No. 18-2396

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Jeremy Andrews; Wendy Kelley; Joshua Mayfield,
Defendant - Appellants,

v.

Abdulhakim Muhammad,
Plaintiff - Appellee.

On Appeal from the United States District Court
for the Eastern District of Arkansas
No. 5:15-cv-00130
The Honorable Kristine G. Baker

BRIEF OF MUSLIM ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE'S BRIEF AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(a) of the Federal Rules of Appellate Procedure, the undersigned counsel of record certifies that the *amicus curiae* Muslim Advocates is a nongovernmental entity without any parent corporation or publicly held corporation that owns 10% or more of its stock. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated: November 21, 2018

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Muslim Advocates works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths, including those who are in prison. In pursuit of this vision, Muslim Advocates' mission is to promote equality, liberty, and justice for all by providing leadership through legal advocacy, policy engagement, and civic education, and by serving as a legal resource to promote the full and meaningful participation of Muslims in American public life. The organization has advocated for incarcerated persons in cases where prison policies overly restrict the practice of religion, including in a federal complaint filed in June 2018 on behalf of Muslims prevented from practicing their religious beliefs in a federal correctional facility.

SUMMARY OF THE ARGUMENT

The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), makes clear that prisoners must exhaust administrative remedies prior

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this amicus brief.

to filing a civil action. This appeal presents two dispositive and interrelated questions as to the PLRA's exhaustion requirement: (1) whether Plaintiff-Appellee Abdulhakim Muhammad exhausted a request for a religiously compliant, halal diet, and if not, (2) whether he was excused from doing so. This brief focuses primarily on the second question and urges this Court to affirm the decision of the District Court below.

After a full bench trial, the District Court concluded that Mr. Muhammad did fully exhaust administrative remedies provided by the Arkansas Department of Corrections ("ADC"). In the alternative, the District Court found that "based on the totality of the circumstances presented," Mr. Muhammad was excused from exhausting administrative remedies. In reaching that holding, the District Court determined that ADC put into place a burdensome and confusing prisoner complaint process, and ADC's own conduct made it functionally impossible for Mr. Muhammad to receive the relief he was requesting through ADC's administrative processes.

The District Court's conclusions are consonant with U.S. Supreme Court precedent on the PLRA exhaustion requirement's operation and purpose. While it is well-established that prisoners must "proper[ly]"

exhaust or risk procedural default, *Woodford v. Ngo*, 548 U.S. 81, 90 (2006), the PLRA's exhaustion requirement was never meant to block meritorious claims. And very recently, the Supreme Court, in *Ross v. Blake*, 136 S. Ct. 1850 (2016), clarified that in circumstances where a prison's administrative processes are not "available," due to prison misconduct or muddling of procedures, the prisoner is excused from the requirement to exhaust available administrative remedies.

As set forth below, the District Court's conclusions are also in accord with policy considerations that motivated the passage of the PLRA and of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Prisoners of minority faiths will often face circumstances of unavailability of relief, because administrators reflexively regard their requests as menacing or irksome, disclaim ability to change prison policy or custom, or lack authorization to change policy or custom in the first instance. ADC administrators' conduct in this case exemplifies these propensities.

ARGUMENT

I. ADC's Exhaustion Defense Disregards the Unavailability of Remedies and Would Broadly Undermine Religious Exercise Rights.

A. The PLRA's Exhaustion Requirement Was Never Intended to Block Meritorious Claims.

Under the PLRA, "no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). As the U.S. Supreme Court has made clear, this requirement to exhaust is not discretionary. *Woodford v. Ngo*, 548 U.S. 81, 85 (2006). Prisoners must "proper[ly]" exhaust—i.e., comply with the procedural processes and mechanisms set forth within their correctional facilities—and if they do not, federal courts are required to find them in procedural default and preclude them from filing suit. 548 U.S. at 92-93.[2] The purpose of this exhaustion requirement is to give the agency an opportunity to "correct its mistakes" before being called into

[2] Failure to exhaust is an affirmative defense. Thus, defendants have the burden of raising and proving the elements of that defense. *Jones v. Bock,* 549 U.S. 199, 212 (2007); *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001) (also citing FRCP 8(c) and invoking defendant's burden to plead and to prove); *Porter v. Sturm*, 781 F.3d 448, 451 (8th Cir. 2015).

