PLRA EXHAUSTION IN THE COVID-19 PANDEMIC: A SIMPLE DEAD END

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INTRODUCTION

In 2020, no one could ignore two features that dominated news headlines: the COVID-19 pandemic and the nationwide protests against racial injustice. These issues are intertwined, as troubling statistics revealed the pandemic's disproportionate effects on racial minorities. This interplay was perhaps most severe in United States prisons, where the inmate population's exposure to unsafe conditions reflects society's most troubling disparities.

Take Ronald Marshall, a 46-year-old Black man from New Orleans, who is a published author, adviser, and student of the law. He's also incarcerated at Rayburn Correctional Center in Washington Parish, Louisiana, where he has served 24 years of a 49.5-year sentence.[1] There Ronald can usually be found facilitating support groups or toiling away on a legal brief about constitutional rights or Louisiana's criminal law. But the pandemic has disrupted his work, because he suffers from underlying medical conditions that make him susceptible to developing serious complications if he contracts COVID-19.

Ronald recognized from the beginning of the pandemic that his life was in danger. Crammed in tight living spaces with dozens of other incarcerated men and lacking adequate personal hygiene supplies, he was stuck in an environment primed for an outbreak. He quickly sought injunctive relief against the secretary of the Louisiana Department of Public Safety and Correc-

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1. We'll leave discussion of the merits and constitutionality (or lack thereof) of Ronald's conviction and sentence for another day.

tions and the warden of Rayburn Correctional Center for their failure to create and implement policies to meaningfully address the virus.[2] This failure, Ronald argued, violated his Eighth and Fourteenth Amendment rights under the United States Constitution, which protect against cruel and unusual punishment by state actors.[3] Ronald's claim was dismissed—not because it lacked merit—but because he brought it too soon, failing to exhaust the labyrinthine grievance process run by the very officials who were responsible for his predicament.

That's right. In a pandemic in which every action seems to be a day late and a dollar short, Ronald acted too early and was rewarded with his claims for basic protections being dismissed. The culprit is the Prison Litigation Reform Act ("PLRA"), which requires incarcerated people to exhaust administrative remedies before filing a lawsuit in federal court.[4] The PLRA does not account for the fact that every second that ticks by without proper COVID-19 protection could be the difference between life and death for people like Ronald. Incarcerated people are told to wait until their grievances are denied or become moot, through infection or even death, before being allowed to bring suit. This result is untenable—"a remedy for unsafe conditions need not await a tragic event."[5]

The PLRA requires incarcerated people to exhaust all "available" administrative remedies. But in the context of the COVID-19 pandemic, prison grievance processes do not fit the problem and instead act as "simple dead ends" because they cannot provide incarcerated people with timely relief.[6] These processes are therefore unavailable. This Article argues that the PLRA's exhaustion requirement should not be used to block an incarcerated person's COVID-19-related claims in federal court and that a new

2. Motion for Temp. Restraining Ord. at 1, Marshall v. LeBlanc, No. 18-13569 (E.D. La. Apr. 24, 2020).

3. *Id.* The Eighth Amendment requires state actors to provide incarcerated people with reasonable safety and to address serious medical needs that arise in prison. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

4. Ronald began the administrative grievance process before filing his claim. *See* 42 U.S.C. § 1997e(a).

5. Helling v. McKinney, 509 U.S. 25, 33 (1993).

6. *See* Ross v. Blake, 136 S. Ct. 1850, 1859 (2016).

example of unavailability should be recognized in the jurisprudence.[7]

Part I of this Article discusses the history of the PLRA and the effect of its exhaustion requirement. Part II discusses how the COVID-19 pandemic has rendered existing interpretations of the exhaustion requirement's "availability" untenable. Part III follows *Valentine v. Collier* from a geriatric prison in Grimes County, Texas, to the United States Supreme Court and back. *Valentine* illustrates the application of the PLRA's exhaustion requirement during the COVID-19 pandemic. Part IV posits that the PLRA exhaustion requirement should not close the courthouse doors to incarcerated people seeking protection from the COVID-19 pandemic and suggests methods that would lessen or remove the obstacles those individuals face when attempting to assert the rights granted to them by the United States Constitution.

I. PRISON LITIGATION REFORM ACT

The PLRA[8] was passed to remedy a perceived problem: incarcerated people using frivolous civil rights lawsuits and other abusive tactics to clog up the federal court system.[9] One of the PLRA's reforms to address this perceived problem is an exhaustion requirement for prisoner civil rights claims, meaning state prisoners must exhaust their state-law administrative remedies before filing a civil rights suit in federal court.[10] This requirement is not trivial. The exhaustion process—which varies among the fifty states—is often burdensome and haphazardly administered, with many hurdles to a speedy and meaningful resolution. As a result, prisoner litigation and rulings on the merits in prisoner civil rights cases have decreased substantially since the PLRA's enactment.

Although this result seems to align with the exhaustion requirement's intended purpose, its practical application may have gone too far. Courts have unnecessarily limited the exhaustion

7. This Article is only about an incarcerated person's first step in obtaining relief—being allowed to sue. What is not addressed is the immeasurably high burden that an incarcerated person faces once they get into court: showing that prison officials were deliberately indifferent to the risk of harm.

8. 42 U.S.C. § 1997e(a).

9. *See* Part I(A), *infra*.

10. *See* Part I(B), *infra*.

requirement's one guardrail—the "availability" requirement—to a few specific applications, denying access to meaningful civil rights protections for incarcerated people for whom adequate procedures are practically unavailable. This outcome has long been a scar on the PLRA, but lately it has become untenable in the face of the COVID-19 pandemic. This Part examines the PLRA's historical background and the factors that have led to the current jurisprudential predicament.

A. LEGISLATIVE HISTORY OF THE PLRA

The PLRA was born out of the litigation reform movement that came to a head in the 1990s and was influenced by damning allegations of frivolous litigation.[11] Republican Senator Bob Dole introduced a bill to enact the PLRA on May 25, 1995.[12] The bill was revised and reintroduced on September 27, 1995, though it was not ultimately passed until 1996, as part of the Omnibus Public Services Appropriations Act of 1996.[13] In his statements in support of the Act, Senator Dole explained to his Senate colleagues that the bill's purpose was to "address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners."[14] Senator Dole explained that a "litigation explosion" from incarcerated people was resulting in "due process and cruel and unusual punishment complaints" based on "far-fetched" grievances such as "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety."[15] For Senator Dole and many of his Senate colleagues, these anecdotes seemed to call out for reform. The prob-

11. *See generally* Darryl M. James, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America*, 12 LOY. J. PUB. INT. L. 465 (2011) (describing the perceived need for prison litigation reform in the 1990s).

12. 141 CONG. REC. S7524, 1995 WL 317157.

13. 141 CONG. REC. S1279, 1995 WL 568915; Pub. L. No. 104-134, 110 Stat. 1321 (1996).

14. *Id.*

15. *Id.* There are disputes as to the factual validity of these examples provided by Senator Dole. *See, e.g.*, Kathryn F. Taylor, *The Prison Litigation Reform Act's Administrative Exhaustion Requirement: Closing the Money Damages Loophole*, 78 WASH. U. L.Q. 955 (2000).

lem with these anecdotes, however, is that they "were at best highly misleading and, sometimes, simply false."[16]

The PLRA drafters did not hide their litigation suppression strategies. Senator Dole explained that the PLRA would curb what he viewed as frivolous litigation by requiring incarcerated people to pay court costs or have their prison trust accounts garnished.[17] The Act would also require judicial screening of any prisoner's civil complaint and provide a mechanism for courts to dismiss suits immediately in some circumstances, such as when the screening process revealed that the complaint failed to state a claim on which relief could be granted or the defendant was immune from suit.[18] These requirements were well tailored to cut down prisoner litigation in federal courts.

The PLRA's most effective weapon, however, would turn out to be a requirement that "[s]tate prisoners exhaust all administrative remedies before filing a lawsuit in Federal court."[19] This so-called "exhaustion requirement" has its own unique legislative history.

B. THE PLRA'S EXHAUSTION REQUIREMENT

The PLRA's exhaustion requirement seemed to answer a call from the nation's highest court. Before the PLRA, lower courts had discretion to decide whether to require exhaustion of administrative remedies for prisoner suits.[20] In *McCarthy v.*

16. Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996). For example, the "chunky peanut butter case" was actually a suit filed because the prisoner "had ordered two jars of peanut butter; one sent by the canteen was the wrong kind, and a guard had quite willingly taken back the wrong product and assured the prisoner that the item he had ordered and paid for would be sent the next day." *Id.* at 521–22. The prisoner's money was never returned, and, as Judge Newman points out, while $2.50 is not a large sum of money, "such a sum is not trivial to the prisoner whose limited prison funds are improperly debited." *Id.* at 522. *See also* AM. CIVIL LIBERTIES UNION OF OR. NAT'L PRISON PROJECT, THE TOP TEN NON-FRIVOLOUS LAWSUITS FILED BY PRISONERS, http://jailfire.net/documents/aclu1.pdf (compiled to respond to various "top ten" lists of frivolous lawsuits "touted by various attorney generals" in support of the PLRA).

