No. 24-11081

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TERRI MCGUIRE-MOLLICA,

Plaintiff-Appellant,

v.

THE FEDERAL BUREAU OF PRISONS, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama
Case No. 7:20-cv-01768-SGC
The Honorable Staci G. Cornelius

PLAINTIFF-APPELLANT TERRI MCGUIRE-MOLLICA'S REPLY BRIEF

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11th Cir. Docket No. 24-11081

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned hereby certifies that, in addition to those named in appellant's opening brief and appellee's response brief, the following person may have an interest in the outcome of this appeal:

Raman, Nethra K., Counsel for Plaintiff-Appellant

Pursuant to Eleventh Circuit Rule 26.1-3, the undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: December 16, 2024

Respectfully Submitted,

s/ Nethra K. Raman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

When Terri McGuire-Mollica placed her signed and completed Form BP-11 in the FCI-Aliceville mailbox, she satisfied the Prison Litigation Reform Act's ("PLRA") exhaustion requirement, allowing her to commence suit in federal court. This is clear from the plain text of the Bureau of Prisons' ("BOP") Administrative Remedy Program ("ARP"), which places on the prisoner only the responsibility to complete and submit the form; responsibility for filing the appeal in the BOP's internal system falls on the relevant BOP official. Ms. McGuire-Mollica satisfied her obligations when she completed her Form BP-11 and submitted it to prison officials for mailing. Indeed, Defendants concede that the district court "properly found" that Ms. McGuire-Mollica completed and mailed her Form BP-11. Resp. Br. 14. She therefore properly exhausted administrative remedies. BOP officials' failure to file her properly submitted appeal does not undo the fact that Ms. McGuire-Mollica did everything the BOP's grievance process rules required of her.

Nor does the BOP's 40-day response period for properly filed appeals affect Ms. McGuire-Mollica's exhaustion of remedies. Defendants concede that the 40-day response period is triggered only when a "particular event occurs": namely, when an appeal is "logged into the Administrative Remedy Index as received." Resp. Br. 14-15. As Defendants acknowledge, that event never occurred, *id.*, and thus the response period does not apply.

On top of that, even if the 40-day response period were somehow applicable, it was plainly satisfied at the time of the operative amended complaint. Defendants ask this Court to ignore the operative complaint, contrary to Rule 15 of the Federal Rules of Civil Procedure. But the primary case on which Defendants rely is inapposite because it concerned whether a different provision of the PLRA applied at all when a plaintiff amended his complaint. Here, there is no dispute that the PLRA's exhaustion requirement applies. The only question is at which point courts should evaluate whether that requirement was met—and Rule 15 instructs that the filing of the operative complaint is the answer.

Alternatively, if properly completing and submitting her Form BP-11 was not enough to exhaust administrative remedies, then administrative remedies were unavailable to Ms. McGuire-Mollica for two independent reasons: the ARP is opaque about what more a prisoner is required to do, and prison officials thwarted Ms. McGuire-Mollica from submitting her appeal. Defendants try to avoid these issues by claiming that Ms. McGuire-Mollica waived this argument below. But Ms. McGuire-Mollica—who litigated *pro se* in the district court—argued both grounds of unavailability, explaining that the grievance process rules did not make clear that she was required to do anything more than complete and submit the form, and that mailroom officials had interfered with her legal mail, including her Form BP-11.

Either ground is sufficient to find remedies were unavailable. Accordingly, this Court should reverse the district court's decision.

ARGUMENT

I. Ms. McGuire-Mollica Satisfied The PLRA's Exhaustion Requirement By Properly Completing And Mailing Her Final Appeal.

A. Ms. McGuire-Mollica Exhausted Administrative Remedies By Doing Everything The BOP's Grievance Process Rules Required Her To Do To Pursue A Final Appeal.

