No. 21-5592

In the Supreme Court of the United States

JOHN HENRY RAMIREZ
Petitioner,

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.,
Respondents

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

BRIEF OF SCHOLARS OF THE PLRA AND PRISON GRIEVANCE SYSTEMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Statutes

Rules

Other Authorities

Other Authorites—Continued: **Page(s)**

Other Authorites—Continued: **Page(s)**

INTEREST OF *AMICI CURIAE*[1]

Amici are academic experts on the Prison Litigation Reform Act (PLRA) and prison grievance systems and legal scholars who teach and write on constitutional law, civil rights, and prison issues. This Court has asked the parties to address whether petitioner John Ramirez adequately exhausted his audible prayer claim under the PLRA. *Amici* aim to assist the Court in analyzing this question.

Amici have decades of experience interpreting, studying, and analyzing the PLRA and the grievance process. They understand how the PLRA is written and how it is applied. And, although *amici* seek the same result as the petitioner, they also share a strong interest in ensuring there is an effective procedure for future prisoner complaints.

Amici include Andrea Armstrong, Kitty Calavita, Michele Deitch, Sharon Dolovich, Valerie Jenness, Michael B. Mushlin, Keramet Reiter, and Margo Schlanger. The experience of each scholar is described below.[2]

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, the petitioner and respondent have given blanket consent for the filing of *amicus curiae* briefs.

[2] Institutional affiliations are provided for information only and do not reflect institutional views.

sity New Orleans, College of Law. She is a leading national expert on prison and jail conditions, with a focus on deaths in custody and prison and jail healthcare services. She is also certified by the U.S. Department of Justice as a Prison Rape Elimination Act auditor. Her published research concerns the constitutional dimensions of prisons and jails and public oversight of detention facilities.

Kitty Calavita is Chancellor's Professor Emerita of Criminology, Law and Society, and Sociology at the University of California, Irvine. Her most recent book, *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic* (2015) (with Valerie Jenness) is an unprecedented study of prison disputes in an asymmetrical setting. Her research focuses on the internal grievance process available to California prisoners.

Michele Deitch is a Distinguished Senior Lecturer at the University of Texas at Austin's Lyndon B. Johnson School of Public Affairs with a joint appointment in the School of Law. Her primary research focus is on independent prison oversight. She previously served as a federal court-appointed monitor of conditions in the Texas prison system where, among other issues, she reviewed the prison agency's grievance system. She also served as the original reporter for the American Bar Association's Standards on the Treatment of Prisoners and as general counsel to the Texas Senate Criminal Justice Committee.

Sharon Dolovich is a Professor of Law at UCLA School of Law and Director of the UCLA Prison Law & Policy Program. Her scholarship focuses on the law,

policy, and theory of prisons and punishments. She has emerged as a leading national voice on the issue of COVID-19 in custody since the start of the pandemic, when she launched the UCLA Law COVID-19 Behind Bars Data Project to track the impact of the virus in prisons, jails, and detention centers nationwide.

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SUMMARY OF ARGUMENT

Under the PLRA, incarcerated individuals must exhaust administrative remedies provided in a prison's grievance system. While the PLRA does not mandate what should be included in a grievance system, this Court expects those systems to be informal and relatively simple. The text of the PLRA requires only that incarcerated plaintiffs exhaust *available* remedies. Administrative remedies are *unavailable*

when they are so opaque that they are incapable of use and when prison administrators use gamesmanship to keep incarcerated people from taking advantage of the grievance process.

The Texas Department of Criminal Justice (TDCJ) interpreted Ramirez's grievance in a way that rendered its process unavailable. The contention that Ramirez did not request *audible* prayer when he asked for his spiritual advisor to "pray over" him is untenable. The TDCJ's grievance rules emphasize concision and brevity and limit requested relief to two lines on a preset form. Rather than follow its own rules, the TDCJ imposed an unannounced hyper-specificity requirement on Ramirez's request. The TDCJ also ignored the plain meaning of the term "pray over." This treatment of Ramirez made the TDCJ process too opaque to be capable of use. Alternatively, its treatment of the complaint amounts to impermissible gamesmanship that rendered the process unavailable.