17. 141 CONG. REC. S1279, 1995 WL 568915; Pub. L. No. 104-134, 110 Stat. 1321 (1996).

18. *Id.*

19. *Id.*

20. *See* McCarthy v. Madigan, 503 U.S. 140, 150 (1992) ("§ 1997e does not mechanically require exhaustion in every case where an acceptable state procedure is

Madigan, decided in 1992, the United States Supreme Court considered the pre-PLRA version of 42 U.S.C. § 1997e and explained that because Congress had not "clearly required exhaustion" for prisoner suits, "sound judicial discretion govern[ed]."[21] At least one congressman during the 1995 legislative session viewed McCarthy as an invitation to rewrite the exhaustion rules. During floor debate on a precursor bill to the PLRA, Representative Frank LoBiondo opined that the Court in *McCarthy* "made th[e] point" about exhaustion "almost to the point of asking that Congress do something."[22] Representative LoBiondo proposed as a part of his Prisoner Lawsuit Efficiency Act that the "exhaustion of administrative remedies for prisoners bringing suit be "requir[ed]."[23]

That exhaustion requirement aligned perfectly with the PLRA's purpose. The bill's original co-sponsor, Senator Jon Kyl, argued in support of exhaustion "given the burden that the cases place on the Federal court system, the availability of administrative remedies, and the lack of merit of many of the claims filed under 42 U.S.C. section 1983."[24] Senator Dole supported the addition, explaining that the exhaustion requirement would "go a long way to take the frivolity out of frivolous inmate litigation."[25]

For these reasons, the exhaustion requirement was written into the PLRA's final draft. The PLRA as enacted 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*.[26]

With this language, incarcerated people are now barred from filing any Section 1983 lawsuit in federal court before exhausting all available administrative remedies. As a result, claims will be heard on the merits only after a prisoner overcomes all administrative hurdles and exhausts all associated remedies.

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in place. Rather, it directs federal courts to abstain 'if the court believes that such a [waiting] requirement would be appropriate and in the interests of justice.'").

21. *Id.* at 144.

22. 141 CONG. REC. H14105, 1995 WL 716064.

23. *Id.*

24. 141 CONG. REC. S7527, 1995 WL 317157.

25. 141 CONG. REC. S14414, 1995 WL 568915.

26. 42 U.S.C. § 1997e(a) (emphasis added).

C. PLRA EXHAUSTION IN PRACTICE

The PLRA does not define when a prisoner has "exhausted" their administrative remedies, so the bounds of proper exhaustion have been jurisprudentially defined.[27] According to the Supreme Court, exhaustion of "available" remedies means incarcerated people must exhaust all administrative remedies provided by state prison systems, "not just those that meet federal standards."[28] Exhaustion is required not only for Section 1983 relief but for *all* suits challenging prison conditions.[29] If administrative remedies are "available," judges have no discretion to excuse the exhaustion requirement, even if a court determines that "special circumstances" exist to justify an incarcerated person's failure to comply with administrative procedures.[30] Congress thus used the Supreme Court's statement in *McCarthy* that "sound judicial discretion" should govern the exhaustion analysis as the catalyst to strip federal courts of this discretion in the PLRA.

Judicial interpretation of the PLRA's exhaustion requirement means that incarcerated people must navigate a confusing patchwork of grievance procedures before having the opportunity to seek federal relief. There is no nationwide procedure for prisoner grievances. Instead, the requirements for administrative exhaustion vary from state-to-state.[31] Many states' processes do share some common features, like being highly technical and deferential to prison officials' discretion.[32]

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27. *See id.*; *see also* Ross v. Blake, 136 S. Ct. 1850, 1856–58 (2016) (summarizing PLRA exhaustion litigation in the Supreme Court).

28. Woodford v. Ngo, 548 U.S. 81, 85 (2006).

29. *Id.* Incarcerated people must exhaust administrative remedies for constitutional claims, even though there is typically a constitutional claims exception to administrative law exhaustion. *Ross*, 136 S. Ct. at 1863 (Breyer, J., concurring); *see also* Mathews v. Eldridge, 424 U.S. 319, 330–31 (1976) (reviewing a constitutional claim on the merits although the plaintiff conceded he did not fully exhaust his administrative remedies).

30. *Ross*, 136 S. Ct. at 1863, 1856; Valentine v. Collier, 978 F.3d 154, 160 (5th Cir. 2020) ("*Valentine VI*") ("[C]ourts have zero discretion to hear unexhausted claims.").

31. *See* Cara Mazor, *Blog: The Administrative Remedy Exhaustion Requirement Under the Prison Litigation Reform Act of 1996 and its Current Impact on Prisoners' Rights*, 10 MOD. AM. 70 (2017), https://digitalcommons.wcl.american.edu/tmavol10/iss1/7.

32. *See* MICHIGAN LAW, PRISON AND JAIL GRIEVANCE POLICIES, *available at* https://www.law.umich.edu/facultyhome/margoschlanger/Pages/PrisonGrievanceProceduresandSamples.aspx (providing links to grievance policies for every state prison system) (last visited April 8, 2021).

In Louisiana, for example, a prisoner must initiate a grievance process through a "request to the warden . . . made in writing within a 90 day period" after the incident occurs—although that requirement "may be waived when circumstances warrant."[33] The request can be made through an Administrative Remedy Procedure ("ARP") form, if the particular prison furnishes those forms, or through any written communication containing the phrases "ARP" or "[t]his is a request for an administrative remedy."[34] The grievance is then screened and either accepted or rejected.[35] If the grievance is accepted, the incarcerated person then "must use the manila envelope that is furnished to him" to continue the procedure with a "first step."[36] The warden must respond to a "first step" grievance within 40 days.[37] If the incarcerated person disputes the warden's determination, they have five days from receipt of the decision to pursue their "second step" grievance "to the secretary [of the Department of Corrections], through the chief of operations/office of adult services."[38] The final decision on the "second step" must be made in 45 days, and only then (or if 90 days has elapsed since the initiation of the grievance process with no decision) can the prisoner seek relief from the courts.[39]

Requiring incarcerated people to complete such "onerous and error-inviting" grievance procedures "immediately transformed" the prisoner litigation landscape.[40] Just five years after the PLRA was passed, prisoner filings had decreased by 43%, even though the prison population increased by 23% in that time period.[41] In Louisiana, in 1995, 1,548 prisoner suits were filed by a total jail and prison population of 38,106—a rate of 40.6 filings per 1000 prisoners.[42] By 2014, that rate was 12.7—623 prisoner suits were filed in Louisiana that year, from a total jail and prison popula-

33. LA. ADMIN CODE tit. 22, pt. I, § 325 (G) (2021).

34. *Id.* § 325 (G)(1)(a)(i).

35. *Id.* § 325 (I).

36. *Id.* § 325 (I)(b)(ii).

37. *Id.* § 325 (J)(1)(a)(ii).

38. *Id.* § 325 (J)(1)(a)(iii).

39. *Id.* § 325 (J)(1)(b)(ii), (iv), (c).

40. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Approaches 20*, 27 CORR. L. REP. 69, 69–70 (2017).

41. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559–60 and tbl. I.A (2003).

42. Schlanger, *supra* note 40, at tbl. 2.

tion of 49,100.[43] Prisoner suit success rates decreased too, even though the PLRA's exhaustion requirement and screening process should theoretically ensure only meritorious claims proceeded to the courts.[44] These developments raise the concern that the PLRA's exhaustion requirement lacks sufficient guardrails to protect against prohibitive grievance policies that block needed relief.

