

No. _____

In The
Supreme Court of the United States

WINIFRED JIAU,

Plaintiff-Appellant,

v.

KAIRE POOLE; RANDY L. TEWS,

Defendant-Appellee.

*On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit*

Appeal Case No. 16-15147
in the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit held, contrary to the holdings of every other circuit considering the question, that exhaustion under the Prison Litigation Reform Act (PLRA) is required when administrative remedy is unavailable.

1. Was the district court in error when it denied Petitioner's *Bivens* action without addressing the three kinds of unavailability articulated in the Supreme Court's ruling in *Ross v. Blake* under 42 U.S.C. § 1983?

2. Whether the court of appeals erred in not considering all the context of the provisions dealing with the BOP's grievance procedure such as 28 C.F.R. § 542.14(d)(1) governing inmates' sensitive grievances?

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Petitioner Winifred Jiau respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's order in 2017 is unreported, but is available at 682 Fed. Appx. 613 (9th Cir. 2017). Pet. App. 2a. The Ninth Circuit's order in 2015 is unreported, but is available at 590 Fed. Appx. 689 (9th Cir. 2015). Pet. App. 5a. The Ninth Circuit's order denying rehearing and rehearing en banc is unreported. *Id.* at 1a. The district court's 2016 order granting Defendant's motion for summary judgment is unreported, but is available at 2016 U.S. Dist. LEXIS 1219 (N.D. California. 2016). Pet. App. 10a. The district court's 2013 order of dismissal Jiau's *Bivens* action is unreported, but is available at 2013 U.S. Dist. LEXIS

JURISDICTION

The Court has jurisdiction under 28 U.S.C. §1254. The order of the court of appeals was entered on March 16, 2017. Petitioner timely filed a petition for rehearing and rehearing en banc, which was denied on November 30, 2017.

STATUTORY AND RULE PROVISIONS INVOLVED

42 U.S.C. § 1997e(a) — 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. Pet. App. 21a.

28 C.F.R. § 542.14(d)(1) — if the inmate reasonably believes the issue is sensitive and the inmate's safety and well-being would be placed in danger if the Request became known at the institution, the inmate may submit the Request directly to the appropriate Regional Director. ...if the Regional Administrative Remedy Coordinator agrees that the Request is sensitive, the Request shall be accepted. Otherwise, the Request will not be accepted, and the inmate shall be advised in writing of that determination, without a return of the Request. The inmate may pursue the matter by submitting an Administrative Remedy Request locally to the Warden. The Warden shall allow a reasonable extension of time for such a resubmission. Pet. App. 22a.

STATEMENT OF THE CASE

Jiau was a federal inmate incarcerated at the federal prison in Dublin, California between 2011 and 2013. She enrolled in the prison's Residential Drug Abuse Program ("RDAP") in 2012. RDAP officers picked on her by aggressively questioning Jiau about her pending criminal appeal to the conviction of Security Fraud and threatened her with expulsion from the program unless she withdrew it. Jiau exercised her Fifth Amendment right against self-incrimination by refusing to answer the prison officers' questions related to the alleged charge. She continuously exercised her right to appeal without dropping her pending direct appeal. The prison officials soon expelled Jiau from RDAP in retaliation for exercising those rights. Moreover, the RDAP officers had aided and abetted other inmates in harassing Jiau and accusing

her stealing people's money for the alleged offense. Jiau was not only intimidated and overwhelmed by the punishment, but also concerned about her safety. Ultimately, she was expelled from RDAP in July 2012. As for administrative remedies, FCI-Dublin played hide-and-seek. None of those grievance forms could be found or available in any of inmate's housing units. Grievance forms were locked in the unit team's building, an independent building separating from inmates' dorms. In July 2012, Jiau asked for applicable form to file her grievance request. Her unit counselor gave her BP-10. Jiau indicated "sensitive" on her BP-10 and filed it to the Western Regional Director. Later, Jiau's BP-10 was returned to her without a determination of "sensitive". On remand, the district court deliberately ignored these material facts at issue, but made its own conclusion that "it is not disputed that Jiau was aware of the first level of review because on at least two other occasions" Pet. App. 15a. Contrary to the district court's erroneous view, the record reflected that Jiau's July 2012 remedy request, No. 697874-R1, is her first grievance, given that she had no other grievance forms but this BP-10 that her counselor gave her.