court; to discourage "disregard" of procedures; to promote the efficient resolution of claims at the administrative level; and to produce a useful record. 548 U.S. at 89 (references omitted). The aim of the PRLA's exhaustion mandate is to create incentives for administrative schemes to work effectively. Exhaustion requirements were designed largely to motivate parties who do not "want" to exhaust or "otherwise prefer" not to. *Woodford*, 548 U.S. at 89-90; *see also Friends of Norbeck v. U.S. Forest Service*, 661 F.3d 969, 974 (8th Cir. 2011) (discussing the purpose of exhaustion).

The PLRA's legislative history makes clear that while Congress purposefully heightened prisoners' exhaustion obligations, the statute was never intended to block meritorious claims. As Senator Orrin Hatch, one of the PLRA's sponsors, explained, "I do not want to prevent inmates from raising legitimate claims . . . . this legislation will not prevent those claims from being raised." *See* 141 Cong. Rec. S18,136-37 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch); *see also* 141 Cong. Rec. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) ("If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners.").

Similarly, Representative Charles Canady emphasized on the floor of the House of Representatives that the PLRA's "reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit."141 Cong. Rec. H1,480 (daily ed. Feb. 9, 1995) (statement of Rep. Canady).

Faithful application of the PLRA does not require wooden application of *Woodford*'s procedural default rule. Doing so would create incentives for corrections agencies to create ever more complex grievance procedures. Many meritorious claimants would give up, or would never succeed in navigating labyrinthine procedures, and prisons would be shielded from meaningful judicial scrutiny. Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons*, 11 U. Pa. J. Const. L. 139, 147-48 (2008); David C. Fathi, *The Challenge of Prison Oversight*, 47 Am. Crim. L. Rev. 1453 (2010) (describing the historic role of federal courts in providing prison oversight and the absence of other oversight mechanisms).

It is thus imperative that federal courts recognize that while the PLRA's exhaustion requirement serves as an important filter against frivolous claims, the statute should not be used to incentivize the creation

of unduly complex administrative procedures and pleading traps. In fact, the exhaustion arguments raised by ADC perfectly illustrate how correctional institutions seek to improperly invoke procedural default rules to do an end-run around fundamental rights.

B. It Is Well-Established that Exhaustion is Not Required Where Administrative Remedies Are "Unavailable."

While the PLRA's exhaustion requirement is mandatory, the Supreme Court recently recognized that "[a] prisoner need not exhaust remedies if they are not 'available.'" *Ross v. Blake*, 136 S. Ct. 1850, 1854-55 (2016). As the Court made clear, this statutory exception to the PLRA's exhaustion requirement has "real content" and must be applied in light of "the real-world workings" of prison grievance systems. 136 S. Ct. at 1858-59.

Ross involved a dispute between a Maryland prisoner, Shaidon Blake, and a Maryland prison guard, Michael Ross. Blake alleged that while incarcerated he was assaulted by Ross and a second guard, James Madigan. Immediately after the alleged assault, Blake referred the incident to the Maryland prison system's internal investigative unit. That unit conducted a year-long review and issued a report where it

condemned Madigan's actions but made no determinations as to Ross' role or involvement. Blake subsequently brought a civil action against both officers. During those proceedings, Ross raised the PLRA's exhaustion requirement as an affirmative defense, arguing that Blake failed to comply with the grievance process set forth in Maryland's inmate handbook. Blake explained that he did not follow the handbook's grievance process because he believed that the internal investigative unit's review was a substitute. The district court rejected Blake's argument. The U.S. Court of Appeals for the Fourth Circuit reversed, concluding that PLRA's exhaustion requirement could be excused in "special circumstances" where a prisoner is justified in not meeting an institution's administrative procedures.

The Supreme Court rejected the Fourth Circuit's reasoning but found that Blake's argument he was excused from exhausting warranted further examination on remand. Justice Kagan, writing for the majority, explained that the statutory text makes clear that there is no "special circumstances" exception to the PLRA's exhaustion requirement. 136 S. Ct. at 1862. Moreover, allowing a carve out for "special circumstances" would contravene Congress' express desire to make exhaustion

mandatory. However, the Court went on to explain that the text of the PLRA contains its own exception to the exhaustion requirement. Specifically, prisoners are only required to exhaust "administrative remedies *as are available*." 42 U.S.C. § 1997e(a) (emphasis added). The Court identified three situations where "unavailability" could preclude application of the PLRA's exhaustion mandate.

