

THE PRISON LITIGATION REFORM ACT EXHAUSTION
REQUIREMENT: HOW A LEGISLATIVE DECISION FROM
1996 IS CONTROLLING COVID-19 CONDITIONS
INSIDE CORRECTIONAL FACILITIES, AND WHAT CAN
BE DONE TO FIX IT

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INTRODUCTION

The COVID-19 pandemic has created especially risky environments in state and federal prisons where, due to mass incarceration and overcrowding, social distancing is nearly impossible and incarcerated persons are not provided proper protective equipment, such as face masks and gloves.¹ There has been an increase in claims filed by incarcerated people seeking release and other injunctive remedies due to prison conditions that place them at a higher risk of contracting COVID-19.² Under the Prison Litigation Reform Act, all incarcerated people who file claims regarding prison conditions under § 1983,³ or other federal law, must satisfy an exhaustion requirement that requires complete exhaustion of all administrative remedies prior to litigation.⁴ Administrative remedies are often grievances filed with the prison administration, which must be processed and responded to by administrative officials.⁵ Due to this exhaustion requirement, many district courts are rejecting these claims, even though exhaustion can take 75 to 105 days to complete, which can be detrimental in the context of a highly contagious disease.⁶

This Note will propose that the exhaustion requirement be amended by Congress to allow an incarcerated person to bring suit without exhausting all administrative remedies in cases of life-threatening emergencies, such as a global pandemic. The exhaustion requirement was previously amended in the Prison Rape Elimination Act in order to allow victims of sexual assault to meet the exhaustion requirement, and thus bring suit, by merely reporting the assault without having to file an administrative grievance.⁷ The exhaustion requirement of the Prison Litigation Reform Act should not apply to suits filed by incarcerated persons when they are seeking relief due to life-threatening emergency situations, and should instead be satisfied by reporting the emergency to prison officials in a manner aligned with the Prison Rape Elimination Act sexual assault exception.

This Note proceeds in three Parts. Part I presents a background of the novel COVID-19 virus and the severe impact it had on the United

¹ See KEVIN T. SCHNEPEL, COUNCIL ON CRIMINAL JUSTICE, COVID-19 IN U.S. STATE AND FEDERAL PRISONS (Sept. 2020).

² See *infra* Section II.A.

³ This is a federal statute applicable to all civil rights actions against the federal government. 42 U.S.C. § 1983; see also *id.* § 1997e(a).

⁴ 42 U.S.C. § 1997e(a).

⁵ *Id.*

⁶ See *infra* Section II.A.

⁷ See *infra* Section I.E.

States prison population.⁸ Next, Part I describes the legislative history of the Prison Litigation Reform Act (PLRA),⁹ and lastly examines the history and purpose of the Prison Rape Elimination Act, which is the only context in which less stringent exhaustion requirements have been interpreted to satisfy PLRA exhaustion.¹⁰ Part II begins with an analysis of the various ways in which the PLRA's exhaustion requirement serves as a barrier to incarcerated people seeking to file suit regarding inadequate prison conditions that place them at a higher risk of contracting COVID-19.¹¹ Part II continues by presenting the various reasons that the exhaustion requirement is unnecessary in the context of a dangerous global pandemic.¹² Lastly, Part III presents a proposed amendment to the Prison Litigation Reform Act—to remove the exhaustion requirement in a method analogous to the amendment made in the Prison Rape Elimination Act.¹³

I. BACKGROUND

A. *The COVID-19 Pandemic in the United States*

On March 11, 2020, the World Health Organization (WHO) characterized the novel COVID-19 (COVID) virus as a global pandemic,¹⁴ and on March 13, 2020, President Trump declared a National Emergency due to COVID outbreaks in the United States.¹⁵ As of February 16, 2022, 77,951,498 people in the United States have been infected with COVID and at least 923,809 have died.¹⁶ The infection rate in the United States is steadily increasing, with an average of 140,204

⁸ See *infra* Section I.B and accompanying notes.

⁹ See *infra* Sections I.C–I.D.

¹⁰ See *infra* Section I.E.

¹¹ See *infra* Section II.A.

¹² See *infra* Section II.B.

¹³ See *infra* Part III.

¹⁴ *Listings of WHO's Response to COVID-19*, WORLD HEALTH ORG. (Jan. 29, 2021), <https://www.who.int/news-room/detail/29-06-2020-covidtimeline> [https://perma.cc/7279-ZANT].

¹⁵ Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

¹⁶ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [https://perma.cc/VU89-ARRG].

new cases a day.¹⁷ As of February 16, 2022, the case fatality ratio in the United States is 1.2%, with 281.94 deaths per 100,000 people.¹⁸

COVID symptoms include, but are not limited to, fever or chills, coughing, shortness of breath or difficulty breathing, fatigue, muscle or body aches, and headaches.¹⁹ Those with preexisting medical conditions, such as asthma, obesity, diabetes, chronic kidney disease, coronary artery disease, etc., are at a higher risk for hospitalization and serious illness.²⁰ Age can also make one high-risk if they are infected with COVID.²¹ For example, those age fifty to sixty-four are 25 times more likely to die from COVID, and those age sixty-five to seventy-four are 65 times more likely to die from COVID, when compared to those age eighteen to twenty-nine.²² There is also a racial component to the risk posed by COVID infection.²³ Black Americans are 2.5 times more likely to be hospitalized from COVID and 1.7 times more likely to die from it, and Hispanic Americans are 2.4 times more likely to be hospitalized from COVID and 1.9 times more likely to die from it, when compared to white non-Hispanic Americans.²⁴

The Centers for Disease Control (CDC) has produced guidelines in order to reduce the spread of COVID infection.²⁵ For example, the guidelines recommend frequent handwashing, or sanitizing in the alternative; maintaining six feet of distance between oneself and others, referred to as social distancing; wearing a mask outside the home at all times; and frequent disinfecting of commonly touched surfaces.²⁶ The

¹⁷ *Id.*

¹⁸ *Coronavirus Resource Center: Mortality Analyses*, JOHNS HOPKINS UNIV. & MED., <https://coronavirus.jhu.edu/data/mortality> [<https://perma.cc/A8NK-NMNR>].

¹⁹ *Symptoms of COVID-19*, CTNS. FOR DISEASE CONTROL & PREVENTION (Feb. 22, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> [<https://perma.cc/V2YW-C3ZN>].

²⁰ *People with Certain Medical Conditions*, CTNS. FOR DISEASE CONTROL & PREVENTION (Feb. 15, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/67R3-6UJC>].

²¹ *Risk for COVID-19 Infection, Hospitalization, and Death by Age Group*, CTNS. FOR DISEASE CONTROL & PREVENTION (Jan. 31, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html> [<https://perma.cc/3GHH-W5YQ>].

²² *Id.*

²³ *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CTNS. FOR DISEASE CONTROL & PREVENTION (Feb. 1, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [<https://perma.cc/D648-RS4P>].

²⁴ *Id.*

²⁵ *How to Protect Yourself & Others*, CTNS. FOR DISEASE CONTROL & PREVENTION (Jan. 20, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> [<https://perma.cc/7XAX-6KEB>].

