.pdf> [<https://perma.cc/C44A-FQW9>]. Although Texas exempts emergency grievances from the informal resolution process, it subjects them to the same forty-day deadline for regular grievances. Step II appeals in Texas are available for emergency grievances and include a forty-five-day response time (thirty-five days for medical emergency grievances). Tex. Dep't of Crim. Just., *supra* note 84, at 17–18, 59, 78.

emergencies.<sup>90</sup> Other states, by contrast, do not specify a similarly expedited timeline for an appeal of an emergency grievance.<sup>91</sup>

Finally, if an emergency grievance process is going to provide the possibility of relief or meaningful access to courts for incarcerated people facing emergencies, the procedures must be straightforward. Prison grievance procedures are notoriously cumbersome and complex—difficult to follow under the easiest of circumstances, let alone during a crisis.<sup>92</sup> Emergency grievance procedures should be written in simple language, and should be available in multiple languages and accessible formats for non-English speakers and people with disabilities. The emergency grievance procedures, including appeals, should be entirely contained in one section of the grievance policy—rather than scattered throughout, as seen in several policies that do not provide for emergency-specific appeal processes.<sup>93</sup> Prisons and jails should allow third parties to submit grievances in the event that the emergency itself, or other factors such as mental disability or fear of reprisal, present barriers to filing.<sup>94</sup>

Given that prisons and jails may lack incentives to improve emergency grievance procedures,<sup>95</sup> state legislatures, which have in recent times been more active in efforts to reform civil rights litigation,<sup>96</sup> can step in where the agencies themselves do not provide working solutions. It is well within the authority of state legislatures that wish to avoid the negative consequences

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90. Wash. State Dep't of Corr., *supra* note 84, at 7, 8.

91. See, e.g., Colo. Dep't of Corr., *supra* note 84; Miss. Dep't of Corr., *supra* note 83, at 7–8; N.Y. State Dep't Corr. & Cmty. Supervision, *supra* note 89; N.C. Dep't of Pub. Safety, Administrative Remedy Procedure 8–9 (2013), [https://files.nc.gov/ncdps/div/Prisons/Policy\\_Procedure\\_Manual/G.0300\\_08\\_01\\_13.pdf](https://files.nc.gov/ncdps/div/Prisons/Policy_Procedure_Manual/G.0300_08_01_13.pdf) [<https://perma.cc/S3SQ-VDBG>].

92. See Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 592–93 (2006).

93. See *supra* note 91.

94. In the context of claims involving sexual assault in prisons, the Department of Justice recognized the importance of allowing third parties to submit grievances on behalf of incarcerated people. The regulations implementing the Prison Rape Elimination Act require prisons and jails to allow grievances filed by third parties. 28 C.F.R. § 115.52 (2020).

95. See Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. Pa. J. Const. L. 139, 149 (2008).

96. Alexander A. Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 Nw. U. L. Rev. 737, 769–75 (2021). For recent examples of state statutes enacted to facilitate civil rights litigation, see Act of June 19, 2020, ch. 110, § 3, 2020 Colo. Sess. Laws 445 (codified as amended at Colo. Rev. Stat. § 13-21-131 (2021)), amended by Act of July 6, 2021, ch. 458, § 6, 2021 Colo. Sess. Laws 3054; New Mexico Civil Rights Act, ch. 119, 2 N.M. Laws 1849 (2021) (codified at N.M. Stat. Ann. §§ 41-4A-1 to 41-4A-13).

of the PLRA's exhaustion rule to overrule it by state legislation.<sup>97</sup> After all, even the jurisdictional bar of sovereign immunity can be waived by state statute.<sup>98</sup> And the Supreme Court has been clear: the PLRA exhaustion requirement is not jurisdictional.<sup>99</sup> In fact, it's not even a pleading requirement, but rather an affirmative defense.<sup>100</sup> Accordingly, it may be intentionally waived, or forfeited by defendants' failure to raise it (or failure to timely raise it).<sup>101</sup>

Statutory waiver certainly suffices for cases against government entities,<sup>102</sup> but we think it would also be dispositive in damages actions against state or local employees. After all, the PLRA's caselaw holds that waiver of administrative exhaustion need not be by the particular individual defendant.<sup>103</sup> Rather, courts have consistently held that if prison officials decide the merits of a grievance rather than rejecting it for procedural noncompliance, an individual defendant cannot rely on that noncompliance to seek dismissal of subsequent litigation for non-exhaustion.<sup>104</sup> As the Ninth Circuit put it:

