No.

In the Supreme Court of the United States

NEIL DUPREE, PETITIONER,

v.

KEVIN YOUNGER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Prison Litigation Reform Act of 1995 (PLRA), prisoners cannot sue officials unless they have exhausted "such administrative remedies as are available." 42 U.S.C. § 1997e(a). In *Ross* v. *Blake*, 578 U.S. 632 (2016), this Court held that a remedy is "available" under the PLRA so long as it is "capable of use" to obtain "some relief for the action complained of." *Id.* at 642. This case involved an attack on multiple prisoners that triggered an Internal Investigative Unit (IIU) investigation. Under Maryland law, prisoners can obtain a remedy from the Inmate Grievance Office (IGO) during an IIU investigation by first seeking relief from the warden, then seeking relief from the IGO. Prisoners routinely have their complaints adjudicated on the merits using this procedure, including another prisoner who was a victim of the same attack at issue in this case.

The question presented is:

Whether a grievance procedure that prisoners regularly have been able to use to have their claims adjudicated on the merits is "available" for that reason.

RELATED PROCEEDINGS

U.S. District Court for the District of Maryland (D. Md.):

Younger v. *Green*, Case No. 1:16-cv-03269 (Feb. 4, 2020)

U.S. Court of Appeals for the Fourth Circuit (4th Cir.):

Younger v. *Dupree*, No. 21-6423 (June 17, 2024) (affirming district court on exhaustion issue)

Younger v. *Dupree*, No. 21-6423 (Mar. 11, 2022) (dismissing appeal for failure to preserve)

Younger v. *Crowder*, No. 21-6422 (Aug. 24, 2023)

Younger v. Green, No. 20-6294 (July 30, 2021)

Younger v. Ramsey, No. 20-6262 (July 30, 2021)

Supreme Court of the United States:

Dupree v. *Younger*, No. 24A220 (Sept. 3, 2024) (granting application for extension of time to file petition for a writ of certiorari)

Dupree v. *Younger*, No. 22-210 (June 26, 2023) (vacating Fourth Circuit's dismissal of appeal and remanding)

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The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished but available at 2024 WL 3025121. The order of the court of appeals denying rehearing en banc (Pet. App. 35a) is unreported. The opinion of the district court denying petitioner's motion for summary judgment (Pet. App. 9a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2024. Pet. App. 1a. The court of appeals denied a timely petition for rehearing en banc on August 12, 2024. Pet. App. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Prison Litigation Reform Act (PLRA) provides in relevant part:

> 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).

STATEMENT OF THE CASE

This case concerns an important, recurring question of federal law regarding exhaustion of administrative remedies under the PLRA. In *Ross* v. *Blake*, 578 U.S. 632, 642 (2016), this Court held that inmates need only exhaust administrative remedies that are actually "available" to them. An administrative remedy is "available" under the PLRA, the Court said, so long as it is "capable of use" to obtain "some relief for the action complained of." *Id.* In evaluating whether an administrative remedy is available,

the Court emphasized that lower courts must consider the "real-world workings of prison grievance systems" and "the facts on the ground." *Id.* at 643. So, for example, even if "a prison handbook" suggests that a remedy is available or administrative officials have "apparent authority" to provide remedies, a remedy still may not be "available" if inmates do not receive remedies "in practice." *Id.* This case presents the inverse question: Whether a grievance procedure that prisoners routinely use to obtain relief, and that regularly results in relief, is "available" even when the text of the relevant statutes and prison regulations purportedly provide "no explanation" for the remedy.

Here, respondent and another inmate in a Maryland prison were the victims of an attack by several prison guards. The attack triggered an Internal Investigative Unit (IIU) investigation. While that IIU investigation was ongoing, respondent began—but indisputably did not complete—the required steps under Maryland's prison-grievance procedures to obtain an administrative remedy from the Inmate Grievance Office (IGO). Another inmate injured during the same attack—Raymon Lee—completed all the required steps under the grievance procedures and obtained a remedy of $5,000. The record shows that over a dozen prisoners have received merits hearings through Maryland's grievance procedures even when an IIU investigation is ongoing, several of whom received monetary compensation. Conversely, neither respondent nor the decisions below have identified a *single* instance in which the IGO dismissed an appeal because Maryland's statutes or regulations required it to do so due to an IIU investigation.

Yet in the decisions below, the Fourth Circuit held that, even if inmates *in fact* obtain remedies, those remedies are not "available" under the PLRA if, based on the court's reading, the text of the relevant statutes and

prison regulations provide "no explanation" for the remedy. *Younger* v. *Crowder*, 79 F.4th 373, 380-81 (4th Cir. 2023). Thus, despite acknowledging that Mr. Lee obtained a remedy under Maryland's grievance procedures related to the *same* attack, the Fourth Circuit held that respondent was not required to exhaust Maryland's grievance procedures because no administrative remedies were "available" to him. *Id.*; *see also* Pet. App. 8a (concluding that the panel was bound by *Crowder* to reach the same result).