²⁶ *Id.*

CDC has also released guidelines for correctional facilities, with an emphasis on disinfecting commonly touched surfaces and proper personal protective equipment, with a recognition that correctional facilities are environments that promote the spread of COVID infection.²⁷

B. Overview of COVID-19 Pandemic in Prison

The COVID-19 pandemic has ravaged the United States prison system and has left thousands of vulnerable people at a much greater risk than the general population. As of April 16, 2021, there have been 661,000 COVID infections and 2,990 deaths among incarcerated people and correctional facility staff across the country.²⁸ The COVID infection rate inside prison facilities is 7,000 cases per 100,000 incarcerated people, which is more than four times the rate of cases per 100,000 United States residents.²⁹ The mortality rate is 60% higher than the mortality rate of the general population, with 61.8 deaths per 100,000 infected incarcerated people.³⁰ Prison officials are also facing an increased risk of COVID infection, with more than 45,470 reported cases and 98 deaths in the 685,000 people employed by a correctional facility.³¹

There are currently 134,190 people incarcerated in federal prison and as of February 16, 2022, 128,906 incarcerated people have been tested for COVID across all federal facilities, with 55,554 positive tests.³² As of February 16, 2022, the Federal Bureau of Prisons (BOP) reported that 54,062 incarcerated people in federal facilities and 10,736 BOP staff members have been infected with COVID, and that 285 incarcerated people and 7 BOP staff members have died from COVID infection.³³ However, the Equal Justice Initiative reported that these numbers may

²⁷ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 15, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [<https://perma.cc/BC5T-FWYL>].

²⁸ *COVID-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE (Apr. 16, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison> [<https://perma.cc/2Z46-J7QY>].

²⁹ SCHNEPEL, *supra* note 1.

³⁰ *Id.*

³¹ Editorial Board, *Opinion, America Is Letting Coronavirus Rage Through Prisons*, N.Y. TIMES (Nov. 21, 2020), <https://www.nytimes.com/2020/11/21/opinion/sunday/coronavirus-prisons-jails.html?searchResultPosition=11> [<https://perma.cc/ZY8E-7RMM>].

³² *COVID-19 Coronavirus*, FED. BUREAU PRISONS (Feb. 16, 2022), <https://www.bop.gov/coronavirus> [<https://perma.cc/PYS2-QLVM>].

³³ *Id.*

not be accurate, as there are limited amounts of testing conducted on incarcerated people.³⁴ For example, many facilities will not test incarcerated people who are likely to die from COVID infection, even after showing symptoms.³⁵ As of February 16, 2022, the BOP has placed 38,185 high-risk incarcerated people in home confinement due to an order from the Attorney General issued on March 26, 2020.³⁶ While there was an initial reduction in prison populations, it has since been reported that many state facilities have steadily increased their prison populations, returning to capacities similar to those before the pandemic began.³⁷

The New York Times has reported that federal testing of incarcerated people is far below the national average.³⁸ California has tested only 7% of their incarcerated population, while New York has only tested 3% as of November 30, 2020.³⁹ Prisons that have conducted mass testing of their incarcerated populations have found that about 1 in 7 tests are positive.⁴⁰ The vast majority of incarcerated people who have tested positive for COVID have been asymptomatic, meaning that they are infected but are not showing symptoms of infection.⁴¹ Furthermore, in December of 2020 the Federal Defenders reported that proper guidelines and protections were not being followed at Metropolitan Detention Center, a federal facility in Brooklyn, New York.⁴² While the BOP is claiming the opposite, the Federal Defenders has reported noncompliance with face mask protocols by prison officials, a lack of segregation between infected and healthy incarcerated people, and a lack of medical attention to incarcerated people who request it.⁴³

State prisons systems are also battling terrible infection outbreaks, especially in large facilities that house more than 1,000 incarcerated

³⁴ COVID-19's Impact on People in Prison, *supra* note 28.

³⁵ *Id.*

³⁶ COVID-19 Coronavirus, *supra* note 32.

³⁷ Emily Widra, *Visualizing Changes in the Incarcerated Population During COVID-19*, PRISON POLY INITIATIVE (Sept. 10, 2020), https://www.prisonpolicy.org/blog/2020/09/10/pandemic_population_changes [<https://perma.cc/MDV6-ZWDC>].

³⁸ Timothy Williams, Libby Seline & Rebecca Griesbach, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html> [<https://perma.cc/Q8K9-84WZ>].

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Editorial Board, Opinion, *Stop the Coronavirus Outbreak at Brooklyn's Federal Jail*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/opinion/coronavirus-brooklyn-federal-jail.html?searchResultPosition=7> [<https://perma.cc/2GDS-QPC6>].

⁴³ *Id.*

people.⁴⁴ For example, San Quentin State Prison in California reported an outbreak in the summer of 2020 that resulted in 2,200 infections and 28 deaths among incarcerated people, and 298 infections and 1 death among correctional officers.⁴⁵ A report by *The New York Times* attributed this to poor ventilation, substandard healthcare, prohibitions on cleaning products, and a facility that was at 124% of its capacity.⁴⁶ In North Carolina, the state prison system has reported 8,000 infections and 36 deaths of incarcerated persons and guards.⁴⁷ In Connecticut, a study by the *New England Journal of Medicine* revealed that out of approximately 10,000 state incarcerated people, 13% of the male population was infected, which is a higher infection rate than that of the overall state.⁴⁸ Furthermore, in Arkansas the mortality rate of state incarcerated people is nearly 20 times higher than the adjusted state rate, Ohio's is 11 times higher than the adjusted state rate, Texas's 3 times higher than the state rate, and California's prison death rate was about twice the state rate.⁴⁹

The United States has the highest incarceration rate in the world, with 1.3 million people currently incarcerated in state and federal prisons,⁵⁰ which in turn leads to overcrowding in these facilities.⁵¹ Consequently, there is difficulty implementing CDC health guidelines, such as social distancing or frequent disinfection of commonly touched surfaces.⁵² The facilities are overcrowded and poorly ventilated, with a constant influx of prison officials, transferred incarcerated people, and visitors.⁵³ Even more concerning, the healthcare quality offered to

⁴⁴ See SCHNEPEL, *supra* note 1.

⁴⁵ See Timothy Williams & Rebecca Griesbach, *San Quentin Prison Was Free of the Virus. One Decision Fueled an Outbreak.*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/us/san-quentin-prison-coronavirus.html> [<https://perma.cc/ZS3G-9FDX>]; Editorial Board, *supra* note 31.

⁴⁶ Williams & Griesbach, *supra* note 45.

⁴⁷ Brendon Derr, Rebecca Griesbach & Danya Issawi, *States Are Shutting Down Prisons as Guards Are Crippled by COVID-19*, N.Y. TIMES (Jan. 1, 2021), <https://www.nytimes.com/2021/01/01/us/coronavirus-prisons-jails-closing.html?searchResultPosition=1> [<https://perma.cc/39NX-CDYN>].

⁴⁸ Byron S. Kennedy, Robert P. Richeson & Amy J. Houde, *Risk Factors for SARS-CoV-2 in a Statewide Correctional System*, NEW ENG. J. MED. (Dec. 17, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMc2029354?query=RP> [<https://perma.cc/8DJW-T2XV>].

⁴⁹ See SCHNEPEL, *supra* note 1.

⁵⁰ *Id.*

⁵¹ *Flattening the Curve: Why Reducing Jail Populations Is Key to Beating COVID-19*, ACLU, <https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19> [<https://perma.cc/HJ6P-Q7CT>].