D. THE EXCEPTION TO EXHAUSTION: WHEN ADMINISTRATIVE REMEDIES ARE "UNAVAILABLE"

There is one qualifier in the PLRA's exhaustion requirement that could serve as a necessary guardrail: incarcerated people must only exhaust those administrative remedies that "are available" to them.[45] Like the term "exhausted," "available" is not defined in the statute, so courts must determine when a remedy is "available" or "unavailable."[46]

Courts' elaboration here has not been exacting. For example, the Supreme Court, relying on English-language dictionaries, concluded that "available" means "capable of use for the accomplishment of a purpose and that which 'is accessible or may be obtained.'"[47] Therefore, a prisoner is only required to exhaust administrative procedures that are "'capable of use' to obtain 'some relief for the action complained of.'"[48] But this broad theoretical treatment then must be applied "to the real-world workings of prison grievance systems."[49]

Courts' real-world application of the availability analysis has been highly technical. This idea can be seen in the Supreme Court's most recent comprehensive analysis of "availability" in *Ross v. Blake*.[50] In *Ross*, a Maryland prisoner had not sought administrative review of his assault claim through the ARP process, because he believed that reporting the assault to the prison system's Internal Investigative Unit ("IIU") was sufficient.[51] The

43. *Id.*
44. *Id.* at tbl. 3.
45. 42 U.S.C. § 1997e(a).
46. *See* Ross v. Blake, 136 S. Ct. 1850, 1858–60 (2016) (collecting cases).
47. *Id.* (quoting Booth v. Chumer, 532 U.S. 731, 737–38 (2001)).
48. *Id.* (quoting *Booth*, 532 U.S. at 738).
49. *Id.* at 1859.
50. *Id.*
51. *Id.* at 1855.

United States Court of Appeals for the Fourth Circuit reversed the district court's dismissal on failure to exhaust grounds, determining that a "special circumstance" existed because Blake reasonably believed he had exhausted his administrative remedies.[52] The Supreme Court rejected the "special circumstances" exception to exhaustion, but remanded for a determination of whether administrative remedies were in fact available, because the record showed that Maryland officials typically dismissed ARP complaints while IIU investigations were underway.[53]

Despite this procedural outcome, the *Ross* Court did provide some helpful guidance. The Court identified three circumstances in which an administrative remedy, "although officially on the books," is not actually available.[54]

The Court's first example of unavailability is administrative. This unavailability occurs when officials are "unable or consistently unwilling to use" prescribed administrative procedures to provide relief to incarcerated people.[55] For instance, a grievance process on the books is unavailable if it allows a prisoner in the special housing unit to give a complaint to a corrections officer rather than file it themselves with the grievance clerk, but the corrections officer never files the grievance and no regulation describes an appeal mechanism for grievances that are never filed.[56] This "administrative unavailability" looks at officials' likely compliance with the given procedures, not whether those procedures (if followed) are adequate.

The Court's second example of unavailability is grounded in comprehension. This unavailability occurs when an administrative procedure "exists to provide relief, but no ordinary prisoner can discern or navigate it."[57] For example, administrative remedies are unavailable when they are described to a prisoner only in

52. *Ross*, 136 S. Ct. at 1856.

53. *Id.* at 1862.

54. *Id.* at 1859.

55. *Id.* The Court's examples of this type of unavailability were if 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" or if "administrative officials have apparent authority, but decline ever to exercise it." *Id.*

56. Williams v. Correction Officer Prianto, 829 F. 3d 118, 121, 126 (2d Cir. 2016).

57. *Ross*, 136 S. Ct. at 1859. But, if "an administrative process is susceptible of multiple reasonable interpretations, Congress has determined that the inmate should err on the side of exhaustion." *Id.*

a language that prison officials know the prisoner cannot understand.[58]

The Court's third example of unavailability is oppression. This unavailability occurs when "prison administrators thwart inmates from taking advantage of a remedy through machination, misrepresentation, or intimidation."[59] For example, a grievance process is unavailable when prison officials do not provide incarcerated people the findings issued regarding their grievances, do not provide incarcerated people appeal forms when their grievances are rejected, and ignore prisoners' attempts to file their appeals even without the forms.[60] Even this oppressive unavailability looks at prison officials' intent when implementing the given procedures, not the procedure's adequacy.

The three examples of unavailability provided in *Ross* are not exhaustive.[61] Courts interpreting *Ross* have held that the examples "are not a closed list."[62] An opening therefore exists to attack the PLRA's exhaustion requirement based on the hurdles presented by administrative remedies in the context of certain world events.

II. THE "AVAILABILITY" OF GRIEVANCE PROCEDURES IN THE COVID-19 PANDEMIC

The COVID-19 pandemic illustrates why a new approach to reviewing the "availability" of administrative remedies is needed. The unprecedented nature of the COVID-19 pandemic creates a fourth circumstance of unavailability relevant here: Administrative remedies may not be available where grievance procedures "could not provide relief before an inmate faced a serious risk of death," because the circumstance poses "an imminent risk of

58. Ramirez v. Young, 906 F.3d 530, 537–38 (7th Cir. 2018).

59. *Ross*, 136 S. Ct. at 1860.

60. Does 8-10 v. Snyder, 925 F.3d 951, 966 (6th Cir. 2019). In *Snyder*, the court also found that the grievance process outlined by the Michigan Department of Corrections presented "a classic case of Orwellian doublethink" and held that "inmates need not navigate this 'labyrinthine world of doublethink' to satisfy the exhaustion requirement." *Id.* at 963 (quoting GEORGE ORWELL, 1984, at 35 (1949)).

61. *See, e.g.*, 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.").

62. *Ramirez*, 906 F.3d at 538 ("[The three examples in *Ross*] were only examples, not a closed list. . . .").

harm that the grievance process cannot or does not answer."[63] Because we have not seen a health crisis that poses such imminent risk since 1918,[64] few courts have had the opportunity to recognize this exception to PLRA exhaustion. Without such precedent, most courts recently have taken a hardline stance regarding the PLRA's exhaustion requirement and have required incarcerated people to sit and wait in the pandemic's epicenters before defending their rights.[65] Few have taken the opportunity to apply the logic of unavailability outside the Supreme Court's prescribed examples. But unprecedented times call for unprecedented analysis.

COVID-19 quickly became a public health threat that disrupted all facets of society. The virus first appeared in 2019 and was classified by the World Health Organization as a worldwide pandemic on March 11, 2020.[66] Since then, COVID-19 has spread across the country, imperiling the healthy and vulnerable alike. The negative impacts, however, were not evenly distributed.

COVID-19 has hit Louisiana and its Black community especially hard. As of this writing, there are more than 384,292 known cases of COVID-19 in this state, with 9,388 known deaths.[67] These statistics are troubling by themselves, but a closer look at the data reveals that Black people have been affected

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63. Valentine v. Collier, 140 S. Ct. 1598, 1601 (2020) (Sotomayor, J.) ("*Valentine II*").

64. *See generally* Brian Beach et al., *The 1918 Influenza Pandemic and its Lessons for COVID-19* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27673, 2020), https://www.nber.org/system/files/working_papers/w27673/w27673.pdf.

65. *See, e.g.*, Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES, (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html.

66. *WHO Director-General's opening remarks at the media briefing on COVID-19*, HHS, (Mar. 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—-11-march-2020. COVID-19 was declared a Public Health Emergency by the United States Secretary for Health and Human Services and by Louisiana Governor John Bel Edwards. *Determination that a Public Health Emergency Exists*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES (January 31, 2020), https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx; Proclamation No. 25 JBE 2020, Public Health Emergency – COVID-19, STATE OF LOUISIANA EXECUTIVE DEPARTMENT (Mar. 11, 2020), https://gov.louisiana.gov/assets/Proclamations/2020/modified/25-JBE-2020-Public-Health-Emergency-COVID-19.pdf.

67. *See* Dan Swenson et al., *Coronavirus in Louisiana*, THE TIMES PICAYUNE | THE NEW ORLEANS ADVOCATE, https://www.nola.com/news/coronavirus/article_7cb2af1c-6414-11ea-b729-93612370dd94.html (last updated Apr. 15, 2021) (providing regularly updated data on COVID-related statistics).

disproportionately. Indeed, the data shows that the coronavirus "is infecting and killing Black Americans at an alarmingly high rate."[68] In Louisiana, Black people make up only 32% of the population but account for a shocking 70% of COVID-19 deaths.[69]

These disparities only intensify when one considers Louisiana's prison population. Black people account for 66% of Louisiana's prison population.[70] This fact is especially troubling given the combined effects of increased risk to Black populations generally and increased risk of transmission in a prison environment. As one court put it, the COVID-19 pandemic is of "unprecedented magnitude" because of the "speed of transmission."[71] There is evidence that the disease can be transmitted indirectly through contamination of common surfaces and use of communal restrooms.[72] Controlling the spread of COVID-19 is even more difficult because asymptomatic and pre-symptomatic individuals—people who have not yet exhibited any illness—can and do transmit the virus.[73]

For these reasons, COVID-19 "spreads at its quickest in closed environments," making institutions such as jails and prisons "epicenters" of the pandemic, where some of the most vulnerable citizens are located.[74] Jails and prisons are particularly dangerous right now:

> In America's jails and prisons, people share bathrooms, laundry and eating areas. The toilets in their cells rarely have lids. The toilet tank doubles as the sink for hand washing,

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68. *See, e.g.*, Reis Thebault et al., *The Coronavirus is Infecting and Killing Black Americans at an Alarmingly High Rate*, THE WASHINGTON POST (Apr. 7, 2020), https://www.washingtonpost.com/nation/2020/04/07/coronavirus-is-infecting-killing-black-americans-an-alarmingly-high-rate-post-analysis-shows/?arc404=true.