Regardless of whether that the district court's finding that Jiau should be aware of the first level of review is correct or not, Code of Federal Regulations 28 § 542.14(d)(1) is nonetheless included on the BOP's official book, providing that "if the inmate reasonably believes the issue is sensitive and the inmate's safety and well-being would be placed in danger if the Request became known at the institution, the inmate may submit the Request directly to the appropriate Regional Director." Jiau filed this action since she was harassed, intimidated, coerced by multiple prison officers and she was ultimately expelled from RDAP in retaliation for exercising her Fifth Amendment constitutional right against self-incrimination and right to direct appeal. She marked "Sensitive" on her BP-10 and identified humiliating and harassing behavior by officer Kubitz and Friedeberg, who also agitated other inmates' to snoop and attack her underlying offense that caused her fears, stress, anxiety, pain and depress. Jiau's BP-10 was returned to her by the Regional Administrative Remedy Coordinator without a determination of "sensitive". Whether this official administrative procedure operated as a simple dead end — with officers unable or consistently unwilling to provide any relief to aggrieved inmates should be a genuine issue of material fact for the court to consider.

Neither the Government nor the district court disputed that Jiau had properly asserted "sensitive" on her July 18, 2012 BP-10. On July 25, 2012. As the records reflected, Jiau provided more sensitive evidence and resubmitted this remedy request to the Western Regional office when she obtained an evidential email from Jiau's counselor. The email was initiated and distributed by RDAP Program Coordinator Kaire Poole to Jiau's unit team members. Pet. App. 12a.

Jiau filed her *Bivens* action on January 17, 2013 at the Northern District of California. Her *Bivens* action was soon dismissed by the district court on March 1, 2013. Pet. App. 19a. Following a dismissal of her *Bivens* action, Jiau timely filed her notice of appeal. On January 15, 2015, an unanimous panel of this Court held that the district court “was erroneous to dismiss Jiau’s 2012 pro se *Bivens* action on the ground of failure to exhausted her administrative remedies and her claims implicating the duration of her confinement which must be raised in a habeas petition not a civil rights complaint, given the language in the applicable statute indicates that successful completion of RDAP does not necessarily result in a reduced sentence, but rather that the Bureau of Prisons (“BOP”) retains discretion over whether to grant a sentence reduction to a prisoner who completes the program.” *Jiau v. Poole*, 590 Fed. Appx. 689 (9th Cir. 2015). Pet. App. 6a-8a. The order to dismiss Jiau’s *Bivens* action was vacated and the case was remanded to the district court. On remand, the district court again dismissed Jiau’s *Bivens* action without holding an evidentiary hearing nor calling for additional evidence to certain material facts in question, but maintained that Jiau failed to create any genuine issue of material fact as to whether or not her obligation to properly exhaust her administrative remedies included seeking review at the institutional level because Jiau’s assertion of “Unit Team” may have consisted of inmates, officials or a combination of the two. Pet. App. 15a. Without considering 28 § 542.14(d)(1), neither conducting any evidential hearing, nor granting leave to amend, the district court granted Defendant’s motion for Summary Judgment and dismissed Jiau’s complaint. On March 8, 2017, shortly after the Supreme Court’s decision in *Ross v. Blake* was decided, another three judges panel of the Ninth Circuit affirmed the district court’s remand order in this case that, without addressing the three kinds of circumstances articulated in *Ross v. Blake*, while focused on whether Jiau failed to raise a genuine dispute of material fact as to whether there was “something in [her] particular case that made the existing and generally available administrative remedies effectively unavailable to [her].”, citing this Court’s decision in *Woodford v. Ngo* “requiring proper exhaustion, which means “using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits) *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)”. Pet. App. 3a. The panel also rejected Jiau’s contentions concerning appointment of counsel, leave to amend, leave to conduct discovery, or deliberate indifference to medical needs and defendants committed perjury; said that they were not raised in Jiau’s first and only claim filed in January 2013. The panel’s attempts notwithstanding, the two decisions cannot be reconciled.