ARGUMENT

I. The touchstone of the PLRA's exhaustion requirement is that prison grievance remedies be "available."

The grievance process is an abiding fact of prison life. In a recent study of the California prison system, 74.2% of men in a random sample "had filed at least one grievance while in a California prison." Valerie Jenness & Kitty Calavita, *"It Depends on the Outcome": Prisoners, Grievances, and Perceptions of Justice*, 52 Law & Society Rev. 41, 57–58 (2018). Twenty-five years ago, Congress passed the PLRA to

overhaul the way incarcerated people access the judicial system and made resort to prison grievance systems a mandatory part of that process.

Before the PLRA's enactment, people who were incarcerated had to exhaust administrative remedies that had either been certified "plain, speedy, and effective" by the Attorney General; determined by a court to meet standards set by the Attorney General; or determined by a court to be "otherwise fair and effective." 42 U.S.C. § 1997e(a) (1994) (since amended). Under the PLRA, remedies do not have to meet a federally prescribed standard. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, § 803(d), 110 Stat. 1321, 1321–71 (amending 42 U.S.C. § 1997e). At the same time, the PLRA eliminated judicial discretion to excuse exhaustion. *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001).

The PLRA also created restraints at the courthouse. When grievances are not resolved in-house and incarcerated individuals choose to go to court, they face hurdles that average litigants do not. See generally Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1627–1633 (2003) (surveying the procedural "sea change" brought about by the PLRA). For example, an incarcerated person, unlike other indigent litigants, must "pay the full amount [at least $350] of a filing fee." 28 U.S.C. §§ 1914(a), 1915(b)(1). If a prisoner has insufficient funds to cover the fee, the prison transfers money from the person's prison account to the clerk of court every time the account exceeds $10 until the filing fee is paid. 28 U.S.C. § 1915(b)(2). Incarcerated individuals must also comply with the PLRA's three-strikes rule, 28 U.S.C.

§ 1915(g), and their complaints are subject to judicial screening before docketing or closely thereafter, 28 U.S.C. § 1915A(a).

But while the incarcerated face heightened barriers at the courthouse, Congress understood that a grievance system's rules should be easier to satisfy than those in federal court. Indeed, this Court has described prison grievance systems as "informal[] and relative[ly] simpl[e]." *Woodford* v. *Ngo*, 548 U.S. 81, 103 (2006). Such simplicity makes sense. Incarcerated persons, who "are frequently uneducated, unsophisticated, and legally inexperienced," are generally ill-equipped to navigate the legal niceties of Rule 8 and the pleading standards of *Iqbal*. See Jamie Ayers, Comment, *To Plead or Not to Plead: Does the Prison Litigation Reform Act's Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?*, 39 U.C. Davis L. Rev. 247, 272 (2005); cf. *Haines* v. *Kerner*, 404 U.S. 519, 520–521 (1972) (per curiam) (filings of pro se prisoners should be liberally construed).

A. The PLRA is silent on what remedies a grievance system must include.

The PLRA does not impose requirements for a state's grievance regime. See 42 U.S.C. § 1997e. People who are incarcerated must satisfy whatever administrative process a prison system creates. *Woodford*, 548 U.S. at 90–91. "[T]he primary purpose of a grievance is to alert prison officials to a problem * * *." *Jones* v. *Bock*, 549 U.S. 199, 219 (2007) (internal quotation marks omitted). Accordingly, the level of detail necessary "to comply with the grievance

procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Id*. at 218.

In the absence of specific instructions as to the content of grievances, the Seventh Circuit held that "[w]hen the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." *Strong* v. *David*, 297 F.3d 646, 650 (7th Cir. 2002). "As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief." *Ibid.* Instead, "[a]ll the grievance need do is object intelligibly to some asserted shortcoming." *Ibid.* This standard has been explicitly adopted by the Second,[3] Ninth,[4] and Tenth[5] Circuits and quoted or cited with approval by the Third,[6] Fourth,[7] Fifth,[8] and Sixth.[9]

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[3] *Johnson* v. *Testman*, 380 F.3d 691, 697 (2d Cir. 2004).

[4] *Griffin* v. *Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009).

[5] *Kikumura* v. *Osagie*, 461 F.3d 1269, 1283–1284 (10th Cir. 2006).

[6] *Fennell* v. *Cambria Cty. Prison*, 607 Fed. Appx. 145, 149 (3d Cir. 2015) (per curiam) (unpublished).