69. *See, e.g.*, Gordon Russell & Sam Karlin, *Coronavirus Disparity in Louisiana: About 70% of the Victims are Black, But Why?*, THE TIMES PICAYUNE | THE NEW ORLEANS ADVOCATE, (Apr. 6, 2020, 9:26 PM), https://www.nola.com/news/coronavirus/article_d804d410-7852-11ea-ac6d-470ebb61c694.

70. *See Louisiana Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/LA.html (last visited Apr. 4, 2021).

71. United States v. Martin, 447 F. Supp. 3d 399, 401 (D. Md. 2020).

72. *See* Jing Cai et al., *Indirect virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 EMERGING INFECTIOUS DISEASES 1343, (2020), https://doi.org/10.3201/eid2606.200412.

73. Wycliffe E. Wei et al., *Presymptomatic Transmission of SARS-CoV-2 — Singapore, January 23–March 16, 2020*, CDC (Apr. 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm.

74. Klonsky, *supra* note 65.

> tooth brushing and other hygiene. People bunked in the same cell—often as many as four—share these toilets and sinks. Meanwhile, hand sanitizer is not allowed in most prisons because of its alcohol content. Air circulation is nearly always poor. Windows rarely open; soap may only be available if you can pay for it from the commissary.[75]

Unsurprisingly, public health experts warn that incarcerated people "are at special risk of infection, given their living situations"; that they "may also be less able to participate in proactive measures to keep themselves safe"; and that "infection control is challenging in these settings."[76] Health experts knew that the question was not if, but when, COVID-19 clusters would break out in prisons.[77]

These predictions have proven true. At one prison in Ohio, 73% of prisoners—1,828 people—tested positive for COVID-19 after the prison mass-tested the prison population, including those people showing no symptoms.[78] Indeed, as of this writing, there have been over 1,700 confirmed cases in Louisiana's four federal prisons and nine prisoner deaths at FCI Oakdale in Allen Parish, Louisiana—including men as young as 43 and 49.[79] There have been over 3,200 confirmed COVID-19 cases in Louisiana state prisons, 159 of which are at Rayburn Correctional Center where

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75. *Id.*

76. Letter from Students, Yale Sch. of Pub. Health & Yale L. Sch., & Assoc. Signatories, to U.S. Fed. Offs., https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf (last updated Mar. 2, 2020, 11:21 AM).

77. Klonsky, *supra* note 65.

78. Bill Chappell & Paige Pfleger, *73% Of Inmates at an Ohio Prison Test Positive for Coronavirus*, NPR (Apr. 20, 2020, 3:58 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/838943211/73-of-inmates-at-an-ohio-prison-test-positive-for-coronavirus.

79. *COVID-19 Cases*, FED. BUREAU PRISONS, https://www.bop.gov/coronavirus/ (last updated Apr. 2, 2021); *see also* Aristos Georgiou, *Louisiana Inmate, 49, Dies from COVID-19, the First in Bureau of Prisons Federal Custody to Succumb to Coronavirus*, NEWSWEEK (Mar. 29, 2020, 6:01 AM), https://www.newsweek.com/firstfederal-inmate-49-coronavirus-bureau-prisons-facility-louisiana-1494862; Rosemary Westwood, *Third Federal Inmate Dies from COVID-19*, NPR https://www.npr.org/sections/coronavirus-liveupdates/2020/04/01/825448006/second-federal-inmate-dies-from-covid-19 (last updated Apr. 1, 2020, 3:38 PM).

Ronald Marshall is housed.[80] These are just the cases that have been publicly reported.

In response to the substantial risk of serious harm to incarcerated people, the United States Centers for Disease Control and Prevention ("CDC") issued detailed guidance specifically for correctional facilities and detention centers to ensure the safety of incarcerated people and staff. The CDC's recommendations include, *inter alia*:

- ensuring that sufficient stocks of hygiene supplies, cleaning supplies, medical supplies, and personal protective equipment are on hand and available;
- providing no-cost soap to all prisoners, and providing running water, hand-drying machines or disposable paper towels, and tissues with no-touch trash receptacles for disposal;
- providing alcohol-based sanitizer with at least 60% alcohol;
- requiring individuals with symptoms of COVID-19 to wear face masks and be placed in medical isolation;
- conducting verbal screening and temperature checks for persons who enter or are transferred to prison facilities; and
- implementing social distancing strategies to increase the physical space between prisoners, ideally to six feet.[81]

The CDC's recommendation with respect to social distancing includes staggering meal times and time in recreation spaces, rearranging seating at meals so there is more space between individuals, reassigning bunks to provide more space between individuals, and rearranging scheduled movements to minimize contact among individuals from different housing areas.[82]

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80. *COVID-19 Inmate Positives*, La. Dep't Pub. Safety & Corr., https://doc.louisiana.gov/doc-covid-19-testing/ (last updated Apr. 3, 2021) (providing daily updated statistics).

81. *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional Detention Facilities*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last updated Feb. 19, 2021).

82. *Id.*

Ronald Marshall's reality in the spring of 2020 did not reflect the CDC's recommendations.[83] Ronald was one of 78 incarcerated men confined in a dorm for 22 hours per day. These 78 men slept in bunks, row-by-row, a few feet from one another. These 78 men shared one bathroom area with 5 toilets, 6 showers, and 5 sinks. There was just a single soap dispenser for all to share, with no access to hand sanitizer or towels with which to dry their hands. They did not have access to the most basic hygiene supplies needed to keep the virus at bay.

Any social distancing protocols that existed had not been enforced. In the TV and game area of Ronald's dorm, the only place where he can obtain information about COVID-19 from news sources or the Louisiana Department of Public Safety and Corrections ("DOC"), men must sit shoulder-to-shoulder on benches—no other seating is provided. Only three small tables are available for them to study, read, or play games or cards. Two dorms—up to 156 men—travel in "bunch formation" to the cafeteria three times per day, where distancing protocols are inconsistently enforced.

No cleaning protocols have been established. Nonetheless, Ronald, as his dorm's orderly, takes it upon himself to clean the microwaves, phones, email kiosk, sinks, and TV benches daily. Neither disposable nor reusable towels are provided for surface cleaning; instead, Ronald uses unclaimed towels from the laundry to clean.

Despite the well-known fact that asymptomatic individuals can carry the virus, DOC policy is to test only those incarcerated people who exhibit "influenza like illness," meaning a "fever of 100 Degrees Fahrenheit and cough."[84] Contrast that with prisons in other states, such as the one in Ohio that is "testing everyone — including those who are not showing symptoms" and that was "getting positive test results on individuals who otherwise would have never been tested because they were asymptomatic."[85] Without proper testing protocols, DOC cannot possibly prevent the spread of the virus through its prisons.

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83. Motion for Temp. Restraining Ord., *supra* note 2, at Exhibit B, p. 2; Memorandum in Opposition to Motion for Summary Judgment at Exhibit 1, Marshall v. LeBlanc, No. 18-13569 (E.D. La. Aug. 4, 2020).

84. LA. DEP'T OF CORR., COVID-19 FAQ GUIDANCE TO PRISON FACILITIES (Apr. 6, 2020).

85. Chappell & Pfleger, *supra* note 78.

Ronald knew his life was in danger. Just weeks after the unprecedented and deadly coronavirus pandemic shut down Louisiana, Ronald sought immediate injunctive relief against DOC's secretary and Rayburn's warden for their failure to create and implement policies to meaningfully address the virus.[86] This failure, Ronald argued, violated his Eighth and Fourteenth Amendment rights.[87] Ronald initiated the administrative grievance process before filing suit, but because DOC had suspended the deadlines to respond to administrative grievances "until further notice,"[88] he did not fully exhaust the process. Ronald's claim was dismissed—not because it lacked merit—but because he brought it too soon.

Ronald's story shows that health emergencies can make grievance policies practically unavailable, even though those circumstances do not fit neatly in the prescribed unavailability examples in *Ross*. Unlike those examples, the problems associated with health emergencies get to the heart of the administrative policies themselves and ask whether time constraints make them unavailable.