Not only is the Panel’s holding inconsistent with the Ninth Circuit’s decision in 2015, it also conflicts with this Court’s recent articulation of the circumstances in *Ross v. Blake*, 136 S. Ct. 1850, 1858-60 (2016). In affirming the district court’s dismissal of Jiau’s *Bivens* action, the Ninth Circuit

deliberately ignored three circumstances where Jiau were facing, had been identified by the Supreme Court, in which an administrative remedy is unavailable: (1) when the process "operates as a simple dead end" with prison officials "unable or consistently unwilling to provide any relief" to prisoners; (2) when the process is "so opaque" or confusing that it is "essentially 'unknowable' — so that no ordinary prisoner can make sense of what it demands;" and (3) when prison officials thwart inmates from using the process "through machination, misrepresentation, or intimidation." 136 S. Ct. 1850, 1859-60 (2016).

The Ninth Circuit denied rehearing and rehearing en banc. *Id.* at 1a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit incorrectly accepted the district court's finding that Jiau was aware of the first level of review in 2012 based on Jiau's another grievance requests filed in 2014. *See Jiau v. Tews*, 623 Fed. Appx. 349 (9th Cir. 2015). The Court of Appeal did not only fail to correct the error of the district court analysis whether there was "something in [her] particular case that made the existing and generally available administrative remedies effectively unavailable to [her], but also deliberately ignore the fact that prison officers consistently unwilling to provide any relief to aggrieved inmates, like Jiau. If the court of appeals' decision stands, the dismissal of Jiau's *Bivens* action is accomplished without her ever having had an opportunity to defend against the prison officers' viciousness. The Ninth Circuit dismissed Jiau's complaint and denied her relief, not because of lack of power or because of any demerit in the complaint, but because Jiau did not first file BP-9 or the BOP did not address Jiau's sensitive grievance on the merits, which, in fact, was never available which is not now open to it. Thus, by denying to it the only remedy ever available for the protection of an inmate's right of grieving sensitive issues such as prison official's abusive conducts; intimidation, coercion, and harassment, the judgment deprives Jiau of her civil rights. Nevertheless, this Court has articulated three circumstances in which an administrative remedy is unavailable in *Ross v. Blake*. The court of appeals' rejection of the Supreme Court's conclusion is particularly unsettling because the lower court is bound to the High Court's decision. Further review is warranted.

I. THE PANEL'S DECISION DISTURBS UNIFORMITY OF LAW

A. The Panel's Decision Conflicts with Supreme Court and Ninth Circuit Precedent for Determining Whether Administrative

Remedies Effectively Unavailable

As permitted by 28 C.F.R. § 542.14(d)(1), Jiau repeatedly asserted her grievance (BP-10) complaining of prison staffs' misconducts, was sensitive in her pleadings. Appellant's Brief at 13, 18, 19, 29. The district court refused to review whether an inmate's administrative grievance is improperly rejected under 28 C.F.R. § 542.14(d)(1), thus, exhaustion may be excused as an administrative remedy, although officially on the books, is not capable of use to obtain relief. Instead, the district court solely relied on 28 C.F.R. §§ 542.10, 542.14(c)(4) and 542.15(a), a premise that the federal Bureau of Prisons provides a three-step administrative review process for inmates to seek remedies relating to any aspect of their imprisonment: (1) a complaint to staff at their institution (Form BP-9); (2) an appeal to the BOP Regional Director (Form BP-10); and (3) an appeal to the BOP Central Office (BP-11). Pet. App. 11a. But, pursuant to 28 C.F.R. § 542.14(d)(1), the duty to first file a BP-9 can be relieved. The Ninth Circuit once concluded that when an inmate's administrative grievance is improperly rejected on procedural grounds, exhaustion may be excused as effectively unavailable. *Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010); see also *Nunez v. Duncan*, 591 F.3d 1217, 1224-26 (9th Cir. 2010) (warden's mistake rendered prisoner's administrative remedies "effectively unavailable"); *Ward v. Chavez*, 678 F.3d 1042, 1045 (9th Cir. 2012) (exhaustion excused where futile). Consequently, because it appears that the district court may have relied on erroneous findings of fact, improperly applied the law or used an erroneous legal standard to reach its decision. The district court's dismissal of Jiau's *Bivens* action on that basis is an abuse of discretion. *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1062 (9th Cir.1995).