As Ms. McGuire-Mollica showed in her opening brief, she exhausted administrative remedies by doing everything the BOP's grievance process rules required her to do to pursue a final appeal. *See* Opening Br. 20-21. The ARP required only that Ms. McGuire-Mollica "submit" her Form BP-11 to the General Counsel. *See* 28 C.F.R. § 542.15 ("An inmate who is not satisfied with the Regional Director's response may *submit* an Appeal on the appropriate form (BP-11) to the General Counsel." (emphasis added)). Just as in *Dole v. Chandler*, 438 F.3d 804, 810 (7th Cir. 2006), Ms. McGuire-Mollica "had no choice in the method used to transmit" her form, and she "could not maintain control" of her submitted form once prison officials took it for mailing. As a result, she submitted her Form BP-11 to the prison mailroom, which was the method the prison provided to transmit an appeal to the General Counsel. *See* Doc. 57 at 14 ("McGuire-Mollica properly completed and mailed her final appeal."). That means she exhausted administrative remedies. *See Dole*, 438 F.3d at 811 ("Dole fully complied with *Pozo*'s strict compliance

requirement. He filed his suit 'in the place, and at the time, the prison's administrative rules require.'"); *see also Bryant v. Rich*, 530 F.3d 1368, 1378 (11th Cir. 2008) ("To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require[.]" (cleaned up)).

Defendants do not dispute the district court's factual determination that Ms. McGuire-Mollica "properly completed and mailed her final appeal." Doc. 57 at 14; *see* Resp. Br. 14 ("[T]he district court properly found that McGuire-Mollica 'mailed' her BP-11."). And Defendants' only response to *Dole* is to comment, in a footnote, that it concerned a different grievance procedure than the ARP. *See* Resp. Br. 17 n.6. But Defendants fail to identify a single difference in *Dole* that would explain why Ms. McGuire-Mollica, unlike the plaintiff in *Dole*, should be treated as having failed to exhaust remedies even though she followed the ARP's requirements "to the letter," and her appeal "remains unresolved through no apparent fault of [her] own." *Dole*, 438 F.3d at 811.

Instead, Defendants rely on *Shivers v. United States*, 1 F.4th 924 (11th Cir. 2021), to argue that it is "irrelevant" that Ms. McGuire-Mollica "properly completed and mailed her final appeal." Resp. Br. 17. In Defendants' view, all that matters under *Shivers* is that "the appeal was never 'logged' and therefore, never 'filed'"—even if *BOP officials* are the ones who failed to log and file Ms. McGuire-Mollica's properly submitted form in their internal system. *Id.*

As Ms. McGuire-Mollica explained in the opening brief, *Shivers* does not establish such a categorical rule, which would allow prison officials to stymie properly filed grievances at will. Rather, as Defendants acknowledge, the district court in *Shivers* determined, unlike here, that the prisoner had *not* properly completed and submitted his Form BP-11. *See* Resp. Br. 17; *Shivers*, 1 F.4th at 936. This Court upheld that factual finding, holding that the district court did not commit clear error in finding that the plaintiff failed to submit his Form BP-11 to the General Counsel. *Shivers*, 1 F.4th at 936.

In other words, the "critical holding" in *Shivers* was not, as Defendants claim, that a BOP official must have "logged" a prisoner's appeal into the system for administrative remedies to be considered exhausted. Resp. Br. 16. The critical holding was that the district court did not clearly err in finding that Shivers "failed to file his BP-11 form" because "substantial evidence" supported that finding—evidence that included the fact that the appeal was never submitted or logged in the BOP's internal system. *Shivers*, 1 F.4th at 936. Here, unlike in *Shivers*, the district court made the opposite factual finding: that Ms. McGuire-Mollica *did* "properly complete[] and mail[] her final appeal." Doc. 57 at 14. Accordingly, *Shivers* does not apply here.

Other than citing to *Shivers*, Defendants simply assert that the ARP requires Ms. McGuire-Mollica to "file[]" her appeal in the BOP's Administrative Remedy

Index. Resp. Br. 17. The problem is that Defendants never point to any rule or regulation that requires a prisoner to either docket the appeal herself or somehow take additional steps to ensure that the appeal is docketed properly by BOP officials. *See Jones v. Bock*, 549 U.S. 199, 218 (2007) ("It is the prison's requirements . . . that define the boundaries of proper exhaustion."). Nor could they. No regulation in 28 C.F.R. § 542 places the obligation to log an appeal into the BOP's internal system on the prisoner—an obligation that would be impossible to meet.[1]

Instead, the ARP directs prisoners to "*submit* an Appeal on the appropriate form." 28 C.F.R. § 542.15(a) (emphasis added). Section 542.15(b)(1) reiterates that "[a]ppeals to the General Counsel shall be submitted on the form designed for Central Office Appeals (BP-11)." 28 C.F.R. § 542.15(b)(1). Prisoners must "complete the appropriate form," "date and sign the Appeal," and "mail it" to the General Counsel—all of which Ms. McGuire-Mollica did. 28 C.F.R. § 542.15(b)(3). Not once in the entire provision addressing "Appeals" is a prisoner obligated to "file" anything in the BOP's internal system.