First, administrative remedies are unavailable where they operate "as a simple dead end" and correctional officers are "unable or consistently unwilling to provide any relief." 136 S. Ct. at 1859. Second, procedures that are excessively "opaque" and "practically speaking incapable of use" are also unavailable. And third, administrative processes can be rendered unavailable where prison administrations engage in "machination, misrepresentation, or intimidation" that thwart a prisoner's ability to satisfy exhaustion requirements. 136 S. Ct. at 1860.[3]

[3] In *Ross*, the Supreme Court did not explicitly limit "unavailability" to the three enumerated situations. *See Williams v. Priatno*, 829 F.3d 118, 125 n.2 (2d Cir. 2016) (noting the three circumstances are not exhaustive); *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017)

This Court—even before the Supreme Court's decision in *Ross*—has long recognized that unavailability may excuse a prisoner from satisfying the PLRA's exhaustion requirement. In *Miller v. Norris*, this Court held that an administrative remedy was not "available" when officials prevent prisoners from using it. 247 F.3d 736, 740 (8th Cir. 2001). In *Porter v. Sturm*, this Court concluded that where corrections officials themselves fail to comply with the grievance procedures they put in place, those procedures are unavailable. 781 F.3d 448, 452 (8th Cir. 2015) (citing *Gibson v. Wheeler*, 431 F.3d 339, 341 (8th Cir. 2005)). More recently, in *Townsend v. Murphy*, a decision announced after Ross, this Court found unavailability where the prisoner's sworn affidavit showed that an ADC officer repeatedly told him not to file a formal grievance until after he received a response to an informal complaint, causing him to miss the six-day deadline. 898 F.3d 780, 783 (8th Cir. 2018). As set forth more fully below, several analogous circumstances of unavailability apply in the instant case.

(describing *Ross*'s "non-exhaustive list" of circumstances in which prison remedies were not capable of use to obtain relief).

C. The District Court Properly Concluded that Administrative Remedies Were Not Available.

The District Court below made two findings related to exhaustion. First, the District Court concluded, after a full bench trial, that the grievances and requests for religious accommodation submitted by Mr. Muhammad were sufficient to satisfy the PLRA's exhaustion requirement. Second, the District Court found that in the alternative, Mr. Muhammad was excused from exhausting administrative remedies. Although the District Court did not discuss *Ross* at length in reaching this alternative holding, the record below clearly establishes that each of the three "unavailability" circumstances identified by the Supreme Court are present here.

The first *Ross* circumstance—administrative procedures that operate as a "simple dead end"—is directly implicated by ADC's conduct in this matter. Mr. Muhammad filed a total of seven requests and grievances seeking a halal diet. But as the evidence before the District Court revealed, ADC's Chaplaincy Service and Food Service Department, the only offices that could provide the religious accommodation Mr. Muhammad was seeking, were "not able or authorized" to make those

dietary modifications. Add. 7, para. 28. Where, as here, "the facts on the ground" demonstrate that there is no possibility of relief, a prisoner cannot be obligated to comply with the PLRA's exhaustion requirement. *Ross*, 136 S. Ct. at 1859.

ADC fares no better with the second *Ross* circumstance, which involves administrative procedures that are "so opaque" that they become unusable. ADC has two administrative processes at issue: AD 12-16, its "standard" grievance process, and AD 13-83, its religious diet request procedure. Throughout this litigation, ADC has argued that Mr. Muhammad has not exhausted his claims because he did not properly present his concerns through the mechanisms set forth in AD 12-16 and AD 13-83. Yet, and as the District Court concluded, it is not at all clear how Mr. Muhammad would have done that. ADC provided prisoners no guidance about how AD 12-16's multi-step grievance process interacts with AD 13-83's specific, one-step meal request process. Despite that lack of clarity, Mr. Muhammad did all he could to seek relief under both processes, filing four grievances under AD 12-16 and three requests under AD 13-83. To the extent that was insufficient, it is because the

processes are "essentially 'unknowable,'" 136 S. Ct. at 1859-60, and thus unavailable.