⁵² *Id.*

⁵³ Editorial Board, *supra* note 31.

incarcerated people is notoriously substandard.⁵⁴ These factors combine to create an increase in COVID infection and mortality rates across the country's incarcerated population.⁵⁵ A study conducted by the American Civil Liberties Union found that 188,000 incarcerated people will die from COVID infection if less effective social distancing continues, and that number is only reduced to 99,000 deaths with highly effective social distancing implemented.⁵⁶

As stated earlier, the age of an individual is a contributing factor toward the risk level posed by COVID infection. This is especially problematic in the prison context, as the number of incarcerated adults who are age fifty-five and older reached 12% in 2016.⁵⁷ There are also extreme racial disparities within the prison system.⁵⁸ If current trends continue, 1 in 3 Black males and 1 in 6 Hispanic males can expect to go to prison in their lifetime, compared to 1 in 17 white males.⁵⁹ Across all facilities in the United States, 67% of the incarcerated population are people of color, while only making up 37% of the general population.⁶⁰ Black Americans are twice as likely to die from COVID infection than white Americans, but are 5 times more likely to be incarcerated.⁶¹ The Marshall Project has reported that 43 state institutions and the BOP refuse to release information categorizing COVID deaths by race. However, in states that did release that data, a higher percentage of Black incarcerated people have died from COVID infection when compared to the percentage of the general population who died in the state overall.⁶² A disproportionate number of older people, racial

⁵⁴ *Flattening the Curve: Why Reducing Jail Populations Is Key to Beating COVID-19*, *supra* note 51.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Weihua Li & Nicole Lewis, *This Chart Shows Why the Prison Population Is So Vulnerable to COVID-19*, MARSHALL PROJECT (Mar. 19, 2020, 2:45 PM), <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19> [https://perma.cc/RC6R-897K].

⁵⁸ SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013), <https://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system> [https://perma.cc/A7AP-HXXB].

⁵⁹ *Id.*

⁶⁰ *Criminal Justice Facts*, SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> [https://perma.cc/4CAW-3X2C].

⁶¹ See SCHNEPEL, *supra* note 1.

⁶² Maurice Chammah & Tom Meagher, *Is COVID-19 Falling Harder on Black Prisoners? Officials Won't Tell Us*, MARSHALL PROJECT (May 28, 2020, 6:25 PM), <https://www.themarshallproject.org/2020/05/28/is-covid-19-falling-harder-on-black-prisoners-officials-won-t-tell-us> [https://perma.cc/VK5G-KEEL].

disparities, and substandard qualities of healthcare in correctional institutions, combined with a lack of adequate implementation of health guidelines and testing protocols, have all contributed to an increased risk of incarcerated people contracting and dying from COVID.

C. *The History of the Prison Litigation Reform Act*

Congress enacted the Prison Litigation Reform Act in 1996, which impacted various areas of the criminal justice system, including the institution of a strict exhaustion requirement.⁶³ The purpose of the exhaustion requirement was to reduce the number of “frivolous” lawsuits challenging conditions of confinement that the House viewed as clogging the courts and preventing the efficient administration of justice.⁶⁴ One method of fulfilling this purpose was to create an exhaustion requirement with only one substantive condition, namely that the administrative remedies be “available.”⁶⁵ The exhaustion requirement states: “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.”⁶⁶ The Supreme Court has determined that the PLRA exhaustion requirement applies to all suits by incarcerated people regarding prison conditions, whether they involve daily circumstances or particular instances of excessive force or other wrongs.⁶⁷

Exhaustion requirements are common in many facets of administrative law, not just the PLRA, and the Supreme Court has held

⁶³ H.R. REP. NO. 104-21, at 7 (1995). The doctrine of exhaustion of administrative remedies is well established and simply purports that “that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Woodford v. Ngo*, 548 U.S. 81, 88–89 (2006). The Supreme Court has determined that the PLRA requires proper exhaustion, which means “a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court.” *Id.* at 88.

⁶⁴ H.R. REP. NO. 104-21, at 7 (“Title II—Stopping Abusive Prisoner Lawsuits—places sensible limits on the ability of detained persons to challenge the legality of their confinement. Too many frivolous lawsuits are clogging the courts, seriously undermining the administration of justice.”).

⁶⁵ *See id.* (“The title addresses the problem of frivolous lawsuits in three significant ways. First, it requires that all administrative remedies be exhausted prior to a prisoner initiating a civil rights action in court.”); 42 U.S.C. § 1997e(a).

⁶⁶ 42 U.S.C. § 1997e(a).

⁶⁷ *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (“[W]e hold that the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”).

that all exhaustion requirements have two main purposes.⁶⁸ The first is to protect the administrative agency's authority by allowing them the first opportunity to redress their wrongs before being subjected to federal court.⁶⁹ Exhaustion requirements also promote judicial efficiency in two ways. They allow the administrative agency the opportunity to remedy the issue without requiring the need for litigation, and in cases where exhaustion did not result in a proper remedy and litigation is required, the court is still provided with a useful factual record for consideration.⁷⁰

The PLRA was enacted to replace the Civil Rights of Institutionalized Persons Act (CRIPA), which was enacted in 1980.⁷¹ The exhaustion requirement of the PLRA changed the exhaustion requirement of CRIPA in four distinct ways.⁷² First, the PLRA mandates dismissal of conditions of confinement cases in which exhaustion was not met, whereas CRIPA allowed for courts to stay cases pending exhaustion of administrative remedies.⁷³ Second, all incarcerated people

⁶⁸ *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992); see Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 513 (2001).

⁶⁹ *McCarthy*, 503 U.S. at 145 ("The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court. Correlatively, exhaustion principles apply with special force when 'frequent and deliberate flouting of administrative processes' could weaken an agency's effectiveness by encouraging disregard of its procedures." (quoting *McKart v. United States*, 395 U.S. 185, 195 (1969))).

⁷⁰ *Id.* ("When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." (internal citations omitted)).

⁷¹ Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997-1997j (1980). The purpose of CRIPA was to improve the quality of treatment of incarcerated people and assist in upholding the constitutional rights of those incarcerated. See S. REP. NO. 96-416, at 18-19 (1979) ("The experience of the Department of Justice through its involvement in this litigation has shown that the basic constitutional and Federal statutory rights of institutionalized persons are being violated on such a systematic and widespread basis to warrant the attention of the Federal Government.").

⁷² 42 U.S.C. § 1997e (1980), amended by 42 U.S.C. § 1997e(a) (2013).

⁷³ Compare 42 U.S.C. § 1997e(a) (2013) ("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."), with 42 U.S.C. § 1997e(a)(1) (1980) ("Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.").

contesting their conditions of confinement on constitutional or federal grounds are subject to this requirement, which previously only applied to adults in state facilities.⁷⁴ Third, the PLRA eliminated the mandatory cap on the exhaustion period, which previously provided only 180 days for correctional facilities to process an administrative grievance.⁷⁵ Currently there is no time limit for processing.⁷⁶ Lastly, the PLRA removed the minimum standards requirement that provided state and local facilities with specific factors that must be instituted in their grievance procedure in order to comply with CRIPA.⁷⁷ Under CRIPA, if a court or the Attorney General deemed an administrative procedure to be not in substantial compliance with these minimum standards, exhaustion would not be required.⁷⁸ After these amendments, the only substantive requirement that administrative remedies must meet in order for the exhaustion requirement to apply is that the remedies be “available.”⁷⁹

The definition of “available”⁸⁰ has been the subject of much disagreement and the Supreme Court has since interpreted its meaning.