[1] Defendants attempt to recast Ms. McGuire-Mollica's argument as one of "futility," and argue that "there is no[t] a futility exception to the PLRA." Resp. Br. 22. As discussed later in this brief, this argument is a strawman. *See infra* 11. Ms. McGuire-Mollica is not arguing that she is excused from complying with a filing requirement—she is arguing that there is no such requirement in the first place, as made clear by the BOP's own regulations. In other words, the BOP's regulations do not require a prisoner to somehow access the BOP's internal Administrative Remedy Index and file an appeal herself.

Rather, the BOP regulations repeatedly make clear that "filing" is the responsibility of BOP officials, who have sole control over the BOP's Administrative Remedy Index. Under a separate provision, BOP officials are directed to treat appeals as "filed" on the date they are "logged into the Administrative Remedy Index as received." 28 C.F.R. § 542.18. Prisoners cannot log appeals into the BOP's internal Index; only BOP officials can do that.[2] When BOP officials fail to do so, for whatever reason, they cannot then blame the prisoner who properly submitted the appeal for failing to exhaust. *See Risher v. Lappin*, 639 F.3d 236, 241 (6th Cir. 2011) ("When pro se inmates are required to follow agency procedures to the letter in order to preserve their federal claims, we see no reason to exempt the agency from similar compliance with its own rules.").

With no regulation supporting their position, Defendants cite a host of other provisions that simply do not apply to the situation here. *See* Resp. Br. 24. For example, Defendants cite to 28 C.F.R. § 542.19, which states that prisoners and members of the public "may request access" to Administrative Remedy indexes and responses. In other words, Section 542.19 provides a mechanism for people to obtain copies of records and entries maintained in Administrative Remedy indexes. *See,*

[2] *See, e.g.*, Federal Bureau of Prisons, *Privacy Impact Assessment for the SENTRY Inmate Management System*, at 4 (July 2, 2012), https://www.bop.gov/foia/docs/sentry.pdf ("Only those Bureau personnel who require access to perform their official duties may access the [SENTRY] system equipment and the information in the system.").

e.g., *DeBrew v. Atwood*, 792 F.3d 118, 128 (D.C. Cir. 2015) (finding remedies unavailable where BOP officials "failed to send DeBrew a copy of the Regional Director's response from the Administrative Remedy Index" after such a request). Section 542.19 does not, however, require prisoners to request access to the Administrative Remedy Index at any point, much less give prisoners the ability to file appeals directly into the Index. Instead, as noted above, prisoners are required only to "submit" Form BP-11, which Ms. McGuire-Mollica did. *See* 28 C.F.R. § 542.15(a).

Defendants also cite to 28 C.F.R § 542.17, which governs resubmissions. That provision, however, does not create a freestanding requirement that appeals must be resubmitted, as Defendants appear to suggest. Rather, Section 542.17 provides that BOP officials may "reject and return" a grievance or appeal that is written "in a manner that is obscene or abusive, or does not meet any other requirement of this part." 28 C.F.R § 542.17(a). When there are grounds for such a rejection, the prisoner must be provided with a notice informing him of "the reason for rejection" and providing "a reasonable time extension within which to correct the defect and resubmit the Request or Appeal." 28 C.F.R § 542.17(b).

This provision is inapplicable here because the BOP did not "reject and return" Ms. McGuire-Mollica's appeal as defective under 28 C.F.R § 542.17(a). Nor did the BOP provide Ms. McGuire-Mollica with a notice stating the reasons for

rejection and providing an extension of time to correct any defects. As a result, Section 542.17 imposes no requirement of resubmission.

Without explanation, Defendants also suggest that 28 C.F.R. § 542.18 somehow implies that "an inmate may require multiple opportunities before an appeal is perfected." Resp. Br. 25. Section 542.18 says nothing of the sort. To the contrary, it imposes requirements on BOP officials to respond to a grievance or appeal within a fixed period of time, triggered from "the date"—singular—that it is "logged into the Administrative Remedy Index as received." 28 C.F.R. § 542.18. In other words, the regulation contemplates a single filing, a single filing date, and a single response period, not the multiple attempts that Defendants would require of prisoners who properly complete and submit their forms the first time.