[7] *Wilcox* v. *Brown*, 877 F.3d 161, 167 n.4 (4th Cir. 2017).

[8] *Johnson* v. *Johnson*, 385 F.3d 503, 517–518 (5th Cir. 2004).

[9] *Burton* v. *Jones*, 321 F.3d 569, 575 (6th Cir. 2003), *abrogated on other grounds by Jones* v. *Bock*, 549 U.S. 199 (2007).

B. The text of the PLRA requires exhausting only those remedies that are "available."

Congress cabined the PLRA's exhaustion requirement in one clear way. An incarcerated person may not bring a claim for prison conditions "until such administrative remedies *as are available* are exhausted." 42 U.S.C. § 1997e(a) (emphasis added).[10] While Congress decided that prisons, and not federal courts, should be the primary grievance adjudicator, it limited a prison's ability to invoke exhaustion in federal court. That limit is expressed in the one exhaustion exception that is "baked in" to the text: the incarcerated must exhaust only "available" remedies. *Ross* v. *Blake*, 136 S. Ct. 1850, 1862 (2016). Put another way, if a remedy is "unavailable," it cannot be a bar to seeking relief at the courthouse.

This "availability" requirement reflects Congress's policy judgment that *functioning* grievance procedures are essential to prison administration. Empirical research backs that up: "When prisoners perceive the prison administration as legitimate (i.e., that the policies are neutral and fairly applied), prisoners are more likely to contribute to an orderly and safe

[10] The exhaustion section of the PLRA provides in full: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

prison environment." Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 Stanford L. & Pol'y Rev. 435, 464–465 (2014). And research shows that well-functioning grievance systems actually reduce litigation. See Dora Schriro, *Correcting Corrections: Missouri's Parallel Universe*, Sentencing & Corrections: Issues for the 21st Century, Papers from the Executive Sessions on Sentencing and Corrections, May 2000, at 6.

C. Under *Ross*, a remedy is not "available" if it offers no relief.

A person who is incarcerated must exhaust only those grievance procedures that are "capable of use." *Ross,* 136 S. Ct. at 1858–1859. This Court has identified three situations where "an administrative remedy, although officially on the books" fails to be "available" because it is incapable of providing relief. *Id*. at 1859. First, an administrative procedure is unavailable when "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Ibid*. Second, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use." *Ibid*. This occurs when some mechanism exists to provide relief, but no ordinary prisoner can navigate it, making the remedy essentially unknowable. *Ibid*. Finally, remedies are unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id*. at 1860.

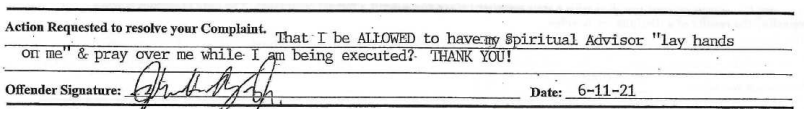
Ross underscores the fact that if the PLRA is supposed to act as a "filter" for "bad claims," then it

should not preclude meritorious ones. *Jones*, 549 U.S. at 204. Instead, this Court has emphasized the PLRA should "*facilitate* consideration of the good" claims. *Ibid.* (emphasis added). Dead-end remedies, opaque remedies, and remedies thwarted by the machinations of prison administrators fail to provide such facilitation and are unavailable under the PLRA.

II. The TDCJ grievance process limits prisoners to brief descriptions of their complaints and provides a procedure for investigating claims.

In Texas, the grievance process is outlined in the Offender Orientation Handbook. Texas Dep't of Criminal Justice, *Offender Orientation Handbook* (Feb. 2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf (the TDCJ Handbook). Prison administrators must provide a copy of the handbook to everyone entering the Texas Department of Criminal Justice and ensure currently incarcerated individuals have access to revised copies when revisions are made. *Id.* at General Information. All incarcerated individuals are "responsible for understanding and abiding by the rules, regulations and policies detailed in the handbook." *Ibid.*

The TDCJ Handbook explicitly prohibits long descriptions of the individual's complaint on the grievance form. TDCJ Handbook at 75. It commands, "Your grievance shall be stated on one form and in the space provided." *Ibid.* Incarcerated individuals have two lines to state their requested remedy. The actual grievance at issue in this case shows this confined space:


Action Requested to resolve your Complaint. That I be ALLOWED to have my Spiritual Advisor "lay hands on me" & pray over me while I am being executed? THANK YOU!