That reasoning gets the *Ross* v. *Blake* analysis backwards. If the record shows that inmates regularly obtain remedies under a prison's grievance procedures, much less that a prisoner involved in the *same* incident obtained a remedy, then those remedies are unquestionably "capable of use" to obtain "some relief for the action complained of." In holding otherwise, the Fourth Circuit again created a novel exhaustion exception divorced from the PLRA's text—like the exception struck down by this Court in *Ross* v. *Blake*.

In addition, this case meets the Court's other criteria for certiorari. The Fourth Circuit's decisions conflict with the decisions of several other circuit courts that have faithfully applied *Ross* v. *Blake* in holding that evidence of other prisoners succeeding in obtaining administrative remedies is dispositive of the question whether remedies are "available" under the PLRA. And this case is a good vehicle to resolve the question presented because the exhaustion issue was the sole basis for the decisions below.

The question presented is likewise of great legal and practical significance, both in reaffirming that remedies cannot be deemed "unavailable" when prisoners regularly obtain them and in ensuring that inmates properly exhaust prison grievance procedures before suing prison officials in federal court. The federalism concerns presented here also support review: Congress passed the

PLRA to "eliminate unwarranted federal-court interference with the administration of prisons." *Woodford* v. *Ngo*, 548 U.S. 81, 93 (2006). Yet the decisions below ignored Maryland's longstanding position that remedies are available to prisoners regardless of whether an IIU investigation is ongoing.

The Court should grant certiorari and reverse the Fourth Circuit.

A. Legal Background

1. Maryland administers prisoner remedies through the IGO. Created in 1971 to hear inmates' complaints, the IGO provides the primary administrative remedy for any inmate grievance against a correctional officer. *McCullough* v. *Wittner*, 552 A.2d 881, 882 (Md. 1989); Md. Code Regs. § 12.07.01.01(B)(8).

2. In the usual case, before an inmate may seek review before the IGO, he must complete two steps comprising Maryland's Administrative Remedy Procedure (ARP). Pet. App. 36a-37a. First, an aggrieved inmate must file a complaint with the institution's warden. *Id.* Second, if the inmate is not satisfied with the warden's response, he may appeal to the Commissioner of Correction. *Id.* If the inmate remains unsatisfied, he may then file a grievance with the IGO. Pet. App. 37a-39a.

That two-step process may be abbreviated when Maryland's Internal Investigative Unit, or IIU, becomes involved. The IIU is a separate body in the Maryland Department of Public Safety and Correctional Services that investigates alleged violations of criminal law by Department employees. Md. Code Regs. § 12.11.01.03. Presumably because simultaneous factfinding by the IIU and the warden in the ARP process would be redundant, when an IIU investigation takes place, wardens are instructed to dismiss ARP complaints and inform prisoners that "no further action shall be taken within the

ARP process." Pet. App. 73a-74a. After prisoners receive notice of that procedural dismissal, they may proceed to file a grievance with the IGO (without first appealing to the Commissioner). Pet. App. 36a-39a; C.A. Doc. 15, at JA 374-91.

Despite the dismissal's language that "no further action shall be taken within the ARP process," prisoners sometimes file an appeal to the Commissioner anyway (which is within the ARP process). *See, e.g.*, C.A. Doc. 104, at Add. 49. In those cases, the Commissioner dismisses the appeal with the same notice that "[n]o further action shall be taken within the ARP process." *Id.* Prisoners can then appeal to the IGO, as demonstrated by the case of Tyrone Diggs. C.A. Doc. 104, at Add. 50.

There are therefore two routes to the IGO and potential relief: (1) a denied ARP complaint appealed to the Commissioner and then the IGO; and (2) an ARP complaint dismissed because of an IIU investigation then "appealed" directly to the IGO.

B. Factual and Procedural Background

1. Petitioner Neil Dupree is a former intelligence lieutenant in the Maryland Reception, Diagnostic & Classification Center (MRDCC), a prison operated by the Division of Correction within the Maryland Department of Public Safety and Correctional Services. Petitioner was a "good" and "well-respected" officer who was promoted multiple times for his exemplary service. *See* Dist. Ct. Dkt. 291, at 28-29, 133-34, 138-39, 177-78. He served for more than a decade as a corrections officer without incident before the events of this case. Dist. Ct. Dkt. 331, at 144, 181.