The facts of Jiau's case raise questions about whether Jiau had an "available" administrative remedy to exhaust, like in *Ross v. Blake*, the circumstances of interaction between two processes of administrative remedy procedure. The district court's conclusion rested on Jiau's failure to seek relief through the BOP's procedural regulation 28 C.F.R. §§ 542.10, 542.14(c)(4) and 542.15(a), which begins with a grievance to the institution level (BP-9). That process is the standard method for addressing inmate complaints in the Federal prisons. But the BOP holds up a provision 28 C.F.R. § 542.14(d)(1) to deal with sensitive issues "if the inmate reasonably believes the issue is sensitive and the inmate's safety and well-being would be placed in danger if the Request became known at the institution", and Provision 28 C.F.R. § 542.14(d)(1) did just that here. Jiau urged the district court and on her appeal to that once a grievance request commenced under the provision of 28 C.F.R. § 542.14(d)(1), it would require a writing determination of sensitive from the Regional Office without a return of the Request, contrary to what were asserted by the district court. The BOP never made any ineligibility determination on

Jiau's sensitive grievance request pursuant to 28 C.F.R. § 542.14(d)(1), nor advised Jiau that 28 C.F.R. § 542.14(d)(1) is not a valid provision and removed that provision from the its official books. Moreover, both the district court and the court of appeals refused to address Jiau's question raised concerning 28 C.F.R. § 542.14(d)(1). Appellant's Brief at 13, 17, 18, 19, 25, 29, 31, 33, 52. Neither the district court nor the Ninth Circuit asked to lodge additional materials relating to the interaction between 28 C.F.R. § 542.14(d)(1) and the so-called "BOP regulations" maintained by the district court. Without any further review, the Ninth Circuit lend its support to Appellees' account.

In *Ross v. Blake*, 136 S. Ct. 1850, 1858-1860 (2016), this Court held that there are three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief. 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. Next, an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use — i.e., some mechanism exists to provide relief, but no ordinary prisoner can navigate it. And finally, a grievance process is rendered unavailable when prison administrators thwart inmates from taking advantage of it through machination, misrepresentation, or intimidation. The Court in *Ross v. Blake* held that the PLRA contains its own, textual exception to mandatory exhaustion. Under § 1997e(a), an inmate's obligation to exhaust hinges on the "availab[ility]" of administrative remedies. A prisoner is thus required to exhaust only those grievance procedures that are "capable of use" to obtain "some relief for the action complained of." *Booth*, 532 U.S., at 738, 121 S.Ct. 1819. *Ross v. Blake* at 1854. The Supreme Court also signaled a standard approach, which requires the appeal court to perform a thorough review on whether grievances were routinely dismissed as procedurally improper by prison officials. *Ross v. Blake* at 1854, 1861.

Prior to Supreme Court's decision in *Ross v. Blake*, the Ninth Circuit had decided *Nunez v. Duncan*, 591 F.3d 1217, 1224-26 (9th Cir. 2010) and *Albino v. Baca*, 697 F. 3d 1023, 1030 (9th Cir. 2012), holding that "[t]he PLRA requires that an inmate exhaust only those administrative remedies 'as are available.'" The court in *Nunez v. Duncan* also found when an inmate's administrative grievance is improperly rejected on procedural grounds, exhaustion may be excused as effectively unavailable. *Nunez v. Duncan*, 591 F.3d 1217, 1224-26 (9th Cir. 2010). The court in *Sapp v. Kimbrell*, consistent with these precedents and with this Circuit's decision in *Nunez*, held that improper screening of an inmate's administrative grievances renders administrative remedies "effectively unavailable" such that exhaustion is not required under the PLRA. If prison officials screen out an inmate's appeals for improper reasons, the inmate cannot pursue the necessary sequence of appeals, and administrative remedies are therefore plainly unavailable. *Sapp v. Kimbrell*, 623 F.3d 813,

823 (9th Cir. 2010). The Supreme Court's explanation in *Ross v. Blake*, of three kinds of circumstances in which an administrative remedy is not capable of use to obtain relief, just confirmed the exhaustion rules held by the Ninth Circuit previously.