III. PLRA EXHAUSTION DURING THE COVID-19 PANDEMIC: *VALENTINE V. COLLIER*

The application of the PLRA's exhaustion requirement to claims involving COVID-19 has been all over the map. Some courts have held fast to the admonishment that PLRA exhaustion is mandatory and that a plaintiff cannot succeed on the merits without it.[89] Others have found that defendants failed to meet

86. Motion for Temp. Restraining Ord., *supra* note 2.

87. *Id.*

88. Memorandum from James LeBlanc, Sec'y, La. Dep't of Pub. Safety and Corr., to all Dep't Leadership and Prison Wardens (Apr. 21, 2020).

89. S*ee e.g.*, Marlowe v. LeBlanc, 810 F. App'x 302, 306 (5th Cir. 2020) (finding that the district court's reasoning that it was compelled to act on plaintiff's COVID claims before they were exhausted in "the interests of justice" was "out-of-step with Supreme Court precedent"); Swain v. Junior, 961 F.3d 1276, 1292 (11th Cir. 2020) (considering a preliminary injunction, pre-trial detainees could not show a substantial likelihood of success on the merits because "unexhausted claims *cannot be brought* in court") (quoting Jones v. Bock, 549 U.S. 199, 211 (2007)); Johnson v. White, No. 5:20-cv-260-MTT-CHW, 2020 WL 4194990, at *4 (M.D. Ga. July 21, 2020) ("[I]t is clear on the face of Plaintiff's complaint that he has not exhausted available administrative remedies. Thus, his action must be dismissed without prejudice to his right to refile once he has exhausted these remedies."); Bell v. Ohio, No. 2:20-cv-1759, 2020 WL 1956836, at *4 (S.D. Ohio Apr. 23, 2020) ("Plaintiff failed to properly exhaust his administrative remedies before seeking judicial relief . . . . [T]he

their burden of showing that a remedy was available.[90] But few have considered the emergency nature of the COVID-19 pandemic to find administrative remedies unavailable.[91]

The United States Court of Appeals for the Fifth Circuit in its opinions in *Valentine v. Collier* seems firmly entrenched in the first camp.[92] Laddy Curtis Valentine and Richard Elvin King are individuals incarcerated at the Wallace Pack Unit ("Pack Unit").[93] They filed a putative class action in the United States District Court for the Southern District of Texas on March 30, 2020.[94] The Pack Unit is a geriatric prison facility located in unincorporated Grimes County, Texas, and houses up to 1,478 men, most of whom are 65 and older and suffer various comorbidities.[95] The *Valentine* plaintiffs claimed that the Texas Department of

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exhaustion requirements of the PLRA are mandatory and may not be altered for special circumstances."); Nellson v. Barnhart, 454 F. Supp. 3d 1087, 1094 (D. Colo. 2020) ("The Court finds that plaintiff has failed to exhaust his administrative remedies before seeking judicial relief . . . . [T]he Court may not alter the mandatory requirements of the PLRA for COVID-19 or any other special circumstance.").

90. *See, e.g.*, Gonzalez v. Ahern, No. 19-cv-07423-JSC, 2020 WL 3470089, at *4 (N.D. Cal. June 25, 2020) (finding an absence of any evidence regarding the availability of administrative remedies but denying preliminary injunction on other grounds).

Because exhaustion is a non-jurisdictional affirmative defense, a defendant bears the burden of proving that a prisoner failed to exhaust an available remedy. *Jones*, 549 U.S. at 216. The defendant "must establish beyond peradventure all of the essential elements of the defense of exhaustion to warrant summary judgment in their favor." Dillon v. Rogers, 596 F.3d 260, 266 (5th Cir. 2010). And "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones*, 549 U.S. at 216.

Only if a defendant meets this burden does the burden shift to a Section 1983 plaintiff to show that the grievance process was unavailable. *See* Williams v. Paramo, 775 F.3d 1182, 1191 (9th Cir. 2015) ("[T]he burden shifts to the plaintiff, who must show that there is something particular in his case that made the existing and generally available administrative remedies effectively unavailable to him by 'showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.'") (quoting Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014)).

91. *See, e.g.*, McPherson v. Lamont, 457 F. Supp. 3d 67, 81 (D. Conn. 2020) ("The Connecticut DOC grievance procedure, which lacks an emergency review process, was not set up with a pandemic in mind."); United States v. Vence-Small, No. 3:18-CR-00031 (JAM), 2020 WL 1921590, at *5 (D. Conn. Apr. 20, 2020) ("In light of these emergency circumstances, some judges have [waived exhaustion requirements.]").

92. The Fifth Circuit signaled the same in *Marlowe v. LeBlanc*. *See supra* note 89.

93. Valentine v. Collier, 993 F.3d 270 (5th Cir. 2021) ("*Valentine VIII*").

94. Complaint, Valentine v. Collier, No. 4:20-cv-1115 (S.D. Tex. Mar. 30, 2020).

95. Valentine v. Collier, No. 4:20-cv-1115, 2020 WL 5797881, at *4 (S.D. Tex. Sept. 29, 2020) ("*Valentine V*").

Criminal Justice ("TDCJ") violated the Eighth Amendment by acting with deliberate indifference to the health of the Pack Unit prisoners and the Americans with Disabilities Act, because TDCJ refused to accommodate the Pack Unit prisoners' disabilities by failing to provide adequate measures to protect them from the spread of COVID-19.[96]

After an evidentiary hearing, the district court entered a preliminary injunction, which did not address the issue of PLRA exhaustion even though it was undisputed that the *Valentine* plaintiffs filed suit before exhausting their administrative remedies.[97] The Fifth Circuit stayed the preliminary injunction pending an appeal on the merits.[98] Despite noting that "[t]here is no doubt that infectious diseases generally and COVID-19 specifically can pose a risk of serious or fatal harm to prison inmates,"[99] the Fifth Circuit found a stay appropriate. The Fifth Circuit reasoned that the *Valentine* plaintiffs' failure to exhaust made it all but certain that TDCJ's appeal would succeed on the merits.[100]

In his concurrence, Judge Higginson clarified that the *Valentine* stay order "does not foreclose the possibility" that the Fifth Circuit "may nonetheless conclude that a remedy using the [TDCJ's] grievance system is not 'available' because of the immediacy of the COVID-19 medical emergency coupled with statements credited by the district court that prisoners' grievances may not be addressed promptly."[101] If a prisoner has "no opportunity to expedite systemic medical emergency grievances," the Fifth Circuit "might hold that prison administrative remedies 'operate[ ] as a simple dead end' giving prison officials apparent authority though they decline to exercise it."[102] Judge Higginson's concurrence recognized the importance of considering the PLRA exhaustion requirement in the context of the current health crisis.

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96. *Id.* at *1. The *Valentine* plaintiffs' claims are for injunctive and declaratory relief only.

97. *See* Preliminary Injunction Ord., Valentine v. Collier, No. 4:20-cv-1115 (S.D. Tex. Apr. 16, 2020).

98. Valentine v. Collier, 956 F.3d 797 (5th Cir. 2020) ("*Valentine I*").

99. *Id.* at 801.

100. *See id.* at 804–05.

101. *Id.* at 806 (Higginson, J., concurring).

102. *Id.* (Higginson, J., concurring) (quoting *Ross*, 136 S. Ct. at 1859) .

The Supreme Court did not settle the issue. It refused to vacate the stay of the preliminary injunction, but Justices Sotomayor and Ginsburg—recognizing that "the stakes could not be higher"—cautioned not to understand "unavailability" too narrowly.[103] Justice Sotomayor posited that administrative remedies may not be available where grievance procedures "could not provide relief before an inmate faced a serious risk of death," because these circumstances pose "an imminent risk of harm that the grievance process cannot or does not answer."[104]

On June 5, 2020, a merits panel of the Fifth Circuit vacated the district court's preliminary injunction on the basis that TDCJ "ha[d] substantially complied with the measures ordered by the district court."[105] Notably, the *Valentine III* merits panel declined to reach the question of exhaustion and availability under the PLRA.[106] The Fifth Circuit did not suggest that the *Valentine* plaintiffs' claims should be dismissed for failure to exhaust.[107] As Judge Ellison, the district judge, later observed:

> Although each judge wrote separately, none suggested that the PLRA should bar this suit from proceeding. In fact, Judge Davis stated that this Court should resolve the "factual dispute[s]" regarding exhaustion, emphasized the need for more factual development on the merits, and encouraged this Court to move the trial to an earlier date. Id. at *1–2 & n.2 (Davis, J., concurring).[108]

Importantly, even though the *Valentine III* merits panel vacated the preliminary injunction, it urged Judge Ellison to consider expeditiously the factual disputes regarding exhaustion and the merits of the plaintiffs' demand for permanent injunctive relief. The matter moved forward to class certification and, ultimately, an 18-day bench trial.