⁷⁴ Compare 42 U.S.C. § 1997e(a) (2013) (“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.” (emphasis added)), with *McCarthy*, 503 U.S. at 150 (“Section 1997e imposes a limited exhaustion requirement for a claim brought by a state prisoner . . . provided that the underlying state prison administrative remedy meets specified standards. . . . We find it significant that Congress, in enacting § 1997(e), stopped short of imposing a parallel requirement in the federal prison context.” (citing 42 U.S.C. § 1997e (1980))).

⁷⁵ 42 U.S.C. § 1997e(a)(1) (1996), amended by 42 U.S.C. § 1997e(a) (2013) (“Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, *continue such case for a period of not to exceed 180 days* in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.” (emphasis added)).

⁷⁶ 42 U.S.C. § 1997e(a) (2013).

⁷⁷ 42 U.S.C. § 1997e(b)(2)(A)–(E) (1980) (“The minimum standards shall provide—(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system; (B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system; (C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages; (D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and (E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.”).

⁷⁸ 42 U.S.C. § 1997e(a)(2) (1980) (“The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).”).

⁷⁹ 42 U.S.C. § 1997e(a) (2013); see also Branham, *supra* note 68, at 497.

⁸⁰ 42 U.S.C. § 1997e(a).

In *Booth v. Churner*, the Court held that an administrative remedy that cannot provide the plaintiff with the specific relief sought is still deemed available for purposes of exhaustion.⁸¹ The Court found exhaustion mandatory even when the relief sought, namely monetary damages, could not be granted by the administrative process.⁸² *Booth* also established the first exception to the exhaustion requirement, namely that an administrative remedy that is *unavailable* does not need to be exhausted.⁸³ An administrative remedy is deemed unavailable when it operates as a dead end, in the sense that officers are unable or unwilling to provide relief, regardless of whether the official regulations of the facility state the contrary.⁸⁴

In *Ross v. Blake*, the Supreme Court recognized further exceptions, although they are very narrow.⁸⁵ When an administrative remedy is unknowable, meaning that the remedy exists but is so complicated or convoluted that the average incarcerated person would not be able to discern it, it is deemed unavailable under the PLRA.⁸⁶ The Court explained that this does not require the remedies to be so plain as to only suggest one interpretation, but it cannot be entirely unknowable as to what is required of the incarcerated person.⁸⁷ Another exception to the exhaustion requirement arises when prison administrators attempt to prevent an incarcerated person from using the grievance process through various means of machination, misrepresentation, or intimidation.⁸⁸ In these situations where prison officials seek to interfere with an incarcerated person's pursuit of relief, complete

⁸¹ *Booth v. Churner*, 532 U.S. 731, 741 (2001) (inferring legislative intent and finding “it highly implausible that [Congress] meant to give prisoners a strong inducement to skip the administrative process simply by limiting prayers for relief to money damages not offered through administrative grievance mechanisms”).

⁸² *Id.* at 734.

⁸³ *Id.* at 736 (finding exhaustion unavailable “where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint”).

⁸⁴ *Ross v. Blake*, 578 U.S. 632, 643 (2016) (“First, as *Booth* made clear, an 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.” (citing *Booth*, 532 U.S. at 738)).

⁸⁵ *Id.* at 642–44.

⁸⁶ *Id.* at 643–44 (“[A]n administrative scheme might be so opaque that it becomes, practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it.”).

⁸⁷ *Id.* at 644.

⁸⁸ *Id.* (“[W]e recognized that officials might devise procedural systems . . . in order to ‘trip[] up all but the most skillful prisoners.’ And 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.” (alteration in original) (quoting *Woodford v. Ngo*, 548 U.S. 81, 102 (2006))).

exhaustion is not required.⁸⁹ These three judicially created exceptions to the exhaustion requirement are extremely narrow and not often successfully invoked, and most incarcerated plaintiffs are still required to exhaust all administrative remedies before filing suit.⁹⁰

Even a procedural error by an incarcerated plaintiff, such as missing the deadline to file an administrative grievance, can preclude courts from hearing the claim due to a failure to exhaust.⁹¹ While the Supreme Court did offer some narrow exceptions to exhaustion, it is clear that the requirement remains a barrier to most litigation brought by incarcerated people.⁹² Notably, the Court has also held that the strict language of the PLRA requires a lower court to not excuse a failure to exhaust, even when there may be special circumstances, such as a plaintiff who mistakenly, but reasonably, believed they had exhausted their administrative remedies.⁹³ Emphasizing the legislative authority of Congress, the Court reasoned that mandatory exhaustion statutes cannot be judicially altered, and that all exceptions must come from legislation.⁹⁴ This is very pertinent, especially when federal court judges express interest in excusing the exhaustion requirement, but feel bound by the strict language of the PLRA.⁹⁵

⁸⁹ *Id.*

⁹⁰ *Id.* at 643. The Court presents three circumstances in which an administrative remedy will not be deemed available but qualifies these circumstances by stating that “[g]iven prisons’ own incentives to maintain functioning remedial processes, we expect that these circumstances will not often arise.” *Id.*

⁹¹ See *Woodford*, 548 U.S. at 95 (“The prison grievance system will not have such an opportunity unless the grievant complies with the system’s critical procedural rules. A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system’s procedural rules unless noncompliance carries a sanction”); Giovanna Shay, *Exhausted*, 24 FED. SENT’G REP. 287, 287 (2012).

⁹² See *Booth v. Churner*, 532 U.S. 731, 738 (2001) (dead end exception); *Ross*, 578 U.S. at 644 (unknowable exception and intentional interference by prison officials exception).

⁹³ *Ross*, 578 U.S. at 639 (“[T]he PLRA’s text suggests no limits on an inmate’s obligation to exhaust—irrespective of any ‘special circumstances.’ And that mandatory language means a court may not excuse a failure to exhaust, even to take such circumstances into account.”).

⁹⁴ *Id.* (“But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to. For that reason, mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion.”).

⁹⁵ See, e.g., *Valentine v. Collier*, 978 F.3d 154, 161 (5th Cir. 2020) (“We reiterate that the spread of COVID-19 in the Pack Unit is an emergency that demands prison officials’ full attention. But . . . emergencies are not ‘license to carve out new exceptions to the PLRA’s exhaustion requirement, an area where our authority is constrained.’” (quoting *Dillon v. Rogers*, 596 F.3d 260, 270 (5th Cir. 2010))).

D. *Emergency Situations Under the Prison Litigation Reform Act*

The PLRA removed the previous emergency provision in CRIPA, which required, as a minimum standard, that the administrative remedy procedures prioritized processing emergency grievances.⁹⁶ Some courts have opined that the reason for this removal was that an exception for urgent medical needs would defeat one of the purposes of the exhaustion requirement, namely, to give prison officials the first opportunity to remedy a situation and to curb frivolous lawsuits.⁹⁷ Lower federal courts have typically held that there are no emergency exceptions under the PLRA that would avoid the application of the mandatory exhaustion requirement.⁹⁸

The PLRA is not binding on state law claims, but the vast majority of complaints from plaintiffs incarcerated in either state or federal facilities are filed in federal court. In most cases, the Constitution is the only meaningful source of protection for these plaintiffs, and the PLRA is applicable to any claim filed under federal law.⁹⁹ Some states have enacted legislation to provide expedited processing of grievances if the prison official reviewing grievances determines it is of an emergency

⁹⁶ 42 U.S.C. § 1997e(b)(2)(C) (1980), amended by 42 U.S.C. § 1997e(a) (2013) (“[M]inimum standards shall provide . . . priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages.”).