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97. Reinert et al., *supra* note 96.
98. See *Sossamon v. Texas*, 563 U.S. 277, 284–85 (2011) (first citing *Coll. Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680 (1999); and then *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 101–102 (1989)).
99. *Woodford v. Ngo*, 548 U.S. 81, 101 (2006).
100. *Jones v. Bock*, 549 U.S. 199, 214 (2007); *Handberry v. Thompson*, 446 F.3d 335, 342 (2d Cir. 2006).
101. See, e.g., *Handberry*, 446 F.3d at 342–43 and cases cited therein, finding the defense waived or conceded. See also *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 679–80 (4th Cir. 2005) (rejecting the argument that exhaustion defense is “not forfeitable” (quoting *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 395 (4th Cir. 2004))); *Johnson v. Testman*, 380 F.3d 691, 695–96 (2d Cir. 2004) (holding the defense was waived by failure to assert it in the district court); *Smith v. Mensinger*, 293 F.3d 641, 647 n.3 (3d Cir. 2002) (holding defense can be, and was, waived); *Randolph v. Rodgers*, 253 F.3d 342, 347 n.11 (8th Cir. 2001) (citing *Randolph v. Rodgers*, 170 F.3d 850, 857 n.8 (8th Cir. 1999)); *Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999).
102. Some such cases proceed formally against government entities; others, seeking injunctive relief, are nominally against government officers but are for all intents and purposes (except sovereign immunity) against the government. See *Ex Parte Young*, 209 U.S. 123, 138 (1908); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citing *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985) (noting that the real party in interest in an injunctive case against government officers is the state)).
103. *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004) (“We are mindful that the primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued; the grievance is not a summons and complaint that initiates adversarial litigation.”).
104. *Does 8–10 v. Snyder*, 945 F.3d 951, 962 (6th Cir. 2019) (citing *Reed-Bey v. Pramstaller*, 603 F.3d 322, 325 (6th Cir. 2010)); *Rinaldi v. United States*, 904 F.3d 257, 271 (3d Cir. 2018) (“We simply reaffirm . . . that when an inmate’s allegations

When prison officials opt not to enforce a procedural rule but instead decide an inmate's grievance on the merits, the purposes of the PLRA exhaustion requirement have been fully served: prison officials have had a fair opportunity to correct any claimed deprivation and an administrative record supporting the prison's decision has been developed. Dismissing the inmate's claim for failure to exhaust under these circumstances does not advance the statutory goal of avoiding unnecessary interference in prison administration. Rather, it prevents the courts from considering a claim that has already been fully vetted within the prison system.<sup>105</sup>

This rule, said the Court of Appeals, serves the government's additional interest in:

"deciding when to waive or enforce its own rules" . . . "tak[ing] into account the likelihood that prison officials will benefit if given discretion to decide, for reasons such as fairness or inmate morale or the need to resolve a recurring issue, that ruling on the merits is better for the institution and an inmate who has attempted to exhaust available prison remedies."<sup>106</sup>

And specifically, courts have consistently rejected the argument that government agencies cannot waive the non-exhaustion defense that

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'have been fully examined on the merits' and 'at the highest level,' they are, in fact, exhausted.") (quoting *Camp v. Brennan*, 219 F.3d 279, 281 (3d Cir. 2000)); *Whatley v. Smith*, 898 F.3d 1072, 1083 (11th Cir. 2018) ("[A] prisoner has exhausted his administrative remedies when prison officials decide a procedurally flawed grievance on the merits. . . . [D]istrict courts may not enforce a prison's procedural rule to find a lack of exhaustion after the prison itself declined to enforce the rule.") (quoting *Whatley v. Warden, Ware State Prison*, 802 F.3d 1205, 1215 (11th Cir. 2015)); *Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016); *Whatley*, 802 F.3d at 1213–14 ("We join our sister Circuits in holding that district courts may not find a lack of exhaustion by enforcing procedural bars that the prison declined to enforce."); *Hammett v. Cofield*, 681 F.3d 945, 947 (8th Cir. 2012) (per curiam) (stating "all circuits that have addressed it have concluded that the PLRA's exhaustion requirement is satisfied if prison officials decide a procedurally flawed grievance on the merits" and citing cases); *Hill v. Curcione*, 657 F.3d 116, 125 (2d Cir. 2011) (holding "the exhaustion requirement of the PLRA is satisfied by an untimely filing of a grievance if it is accepted and decided on the merits by the appropriate prison authority."); *Maddox v. Love*, 655 F.3d 709, 722 (7th Cir. 2011) ("Where prison officials address an inmate's grievance on the merits without rejecting it on procedural grounds, the grievance has served its function of alerting the state and inviting corrective action, and defendants cannot rely on the failure to exhaust defense.") (citing *Conyers v. Abitz*, 416 F.3d 580, 585 (7th Cir. 2005))).

105. *Reyes*, 810 F.3d at 658 (citations omitted) (first citing *Porter v. Nussle*, 534 U.S. 516, 525 (2002); and then citing *Woodford v. Ngo*, 548 U.S. 81, 93 (2006)).

106. *Reyes*, 810 F.3d at 658 (first quoting *Reed-Bey*, 603 F.3d at 325; and then quoting *Hammett*, 681 F.3d at 948).

otherwise would be available to individual litigation defendants since the exhaustion requirement is intended to serve institutional purposes, and since the grievance system at issue did not give individual employees a role in controlling the resolution of grievances.<sup>107</sup>

The impact of the PLRA's exhaustion requirement is heavily dependent on states and municipalities—on the grievance procedures they design and on their choice of whether to assert the defense. Whether by creating functioning grievance systems that remedy emergency situations or provide a swift process that allows potential plaintiffs timely access to federal courts, or by enacting a statutory waiver of the exhaustion defense, state and local governments can solve the problem we identify.