Offender Signature: _____ Date: 6-11-21

Pl.'s Ex. 4 at 4, *Ramirez* v. *Lumpkin*, No. 2:12-cv-410 (S.D. Tex.).

Each TDCJ unit has a grievance investigator. TDCJ Handbook at 73. And, according to the TDCJ Handbook, the prison has the ability to "conduct an investigation" as part of the grievance process. *Id.* at 74. Indeed, grievance forms must show that the incarcerated individual attempted to get an informal resolution of the grievance. *Id.* at 75.

TDCJ can reject grievances for a host of reasons, including excessive attachments, redundancy, illegibility, incomprehensibility, and failure to state requested relief. TDCJ Handbook at 75. Austerity, not verbosity, is the driving principle. Cf. *Jones*, 549 U.S. at 218 (rejecting contention that a grievance filed with a Michigan prison was insufficiently precise where prison "policy required only that prisoners 'be as specific as possible'" on forms that advised them to "be brief and concise") (cleaned up).

III. The TDCJ's treatment of Ramirez's request rendered the administrative process unavailable.

The TDCJ maintains that Ramirez did not exhaust administrative remedies. This contention boils down to a single proposition: when Ramirez requested he "be ALLOWED to have [his] spiritual advisor 'lay hands on me' & pray over me," he did not ask TDCJ "to permit his pastor to pray *aloud* with him during his execution." Br. in Opp. 12 (emphasis added). But

the TDCJ rules do not require that level of specificity and imposing such a requirement *post facto* renders the process "so opaque" that "no ordinary prisoner can discern or navigate it." *Ross*, 136 S. Ct. at 1859. Alternatively, TDCJ's rejection of the ordinary meaning of "pray over" to include audible prayer amounts to impermissible "game-playing." *Id.* at 1862.

A. A system that commands brevity but imposes an unannounced specificity requirement is too opaque for an ordinary prisoner to navigate.

In a wide variety of contexts, government organs are required to abide by their own rules. *See Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370, 389–390 (1932). The TDCJ's rules explicitly prohibit long descriptions of grievances. TDCJ Handbook at 75. In spite of that rule, the TDCJ rejected Ramirez's grievance for failing to go into detail about the type of prayer he wanted. Under *Ross*, when a prison's grievance process is "essentially unknowable—so that no ordinary prisoner can make sense of what it demands—then it is also unavailable." *Ross*, 136 S. Ct. at 1859 (internal quotation marks omitted). The TDCJ's *post-hoc* hyper-specificity requirement—at odds with its own rules on brevity—presents such an unknowable process.

In *Ross*, this Court approvingly cited Judge Carnes's opinion rebuffing grievance procedures "inspired by the Queen of Hearts' Croquet game." *Goebert* v. *Lee Cty.*, 510 F.3d 1312, 1322 (11th Cir. 2007). "[T]hey don't seem to have any rules in particular: at least, if there are[,] no-body attends to them." *Id.* at

1322 n.4 (quoting Lewis Carroll, *Alice's Adventures in Wonderland* (1865)). Here, TDCJ rejected a grievance for violating a rule not found in the TDCJ Handbook (hyper-specificity) that is itself at odds with numerous rules requiring brevity. Cf. Lon Fuller, *The Morality of Law* 38–39 (1964) (identifying "the enactment of contradictory rules" as one of eight paradigmatic legal system defects). A system that holds prisoners to unknowable and contradictory rules is "so confusing that no [ordinary] inmate could make use of it." *Ross*, 136 S. Ct. at 1862.

Jurists may enjoy asking whether a bicycle or airplane is included in a "[no] vehicle[s] into the public park" hypothetical. Cf. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 607 (1958). But no person at a rental counter specifies that a car must "include four tires" and no diner specifies that the spaghetti he orders will come "cooked." And if a rental salesperson or waiter presented a tireless car or plate of uncooked pasta, the customer would be aghast, unsure of what went wrong. With fundamentally more at stake—a request implicating constitutional and statutory religious liberty interests at the moment of death—the TDCJ chose to require more of Ramirez's grievance than common sense and its own rules required. The after-the-fact imposition of a hyper-specificity requirement renders the grievance system unavailable.