In his order granting class certification, Judge Ellison again found that the TDCJ administrative grievance process was una-

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103. Valentine v. Collier, 140 S. Ct. 1598, 1601 (2020) (Sotomayor, J.) ("*Valentine II*").

104. *Id.* at 1600–01 (Sotomayor, J.).

105. Valentine v. Collier, 960 F.3d 707, 707 (5th Cir. 2020) (mem.) ("*Valentine III*").

106. *Id.*

107. *Id.*

108. Valentine v. Collier, No. 4:20-cv-1115, 2020 WL 3491999, at *5 (S.D. Tex. June 27, 2020) ("*Valentine IV*").

vailable and that the plaintiffs' failure to exhaust was excused.[109] Following Justice Sotomayor's lead, Judge Ellison found that "TDCJ's grievance procedure was not 'capable of use to obtain some relief,' in the form of such coordinated emergency protection from COVID-19, under two theories of unavailability": (1) TDCJ's grievance process was not "capable of use to obtain some relief" from COVID-19, because "it did not fit the problem Plaintiffs were facing"; and (2) TDCJ's grievance process operates as a "dead end" to relief, as described in *Ross*.[110]

After trial, Judge Ellison issued a permanent injunction against TDCJ, which was scheduled to become effective on October 14, 2020.[111] The Fifth Circuit, however, sounded the case's death knell in its ruling on a motion to stay the permanent injunction: "[T]he plaintiff-inmates failed to comply with the exacting procedural preconditions imposed by the Prison Litigation Reform Act, specifically the PLRA's mandatory and jurisdictional exhaustion requirement. That alone defeats this suit."[112] The Fifth Circuit reasoned that the realities of the COVID-19 pandemic in the exhaustion analysis is not a question of the availability of the grievance process, but that it is instead an application of the "special circumstances" exception that *Ross* prohibits.[113] Under this rationale, "special circumstances—even threats posed by global pandemics—do not matter"[114] and "concerns that TDCJ's grievance process was ineffective or operated too slowly" are "irrelevant."[115]

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109. *Id.* at *7–9.

110. *Id.* at *6.

111. *See* Valentine v. Collier, No. 4:20-cv-1115, 2020 WL 5797881, at *26 (S.D. Tex. Sept. 29, 2020) ("*Valentine V*"). In his Findings of Fact and Conclusions of law, Judge Ellison addressed the question of PLRA exhaustion for (at least) the third time. He again found that TDCJ's grievance process was unavailable because it "operates as a simple dead end." *Valentine V*, 2020 WL 5797881 at *26. *See also* Ord. Denying Defendants' Emergency Motion to Stay Pending Appeal, Valentine v. Collier, No. 4:20-cv-1115 (S.D. Tex. Oct. 6, 2020).

112. *Valentine VI*, 978 F.3d at 158.

113. *Id.* at 161.

114. *Id.* The PLRA's exhaustion requirement also apparently matters more than the number of lives lost to COVID-19: TDCJ's counsel argued at trial that mandatory PLRA exhaustion "'is the law'—'[e]ven if a hundred people have died, the plaintiffs would have had to wait until the grievance process was exhausted before filing suit.'" *Valentine V*, 2020 WL 5797881 at *28 (quoting Tr. 18-159:20–160:11).

115. *Valentine VI*, 978 F.3d at 162. The invitation to return to the nation's highest court for relief on the merits is surely not lost on the *Valentine* plaintiffs or others seeking similar relief. *See* Valentine v. Collier, 141 S. Ct. 57, 60 (2020) ("*Valentine VII*") (Sotomayor, J., dissenting) ("Importantly, nothing in the Court's decision today

On March 26, 2021, the bell indeed tolled for the *Valentine* case, when the Fifth Circuit reversed Judge Ellison's permanent injunction and rendered its own opinion denying all relief.[116] Judge Davis, who sat on the *Valentine III* preliminary injunction merits panel and who wrote separately to urge the district court to resolve the factual disputes regarding exhaustion expeditiously, authored the opinion. The Fifth Circuit did not consider the question whether the PLRA's exhaustion requirement required dismissal of the *Valentine* plaintiffs' claims.[117] Instead it rendered judgment in favor of TDCJ because the protective measures that TDCJ implemented during the litigation—especially the steps taken during and after the 18-day bench trial—showed that TDCJ had not acted with deliberate indifference to the *Valentine* plaintiffs' needs.[118]

Even though the *Valentine* plaintiffs suffered defeat after more than a year of litigation, not all is lost. Their lawsuit—even if brought too soon according to the PLRA—was the catalyst for efforts by TDCJ to implement significant COVID-19 protections that likely would not have been implemented without the lawsuit's pressure. Even the Fifth Circuit in dismissing *Valentine* recognized the impact: "We are firmly convinced that this litigation generally and the district court's careful management and expedited handling of the case played a role in motivating the prison officials into action and saved countless lives."[119]

As demonstrated by *Valentine*, civil rights lawsuits, even when dismissed on grounds like exhaustion, have *in terrorem* effects that ultimately provide meaningful relief to plaintiffs and others. But incarcerated people should not have to rely on the hope that prison officials will make incremental change only while a federal judge is watching. Civil rights plaintiffs should be able to trust that courts will consider their claims in context, especially when considering the question of exhaustion.

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prevents Valentine and King from returning to this Court if it becomes clear that the risks they face as a result of respondents' conduct are even graver than they already appear. Because I would not force them to wait until it may be too late, I respectfully dissent.").

116. Valentine v. Collier, 993 F.3d 270 (5th Cir. 2021) ("*Valentine VIII*").

117. *Id.* at 291.

118. *Id.*

119. *Id.* at 289.

At least in the Fifth Circuit, the question of the unavailability of prison grievance procedures during a health emergency remains unanswered. Although the Fifth Circuit has not expressly foreclosed the issue, there exists little room for optimism that it will expand its view of unavailability.[120] The result is that incarcerated people seeking relief in extreme circumstances remain outside the courthouse waiting for the very entities charged with protecting them to process their administrative grievances.

IV. OPENING THE COURTHOUSE DOORS

The mandatory PLRA exhaustion requirement cannot be a one-size-fits-all analysis, especially when an incarcerated person's need to seek relief in federal court is most dire. "[W]here 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."[121] We argue that the doors can be opened in at least three ways: (1) courts should take an expansive reading of "unavailability," specifically considering grievance processes in the context of the time-sensitive realities of the COVID-19 pandemic; (2) incarcerated people should assert legal claims with less stringent exhaustion requirements; and, (3) as a last resort, Congress should intervene.

1. COURTS SHOULD CONSIDER WHETHER A GRIEVANCE PROCESS "FITS THE PROBLEM" OR IS A "SIMPLE DEAD END."

The Supreme Court's decision in *Ross* does not handcuff courts into rote application of only three instances of unavailability.[122] Context is important, and the availability analysis neces-

120. *See Valentine VI*, 978 F.3d at 158 ("[T]he plaintiff-inmates failed to comply with the exacting procedural preconditions imposed by the Prison Litigation Reform Act, specifically the PLRA's mandatory and jurisdictional exhaustion requirement. That alone defeats this suit."); *Valentine VIII*, 993 F.3d at 294 (Oldham, J., concurring) ("[T]his case should've been dismissed at the outset because the prisoners failed to exhaust their administrative remedies. . . . And there is no COVID exception to the PLRA's exhaustion requirement[.]").

121. *Valentine II*, 140 S. Ct. at 1601 (Sotomayor, J.).

122. *Valentine IV*, 2020 WL 3491999, at *6 ("[G]iven the unprecedented nature of this pandemic, it should come as no surprise that this case, in some respects, exceeds the bounds of the three, more commonplace instances of unavailability imagined in *Ross*.").

sarily depends on the facts of each case.[123] Courts should reject the idea that the threats posed by the COVID-19 pandemic "do not matter" or are "irrelevant."[124] They should instead consider whether the grievance process "fits the problem" or if it instead is a "simple dead end."[125]

Prison grievance procedures that require incarcerated people to wait months before obtaining relief do not fit the COVID-19 pandemic.[126] Most prison grievance processes are not designed to provide emergency prison-wide protective measures, which is ex-

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123. *Id.* at *5 (citing *Ross*, 136 S. Ct. at 1859); *see also Valentine II*, 141 S. Ct. at 60 (Sotomayor, J., dissenting) ("[C]onsideration of 'the real-world workings of prison grievance systems' is central to assessing whether a process makes administrative remedies unavailable.") (quoting *Ross*, 578 U.S. at 643).