In affirming the dismissal of Jiau's complaint on the ground of failure to exhaust, the PLRA exhaustion rules were applied by the circuit courts of appeal in the prison's favor. However, its implication drawn from the omission part of the procedural rules of the BOP's official books —thus permitting a decision in this case contrary to its previous determinations on exhaustion of available administrative remedies — is unpersuasive. Most importantly, the district court denied Jiau's case by picking and choosing which provision shall be branded as the BOP regulations, as it omitted 28 C.F.R. § 542.14(d)(1), but relied on 28 C.F.R. §§ 542.10, 542.14(c)(4) and 542.15(a). On appeal, the Ninth Circuit turned a deaf ear to Jiau's urge to a review of 28 C.F.R. § 542.14(d)(1).

B. This Panel's Decision Creates Circuit Split

The Ninth Circuit is the only circuit deciding this issue of PLRA exhaustion directly contrary to the Supreme Court's approach after *Ross v. Blake*. On June 6, 2016, this Court decided *Ross v. Blake*, 136 S. Ct. 1850 (2016), pointed out that "many appellate courts have addressed a variety of instances in which officials misled or threatened individual inmates so as to prevent their use of otherwise proper procedures. As all those courts have recognized, such interference with an inmate's pursuit of relief renders the administrative process unavailable", and affirmed the 5th, 7th, 10th and 11th Circuit's determination of "availab[ility]" of administrative remedies in a footnote to its opinion, "and then, once again, § 1997e(a) poses no bar." *Ross & Blake* at 1860.

In light of *Ross v. Blake*, the Fourth Circuit remanded the case to district court to address the question whether or not the inmate remedies are "available." *Blake v. Ross*, 667 Fed.Appx. 408 (4th Cir. 2016). The Second Circuit concluded that grievance process was not available to inmate Williams because the applicable grievance procedures are "so opaque" and confusing that they were, "practically speaking, incapable of use." after reviewing whether the prison's grievance process was actually "available" to inmate Williams in light of the extraordinary circumstances of his case. *Williams v. Correction Officer Priatno*, 829 F. 3d 118, 119 (2nd Cir. 2016). In light of *Ross v. Blake*, the Third Circuit held that SCI Rockview rendered its administrative remedies "unavailable" to inmate Robinson because it did not even address the correct incident — rendered the prison's administrative remedies "available" to him under the PLRA. *Robinson v. Superintendent Rockview SCI*, 831 F. 3d 148, 154 (3rd Cir. 2016). It also vacated the District Court's judgment in

Shumanis v. Lehigh County, 2017 WL 192957 (3rd Cir. 2017) and remanded it for further proceedings, holding that the Supreme Court held that although there are "no limits on an inmate's obligation to exhaust," "the remedies must indeed be 'available' to the prisoner" for the exhaustion requirement to obtain. *Id.* at 1856. The Seventh Circuit vacated the district court's judgment and remanded the case for further proceedings in light of *Ross v. Blake*, as inmate Tullis filed his lawsuit after receiving six returned grievances with the explanation that he had sent the grievances to the wrong decision-maker, missed a deadline, or failed to include necessary paperwork, but before his director issued a decision on his May 2013 grievances. *Tullis v. Shaw*, 2017 WL 219109 (7th Cir. 2017). Under the standard set forth by this Court in *Ross v. Blake*, the Eighth Circuit decided that a liberal construction of Connor's allegations supports the conclusion that prison officials thwarted him from taking advantage of the grievance process, which effectively made the administrative remedies unavailable to him. *Connor v. CO 1 Box*, 2016 WL 3545670 (8th Cir. 2016). In a decision that conflicts with Supreme Court and at least eight other Circuits (the 2nd, 3th, 4th, 5th, 7th, 8th, 10th, 11th Circuit) addressed the issue, the Ninth Circuit not only affirmed the district court's erroneous judgment in dismissing Jiau's *Bivens* action without considering three kinds of circumstances articulated in *Ross and Blake*, but also conducting no evidentiary hearing to clarify those genuine issues as to material facts — which member in Jiau's Unit Team gave her the grievance form and why the Regional Administrative Remedy Coordinator returned Jiau's sensitive grievance without writing determination of sensitive. Instead, it affirmed the district court's finding that Jiau failed raise a genuine dispute of material fact as to whether she properly exhausted her administrative remedies, or whether there was "something in [her] particular case that made the existing and generally available administrative remedies effectively unavailable to [her]."