B. A system that does not conform to the ordinary meaning of commonly used phrases engages in gamesmanship that thwarts the administrative process.

TDCJ says Ramirez failed to exhaust his remedies when he requested that his spiritual advisor "pray over" him without specifying that prayer should be *out loud*. Br. in Opp. 12. Context and ordinary meaning make that claim implausible on its face. An administration that engages in such gamesmanship creates a grievance process that is unavailable.

1. When someone requests to be "prayed over," the request is for an audible prayer.

The correct and most reasonable interpretation of Ramirez's request is that he sought an audible prayer. The ordinary meaning of the word "pray" is "[t]o utter or address" words to God. *Pray*, *American Heritage Dictionary* 1423 (3d ed. 1992) ("pray 1. To utter or address a prayer or prayers to God * * *."); see also *Pray*, *Webster's New International Dictionary* 1782 (3d ed. 1993) ("pray 1. ENTREAT, IMPLORE: as a: to make supplication to (a god) * * *."). More to the point, Ramirez requested not just that his pastor "pray;" he requested a form of interpersonal, communal prayer commonly understood to entail *audible speech* by asking that his pastor "pray over" him. See *Pray Over*, *Webster's New International Dictionary* 1782 (3d ed. 1993) ("pray over: to send up a prayer for: supplicate concerning; *often*: to publicly or ostentatiously offer prayer * * *."). Accordingly, the ordinary meaning of "pray over" implicates audible prayer.

In the context of a condemned man seeking spiritual succor at the hour of death, the *audible* prayer of a spiritual advisor has deep roots in the American experience. In 1686, as convicted murderer James Morgan was escorted to the gallows in Boston, a minister walked with him and prayed aloud "on behalf of the condemned man." Daniel E. Cohen, *Pillars of Salt, Monuments of Grace* 49–54 (1993) (quoting Increase Mather, *A Sermon Occasioned by the Execution of a Man Found Guilty of Murder* 124 (2d ed. 1687)). Likewise, ministers prayed aloud at the public hanging of Esther Rodgers, who was executed in Ipswich, Massachusetts, in 1701 for killing her newborn child. *Id.* at 62–63 (quoting John Rogers, *Death the Certain Wages of Sin to the Impenitent* 151–152 (1701)). When she was ready to be hanged, a minister said "We have Recommended you to God, and done all we can for you. * * * And so we must bid you *Fare-Well*." *Ibid.* Context thus indicates Ramirez's request was for an audible prayer at his execution.

2. TDCJ engaged in machinations that thwarted Ramirez from taking advantage of the grievance process.

An administrative process that rejects the ordinary meaning of commonly used words represents "game-playing" that "thwart[s] the effective invocation of the administrative process." *Ross*, 136 S. Ct. at 1862. Going "through the looking-glass" again, administrators cannot act as Humpty Dumpty: "'When *I* use a word,' [he] said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'"

Lewis Carroll, *Through the Looking-Glass* in *Alice in Wonderland* 163 (Donald J. Gray ed., 1971). Instead, TDCJ should proceed like any other user of the English language, and determine meaning that is "in accord with context and ordinary usage." *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). That approach guarantees the effective administration of the grievance process that Congress sought to make informal and relatively simple. See *Woodford*, 548 U.S. at 103.

If there were somehow doubt about the meaning of Ramirez's request, TDCJ could have simply asked. The TDCJ's grievance process was robust enough for the prison to learn whether the relief Ramirez sought was for an audible or silent prayer. TDCJ Handbook at 73–75 (providing a grievance investigator, describing an informal resolution process, and explaining that TDCJ can conduct an investigation). Instead of attempting to understand Ramirez's (plainly comprehensible) request, officials opted instead to play "gotcha" with a strained reading of his complaint.

"If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1486 (2021). We should expect—and *Ross* requires—more of TDCJ than the game-playing it offered Ramirez. For the PLRA may not just filter out the weak claims, it also must "facilitate consideration of the good." *Jones*, 549 U.S. at 204.

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the Court should hold that Ramirez exhausted such administrative remedies as were available.

Respectfully submitted.

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SEPTEMBER 2021