The third *Ross* circumstance involves situations where prison administrations undermine prisoners' grievance requests through "machination, misrepresentation, or intimidation." ADC's argument that Mr. Muhammad procedurally defaulted because he never advised prison officials that he wanted halal "meat" (as opposed to a halal diet) is precisely the type of blatant gamesmanship that the Supreme Court was seeking to guard against. ADC's standard grievance procedure is seemingly intentionally designed to limit prisoners' description of the issue and thus promote the very kind of procedural default ADC alleges (i.e. a failure to raise a highly specific sub-issue that is clearly encompassed by a general concern named or expressed in the grievance).

For example, the procedures severely restrict the space available for prisoners to communicate their initial concern. In initial grievance forms, prisoners are instructed to state their concern "**BRIEFLY**" over the course of a third of a page, App. 841-850 (emphasis in original), and writing found outside the lines and any supplemental sheets is not accepted. App. 407, 1817-18. Prisoners are forbidden from raising any

"new issues" throughout the process, which functionally serves to prevent them from clarifying their concerns. App. 409, 1820 (forbidding additional sheets and "new issues"). ADC's grievance process involves three different steps, and prisoners are required to proceed to each step within a strictly delineated time period. While ADC firmly enforces those deadlines as applied to prisoners, it has given itself the ability to unilaterally extend its own timeline for response and thus cause the prisoner to believe he is outside of the deadline to file a new, corrected initial grievance. If the prisoner wishes to object to the ADC's extension of time, he is informed that "NO FURTHER ACTION" will be taken on the issue and he "WILL NOT have exhausted" administrative remedies, and his grievance will be returned without a decision on the merits. App. 430, 1841. At best, ADC's arguments that it did not understand Mr. Muhammad's request for halal meat is willful ignorance. The record below strongly suggests that ADC is trying to use procedural loopholes and technicalities to avoid a legitimate request for religious accommodation.

Tellingly, ADC in its opening brief to this Court fails to cite or even reference *Ross*. It is simply impossible to faithfully apply the Supreme

Court's holding to the factual record in this case and conclude that the PLRA's exhaustion requirement should block Mr. Muhammad's claims. Instead, ADC invites this Court to shift the burden of proof for its affirmative defense onto Mr. Muhammad by arguing that he did not state his issue clearly and that he made "no effort" to inform ADC that he wanted halal meat. The Court should decline this invitation.

II. ADC's Interpretation of the PLRA Exhaustion Requirements Would Chill Free Exercise Rights, Particularly for Religious Minorities.

A. Congress Intended To Broadly Protect Prisoners' Religious Exercise Rights.

Congress has repeatedly expressed an intent to provide the broadest protection for religious exercise rights. In keeping with that commitment, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), with overwhelming bipartisan support, to prohibit the government from unnecessarily burdening prisoners' right to exercise their religion while they are incarcerated. Several members of Congress tied the passage of RLUIPA to the need to scrutinize prison policies that unnecessarily restrict religious exercise. *Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 15 (Feb. 13, 2015)

(Statement of Lori Windham, Senior Counsel, Becket Fund for Religious Liberty) (referencing Senator Kennedy and Senator Hatch's comments at the passing of RLUIPA, 146 Cong. Rec. S16,698-99 (daily ed. Jul. 27, 2000) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.")). And as the Supreme Court has recognized, RLUIPA was passed at least in part to ensure that all religious groups are treated equally. *Cutter v. Wilkinson*, 544 U.S. 709, 723-24 (2012) (underscoring that RLUIPA "singles out no bona fide faith for disadvantageous treatment").

For many persons with religious beliefs, compliance with dietary norms is a routine part of daily religious practice. The absence of halal meat is a frequent motivator of prisoner diet requests and complaints. Kenneth L. Marcus, *Jailhouse Islamophobia*, 1 Race & Soc. Problems 36, 37 n.22 (2009) (listing numerous cases), in part because of the centrality of religious beliefs about the importance of consuming halal food. As Mr. Muhammad explained in one of his grievances, "We need to be provided with Halal Food because we believe anything other than it has affected our spirituality as well as our bodies." App. 846. Accommodating such

requests is frequently well within the reach of facilities like ADC.[4] As the District Court found, providing a halal diet in this case would actually be cheaper than the options currently offered at ADC, Add. 7, para. 26.