⁹⁷ See *Sanders v. Norris*, No. 5:08CV00049, 2008 WL 2926198, at *2 n.8 (E.D. Ark. July 24, 2008) (“Recognizing an exception for ‘urgent medical needs’ would defeat the purpose of the exhaustion requirement, which is to give prison officials the first opportunity to promptly remedy a situation within the prison system.” (citing *Jones v. Bock*, 549 U.S. 199, 218–19 (2007))); *Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (explaining that by “[r]equiring proper exhaustion . . . [i]t gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors”); H.R. REP. NO. 104-21, at 5 (1995) (striking all required minimum standards from CRIPA).

⁹⁸ See, e.g., *Gibson v. Weber*, 431 F.3d 339, 341 (8th Cir. 2005) (explaining that “[a]n inmate’s subjective belief that the procedures were not applicable to medical grievances ‘does not matter’ and is not determinative” as to whether exhaustion has been completed (quoting *Lyon v. Vande Krol*, 305 F.3d 806, 809 (8th Cir. 2002))); *Jones*, 549 U.S. at 218 (finding that “it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion” and as such an incarcerated person cannot circumvent the exhaustion process if they subjectively believe the administrative remedies will not provide relief); *Hall v. Richardson*, 144 F. App’x 835, 836 (11th Cir. 2005) (holding that an incarcerated person who was transferred from the facility where the incident occurred still must exhaust all administrative remedies, even if exhaustion is futile); *Dillon v. Rogers*, 596 F.3d 260, 271–72 (5th Cir. 2010) (holding that even in the wake of Hurricane Katrina, an evaluation must be made as to whether administrative remedies were available before a lack of exhaustion can be excused).

⁹⁹ Tasha Hill, *Inmates’ Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, Casey, and Iqbal Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 208 (2015).

nature.¹⁰⁰ This does not preclude an incarcerated person's requirement to exhaust, but merely provides that their grievance should be reviewed swiftly.¹⁰¹ However, this is state specific and not all states have codified a similar exception. There is also a situation in which an "imminent danger exception" can apply. Under 28 U.S.C. § 1915, if an incarcerated person has brought three or more civil actions that were ultimately found to be "frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted," they are precluded from filing suit again *in forma pauperis*,¹⁰² except if the incarcerated person is "under imminent danger of serious physical injury."¹⁰³ Generally, the imminent danger exception *only* excuses full payment of the filing fee, not exhaustion.¹⁰⁴

In an extreme situation the Seventh Circuit applied the imminent danger exception to the exhaustion requirement as well. In *Fletcher v. Menard Correctional Center*, the Seventh Circuit reasoned that in certain situations where an incarcerated person is placed in imminent danger of serious physical injury, such as a death threat by a white supremacist prison gang within the next twenty-four hours, then administrative remedies, which offer no potential to provide relief before the imminent danger occurs, cannot be thought of as available.¹⁰⁵

¹⁰⁰ See, e.g., ILL. ADMIN. CODE tit. 20, § 504.850(f) (2017) ("In those instances in which an offender is appealing a grievance determined by the Chief Administrative Officer to be of an emergency nature, the Administrative Review Board shall expedite processing of the grievance."); CAL. CODE REGS. tit. 15, § 3483(a) (2021).

¹⁰¹ *Roberts v. Neal*, 745 F.3d 232, 236 (7th Cir. 2014) (explaining that the plaintiff would be entitled to expedited review and a response directly from the warden; but only if the plaintiff in fact filed an emergency grievance would a lack of a response from the warden constitute exhaustion).

¹⁰² Filing suit *in forma pauperis* means the incarcerated person would be excused from paying the filing fee up front and instead could pay in installments. 28 U.S.C. § 1915(b) (1996); see also *Fletcher v. Menard Correctional Ctr.*, 623 F.3d 1171, 1172 (7th Cir. 2010) ("Because he had three 'strikes' against him (that is, earlier prisoner suits filed by him that had been dismissed as being frivolous or malicious or failing to state a claim), he could not proceed in the district court *in forma pauperis* (which would have excused him from having to pay the filing fee up front rather than in installments, unless he was 'under imminent danger of serious physical injury.'" (citing 28 U.S.C. § 1915(b))).

¹⁰³ 28 U.S.C. § 1915(g) ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.").

¹⁰⁴ *Fletcher*, 623 F.3d at 1173.

¹⁰⁵ *Id.* ("If a prisoner has been placed in imminent danger of serious physical injury by an act that violates his constitutional rights, administrative remedies that offer no possible relief in time to prevent the imminent danger from becoming an actual harm can't be thought available."). The court presented a hypothetical, reasoning that if an incarcerated person is under threat of death

The court distinguished this situation from the holding in *Booth v. Churner*, where the plaintiff argued that a lack of monetary damages as potential relief deemed his administrative remedies unavailable, and the Supreme Court strongly rejected that as a valid exception to exhaustion.¹⁰⁶ Ultimately, the *Fletcher* court held that because the plaintiff had access to an expedited grievance procedure, codified in the Illinois Administrative Code,¹⁰⁷ which was separate from the prison administration's procedure, the exhaustion requirement could not be excused for Fletcher.¹⁰⁸ However, the decision suggested that administrative remedies would be deemed unavailable when they would not redress an immediate danger to an incarcerated person's health or safety.¹⁰⁹ It should be noted that *Fletcher* was decided before the Supreme Court clarified the meaning of "unavailable" in *Ross v. Blake*,¹¹⁰ and reliance on *Fletcher*'s holding has generally been unsuccessful in COVID litigation.¹¹¹

The BOP's grievance procedure provides that the warden should respond to an administrative grievance within three calendar days of filing if "the [r]equest is determined to be of an emergency nature which

by a prison gang within the next twenty-four hours, a grievance that could take two weeks to process would be of no use to this plaintiff. *Id.*

¹⁰⁶ *Id.* at 1174 ("[A] case in which the prisoner might be killed if forced to exhaust remedies that do not include any remedy against an imminent danger is not a circumvention case and is not controlled by *Booth*, which in any event distinguished between a case in which there are remedies but none to the prisoner's liking (which was the *Booth* case) and a case in which there is no remedy; for the Court said that 'without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust.'" (quoting *Booth v. Churner*, 532 U.S. 731, 736 n.4 (2001))).

¹⁰⁷ ILL. ADMIN. CODE tit. 20, § 504.850(f) (2017).

¹⁰⁸ *Fletcher*, 623 F.3d at 1175 ("But remember that the imminent-danger exception does not excuse a prisoner from exhausting remedies tailored to imminent dangers.").

¹⁰⁹ *Id.* at 1173.

¹¹⁰ *Ross v. Blake*, 578 U.S. 632, 643–44 (2016).