124. *Valentine VI*, 978 F.3d at 161 ("[T]he grievance process is not amenable to current circumstances. But under *Ross*, special circumstances—even threats posed by global pandemics—do not matter."); *id.* at 162 ("Under the old regime, concerns that TDCJ's grievance process was ineffective or 'operated too slowly' might have excused exhaustion. But those concerns are irrelevant under today's PLRA . . . .") (internal citations omitted).

Justice Sotomayor, joined by Justice Kagan, dissented from the Supreme Court's denial of the *Valentine* plaintiffs' application to vacate the Fifth Circuit's stay pending an appeal of the permanent injunction on the merits, finding that the Fifth Circuit "demonstrably erred with respect to both the threshold issue of exhaustion under the PLRA and the merits of the inmates' Eighth Amendment claims." *Valentine VII*, 141 S. Ct. at 59 (Sotomayor, J., dissenting).

125. Judge Ellison considered such factors as whether the plaintiff had begun the administrative process before filing a lawsuit; the length of time that elapsed since the plaintiff filed grievances and remain unresolved; the circumstances in the prison such as the number of positive COVID-19 tests and COVID-19-related deaths; and whether defendants altered their grievance process in light of COVID-19. *Valentine V*, 2020 WL 5797881, at *27.

126. *Valentine IV*, 2020 WL 3491999, at *7 (S.D. Tex. June 27, 2020). Judge Ellison stated:

> Fundamentally, the reason that TDCJ's grievance process was "not capable of use to obtain some relief" from COVID-19 is that it did not fit the problem Plaintiffs were facing. TDCJ's grievance procedure was not designed with a worldwide pandemic in mind. The unique situation presented by the COVID-19 pandemic—a highly contagious disease that poses an imminent risk of serious illness or death to all individuals in Pack Unit, at the same time—could not have been redressed through individual grievances, filed through TDCJ's normal system of grievance review. What Plaintiffs sought in the face of COVID-19 was a set of proactive, preventative measures for an imminent threat that would affect the entire prison. Yet, TDCJ's grievance procedure was not designed to field requests for swift, prison-wide preventative measures.

Id. See also Valentine V, 2020 WL 5797881 at *28 ("The grievance process also operated too slowly, given the risk to human life posed by COVID-19."); McPherson v. Lamont, 457 F. Supp. 3d 67, 79–80 (D. Conn. 2020) (agreeing that "[i]f 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") (internal quotation marks omitted).

actly what COVID-19 requires.[127] A grievance procedure "does not fit the needs of prisoners when they are faced with a quickly spreading, potentially deadly pandemic" and the procedure therefore is "not capable of use to obtain some relief from the imminent threat of COVID-19."[128]

Courts should also consider whether a grievance process is a "simple dead end," because the process does not provide incarcerated people the relief needed to be protected from the COVID-19 pandemic.[129] There is a "disconnect" between the grievance procedure and the threat of the pandemic when prison officials are either "'unable or unwilling' to provide swift, coordinated preventative relief."[130]

Consider, for example, DOC's actions during the COVID-19 pandemic. On March 23, 2020, James LeBlanc, DOC's Secretary, suspended the deadlines for DOC to respond to administrative grievances "until further notice."[131] The suspension contained no carve-out for claims relating to COVID-19.[132] The effect of this suspension is that a prisoner would have to wait an indefinite amount of time before his claims were exhausted and he was allowed to file a lawsuit.

That a grievance process simply exists "officially on the books" does not make it available.[133] If the grievance process does not fit the current health crisis, it is unavailable. So too is a process unavailable if it is simply (and possibly literally) a dead end. Health emergencies expose grievance procedures' flaws and their inability to be "available" when time is of the essence. Courts must consider the practical realities of a grievance process within

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127. *Valentine V*, 2020 WL 5797881 at *28 (noting that the existing grievance process was intended for "run-of-the-mill requests in ordinary times").

128. *Valentine IV*, 2020 WL 3491999 at *14; *Valentine II*, 140 S. Ct. at 1601–01 (Sotomayor, J.) ("[I]f 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 . . . .").

129. *Valentine VII*, 141 S. Ct. at 59 ("[T]his Court held [in *Ross*] that remedies are not available, and thus exhaustion is not required, when 'an administrative procedure . . . operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates.") (quoting *Ross*, 578 U.S. at 643).

130. *Valentine IV*, 2020 WL 3491999 at *7 (quoting *Ross*, 136 S. Ct. at 1859).

131. Memorandum from James LeBlanc, *supra* note 88.

132. *Id.*

133. *Valentine VII*, 141 S. Ct. at 59 (Sotomayor, J., dissenting).

context to determine whether that process is "capable of use to obtain relief."[134]

2. PETITIONERS CAN ASSERT LEGAL CLAIMS WITH LESS STRINGENT EXHAUSTION REQUIREMENTS.

To escape the bonds of the PLRA,[135] incarcerated people may consider filing a habeas corpus application under 28 U.S.C. § 2241, which is usually brought to challenge the length of a prisoner's confinement. Section 2241, however, can also encompass conditions of confinement claims when incarcerated people seek release because the fact of their confinement creates a constitutional violation.[136] A prisoner's ability to challenge the fact of confinement and seek release falls at "the heart of habeas corpus."[137] Some courts have determined that Section 2241 is a proper vehicle to seek release due to unconstitutional conditions of confinement.[138]

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134. *Id.*

135. The PLRA does not apply to habeas petitions under 28 U.S.C. §§ 2241, 2254, or 2255. *See* Walker v. O'Brien, 216 F.3d 626, 629 (7th Cir. 2000).

136. There are important distinctions between a habeas corpus action, which challenges the fact of confinement, and a civil-rights action under 42 U.S.C. § 1983, which challenges only the conditions of confinement. Habeas actions "involve someone's liberty, rather than mere civil liability." Davis v. Fechtel, 150 F.3d 486, 490 (5th Cir. 1998) (citing Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)). Nothing prevents a prisoner from bringing claims under Sections 2241 and 1983 in the same complaint. *See, e.g.*, McPherson v. Lamont, 457 F. Supp. 3d 67, 70 (D. Conn. 2020) (denying motion to dismiss state inmates and pretrial detainees' claims under 28 U.S.C. § 2241 and 42 U.S.C. § 1983 for relief relating to the COVID-19 pandemic).

137. *Preiser*, 411 U.S. at 499.

138. *See, e.g.*, Wilson v. Williams, 961 F.3d 829, 832–33 (6th Cir. 2020) (Section 2241 proper vehicle when incarcerated people sought "release from custody to limit their exposure to the COVID-19 virus"); Medina v. Williams, 823 Fed. App'x 674, 676 (10th Cir. 2020) (Section 2241 claim "could be construed as also contending that in light of the pandemic [the prisoner] should be released from custody because there are no conditions of confinement that could adequately prevent an Eighth Amendment violation"); Cheek v. Warden of Federal Medical Center, 835 Fed. App'x 737, 739 (5th Cir. 2020) (prisoner's "request for release to home confinement in the context of a global pandemic [is] properly brought as an application for a writ of habeas corpus under Section 2241 because a favorable ruling from the district court [will] accelerate his release"); Basank v. Decker, No. 20-cv-2518, 2020 WL 1953847, at *13 (S.D.N.Y. Apr. 23, 2020) (quoting Barbecho v. Decker, No. 20-cv-2821, 2020 WL 1876328, at *6 (S.D.N.Y. Apr. 15, 2020)) ("If these Petitioners—whose medical conditions place them at a higher risk of severe illness, or death, from COVID-19—were to remain detained, they would face a significant risk that they would contract COVID-19 the very outcome they seek to avoid. Release is therefore necessary to make the habeas remedy effective."); Martinez-Brooks v. Easter, No. 3:20-cv-00569, 2020 WL 2813072, at *1 (D. Conn. May 29, 2020) ("During the course of the ongoing

Although Section 2241 has no express exhaustion requirement,[139] courts usually require incarcerated people filing a Section 2241 application to exhaust direct appeals and administrative remedies.[140] But because Section 2241's exhaustion requirement is judge-created, it is "amenable to judge-made exceptions."[141] For instance, courts have waived the exhaustion requirement if: it would be futile because exhaustion would result in "[u]ndue delay, if it in fact results in catastrophic health consequences"; the administrative process is "incapable of granting adequate relief"; and where "pursuing agency review would subject plaintiffs to undue prejudice."[142]

Federal prisoners could also move for compassionate release under the First Step Act.[143] Congress enacted the compassionate release statute as part of the Comprehensive Crime Control Act of 1984.[144] The statute initially required the Bureau of Prisons to file a motion seeking a reduction of a sentence when it determined that "extraordinary and compelling reasons" existed.[145] The First Step Act, passed in 2018,[146] broadened compassionate release to allow release upon a defendant's motion after fully exhausting administrative remedies, and after the sentencing court

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COVID-19 pandemic, district courts within this Circuit have relied on the authority of *Mapp* to issue bail or temporary release orders to medically vulnerable Section 2241 petitioners claiming that their continued confinement violates the Constitution."); *but see* Rice v. Gonzalez, 985 F.3d 1069, 1070 (5th Cir. 2021) ("But we also conclude that the Great Writ does not, in this circuit, afford release for prisoners held in state custody due to adverse conditions of confinement.").