2. On September 30, 2013, respondent Kevin Younger, an inmate at MRDCC, was the victim of an assault carried out by three corrections officers. Pet. App. 3a. Three years later, in 2016, respondent

brought this 42 U.S.C. § 1983 action against petitioner and other correctional staff and officials. Pet. App. 4a. In his responsive pleading, petitioner asserted the affirmative defense that respondent had failed to properly exhaust his available administrative remedies, as required by the PLRA. C.A. Doc. 15, at JA 242.

3. Following the close of discovery, petitioner moved for summary judgment on this defense, but the district court denied the motion. Pet. App. 4a. No party disputed that ordinarily respondent would have been required to exhaust the mandatory ARP process before filing suit. Pet. App. 16a-22a. But it was also undisputed that an IIU investigation into the incident was pending when respondent would have been required to exhaust the mandatory ARP process. Pet. App. 16a-22a. Based on these undisputed facts, the district court held as a matter of law that the IIU investigation made the ARP process not "available" to respondent. Pet. App. 20a-22a. Accordingly, the court concluded that respondent "satisfied his administrative exhaustion requirements and the PLRA [did] not bar his claims." Pet. App. 22a.

4. The case proceeded to a jury trial, during which petitioner did not raise his exhaustion defense because there existed no additional evidence relevant to the court's earlier assessment and rejection of the defense. On February 3, 2020, the jury found petitioner and others liable and awarded respondent $700,000 in damages. Petitioner did not raise his exhaustion defense in a post-trial motion. Pet. App. 2a.

5. Petitioner appealed, seeking to challenge the district court's holding that the existence of an IIU investigation categorically exempts a prisoner from exhausting the ARP process. C.A. Doc. 14, at 8-18. The Fourth Circuit then dismissed the appeal, concluding that the exhaustion issue was not properly before the court under the its precedents because petitioner had not made

a Rule 50(a) motion at trial. *See Younger* v. *Dupree*, No. 21-6423, 2022 WL 738610, at *1 (4th Cir. Mar. 11, 2022) (*Dupree I*) (unpublished).

6. Petitioner successfully sought certiorari to resolve a circuit split over whether appellate courts can review a purely legal question resolved at summary judgment despite the movant's failure to make a Rule 50(a) motion at trial. This Court held that they can—specifically, that "a post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment." *Dupree* v. *Younger*, 598 U.S. 729, 735 (2023) (*Dupree II*). The Court declined, however, to adopt a bright-line rule about what counts as a legal question. *Id.* at 737-38. The Court vacated the circuit court's judgment and remanded for further proceedings. *Id.* at 738.

7. While petitioner's case was pending on remand, the Fourth Circuit decided a related appeal involving the same plaintiff and same incident but a different defendant—Tyrone Crowder, the warden of MRDCC. *See Crowder*, 79 F.4th at 375-77. Mr. Crowder had advanced the same PLRA exhaustion argument against Mr. Younger that petitioner asserted. *Id.* at 377. Before deciding the appeal, the *Crowder* court requested supplemental briefing addressing the effect of *Dupree II* on the exhaustion issue. Order, *Younger* v. *Crowder*, No. 21-6422 (4th Cir. June 9, 2023), Doc. 60. Because the appeals involved the same incident and the same exhaustion issue, petitioner's counsel sought the consent of Mr. Younger's counsel to submit the supplemental briefing at the same time and to set the same schedule for oral argument. Mr. Younger's counsel declined, and *Crowder* was decided shortly after the parties in *Dupree* submitted their supplemental briefing.

In *Crowder*, the court first held that Mr. Crowder's exhaustion argument "present[ed] a purely legal issue,"

and he was accordingly "not required to re-raise this issue in a Rule 50 motion to preserve it for appeal." 79 F.4th at 378-79. But despite siding with Mr. Crowder on the key issue on which this Court remanded in *Dupree II*, the *Crowder* court nevertheless ruled for Mr. Younger on a different ground. Specifically, the court held as a matter of law that administrative remedies were not "available" to Maryland prisoners under the PLRA because "an inmate cannot successfully file an administrative grievance over an event that is the subject of an [IIU] investigation." *Id.* at 380.

In reaching its decision, the *Crowder* panel acknowledged that Maryland prisoners have availed themselves of the precise processes the panel claimed were unavailable—including a different inmate involved in the same altercation. *Id.* But the court dismissed that fact because, to obtain a remedy, the inmate purportedly had to make three "frivolous filings" and then "simply hop[e] [the IGO] would ignore its own regulations." *Id.* at 380-81. According to the court, "[a]n administrative remedy is unavailable if an inmate's only hope for relief is that officials act contrary to statute and regulation." *Id.* at 381.

8. Concluding that it was "bound by … *Crowder*," the panel in this case held that "Younger had no available administrative remedies to exhaust." Pet. App. 8a. Thus, roughly two years after the Fourth Circuit first concluded that its review was "precluded by controlling precedent," *Dupree I*, 2022 WL 738610, at *1—and after a layover in this Court—the Fourth Circuit again decided petitioner's fate simply by concluding controlling precedent required rejection of his appeal.