### C. Solution 3: Federal Amendment

As already discussed, courts can solve the emergency relief issue by implementing the PLRA by its terms—as *Ross v. Blake* insists. Or the emergency relief issue can be solved at the state or local level—prison and jail systems can enact a simple and timely emergency grievance system or state and local legislatures can statutorily waive exhaustion for emergencies. A third solution is within the power of the Congress. It is to provide that, in an emergency, as defined by responsible agencies of government or found by the court, a federal district court may order relief without waiting for the prison administrative process. That relief must be limited in time and scope to prevent or remedy significant risk of harm arising from the emergency. Proposed legislative language follows<sup>108</sup>:

Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended by adding at the end the following:

(1) RELIEF WITHOUT EXHAUSTING ADMINISTRATIVE REMEDIES.—Notwithstanding the other provisions of this section, during an emergency circumstance, a prisoner need not exhaust administrative remedies with respect to prison conditions that pose a significant risk

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107. See *Alexander v. Fillion*, No. 16-cv-64, 2017 WL 1347998, at \*4 (W.D. Mich. Mar. 14, 2017) (rejecting contention that “even if the MDOC waived the procedural rule during the grievance process, the individual Defendants never expressly waived their right to enforce it. . . . Defendants’ argument has no merit because they do not have any individual right in enforcing a procedural rule within the MDOC grievance procedure.”), *report and recommendation adopted*, 2017 WL 1330307, at \*1 (W.D. Mich., Apr. 11, 2017); *Benyamini v. Swett*, No. 13-cv-735, 2015 WL 4879599, at \*5–6 (E.D. Cal., Aug. 14, 2015), *report and recommendation adopted*, No. 13-cv-735, 2015 WL 5611096, at \*1 (E.D. Cal., Sept. 23, 2015); *Jewkes v. Shackleton*, No. 11-cv-00112, 2012 WL 5332197, \*4–5 (D. Colo., Oct. 29, 2012), *appeal dismissed*, No. 12-1479 (10th Cir., June 11, 2013).

108. This proposed bill text addresses only administrative exhaustion because that’s the subject of this article. Other PLRA amendments responsive to emergencies—for example, relaxing the constraints on emergency releases from dangerous confinement—would also be appropriate.

of harm, including access to counsel, to the prisoner before bringing an action related to the emergency circumstance under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law.

(2) DEFINITIONS.—For purposes of this subsection, the term ‘emergency circumstance’ means—

(A) an instance in the geographic area in which the prisoner is located, with respect to which—

(i) the President has declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.);

(ii) the Secretary of Health and Human Services has declared an emergency pursuant to the Public Health Service Act (42 U.S.C. §§ 201 et seq.);

(iii) there has been an emergency or disaster declaration or resolution by a tribe; or

(iv) there has been a State, county, or local emergency or disaster declaration pursuant to State law; or

(B) a situation at a particular jail, prison, or correctional facility presents an immediate and significant risk to health or safety of the prisoner or prisoners.

As can be seen, this proposed exception to the exhaustion requirement is closely tailored to the emergency circumstances, both in substance and in duration, so as not to undermine the present exhaustion requirement, which will continue to govern in non-emergency circumstances. A complaint that is not exhausted and that claims an emergency not declared by the relevant government actor, and not otherwise deemed an emergency by the court, would be dismissed for non-exhaustion. The current Congress probably lacks the necessary appetite for such reform, but perhaps a future Congress could implement this legislative solution. It is a modest and narrow amendment that largely leaves intact the exhaustion requirement.

### Conclusion

The PLRA’s exhaustion requirement has, for the last twenty-five years, repeatedly closed the courthouse doors to incarcerated plaintiffs seeking to vindicate the constitutional rights meant to protect their health and safety behind bars. This is by no means a revelation.<sup>109</sup> The COVID-19

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109. Schlanger, *Inmate Litigation*, *supra* note 3, at 1667–68.

pandemic, however, has placed in stark relief just how difficult it is for those in prison to get a hearing on the merits of their claims for emergency relief. The three types of solutions proposed in this article—the interpretative solution, the state or local solution, and the federal legislative solution—either alone or in combination, would alleviate some of the difficulties faced by incarcerated plaintiffs seeking emergency relief, increasing the possibility that courts would hear prisoner rights cases on the merits. To be sure, even with all of these solutions implemented, incarcerated plaintiffs seeking relief from pandemic-related constitutional violations face an uphill battle to surmount many obstacles, among them: the stringent constitutional standards that govern these claims;<sup>110</sup> other provisions of the PLRA, most notably, the constraints on federal courts' ability to grant release as a remedy;<sup>111</sup> and inadequate access to counsel. Nonetheless, prison litigation in and about the current pandemic has shown that justice requires easing the burden of exhaustion in these limited emergency circumstances.

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110. See sources cited *supra* note 3.

111. 18 U.S.C. § 3626(a)(3).