Ultimately, Defendants appear to suggest that Ms. McGuire-Mollica should have made a "second, third, or fourth attempt," simply in the hopes that one of them would be filed by the BOP General Counsel. *See* Resp. Br. 24-25. Again, that is not required by the BOP's own regulations governing the rules of the grievance process. *See Risher*, 639 F.3d at 240 ("[W]e decline to impose requirements on Risher for exhaustion purposes that go beyond what was specifically required by the Bureau's grievance procedure."). Under the regulations, a prisoner is only required to submit "an Appeal," 28 C.F.R. § 542.15, and the BOP's regulations do not require prisoners to send an undefined number of additional attempts thereafter. This Court has

rejected attempts by defendants to create additional, unwritten requirements after the fact. *See Turner v. Burnside*, 541 F.3d 1077, 1083 (11th Cir. 2008) (rejecting argument that plaintiff "failed to exhaust his administrative remedies because he failed to: (1) file an additional grievance; (2) seek leave to file an out-of-time grievance; (3) file an emergency grievance; or (4) appeal the implicit denial of his formal grievance," none of which was specified in the prison's written procedures). It should do the same here.

B. Ms. McGuire-Mollica Did Not Need To Wait 40 Days For The BOP To Respond To An Appeal They Never Received.

As Ms. McGuire-Mollica explained in her opening brief, the district court erred by citing the BOP's 40-day response period as a reason Ms. McGuire-Mollica failed to exhaust. *See* Opening Br. 26-27. Defendants now concede that the "'[r]esponse time' is triggered when a particular event occurs: 'If accepted, a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received.'" Resp. Br. 15. Defendants also concede that the triggering event never occurred here: "[t]he district court properly found that McGuire-Mollica's BP-11, although 'mailed,' was never 'filed.'" Resp. Br. 13. As a result, by Defendants' own admissions, the 40-day response period does not apply.

Defendants' only response is to attack the straw man of "futility." Resp. Br. 19 ("Essentially, McGuire-Mollica makes a futility argument."). In support, Defendants cite to cases in which the plaintiffs argued that they were exempt from express

requirements in the grievance procedure because they were either futile to attempt or they did not apply. Resp. Br. 23; *see, e.g.*, *Higginbottom v. Carter*, 223 F.3d 1259, 1261 (11th Cir. 2000) (rejecting argument that excessive force claim was not subject to the PLRA's exhaustion requirement); *Bryant v. Rich*, 530 F.3d 1368, 1374 (11th Cir. 2008) (rejecting argument that plaintiff should be excused from complying with grievance process where plaintiff filed untimely first grievance and did not file second grievance for fear of reprisal); *Garcia v. Obasi*, No. 21-12919, 2022 WL 669611, at *4 (11th Cir. 2022) (rejecting argument that plaintiff did not have to submit appeal to final stage of the grievance process because prison failed to timely respond to plaintiff's grievance).

Futility, however, is not the issue. Ms. McGuire-Mollica is not arguing that she *was* required to wait 40 days for a response but should be exempted from that requirement because doing so would be futile. Rather, her argument is that she was *not required* to wait 40 days because, by the plain terms of the BOP's own regulation, that response period was never triggered in the first place. And as Ms. McGuire-Mollica noted, the plain meaning of the BOP's rule makes sense: the regulation does not require a prisoner to wait for a response that the General Counsel *could not* give because he never even filed the appeal. Recognizing that a regulation does not require prisoners to undertake pointless actions is not tantamount to "making a futility argument." Resp. Br. 22.

Tellingly, Defendants do not even attempt to specify when the 40-day response period they believe Ms. McGuire-Mollica was subject to would have started or ended. That is because the 40-day response period is defined by the filing date. 28 C.F.R. § 542.18 ("*Once filed*, response shall be made . . . by the General Counsel within 40 calendar days." (emphasis added)). Defendants have no explanation for how that response period could be calculated if the appeal was never filed.

Regardless, even if the 40-day response period somehow applied—with whatever undefined start or end date Defendants may posit—Ms. McGuire-Mollica's operative amended complaint, filed almost two years after Ms. McGuire-Mollica submitted her appeal, plainly satisfies it. *See Saddozai v. Davis*, 35 F.4th 705, 709 (9th Cir. 2022) ("In PLRA cases, amended pleadings may supersede earlier pleadings."); *Showers v. Rodgers*, No. 23-1241, 2024 WL 1877028, at *3 (3d Cir. Apr. 30, 2024) ("Because Showers supplemented his complaint in May 2021, that is the relevant time for evaluating the failure-to-exhaust defense."). This provides an independent basis for rejecting the district court's reasoning.