The court of appeals did not hold or suggested Jiau's claims were without merits. Instead, The Ninth Circuit rejected Jiau's *Bivens* action based on failure to exhaust administrative remedies or Jiau did not use all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits). It suggested that the BOP did not address the issues on the merits then, so did the courts. In the Ninth Circuit's view, unless Jiau established that she began with a grievance at the institution level (BP-9). That process is the standard method for addressing inmate complaints in the federal's prisons or otherwise the district court was properly granted summary judgment in dismissing Jiau's claim (Pet. App. 3a), despite the district court's plain error of fact and law in addressing PLRA's proper exhaustion and the omission C.F.R. § 542.14(d)(1). The district court did not expressly consider Jiau's allegation that she submitted her sensitive grievance in BP-10 under the steps that the agency holds up in 28 C.F.R. § 542.14(d)(1) while the BOP's

official book maintains such a provision to investigate federal inmates sensitive issues, charges of prison staff misconduct , and that provision did just that here. Even if Jiau's BP-10 were denied by not being sensitive, Jiau could still file BP-11 at the Central Office to appeal the Regional Office's denial accordingly.

If the district dismissed Jiau's case on January 6, 2016 without the benefit of the decision of the Supreme Court in *Ross v. Blake*, the Ninth Circuit's order on March 16, 2017 would have no foundation in reason or in the case law after the Supreme Court's decision in *Ross v. Blake* on June 6, 2016. Although the court of appeals cited a previous decision of this Court in *Woodford v. Ngo*, 548 U.S. 81, 90 (2006), see Pet. App. 3a, that decision does not support its conclusion. As the Supreme Court made it clear that "edict contains one significant qualifier: the remedies must indeed be "available" to the prisoner." *Ross v. Blake* at 1856. As cases in other circuits have made clear, the Ninth Circuit's position is wrong. Prior to *Ross v. Blake*, the 5th, 7th, 10th and 11th Circuit had already regularly reviewed the availability of administrative remedies before dismissing inmates' *Bivens* actions by failure to exhaust under PLRA. See, e.g., *Davis v. Hernandez*, 798 F.3d 290, 295 (C.A.5 2015) ("Grievance procedures are unavailable ... if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process" (emphasis deleted)); *Schultz v. Pugh*, 728 F.3d 619, 620 (C.A.7 2013) ("A remedy is not available, therefore, to a prisoner prevented by threats or other intimidation by prison personnel from seeking an administrative remedy"); *Pavey v. Conley*, 663 F.3d 899, 906 (C.A.7 2011) ("[I]f prison officials misled [a prisoner] into thinking that ... he had done all he needed to initiate the grievance process," then "[a]n administrative remedy is not `available'"); *Tuckel v. Grover*, 660 F.3d 1249, 1252-1253 (C.A.10 2011) ("[W]hen a prison official inhibits an inmate from utilizing an administrative process through threats or intimidation, that process can no longer be said to be `available'"); *Goebert v. Lee County*, 510 F.3d 1312, 1323 (C.A.11 2007) (If a prison "play[s] hide-and-seek with administrative remedies," then they are not "available").