9. The Fourth Circuit denied a timely petition for rehearing en banc. Pet. App. 35a.

REASONS FOR GRANTING THE PETITION

In rejecting petitioner's exhaustion defense below, the Fourth Circuit defied this Court's directive in *Ross* v. *Blake* that it consider the "real-world workings of prison grievance systems" and "the facts on the ground" in determining whether administrative remedies were "available" to respondent. 578 U.S. at 643. The Fourth Circuit's assessment based on its bare read of Maryland's statutes and prison regulations departs from every other circuit's application of *Ross* v. *Blake*. This case is a good vehicle to clarify that whether remedies are "available" under the PLRA turns on whether the prison's grievance procedures are "capable of use"—not on a hypothetical consideration of the administrative officials' "apparent authority." *Id.*

I. THE DECISIONS BELOW FLOUT THIS COURT'S PRECEDENT AND SPLIT FROM OTHER CIRCUITS

A. The Fourth Circuit's Decisions Directly Contravene *Ross* v. *Blake*

In the decisions below, the Fourth Circuit held that administrative remedies were not "available" to Maryland prisoners when the prisoner's complaint is the subject of an IIU investigation. That holding is egregiously wrong under *Ross* v. *Blake*. The Fourth Circuit waved away the fact that another prisoner injured in the same attack in fact obtained an administrative remedy and ignored more than a *dozen* instances when prisoners obtained a hearing on the merits of their claim notwithstanding an IIU investigation. Nor did the court give any weight to the State of Maryland's official, decades-long position that administrative remedies are available to prisoners regardless of whether there is an IIU investigation.

1. In *Ross* v. *Blake*, this Court considered the Fourth Circuit's adoption of "an unwritten 'special circumstances' exception" to the PLRA that permitted some prisoners to pursue litigation "even when they have failed to exhaust

available administrative remedies." 578 U.S. at 635. In rejecting that "freewheeling approach" to exhaustion, the Court explained that the PLRA already contains a "built-in exception to the exhaustion requirement": A prisoner need not exhaust administrative remedies that are not "available." *Id.* at 635-36.

Administrative remedies are "available" under *Ross* v. *Blake* when they are "capable of use" to obtain "some relief for the action complained of." *Id.* at 642 (quoting *Booth* v. *Churner*, 532 U.S. 731, 738 (2001)). The Court cautioned that, in applying that standard, courts must consider the "real-world workings of prison grievance systems" and "the facts on the ground," i.e., how grievance procedures play out in practice. *Id.* at 643. The Court also expressly disclaimed that the inquiry turns on what "a prison handbook directs" or whether administrative officials have "apparent authority" to offer relief; what matters is whether inmates obtain relief "in practice." *Id.*

The Court identified three circumstances in which an administrative remedy, "although officially on the books, is not capable of use to obtain relief." *Id.* First, an administrative remedy is unavailable if it is "a simple dead end," meaning that officers are "unable or consistently unwilling" to provide relief. *Id.* Second, an administrative remedy is unavailable if the administrative scheme is "so opaque" that it is, "practically speaking, incapable of use." *Id.* Grievance procedures are not opaque simply because they are not so "'plain' as to preclude any reasonable mistake or debate with respect to their meaning." *Id.* at 644 (citations omitted). Rather, the administrative scheme is too opaque only when it can be said that the remedy is "unknowable" to the point that "no ordinary prisoner can make sense of what it demands." *Id.* Third, an administrative remedy is unavailable if prison administrators "thwart" prisoners from using the grievance process "through machination, misrepresentation, or intimidation." *Id.*

a. Here, the "real-world workings" of Maryland's grievance system and "the facts on the ground" show that administrative remedies are indisputably available to prisoners even when there is a contemporaneous IIU investigation.

Start with the case of Raymon Lee. Mr. Lee, a Maryland prisoner involved in the same altercation as Mr. Younger, successfully exhausted Maryland's administrative remedies despite an ongoing IIU investigation and ultimately obtained $5,000 in compensation. C.A. Doc. 15, at JA 375-91. He did so by following the prison's grievance procedures as laid out in Maryland's Department of Correction Directives. Pet. App. 37a-38a. Mr. Lee filed an ARP complaint with the warden of MRDCC, which was dismissed because of the ongoing IIU investigation. C.A. Doc. 15, at JA 375-77. But unlike Mr. Younger, Mr. Lee then submitted the dismissed ARP to the IGO. C.A. Doc. 15, at JA 375. Because Mr. Lee submitted evidence that he had exhausted the ARP, his case proceeded to the merits before an administrative law judge and then the Secretary. C.A. Doc. 15, at JA 379-91. Mr. Lee specifically referenced the IIU investigation in his grievance, which facilitated IGO review and his ultimate monetary award. *See* C.A. Doc. 15, at JA 375.