¹¹¹ *See, e.g.*, *Thompson v. Allison*, No. 1:21-cv-00001-JLT, 2021 WL 535360, at *2 (E.D. Cal. Feb. 12, 2021) (holding that *Fletcher* imminent-danger exception does not apply to COVID, especially when California has a codified expedited grievance process); *Duvall v. Hogan*, No. ELH-94-2541, 2020 WL 3402301, at *8 (D. Md. June 19, 2020) (finding that the motion did not need to be dismissed for failure to exhaust, citing *Fletcher*, but ultimately denying the motion on other grounds); *Maney v. Brown*, 464 F. Supp. 3d 1191, 1207 (D. Or. 2020) (holding that Oregon's administrative grievance procedure is unavailable for COVID relief, citing *Fletcher*, but ultimately denying the preliminary injunction on other grounds); *Cameron v. Bouchard*, 815 F. App'x 978 (6th Cir. 2020) (vacating the stay granted by the district court, which deemed the plaintiff's administrative remedies unavailable under *Fletcher*); *McPherson v. Lamont*, 457 F. Supp. 3d 67, 81 (D. Conn. 2020) (deeming Connecticut's grievance procedure unavailable during COVID, citing *Fletcher*); *Nellson v. Barnhart*, 454 F. Supp. 3d 1087, 1093–94 (D. Colo. 2020) (rejecting a reliance on *Fletcher* where plaintiffs at a federal correctional facility had an emergency procedure available to them, codified in a federal rule).

threatens the inmate's immediate health or welfare."¹¹² However, this does not entitle a plaintiff to expedited *relief*, but merely to a response to the initial grievance, which could contain some relief.¹¹³ When evaluating the availability of an administrative remedy, the standard is whether the remedy could offer the possibility of some relief, not whether total and immediate relief can be granted.¹¹⁴ Thus, if the warden deems the request to one be of an emergency nature, even then a petitioner will most likely still have to litigate their claim in order to get the total relief sought.¹¹⁵

E. *History of the Prison Rape Elimination Act*

The Prison Rape Elimination Act (PREA) requires federal and state prison facilities to provide an expedited grievance procedure to plaintiffs who are victims of sexual assault, which in turn satisfies PLRA exhaustion.¹¹⁶ The PREA was introduced to combat the prevalence of sexual assault in prisons and jails across the United States.¹¹⁷ The Act initially garnered support due to a Human Rights Watch report on this issue, which focused on the prevalence of white men in custody who were victims of sexual assault.¹¹⁸ Congress created the National Prison Rape Elimination Commission (Commission) to conduct a comprehensive study on the impacts of prison rape, and the

¹¹² 28 C.F.R. § 542.18 (2002).

¹¹³ "Under 28 C.F.R. § 542.18, a response is required by the Warden within 20 calendar days of an inmate's filing of the initial request; by the Regional Director within 30 calendar days of an inmate's filing of a BP-10; and by the General Counsel within 40 calendar days of an inmate's filing of a BP-11." *United States v. Powell*, No. 1:16cr75-HSO-JCG-2, 2020 WL 4210478, at *3 (S.D. Miss. July 22, 2020). An incarcerated person must then appeal the decisions of the warden, Regional Director, and General Counsel, and either receive a response, or in the alternative, fail to receive a response in the prescribed time allotted, constituting a constructive denial, in order to completely exhaust their administrative remedies. *Id.*

¹¹⁴ *Nelson*, 454 F. Supp. 3d at 1094 ("[T]otal and immediate relief is not the standard for exhaustion, 'the possibility of some relief' is. Moreover, as defendants point out, plaintiff is not required to complete the entire administrative process before receiving some relief; he may get relief at any stage of the administrative process." (internal citations omitted) (quoting *Ross v. Blake*, 578 U.S. 632, 643 (2016))).

¹¹⁵ See *Wilson v. Ponce*, No. CV 20-4451-MWF, 2020 WL 5118066, at *6 (C.D. Cal. July 14, 2020) (explaining that the relief requested must constitute an emergency and the prison administration must deem the relief emergent as well for the emergency procedure to apply).

¹¹⁶ 34 U.S.C. § 30301; 28 C.F.R. § 115.52 (2012).

¹¹⁷ 34 U.S.C. § 30301. Congress found that at least thirteen percent of incarcerated people were victims of sexual assault in prison, with people with mental illness and juvenile offenders more at risk. *Id.* § 30301(2)-(4).

¹¹⁸ Brenda V. Smith, *Promise amid Peril: PREA's Efforts to Regulate an End to Prison Rape*, 57 AM. CRIM. L. REV. 1599, 1600-01 (2020).

Commission then reported its findings to the Attorney General.¹¹⁹ The Attorney General and the Department of Justice (DOJ) were then required to implement national standards to correct the systemic issues brought to light by the Commission's report to detect, prevent, reduce, and punish prison rape.¹²⁰ The standards directly bind institutions governed by the BOP and the Department of Homeland Security¹²¹ and use a financial incentive to bind state institutions.¹²² If a state's correctional facilities' policies are not in accordance with the PREA requirements, then the state's qualifying federal grants can be reduced by five percent until the regulations comply with PREA.¹²³

PREA did not create a new cause of action for incarcerated litigants and as such, suits regarding sexual assault are still governed by other PLRA requirements.¹²⁴ The PREA National Standards were codified in 28 C.F.R. § 115¹²⁵ and permitted prison and jail administrations to create their own sexual assault grievance procedures, so long as they mirror the requirements set forth in PREA.¹²⁶ The National Standards loosened the exhaustion requirements for these claims, which otherwise would be governed by the PLRA.¹²⁷ The new standards contained five critical rules to assist in the exhaustion process: (1) the agency could not impose a time limit to submit a grievance alleging sexual assault;¹²⁸ (2) the agency must ensure that an incarcerated person can report the grievance without revealing the report to the staff member accused of

¹¹⁹ 34 U.S.C. § 30306. "The Commission shall carry out a comprehensive legal and factual study of the pen[ological, physical, mental, medical, social, and economic impacts of prison rape in the United States on (a) Federal, State, and local governments; and (b) communities and social institutions generally, including individuals, families, and businesses within such communities and social institutions." *Id.* § 30306(d).

¹²⁰ 34 U.S.C. § 30307(a); *see also* Smith, *supra* note 118, at 1602–03; Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 802 (2014).

¹²¹ *See* 34 U.S.C. § 30307(b)–(c).

¹²² 34 U.S.C. § 30307(e)(2); *see* Arkles, *supra* note 120, at 806.

¹²³ 34 U.S.C. § 30307(e)(2); *see* Arkles, *supra* note 120, at 806.

¹²⁴ *See* Smith, *supra* note 118, at 1616; *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (asserting that Congress must explicitly create a private cause of action, and without this statutory intent "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute").

¹²⁵ Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

¹²⁶ 28 C.F.R. § 115.11(b) ("An agency shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its facilities.").

¹²⁷ 28 C.F.R. § 115.52; *see* Smith, *supra* note 118, at 1616.