In any event, because of this Court's unique role as the final arbiter of the law on a nationwide basis, the effect of a decision of this Court on determining the availability of the administrative remedies may be somewhat different from that of a court of appeals. If a sensitive grievance procedure under 28 C.F.R. § 542.14(d)(1) were unavailable to a federal inmate, the limitation on Jiau's duty to exhaust should have real content because sensitive grievance procedures were on the grievance system for federal prisoners who seek to challenge their conditions of confinement. The court of appeals erred in striking down Jiau's *Bivens* action without regard to the agent's official procedural rule of 28 C.F.R. § 542.14(d)(1), and this Court's review also is

warranted to resolve the circuit conflict exacerbated by the decision below.

II. THE LOWER COURTS' PURPOSELY OMISSION OF THE PROVISION OF THE AGENT'S PROCEDURAL RULE PRESENTS AN ISSUE OF EXCEPTIONAL NATIONAL IMPORTANCE

The court of appeals' decision, which has a cross-district effect, creates immediate and urgent difficulties for a federal inmate to bring a *Bivens* action that warrant intervention by this Court.

1. Providing for the extent that the fundamental principles and the consistency among the civil right complaints containing PLRA exhaustion requirements has been the purposes of the explicit articulation made by this Court in *Ross v. Blake*. Again, the facts of Jiau's case raises questions about whether she had an "available" administrative remedy to exhaust. This Court has repeated that "*Booth* made clear, administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end — with officers unable or consistently unwilling to provide any relief to aggrieved inmates. *See* 532 U.S., at 736, 738, 121 S.Ct. 1819. Suppose, for example, that a prison handbook directs inmates to submit their grievances to a particular administrative office — but in practice that office disclaims the capacity to consider those petitions. The procedure is not then "capable of use" for the pertinent purpose." *See Ross & Blake* at 1859. As this Court pointed out: "In *Booth*'s words: "[S]ome redress for a wrong is presupposed by the statute's requirement" of an "available" remedy; "where the relevant administrative procedure lacks authority to provide any relief," the inmate has "nothing to exhaust." *Id.*, at 736, and n. 4, 121 S.Ct. 1819. So too if administrative officials have apparent authority, but decline ever to exercise it. Once again: "[T]he modifier 'available' requires the possibility of some relief." *Id.*, at 738, 121 S.Ct. 1819. When the facts on the ground demonstrate that no such potential exists, the inmate has no obligation to exhaust the remedy." Jiau asserts that she submitted her request directly to the BOP's Western Regional Director when she reasonably believed her issue is sensitive and her safety and well-being would be placed in danger if the Request became known at the institution. Jiau asserts that her federal prison handbook directs inmates to submit their sensitive grievances to Regional Director — now in practice that particular administrative office and the district court disclaim the capacity to consider Jiau's sensitive grievance or sensitive grievances were routinely dismissed without a reason as procedurally improper by that particular administrative office and the district court. In either case, a prisoner cannot obtain relief through the BOP's official grievance process for sensitive issues — whatever the Handbook may say to the contrary. Thus, an administrative scheme might be so opaque that it becomes incapable

of use — i.e., some mechanism exists to provide relief, but no ordinary prisoner can navigate it. Furthermore, should a grievance process be rendered unavailable if provision 28 C.F.R. § 542.14(d)(1) in the prisoner's handbook were to mislead an inmate or an unit team counselor as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process. Thus, Jiau urges this Court to review the district court's application of PLRA exhaustion requirements.