Mr. Lee's case is no outlier. Over 250 pages of administrative records from the relevant time period show that *sixteen* prisoners received a merits hearing before the IGO even when there had been an IIU investigation. C.A. Doc. 104, at Add. 9-274.[1] Of those sixteen prisoners, *nine* received monetary compensation, including one prisoner who was awarded *$100,000*. *See* Pet. Merits Reply

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[1] The State of Maryland lodged these materials with the Court when it submitted its reply brief in *Ross* v. *Blake*. *See* Pet. Merits Reply Br. at 22-24 & nn.7-9, *Ross v. Blake*, 578 U.S. 632 (2016) (No. 15-339); *see also* Lodging of Petitioner, *Ross v. Blake*, 578 U.S. 632 (2016) (No. 15-339).

Br. at 22-24 & nn.7-9, *Ross* v. *Blake*, 578 U.S. 632 (2016) (No. 15-339); *see also* C.A. Doc. 104, at Add. 55; *id.* at Add. 256-74.

Importantly, the administrative law judges who conducted the merits hearings were well-aware that the matters before them were appeals of IIU-related procedural dismissals. To take just one example, in the decision involving Eric Gwynn, the ALJ order confirms that Mr. Gwynn's case was an appeal from an ARP dismissal due to an IIU investigation:

> [The Grievant] has filed this grievance on appeal from ARP-RCT-0350-05 after establishing for purposes of the IGO's preliminary review that he took all reasonable steps to exhaust the remedies available to him through the ARP procedure. The response he received to his ARP complaint was that the complaint had been referred to IIU … for which the following case number was assigned: 053500573.

C.A. Doc. 104, at Add. 104. The ALJ then proceeded to rule on the *merits* of the case after setting out findings of facts and conclusions of law. C.A. Doc. 104, at Add. 108-17.

It would be a shock to the prisoners identified in these administrative records—some of whom obtained significant payouts—to learn that Maryland's grievance procedures were not "available" to them. Indeed, these examples alone are more than enough to establish that Maryland's grievance procedures are "capable of use" to obtain "some relief for the action complained of" even when the action is the subject of an IIU investigation.

b. That these remedies are available to prisoners is further confirmed by the State of Maryland's repeated (bordering exasperated) representations to federal courts for more than a decade that IIU investigations do not impede prisoners' administrative remedies. Since at least 2011, the Maryland Attorney General's office has argued

in dozens of federal cases that administrative remedies are available even when a complaint is the subject of an IIU investigation. *See, e.g.*, *Bogues* v. *McAlpine*, Civ. A. No. CCB-11-463, 2011 WL 5974634, at *4 (D. Md. Nov. 28, 2011). This includes representations to this Court in *Ross* v. *Blake*. Transcript of Oral Argument at 7, *Ross* v. *Blake*, 578 U.S. 632 (2016) ("So there is an available remedy in Maryland for prisoners who are assaulted by guards *and where there is an [IIU] investigation.*") (emphasis added). Given that it is the State of Maryland and its administrative bodies that developed the prison-grievance system, and now oversee and administer it, the State's views on this issue should be afforded significant weight.

2. The *Crowder* decision, in contrast, determined that administrative remedies are unavailable to prisoners when there is an ongoing IIU investigation—despite "the facts on the ground" and all "real-world" evidence to the contrary—by focusing almost exclusively on the language of the statutes and regulations governing Maryland's grievance process. But those statutes and regulations do not mean what *Crowder* says they do, as evidenced by the regular merits hearings that prisoners receive before the IGO notwithstanding contemporaneous IIU investigations. And, regardless, the inquiry under *Ross* v. *Blake* looks to whether remedies are available not in theory but in practice.

a. The *Crowder* court's conclusion that an inmate "cannot successfully file an administrative grievance over an event that is the subject of an [IIU] investigation" is simply wrong. 79 F.4th at 380. The court began by correctly noting that when an inmate files an ARP complaint that is the subject of an IIU investigation, it is automatically dismissed on procedural grounds. *Id.* What *Crowder* gets wrong, however, is what happens after that procedural dismissal. Whether a prisoner appeals the ARP dismissal to the Commissioner and then to the IGO or just goes straight to the IGO, the *Crowder* panel suggests that

any appeal is futile because the IGO would be required to dismiss the appeal. *Id.* But neither the text of the statutes and regulations the court cites nor the evidence showing how this process plays out in practice supports the Court's conclusion.