¹²⁸ 28 C.F.R. § 115.52(b)(1) ("The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse.").

assault;¹²⁹ (3) the agency must issue a final decision on the grievance within ninety days of the initial filing;¹³⁰ (4) third parties, including staff, family members, or attorneys, must be allowed to assist the incarcerated person in filing the grievance and be permitted to file on their behalf;¹³¹ and (5) the agency must create an emergency grievance procedure for incarcerated people alleging a substantial risk of imminent sexual abuse.¹³² These new standards are much more plaintiff-friendly than the PLRA standards, especially the removal of a deadline to file a grievance. Many facilities require a grievance to be filed within fourteen days of the incident, which could be extremely difficult for a sexual assault victim who may be understandably traumatized or fearful of retaliation if the assaulter was a prison official.¹³³ Under the PLRA, a failure to file an administrative grievance within the specified timeframe could preclude exhaustion, even if the claim had merits.¹³⁴

New York State provides a good example of state rules that implemented the PREA requirements into their own correctional institutions.¹³⁵ Under this rule, an incarcerated person is not required to file an administrative grievance concerning sexual assault or harassment before bringing suit, and as long as the incident is reported by one of the methods offered by the rule, a person's administrative remedies are deemed exhausted.¹³⁶ The methods of reporting that are offered are: reporting the incident to facility staff; reporting in writing to the Central Office staff; reporting to an outside agency that the Department has identified as agreeing to receive reports and forward them; reporting to the Department's Office of the Inspector General; or a third party can report that the victim was assaulted, which the victim

¹²⁹ *Id.* § 115.52(c) (“The agency shall ensure that—(1) An inmate who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint, and (2) Such grievance is not referred to a staff member who is the subject of the complaint.”).

¹³⁰ *Id.* § 115.52(d)(1) (“The agency shall issue a final agency decision on the merits of any portion of a grievance alleging sexual abuse within 90 days of the initial filing of the grievance.”).

¹³¹ *Id.* § 115.52(e)(1) (“Third parties, including fellow inmates, staff members, family members, attorneys, and outside advocates, shall be permitted to assist inmates in filing requests for administrative remedies relating to allegations of sexual abuse, and shall also be permitted to file such requests on behalf of inmates.”).

¹³² *Id.* § 115.52(f)(1) (“The agency shall establish procedures for the filing of an emergency grievance alleging that an inmate is subject to a substantial risk of imminent sexual abuse.”).

¹³³ See Arkles, *supra* note 120, at 809–10.

¹³⁴ See *Woodford v. Ngo*, 548 U.S. 81, 93 (2006); Shay, *supra* note 91, at 287.

¹³⁵ N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3 (2017).

¹³⁶ *Id.* § 701.3(i) (“[A]n inmate is not required to file a grievance concerning an alleged incident of sexual abuse or sexual harassment to satisfy the Prison Litigation Reform Act (PLRA) exhaustion requirement . . . before bringing a lawsuit regarding an allegation of sexual abuse as long as the matter was reported as set forth below.”).

must then confirm.¹³⁷ There is no time limit for submitting a complaint, and a filed complaint will satisfy exhaustion for the PLRA.¹³⁸ Encompassed in both the New York and federal rules is the proposition that neither federal nor state Departments of Justice will tolerate sexual abuse, and both deem the issue emergent and important enough for an expediated and simpler manner of exhaustion.¹³⁹

II. ANALYSIS

A. Exhaustion Requirement Analyses for COVID-19 Litigation

The COVID-19 pandemic is unprecedented on many accounts. Not only has there never been such a widescale disruption to ordinary life, but the death toll globally and nationally is disparaging to say the least.¹⁴⁰ When the PLRA was enacted nearly twenty-five years ago, it is doubtful Congress had envisioned its exhaustion requirement to apply to a situation such as this.¹⁴¹ As it stands, the PLRA exhaustion requirement is a strong barrier to plaintiffs seeking relief due to unsafe prison conditions placing them at a higher risk of contracting COVID.¹⁴² Due to the entrenched precedent mandating a stringent

¹³⁷ *Id.* § 701.3(i)(1)–(2) (“[A]n inmate who alleges being the victim of sexual abuse or sexual harassment reported the incident to facility staff; in writing to Central Office Staff; to any outside agency that the Department has identified as having agreed to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials under the PREA Standards (28 C.F.R. § 115.51(b)); or to the Department’s Office of the Inspector General; or (2) a third party reported that an inmate is the victim of sexual abuse and the alleged victim confirmed the allegation upon investigation.”).

¹³⁸ *Id.* § 701.3(i).

¹³⁹ *Id.*; 28 C.F.R. § 115.52 (2012).

¹⁴⁰ On February 22, 2021, the United States COVID death toll passed 500,000, which is more American deaths than those from World War I, World War II, and the Vietnam War combined. Lucy Tompkins, Mitch Smith, Julie Bosman & Bryan Pietsch, *Entering Uncharted Territory, the U.S. Counts 500,000 Covid-Related Deaths*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/02/22/us/us-covid-deaths-half-a-million.html> [<https://perma.cc/A386-GDL9>]. As of February 18, 2022, the global COVID death toll was 5,856,224. WHO *Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int> [<https://perma.cc/QSU3-MM39>].

¹⁴¹ The PLRA was enacted to reduce the burden that frivolous lawsuits filed by pro se litigants had on the federal court system. Due to mass incarceration beginning in the 1970s, by 1995, around 40,000 complaints were filed by incarcerated plaintiffs each year, compared to 12,000 complaints a year in the 1980s. Hill, *supra* note 99, at 206–07.

¹⁴² See, e.g., *Nellson v. Barnhart*, 454 F. Supp. 3d 1087, 1094 (D. Colo. 2020); *Frazier v. Kelley*, 460 F. Supp. 3d 799, 834 (E.D. Ark. 2020); *Cameron v. Bouchard*, 815 F. App’x 978 (6th Cir. 2020); *Marshall v. LeBlanc*, No. 18-13569, 2020 WL 2838577, at *4 (E.D. La. June 1, 2020); *Covington v. Armstead*, No. PX-20-2104, 2020 WL 5893628 (D. Md. Oct. 5, 2020); *Miles v. Bell*,

exhaustion requirement under the PLRA, as well as very narrow and few exceptions, federal courts have been struggling to decide whether a global pandemic circumvents the need for exhaustion of administrative remedies.¹⁴³ Some district courts are finding that state departments of corrections cannot establish the affirmative defense of failure to exhaust administrative remedies when there was evidence that the petitioners had already filed grievances and were told in response that the department was already doing everything it could to combat the spread of COVID inside the facility.¹⁴⁴ For example, the Eastern District of Arkansas seemed to suggest that this response deemed the administrative remedy as “unavailable,” as it operates as a dead end with officers unwilling or unable to provide relief.¹⁴⁵

Other district courts have found an exception to the exhaustion requirement where incarcerated people were told by prison officials not to submit grievances because grievances related to COVID were not being accepted due to understaffing.¹⁴⁶ Thus, the administrative remedy cannot be considered available when prison officials inform the petitioners not to file a grievance or tell the incarcerated population that their grievances will be denied if they do file.¹⁴⁷ Similarly, in situations where prison administrations have failed to adjudicate either the initial grievances or subsequent appeals, some courts are finding that the exhaustion requirement has been met.¹⁴⁸

No. DKC-20-2107, 2021 WL 229674 (D. Md. Jan. 22, 2021); *Brown v. Colon*, No. 20-22147-CIV, 2020 WL 5653963 (S.D. Fla. Sept. 23, 2020).

¹⁴³ In a memorandum opinion, Justices Ginsburg and Sotomayor expressed their sympathies to the plaintiffs, but likewise agreed that the PLRA language precludes excluding exhaustion. *Valentine v. Collier*, 140 S. Ct. 1598, 1600–01 (2020).