Defendants respond only in a footnote that this Court should ignore Ms. McGuire-Mollica's operative amended complaint. *See* Resp. Br. 21 n.8. Defendants rely on cases like *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000), to argue that, because 42 U.S.C. § 1997e(a) uses the term "brought," the exhaustion requirement

must be satisfied before the filing of the initial complaint, even if the initial complaint is superseded by an amended complaint under Rule 15.

In doing so, Defendants make the same mistake the Supreme Court rejected in *Jones v. Bock*, 549 U.S. 199 (2007). There, the Supreme Court recognized that the phrase "[n]o action shall be brought" is "boilerplate language" used throughout the Federal Code. *Id.* at 201. Congress's use of that language, the Court admonished, does not reflect an intent to override the normal operations of the Federal Rules of Civil Procedure. *Id.* at 216-17 (rejecting effort to impose a new pleading requirement "as an interpretation of the PLRA"). Thus, the Supreme Court instructed courts not to "depart from the usual practice under the Federal Rules" absent a clear statement from Congress. *Id.* at 212; *see Smith v. Williams*, 67 F.4th 1139, 1141 (11th Cir. 2023) (rejecting argument that the PLRA supersedes Rule 41 where there was a perceived "conflict between the literal operation of Rule 41(a)(1) and the PLRA's purpose, which is to 'deter frivolous suits'").

As Ms. McGuire-Mollica explained in her opening brief, the PLRA embraces—rather than overrules—the normal operation of Rule 15. Opening Br. 28-29. Thus, as courts have recognized, amended pleadings can supersede earlier pleadings in PLRA cases, just as they can in any other civil case under Rule 15. *Saddozai*, 35 F.4th at 709. The operative amended complaint is thus "the relevant time for evaluating [a] failure-to-exhaust defense." *Showers*, 2024 WL 1877028,

at *3. Under Rule 15, Ms. McGuire-Mollica's operative complaint was filed well after any 40-day response period would have expired, and thus, even if the 40-day period were applicable, Ms. McGuire-Mollica's amended complaint satisfied it and she exhausted administrative remedies.

Defendants do not address these cases, and the cases they do cite are inapposite. Both *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000), and *Hoever v. Marks*, 993 F.3d 1353 (11th Cir. 2021) (en banc), addressed an entirely different question: not *when* to evaluate compliance with a requirement of the PLRA, but *whether* the requirement applies in the first place. In *Harris*, this Court held that the physical injury requirement applies as long as the plaintiff was a prisoner at the time of the original complaint, regardless of whether he later filed an amended complaint after release. *See* 216 F.3d at 981 ("[A]ny such amendment or supplement is irrelevant to the *application* of section 1997e(e)." (emphasis added)). Similarly, in *Hoever*, this court relied on the *Harris* court's interpretation of "brought" to hold that § 1997e(e) does not bar punitive damages in the absence of physical injury. *See* 993 F.3d at 1356-58 ("[T]he limitation on damages *applies* to federal civil actions brought 'for,' or with the purpose of compensating, mental or emotional injury when

no physical injury is alleged." (emphasis added)). Neither case concerned the exhaustion requirement under 42 U.S.C. § 1997e(a) or the question presented here.[3]

Here, Ms. McGuire-Mollica accepts that the PLRA's exhaustion requirement applies. The only question is, when evaluating whether the exhaustion requirement has been satisfied, the Court should look to the operative complaint, as Rule 15 commands. Nothing in the PLRA permits the Court to override the normal operation of Rule 15, and the Supreme Court has expressly admonished courts not to do so. *See Jones*, 549 U.S. at 212 ("[W]e have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns."). Ignoring the Supreme Court's instructions would be especially unwarranted here because Defendants' interpretation would "promote the precise inefficiency the PLRA was designed to avoid—requiring courts to docket, assign and process two cases where one would do." *Saddozai*, 35 F.4th at 710.

As a result, Ms. McGuire-Mollica exhausted administrative remedies. She followed the ARP's requirements "to the letter," and she cannot be faulted for the fact that her appeal "remains unresolved through no apparent fault of [her] own." *Dole*, 438 F.3d at 811.