First, nothing in the governing statutes or regulations requires the IGO to dismiss an appeal from an IIU-related ARP dismissal. The *Crowder* court first cites Md. Code Ann., Corr. Servs. § 10-207 for that proposition, but the court itself acknowledges that that statute merely grants the IGO *discretion* to dismiss a complaint it determines is "wholly lacking in merit on its face." *Id.* (quoting Md. Code Ann., Corr. Servs. § 10-207(b)(1) and noting that the regulation "authoriz[es]"—but does not require—the IGO to dismiss certain claims). Nothing in the statute's text requires the IGO to deem an IIU-related ARP dismissal as wholly lacking in merit on its face (and, as discussed below, the IGO did not do so in practice).

Nor does Md. Code Regs. § 12.07.01.08(C) mandate dismissal. That IGO regulation—routinely interpreted and relied on by ALJs hearing Maryland prisoner grievances—tasks ALJs with determining whether administrative actions challenged by prisoners are "arbitrary and capricious" or "inconsistent with law." Md. Code Regs. § 12.07.01.08(C)(1). It nowhere directs ALJs to systematically reject prisoner's appeals from an ARP procedurally dismissed because of an ongoing IIU investigation. Tellingly, neither the court nor Mr. Younger has identified a single instance in which the IGO dismissed an appeal because the cited statute or regulations required it to do so due to an IIU investigation.

Second, ALJs—subject-matter experts in the IGO's regulations—regularly reach the merits of IGO appeals even when the prisoner's ARP had been procedurally dismissed due to an IIU investigation, including in the seventeen cases already identified (Mr. Lee's case, plus the sixteen cases documented in the administrative record

materials). *See supra* at 11-12. Notably, many of the ALJs did so *after explicitly citing* Md. Code Regs. § 12.07.01.08(C) (or its materially similar predecessor, Md. Code Regs. § 12.07.01.09(C) (2007)). *See, e.g.*, C.A. Doc. 104, at Add. 116 ("Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Grievant has failed to establish that the DOC was arbitrary and capricious or in violation of the law. COMAR 12.07.01.09A and 12.07.01.09C(l)[.]"); *id.* at Add. 21 (similar); *id.* at Add. 139 (similar). If the *Crowder* court's interpretation of the regulation were correct, there would never be a reason for an ALJ to proceed to the merits; indeed, an ALJ *couldn't* reach the merits. Rather, any time an ALJ came across an appeal from an IIU-related dismissal, the judge would simply dismiss the matter. But that's not how the ALJs interpreted the regulations, and it's not how the process played out in practice.

b. Forced to acknowledge that, "in some cases, the [IGO] has granted relief to inmates whose grievances were dismissed because of an [IIU] investigation," the court insists that "there is no explanation for this under Maryland law," offering that the IGO perhaps "ignored its regulations as a matter of grace." 79 F.4th at 380-81. In other words, the court suggests that the ALJs often simply acted ultra vires each time they proceeded to consider a prisoner's IGO appeal following an IIU ARP dismissal. On that understanding, the Court in effect created a second requirement that a defendant must show to establish that a prisoner failed to exhaust under the PLRA: (1) the remedy must be "available" under *Ross* v. *Blake*, *and* (2) the remedy must not be "contrary to statute and regulation." *Id.* at 381.

But there is an explanation for the regular relief prisoners receive under Maryland's grievance system (and one that doesn't involve ALJs going rogue). The prison directives mandate that a dismissal of an ARP "for procedural reasons" is treated as a "substantive decision" that

"may be appealed by the inmate." Pet. App. 74a-75a; *see* Pet. Merits Reply Br. at 19, *Ross v. Blake*, 578 U.S. 632 (2016) (No. 15-339) ("As the directives provide, a procedural dismissal of an ARP complaint is a 'substantive decision,' to be appealed to the Commissioner and then submitted to the [IGO]."). So when a prisoner appeals a complaint that was procedurally dismissed because of an IIU investigation, the ALJ reviews the prisoner's substantive challenge—not whether the warden properly dismissed the claim for procedural reasons. That is exactly how it played out in practice, with ALJs applying the "arbitrary and capricious" or "inconsistent with law" standards to the merits of the prisoner's challenge, even when the appeal came from an IIU dismissal. *See supra* at 11-12, 14-15.

c. Even if the *Crowder* court's interpretation of the regulations were correct, that is irrelevant under *Ross* v. *Blake*. The *Crowder* court concluded that "an inmate filing a grievance over an event that is being investigated by the [IIU] faces nothing but 'dead end[s]' that are 'practically speaking, incapable of use.'" 79 F.4th at 380 (quoting *Ross*, 578 U.S. at 643-44). But the court ignored *Ross* v. *Blake*'s explanation of what it means to meet a dead end or for a remedy to be so opaque as to be "incapable of use." The grievance procedures here cannot be characterized as a dead end: Rather than officers being "unable or consistently unwilling" to afford remedies, *Ross*, 578 U.S. at 643, they were both able and consistently *willing* to grant remedies. Nor can the procedures be deemed so opaque that "no ordinary prisoner can make sense of what [they] demand[]," *Ross*, 578 U.S. at 644, when more than a dozen prisoners—including a prisoner involved in the same incident as Mr. Younger—were able to navigate the system. The *Crowder* court's failure to consider the "real-world workings" of Maryland's grievance procedures and the "facts on the ground" is at war with *Ross* v. *Blake*.