This Court has not said that a federal prisoner must exhaust all steps administrative remedies in a standard method regardless the types of grievances, or PLRA's text runs just one way to the prison's benefits, not to the prisoner. This Court had rejected the Ninth Circuit's reversal on an untimely grievance based on the rules on the books, but it did not direct the lower court to consider only the part of agent's procedural rules on the books to benefit the prison. *See Woodford v. Ngo*, 548 U.S. 90, 91 (2006) (Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.) Unlike Ngo, Jiau did not argue that the PLRA's exhaustion is frivolous, instead, Jiau urged the court of appeals to consider all the agent's official's procedural rules including 28 C.F.R. § 542.14(d)(1). This Court also recognized that there are times when the interaction between two relevant grievance procedures could affect an inmate's case. The district court must consider whether the remedies an inmate fails to exhaust are "available" under the principles set out in *Ross & Blake*. Consistent with this Court's decision, the Ninth Circuit once correctly decided to vacate the district court's first denial of Jiau's *Bivens* action in January 2015. Pet. App. 6a. Surprisingly, another panel of the Ninth Circuit overturned its 2015 decision when the district court denied Jiau's *Bivens* action for the same reason. Jiau requests this Court to review whether the district court's second denial is based on a permissible omission of procedural rule 28 C.F.R. § 542.14(d)(1).

2. If allowed to stand, the Ninth Circuit's decision would fundamentally change a lower federal court's analysis on the obligation of an inmate to exhaust the available administrative remedies. It would also violate this Court's conclusion that under § 1997e(a), the exhaustion requirement hinges on the "availab[ility]" of administrative remedies: An inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones. And that limitation on an inmate's duty to exhaust.

On remand, the Government did not raise the issue that "Unit Team" could be an inmate. Rather, the district court dismissed Jiau's *Bivens* action on the ground that she did not meet her burden of production of showing that prison officials informed her that she could bypass the institutional level of

administrative because she does not identify the prison official or officials who gave her this information. She simply says she was told by the "Unit Team" without explaining that term or who was in that team. The team may have consisted of inmates, officials or a combination of the two. If the team was only officials, it is unclear whether she was told by an official in who was in a position that an inmate could reasonably rely on their representations about whether the institutional review should have been bypassed. Pet. App. 15a. However, under availability principle set forth by this Court in *Ross & Blake*, the district court erred in dismissing Jiau's *Bivens* action without considering the remedies that Jiau failed to exhaust were indeed "available" while it speculated who were in Jiau's Unit Team told her to bypass the institutional level of administrative. The effect of rejecting the principles articulated in *Ross & Blake* could lead the district court invoke PLRA exhaustion requirements to upset a decision on the merits of the inmate's civil right complaints, addition to giving judges the leeway to benefit the prison or to pick-and-choose among the agent's procedural rules in the prison's favor.

3. Furthermore, even if the instant decision does not directly compel the district court to blanketly reject the three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief, the Ninth Circuit awarded the district judges the leeway to pick-and-choose among agent's procedural rules for PLRA exhaustion requirements in the prison's favor, imposes unexpected uncertainty on inmates. Contrary to the Ninth Circuit's speculation in memorandum order below, Pet. App. 3a, about Jiau failed to raise a genuine dispute of material fact as to whether she properly exhausted her administrative remedies, is based on a suggestion made by the district court, Pet. App. 12a, 15a, and is unsupported by the BOP's official procedural rules in handbook. The Ninth Circuit's decision that Jiau's failure to exhaust PLRA requirements disturbs this Court's recent instructions concerning availability of administrative remedies, given that Jiau complied the BOP's procedural rules for sensitive grievances.

Further, no other Circuits have adopted the Ninth Circuit position after this Court clarified "availab[ility]" of administrative remedies in *Ross & Blake* and most of the Courts of Appeals had affirmatively acknowledged that there are three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief. The determination of "available remedies to exhaust" limitation is particularly important in inmate's grievance process. The Court ensures that that PLRA contains its own, textual exception to mandatory exhaustion and the merits of inmate grievance will be properly considered. *Ross & Blake* at 1858.

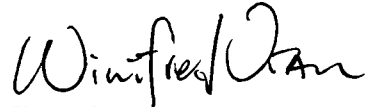
Finally, the Ninth Circuit's divergence from the standards set forth in *Ross v. Blake* not only creates circuit split, but also produces uncertainty for

inmate's grievance process in Ninth Circuit. The prison officials in Western Region can continuously play tricks such as hide-and-seek, pick-and-choose to thwart inmates from taking advantage of a grievance process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Winifred Jiau", written in a cursive style.

Winifred Jiau

Pro Se

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