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[3] As explained in the opening brief, the unpublished decision in *Smith v. Terry*, 491 F. App'x 81 (11th Cir. 2012), is neither binding nor persuasive because it misread *Harris* to address the question presented here. As noted above, *Harris* concerned whether a different PLRA requirement applied at all, not whether to evaluate that requirement at the time of the operative complaint. *See* Opening Br. 29-30.

II. Alternatively, Ms. McGuire-Mollica Adequately Pled That Administrative Remedies Were Not Available To Her.

As Ms. McGuire-Mollica showed in her opening brief, if properly completing and mailing her final appeal were not enough to exhaust administrative remedies, then such remedies were not available to her. *See* Opening Br. 30-35. Two categories of unavailability expressly identified in *Ross v. Blake*, 578 U.S. 632 (2016), apply here. First, the BOP's regulations were "opaque" about what more Ms. McGuire-Mollica was required to do. *Id.* at 643-44. Second, BOP officials thwarted Ms. McGuire-Mollica from pursuing her final appeal. *Id.*

In response, Defendants claim that Ms. McGuire-Mollica "waived"[4] this argument below because she "only argued" that she had "exhausted the administrative remedy process," not that it was unavailable to her. *See* Resp. Br. 26. Defendants' argument should be rejected.

As an initial matter, Ms. McGuire-Mollica did not have to use the specific legal terms "thwarted" or "opaque" to preserve an argument that Defendants' grievance process was unavailable. That is especially true given that Ms. McGuire-

[4] Although Defendants use the term "waiver," their argument is actually one of forfeiture. Forfeiture is the "failure to make the timely assertion of a right," whereas waiver is "the intentional relinquishment or abandonment of a known right." *United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (cleaned up). Even if a forfeiture occurred, this Court has discretion to overlook it, and it should exercise that discretion in light of Ms. McGuire-Mollica's *pro se* status below and the fact that she plainly attempted to dispute Defendants' exhaustion defense. *Id.* As explained above, however, no forfeiture occurred.

Mollica litigated *pro se* before the district court, and thus her pleadings must be interpreted liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers[.]" (cleaned up)).

Despite lacking formal legal training, Ms. McGuire-Mollica adequately raised both unavailability arguments. As to opacity, she argued that she had "done all administrative remedies that were available to her" and that "[n]o place within the administrative remedy guidelines" stated that a prisoner "must wait on a response from one level before proceeding to the next level." Doc. 52 at 6. In other words, she disputed Defendants' argument that the rules required her to do anything more than submit her appeal form; to the extent something more was required, it was not clear from the rules.

Ms. McGuire-Mollica's argument as to thwarting was even more explicit. She highlighted her allegations that "the mail office staff at FCI/SPC Aliceville were tampering with Plaintiff's (and others) incoming and outgoing mail," and explained that she "cannot control the mail, whether the FBoP's employees actually process or respond to the form or even when or if the remedy is logged into the FBoP system." *Id.* at 6-7. This was plainly an argument that she had been thwarted from submitting her appeal. *See Coopwood v. Wayne Cnty., Michigan*, 74 F.4th 416, 422 (6th Cir. 2023) (holding that a plaintiff who alleged that "there is substantial doubt as to

whether [she] . . . had access to the necessary forms and information" had "squarely raised" a thwarting argument).

On top of these arguments in her *pro se* briefing, Ms. McGuire-Mollica explicitly invoked both unavailability arguments in the section of her initial complaint dedicated to "Administrative Remedies." There, Ms. McGuire-Mollica urged that she was "only required to use the processes made *available* to her by the FBoP and Aliceville." Doc. 1 at 12 (emphasis added). She then identified by name the three categories of unavailability under *Ross*, including opacity and thwarting. *Id.* (citing remedies that are "opaque" and prison officials who "thwart the use of the procedure"). Finally, she argued specifically that she should be excused from the exhaustion requirement "because the FBoP and Aliceville refuses to make those remedies available to her and has consciously tried to thwart the use of the administrative remedy process." *Id.* Ms. McGuire-Mollica referenced her initial complaint in her response to Defendants' motion to dismiss, signaling her intent to rely on these arguments. Doc. 52 at 6 (citing Doc. 1). Accordingly, she did more than enough to give Defendants notice of these arguments and preserve the issues for appeal.