To take it one step further, if *Crowder* is correct, most of the 15-page opinion in *Ross* v. *Blake*—not to mention the remand—was a waste of time: This Court should have simply read the applicable Maryland statutes and regulations and held that no remedies were available as a matter of Maryland law. Instead, the Court conducted a four-page analysis of the "facts on the ground," *id.* at 645-48, and directed the lower courts on remand to "perform a thorough review" of the materials evidencing whether remedies were in fact available, *id.* at 648. Thus, the *Crowder* court's focus on the bare text of the statutes and regulations rather than whether prisoners obtain remedies in practice—as shown by the record—cannot be squared with *Ross* v. *Blake*.

B. The Decisions Below Conflict With The Decisions Of Other Circuit Courts

The approach adopted by the Fourth Circuit not only contravenes *Ross* v. *Blake*, but also splits with other circuit courts that have uniformly concluded that when the record establishes that inmates have in fact received remedies from a prison's grievance process, those remedies are necessarily "available." Indeed, no other circuit court has concluded that the text of the governing statutes or prison regulations alone can render remedies unavailable despite what the "facts on the ground" show.

Second Circuit. In *Hall* v. *Annucci*, the court determined that New York's Inmate Grievance Program (IGP) was available because the plaintiff prisoner "had previously used the IGP to file several grievances . . . that resulted in relief." No. 22-2031, 2023 WL 7212156, at *2 (2d Cir. Nov. 2, 2023). That the prisoner had in fact received a remedy in the past under the IGP was dispositive of the question whether a remedy was "available." *See id.*

Third Circuit. In *Cropper* v. *McCarthy*, the court determined that the Delaware Department of Correction's process for requesting staff investigations was available

because "the record indicates that on at least one occasion, [another] inmate's use of [the process] resulted in disciplinary action against an officer." No. 23-2091, 2024 WL 615520, at *3 (3d Cir. Feb. 14, 2024). Indeed, the court explained that when another inmate has obtained a remedy through the prison's grievance procedure, the prison's procedure is "not an example of a remedial process under which 'administrative officials have apparent authority, but decline ever to exercise it.'" *Id.* (quoting *Ross*, 578 U.S. at 643). To the contrary, because the "'facts on the ground' suggest[ed] that there [was] a 'potential' for relief under [the grievance procedure], [Plaintiff] was obligated to exhaust it." *Id.* (quoting *Ross*, 578 U.S. at 643); *cf. Barradas Jacome* v. *Att'y Gen. U.S.*, 39 F.4th 111, 121 (3d Cir. 2022) (concluding that administrative remedies under Immigration and Nationality Act were unavailable to plaintiff where the government could not "cite a single" successful legal challenge during expedited removal proceedings (citing *Ross*, 578 U.S. at 642)).

Shumanis v. *Lehigh County* is also instructive. 675 F. App'x 145 (3d Cir. 2017). There, the text of the prison's Grievance Policy and Procedure (GPP) contained "ambiguities," *id.* at 149 n.1, and "according to one reading of the GPP," the plaintiff prisoner's claims were "not grievable," *id.* at 148. The court concluded that whether remedies were available could not be determined based on an analysis of the GPP's text alone: "Beyond its analysis of the language of the GPP, however, the District Court made no factual finding as to the actual availability of a remedy for prisoner complaints that allege violations of federal law." *Id.* The court accordingly remanded for further fact-finding regarding whether prisoners in fact obtain remedies on claims like the plaintiff's. *Id.* at 149 (directing district court to consider "the actual availability of administrative remedies").

Fifth Circuit. In *Valentine* v. *Collier*, the court determined that the Texas Department of Correctional

Justice (TDCJ) provided a grievance process that was "available" to inmates even though the process was "suboptimal" for addressing the COVID-19 pandemic. 978 F.3d 154, 162 (5th Cir. 2020). The court concluded that remedies were available based on "evidence that Plaintiffs obtained soap and cleaning supplies, COVID-19 testing, and the halt of transfers into the [unit], which they requested through the grievance process at various points." *Id.* That meant the grievance procedure "was capable of providing some relief for the action complained of" and thus available under *Ross* v. *Blake*. *Id.* (internal quotations omitted).