139. *See* U.S. ex rel. Scranton v. State of N.Y., 532 F.2d 292, 294 (2d Cir. 1976) (Section 2241 "does not by its own terms require the exhaustion of state remedies as a prerequisite to the grant of federal habeas relief.").

140. *See, e.g.*, Kane v. Zuercher, 344 F. App'x 267, 269 (7th Cir. 2009) (While "there is no express exhaustion requirement in 28 U.S.C. § 2241, a district court is entitled to require a prisoner to exhaust the administrative remedies that the BOP offers before it will entertain a petition.").

141. Ross v. Blake, 136 S. Ct. 1850, 1857 (2016); *see also* McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." (citations omitted)).

142. Washington v. Barr, 925 F.3d 109, 118–20 (2d Cir. 2019).

143. 18 U.S.C. § 3582(c)(1)(A)(i).

144. 18 U.S.C. § 3582.

145. 18 U.S.C. § 3582(c)(1)(A)(i).

146. P.L. 115-391, 132 Stat. 5194, at § 603 (Dec. 21, 2018). The First Step Act ("Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act") was passed in 2018 with the goal of giving prisoners shortened sentences for exhibiting positive behavior and obtaining job training. *Id.*

considers the factors set forth in Section 3553(a) and determines that extraordinary and compelling reasons for release exist.[147] Although an incarcerated person is required to wait 30 days following the warden's receipt of a request or to exhaust administrative remedies, this "requirement" is not jurisdictional and does not prohibit an incarcerated person from seeking relief in a federal court.[148] Like the exhaustion requirement under Section 2241, the First Step Act's exhaustion requirement is "not absolute and . . . can be waived by the government or by the court, therefore justifying an exception in the unique circumstances of the COVID-19 pandemic."[149]

Federal prisoners have succeeded in obtaining release through the First Step Act during the COVID-19 pandemic.[150]

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147. 18 U.S.C. § 3582(c)(1)(A).

148. *See* United States v. Calton, 900 F.3d 706, 711 (5th Cir. 2018) (requirements of Section 3582(c) are "nonjurisdictional in character").

149. *Valentine I*, 956 F.3d 797 (5th Cir. 2020) (Higginson, J., concurring); Fuller v. Rich, 11 F.3d 61, 62 (5th Cir. 1994); *but see* U.S. v. Alam, 960 F.3d 831, 832 (6th Cir. 2020) (affirming dismissal without prejudice of a plaintiff's COVID-related First Step Act suit because "[Alam] failed to invoke all of the options for obtaining relief from the prison. Alam asks us to overlook that reality by finding the requirement non-mandatory or by fashioning an exception of our own. But because this exhaustion requirement serves valuable purposes (there is no other way to ensure an orderly processing of applications for early release) and because it is mandatory (there is no exception for some compassionate-release requests over others), we must enforce it.").

150. *See, e.g.*, United States v. Rodriguez, 451 F. Supp. 3d 392 (E.D. Pa. 2020) (granting compassionate release after finding risk factors for coronavirus constitute extraordinary and compelling reason and noting that prisons are "tinderboxes for infectious disease"); United States v. Jepsen, 451 F. Supp. 3d 242 (D. Conn. 2020) (granting compassionate release); United States v. Colvin, 451 F. Supp. 3d 237 (D. Conn. 2020) ("She has diabetes, a 'serious . . . medical condition,' which substantially increases her risk of severe illness if she contracts COVID-19. . . . Defendant is 'unable to provide self-care within the environment of' FDC Philadelphia in light of the ongoing and growing COVID-19 pandemic because she is unable to practice effective social distancing and hygiene to minimize her risk of exposure, and if she did develop complications, she would be unable to access her team of doctors at Bridgeport Hospital. In light of the expectation that the COVID-19 pandemic will continue to grow and spread over the next several weeks, the Court concludes that the risks faced by Defendant will be minimized by her immediate release to home, where she will quarantine herself."); United States v. Gonzalez, 451 F. Supp. 3d 1194, 1196 (E.D. Wash. 2020) (releasing defendant and recognizing that "these are not ordinary times"); United States v. Muniz, No. 4:09-cr-0199-1, 2020 WL 1540325 (S.D. Tex. Mar. 30, 2020) (granting compassionate release); United States v. Foster, No. 1:14-cr-324-02, 2020 WL 6882941 (M.D. Pa. Apr. 3, 2020) ("The circumstances faced by our prison system during this highly contagious, potentially fatal global pandemic are unprecedented. It is no stretch to call this environment 'extraordinary and compelling,' and we well believe that, should we not reduce Defendant's sentence, Defendant has a high likelihood of contracting COVID-19 from which he

But this avenue is not a cure-all, as it does not provide a remedy to incarcerated people seeking relief against unconstitutional conditions, but who do not fall within the First Step Act's parameters to obtain compassionate release. Even so, free from the constraints of the PLRA's mandatory exhaustion requirements, courts may be more willing when considering claims under either Section 2241 or the First Step Act to recognize the effects of COVID-19 and apply a context-based approach to exhaustion.

3. AS A LAST RESORT, CONGRESS COULD INTERVENE.

To ensure that cases brought by incarcerated people do not meet a "simple dead end" at the hands of the PLRA, Congress could pass an emergency bill temporarily suspending the exhaustion requirement until the pandemic has subsided. To be sure, we understand that this is a drastic remedy. But the federal government has shown a willingness to take extreme measures in these unprecedented times. For example, the Federal Bureau of Prisons received $100 million in CARES Act funding;[151] the United States Attorney General recommended the release of at-risk incarcerated people;[152] and the Centers for Disease Control and Prevention has issued guidance specifically tailored to correctional institutions.[153] Despite these measures, prisoners remain locked in COVID-19's "epicenters" with a near insurmountable obstacle to constitutional relief. An express directive from Congress may be the only way to clear this hurdle.

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would "not expected to recover." USSG SS 1B1.13. No rationale is more compelling or extraordinary."); United States v. Powell, No. 1:94-CR-00316, 2020 WL 1698194 (D.D.C. Mar. 28, 2020) (granting unopposed motion for compassionate release in light of COVID-19 and finding it "would be futile" to require defendant to first exhaust in light of open misdemeanor case); United States v. Campagna, No. 16-cr-78-01, 2020 WL 1489829 (S.D.N.Y. Mar. 27, 2020) (granting compassionate release); United States v. Brannan, Order on Emergency Motion for Reduction of Sentence, No. 4:15-cr-80-01 (S.D. Tex. Apr. 2, 2020) (granting compassionate release); Ord. on Motion to Reduce Sentence, United States v. Copeland, No. 2:05-cr-135 (D.S.C. Mar. 24, 2020) (granting compassionate release to defendant in part due to "Congress's desire for courts to release individuals the age defendant is, with the ailments that defendant has during this current pandemic").

151. *CARES Act Provides Needed Relief to Legal Profession*, AM. BAR ASS'N (April 6, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/04/cares-act-and-legal-profession/.

152. Memorandum from William Barr, Att'y Gen., U.S. Dep't of Justice, to Director of Bureau of Prisons (April 3, 2020), https://www.justice.gov/file/1266661/download.

153. CDC, *supra* note 81.

CONCLUSION

Ronald's dorm has been under quarantine countless times over the past year, often for weeks at a time, because a prisoner or staff member tested positive for COVID-19. When in quarantine, Ronald cannot access his one place of reprieve—the law library—or even go onto the yard to exercise. Every day passes like the one before, sitting in a room with 77 others just hoping to escape a deadly pandemic. He persists while being prevented from vindicating the protections "guaranteed" under the Constitution.

This result is untenable. Because the PLRA "cannot be understood as prohibiting judicial relief while inmates are dying,"[154] courts should consider the realities of the prison system, the COVID-19 pandemic, and the racial disparities seen in both, in deciding whether administrative grievance procedures are capable of use to obtain relief from the imminent threat of COVID-19 or whether the procedures are only simple dead ends.

154. *Valentine VII*, 141 S. Ct. at 59 (quoting *Valentine V*, 2020 WL 5797881 at *37, n.13).