Yet, as described more fully above, ADC has repeatedly and unnecessarily obstructed Mr. Muhammad's ability to request halal meat as a part of his religious diet. *Supra* Part I.C . Through its own procedures and actions, ADC has made relief functionally "unavailable" to Mr. Muhammad and other similarly-situated prisoners. This is precisely the type of prison obstruction that Congress intended courts to scrutinize and prevent.

B. Religious Minorities, Particularly Muslims, Are Especially Vulnerable To Obstruction by Prison Officials.

Members of religious minorities frequently encounter difficulty when attempting to obtain accommodation through existing administrative procedures. *See e.g.* Walter Echo-Hawk, *Study of Native*

[4] For example, despite early fears about the expense and administrative difficulties of providing kosher meals, a preponderance of states and the federal government now provide some form of kosher diet at reasonable cost. ACLU and Beckett Fund Amicus Brief, *United States v. Flor. Dep't Corr.* No. 14-10086-D, at 7 (11th Cir. May 28, 2014) (noting that as of the date of 2014 at least 35 states and the federal government offer kosher diet in prisons).

American Prisoner Issues, Nat'l Indian Policy Ctr. 8-9, 14 (May 1996) (discussing longstanding problem of non-Indians recognizing significance of some beliefs and practices and the necessity of litigation in securing free exercise). Muslim prisoners in particular are a large and growing share of incarcerated populations, including at ADC, where they form roughly eleven percent of the state's prisoners.[5] At Bureau of Prison facilities nationwide, Muslims are significantly over-represented as grievers and litigants, which indicates that their concerns frequently go unaddressed. *Enforcing Religious Freedom in Prison*, U.S. Comm'n on Civil Rights Table 3.8, at 70; Table 4.1, at 82 (Sept. 2008) (noting that Muslims filed 42% of administrative remedy requests for accommodation from 1997-2008 and that Muslims litigated 29% of RLUIPA cases from 2001-2006). Ensuring that meritorious claims can move forward in practice is particularly important, therefore, to preserving Muslim prisoners' ability to practice their religion while incarcerated.

[5] *ADC Prisoners by Religion*, Excel Document Provided by ADC in Response to Muslim Advocates Records Request (Sept. 6 2018) (on file with author) (listing 777 individuals as "Muslim" and 1193 as "Islam" for the date October 25, 2018).

ADC's single-minded refusal to address Mr. Muhammad and similarly situated prisoners' concerns about access to halal food may result from misunderstanding or a tendency to view Muslims with suspicion, and an unwillingness to provide them the same accommodations that are available to others. *See e.g. Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) (agreeing with the magistrate that it was "almost preposterous" for ADC to forbid a Muslim from growing a half-inch beard on an alleged security rationale when an exemption was allowed for medical reasons). In this case, the warden admitted that individualized physician-ordered secular diets are regularly provided, App. 129, but such individualization was denied Mr. Muhammad on the pretext that halal meat "may threaten security and discipline by provoking jealousy." App. 130. Yet non-religious persons and adherents of other religions are regularly provided with a daily diet that includes meat, seemingly without concern about "provoking jealousy" from those who cannot partake in such meals. The prison administrators' willingness to draw this kind of security conclusion about a halal diet is therefore difficult to explain without ignorance or hostility to the Islamic faith.

Mr. Muhammad's case illustrates the impact that administrative exhaustion requirements can have on prisoners of minority faiths. Here, the District Court correctly found that remedies were not available to Mr. Muhammad. ADC's expansive interpretation of the PLRA's exhaustion requirements is contrary to law and undermines First Amendment and statutory religious exercise rights. His case provides an appropriate vehicle for this Court to confirm that where, as here, relief through administrative procedures is not available, the PLRA exhaustion requirement is excused.

CONCLUSION

For the foregoing reasons and the reasons set forth in Appellee's brief, this Court should deny Defendants' appeal and affirm the District Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Muslim Advocates certifies that this brief contains 3726 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century type style.

3. This brief has been scanned for viruses and found to be virus-free

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on November 21, 2018, I electronically filed the foregoing brief with the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

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