Seventh Circuit. In *Wallace* v. *Baldwin*, noting that courts must apply the availability analysis "to the real-world workings of prison grievance systems," the court determined that whether remedies were available to inmates at an Illinois prison turned on whether there was "evidence that other inmates" had obtained remedies on similar claims. 55 F.4th 535, 543-44 (7th Cir. 2022) (quoting *Ross*, 578 U.S. at 643). Because that was not clear from the record, the court remanded for limited discovery on that dispositive issue. *See id.*; *see also Lanaghan* v. *Koch*, 902 F.3d 683, 688 (7th Cir. 2018) ("The availability of a remedy is . . . a fact-specific inquiry.").

Tenth Circuit. In *Kee* v. *Raemisch*, the court rejected the prisoner's claim that remedies were unavailable under the Colorado Department of Corrections (CDOC) grievance system because the record showed that CDOC had in fact investigated the prisoner's prior claims, and the prisoner failed to show any evidence that other "aggrieved inmates" had not received relief under the grievance process. 793 F. App'x 726, 736 (10th Cir. 2019).

The throughline of these cases is that when inmates have successfully obtained remedies through their prison's grievance procedures, those remedies are plainly "available" under *Ross* v. *Blake*. Or if, unlike here, the record is not clear concerning whether inmates have

obtained remedies in practice, then the proper course is for courts to conduct additional fact-finding on that dispositive issue. The Fourth Circuit is alone in holding that remedies may be deemed unavailable—even when prisoners routinely obtain them—if the court's reading of the governing statutes and regulations suggests, contrary to the "facts on the ground," that remedies are not available.

II. THE QUESTION PRESENTED IS IMPORTANT AND THIS CASE PROVIDES A GOOD VEHICLE TO RESOLVE IT

This case concerns an important and recurring question of federal law—and presents a good vehicle to resolve it.

1. The important exhaustion issue under the PLRA, the Court's previous review of this very issue, and the Court's previous review of this very *case* all confirm that the question presented here is of significant legal and practical importance. This issue also implicates federalism concerns regarding a state's interpretation of its own statutes and regulations.

This Court has acknowledged the exceptional importance of properly applying the PLRA's exhaustion requirement, including specifically as to Maryland's grievance procedures. In *Ross* v. *Blake*, this Court granted certiorari to review the "special circumstances" exception to the PLRA the Fourth Court created, which allowed prisoners to pursue litigation even when they had failed to exhaust administrative remedies. 578 U.S. at 635. *Ross* v. *Blake* involved the same issue, the same administrative-remedies scheme, and even the same prison. *See* Pet. Br. at 9, *Ross v. Blake*, 578 U.S. 632 (2016) (No. 15-339) (noting that Blake "was an inmate at the Maryland Reception, Diagnostic and Classification Center"). That this Court previously granted certiorari *in this case* further underscores its importance; the exhaustion issues here are no less important than the

preservation issue on which the Court previously granted certiorari.

These exhaustion questions under the PLRA repeatedly arise. Since *Ross* v. *Blake* was decided in 2016, courts have cited it over 8,500 times, including over 500 times by the courts of appeals. And as demonstrated by the cases discussed above, courts regularly grapple with the specific issue concerning whether remedies are "available" under the PLRA. *Ross* v. *Blake*'s Westlaw headnote on the definition of "available" has been cited over 300 times. The lower courts would thus benefit from further clarity on this issue.

The federalism concerns presented here also support review. Federal courts have long respected states' interpretations of their own laws, and not just when sitting in diversity. *See Comm'r* v. *Bosch's Est.*, 387 U.S. 456, 465 (1967). That deference is particularly important in relation to the PLRA, which Congress passed "to eliminate unwarranted federal-court interference with the administration of prisons." *Woodford*, 548 U.S. at 93. Indeed, it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Id.* at 94 (internal quotation marks and citation omitted). Yet the Fourth Circuit ignored the State of Maryland's official, decades-long position that administrative remedies *are* available to prisoners regardless of whether there is an ongoing IIU investigation. The Fourth Circuit further ignored the consistent interpretation by Maryland ALJs of the key IGO regulations, which are in direct conflict with the Fourth Circuit's interpretation. The federalism concerns expressed by this Court in *Woodford* are thus at their zenith.

2. This case is an optimal vehicle for deciding this important question. The dispute turns on a pure question

of law: whether remedies are "available" to Maryland prisoners under the PLRA when the prisoner's grievance is the subject of an IIU investigation. That question was squarely raised and resolved below; the court of appeals thoroughly addressed the question and treated it as dispositive. Nor are there any alternative holdings or grounds for affirmance passed on by the court below that would interfere with the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2025