On the merits, Defendants argue that the grievance process rules are not opaque, citing the same array of irrelevant regulations addressed above. Resp. Br. 27. Defendants even suggest that the technical coding system for their internal

SENTRY database somehow made clear to prisoners that they "may need to submit appeals more than once to exhaust their administrative remedies." *Id.*

As explained above, none of the ARP regulations make clear that a prisoner must do anything more than what Ms. McGuire-Mollica did. The regulations required that Ms. McGuire-Mollica submit the necessary forms to the relevant prison administrators—not that she herself log them into the BOP's system, check to ensure a BOP employee logged them, or any other impossible task. 28 C.F.R. § 542.15(a).

The SENTRY database is entirely irrelevant for a number of reasons. First, Defendants have failed to show how a prisoner would even know about the BOP's internal coding system. *See Goebert v. Lee Cnty.*, 510 F.3d 1312, 1322-23 (11th Cir. 2007) (rejecting argument that an appeal procedure that was not communicated to prisoners through the prisoner's handbook provided an available remedy). This coding system was not a regulation or rule "officially on the books," and it was never communicated to prisoners in a way that would make any process relating to it "capable of use to obtain relief." *Ross*, 578 U.S. at 643.

Second, nothing in the coding system announces any requirement imposed on prisoners. Instead, Defendants appear to infer such a requirement because the coding system includes numbers like "F2." Resp. Br. 24-25 ("These designations, along with BOP's comprehensive grievance process, reflect the recognition that an inmate's appeal may not be successfully 'logged' in the first instance or that an

inmate may require multiple opportunities before an appeal is perfected."). That kind of tortured logic is the very definition of opacity. Prisons cannot "play hide-and-seek" with the requirements they intend to impose on prisoners. *Goebert*, 510 F.3d at 1323. Defendants' convoluted argument only demonstrates that their unwritten requirement was "prohibitively opaque, such that no inmate could actually make use of it." *Williams v. Correction Officer Priatno*, 829 F.3d 118, 126 (2d Cir. 2016).

As to the alternative ground that prison officials thwarted Ms. McGuire-Mollica, Defendants argue that Ms. McGuire-Mollica points only to "a mere missing piece of mail," "without elaboration or citation to evidence." Resp. Br. 28. They argue that "[t]he mere fact that her appeal was not 'logged' and 'filed' does not suggest that McGuire-Mollica was somehow 'thwarted.'" *Id.* 28-29.

Defendants are wrong on several levels. First, on a factual level, their argument ignores the ample evidence establishing thwarting. *See* Opening Br. 32-35. Ms. McGuire-Mollica's original complaint identified evidence, which she highlighted in her opposition to Defendants' motion to dismiss, that prison mailroom staff had repeatedly failed to process and deliver her mail properly around the time her Form BP-11 disappeared. Doc. 1 at 47-49; *see* Doc. 52 at 7. On October 7, 2020, Ms. McGuire-Mollica signed an affidavit stating that prison officials were tampering with her legal mail. Doc. 1 at 47-48. She identified numerous instances from May to September 2020 in which either she had not received legal mail or federal courts and

other recipients had not received mail she had submitted to the prison mailroom for mailing. *Id.* Notably, Defendants have never offered any explanation for what happened to Ms. McGuire-Mollica's Form BP-11 once prison officials took control of it.

Second, as a legal matter, a breakdown in the grievance process does not require a long-running pattern or practice. A prisoner is thwarted when a physical or practical "interference" inhibits her "pursuit of relief" through the administrative grievance process. *Ross*, 578 U.S. at 644. Any breakdown in the grievance process that effectively prevents a plaintiff from seeking administrative relief can make remedies unavailable. *See, e.g.*, *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) (remedies unavailable regardless of whether prison officials' error was "innocent or otherwise"); *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008) ("[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it."). Ms. McGuire-Mollica has provided sufficient evidence to demonstrate such a breakdown occurred here.

* * *

For the first time in this litigation, Defendants suggest that they may seek to challenge whether Ms. McGuire-Mollica has a cause of action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), before the district court. *See* Resp.

Br. 29-30. Ms. McGuire-Mollica agrees with Defendants that any such motion must be made in the district court in the first instance. *See Walker v. Jones,* 10 F.3d 1569, 1572 (11th Cir. 1994) ("[A]n issue not raised in the district court and raised for the first time in an appeal will not be considered by this court."); *see also Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (collecting cases).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision.

Dated: December 16, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the parts of the document exempted by Rule 32(f), this document contains 5,232 words.

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Date: December 16, 2024

s/ Nethra K. Raman
Nethra K. Raman

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Nethra K. Raman
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