¹⁴⁴ *Frazier*, 460 F. Supp. 3d at 833–34.

¹⁴⁵ See *id.* at 831 (citing *Ross v. Blake*, 578 U.S. 632, 643 (2016)); cf. *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 769 (E.D. Mich. 2020), *vacated*, 815 F. App'x 978 (6th Cir. 2020) (“At this stage of the proceedings, there is sufficient evidence on this record to conclude that the Jail’s grievance procedures are ‘unavailable’ to Plaintiffs. Corrections officers refuse to provide grievance forms to some inmates who request them. Corrections officers threaten to transfer inmates to COVID-19 infested areas if they complain.”).

¹⁴⁶ *Torres v. Milusnic*, 472 F. Supp. 3d 713, 742–43 (C.D. Cal. 2020).

¹⁴⁷ See *id.* at 743; *Maney v. Brown*, 464 F. Supp. 3d 1191, 1207 (D. Or. 2020) (“Importantly here, Defendants acknowledge that [the administration] is not accepting grievances relating to COVID-19 emergency operations, nor ‘general grievances regarding social distancing, isolation, and quarantine’ . . . because doing so is ‘inconsistent with [the administration’s] rules.’ . . . Based on the current record, the Court concludes that [the administration’s] administrative grievance procedure is currently unavailable for the relief Plaintiffs seek in this case, and therefore exhaustion is not required . . .” (internal citations omitted)).

¹⁴⁸ *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 687 (C.D. Cal. 2020) (“When prison officials improperly fail to process a prisoner’s grievance, the prisoner is deemed to have exhausted available administrative remedies.” (quoting *Andres v. Marshall*, 867 F.3d 1076, 1079 (9th Cir. 2017))).

However, other district courts evaluating similar arguments regarding availability are instead holding that because the grievance process exists, it is inherently *not* unavailable and thus requires exhaustion.¹⁴⁹ For example, a plaintiff incarcerated at the Rayburn Correctional Facility in Louisiana filed an administrative grievance, and subsequently the state superintendent suspended the deadline for the administration to reply to the grievances, which the plaintiff argued made the remedy unavailable, as he could have been infected with COVID awaiting a response.¹⁵⁰ The Eastern District of Louisiana rejected that argument, finding that a remedy is still available when it is possible, even if it is not addressed “as quickly as [a] [p]laintiff would like.”¹⁵¹ In a similar case, a plaintiff incarcerated at a federal facility in Colorado argued that due to the ninety-day timeframe allotted to respond to an administrative grievance, the administrative remedy was a “dead end,”¹⁵² as the grievance process can offer no possible relief in time to prevent the threat of COVID infection.¹⁵³ The District of Colorado found that the *Ross* dead end exception was not applicable,¹⁵⁴ explaining that a court may not adjust the exhaustion requirements of the PLRA for COVID or any other “special circumstance,” and denied his motion for failure to exhaust.¹⁵⁵ Conversely, the District of Connecticut, when evaluating a similar argument that a grievance procedure, which takes 75 to 105 business days to complete, is a dead end and thus is unavailable, agreed with the plaintiff that this created

¹⁴⁹ *Marshall v. LeBlanc*, No. 18-13569, 2020 WL 2838577, at *4 (E.D. La. June 1, 2020) (“Plaintiff cannot show that Defendants are ‘utterly incapable of responding’ to his grievance when they in fact have already responded. This Court cannot, therefore, say that an administrative remedy is unavailable.” (quoting *Valentine v. Collier*, 140 S. Ct. 1598, 1600 (2020))).

¹⁵⁰ *Id.* at *2.

¹⁵¹ *Id.* at *4.

¹⁵² *Nellson v. Barnhart*, 454 F. Supp. 3d 1087, 1093 (D. Colo. 2020).

¹⁵³ *Id.*

¹⁵⁴ *Id.* (“Plaintiff does, however, argue that the administrative grievance process is unavailable to him because it is a ‘dead end’ that would take ninety days to complete, which would put plaintiff and other inmates at [the facility] at risk of COVID-19. However, the dead-end exception to exhaustion is only relevant when ‘officers [are] unable or consistently unwilling to provide any relief to aggrieved inmates.’” (second alteration in original) (internal citation omitted) (quoting *Ross v. Blake*, 578 U.S. 632, 643 (2016))).

¹⁵⁵ *Id.* at 1094 (“But the Court may not alter the mandatory requirements of the PLRA for COVID-19 or any other special circumstance.” (citing *Ross*, 578 U.S. at 637–40)). “[A] court may not excuse a failure to exhaust, even to take [special] circumstances into account.” *Ross*, 578 U.S. at 639 (alterations in original).

unavailability.¹⁵⁶ The purpose of the PLRA was to curb frivolous lawsuits while preserving meritorious ones,¹⁵⁷ but in actuality a plaintiff's claim regarding COVID will be deemed meritorious or not depending on the jurisdiction of the district court in which it is filed.

Some incarcerated plaintiffs are also seeking emergency injunctive relief and are likewise barred by exhaustion requirements. Under the Federal Rules of Civil Procedure,¹⁵⁸ a civil action is only commenced by submission of a valid complaint, and a complaint submitted prior to exhaustion is inherently invalid and must be dismissed.¹⁵⁹ Furthermore, without full exhaustion, complaints seeking injunctive relief must fail, as a lack of exhaustion suggests that there is *not* a substantial likelihood the plaintiffs will prevail on the merits of their claims, which is one of the factors a plaintiff must establish for a successful preliminary injunction.¹⁶⁰ In regard to injunctions relating to COVID, some courts are finding that the complaints also must be dismissed due to a lack of alleged irreparable harm that COVID infection would pose unless the injunction is issued.¹⁶¹ Even in situations where plaintiffs who were, at the time, suffering from COVID infection sought preliminary

¹⁵⁶ *McPherson v. Lamont*, 457 F. Supp. 3d 67, 79–81 (D. Conn. 2020) (“The Court appreciates that the . . . grievance procedure is available and capable of offering relief in ordinary times. However, these are not ordinary times. The . . . grievance procedure, which lacks an emergency review process, was not set up with a pandemic in mind. . . . [T]he imminent health threat that COVID-19 creates has rendered DOC’s administrative process inadequate to the task of handling Plaintiffs’ urgent complaints regarding their health. . . . As such, the Court concludes that administrative remedies for the relief that Plaintiffs seek are unavailable, and thus exhaustion is not required . . .”).

¹⁵⁷ *Hill*, *supra* note 99, at 206.

¹⁵⁸ FED. R. CIV. P. 3.

¹⁵⁹ *Coleman v. Jeffries*, No. 20-4218, 2020 WL 6329469, at *1 (C.D. Ill. Oct. 28, 2020) (dismissing the plaintiff’s complaint seeking injunctive relief to remedy inadequate prison conditions during the pandemic, holding that “before the Court can consider Plaintiff’s request for emergency injunctive relief, they must file a valid complaint”).

¹⁶⁰ *See id.* at *2 (“Plaintiffs cannot demonstrate they are likely to succeed on the merits since the Court is required to dismiss their complaint for failure to exhaust. Plaintiffs motion for a preliminary injunction is denied.”); *Simpson v. Lewis*, No. 20-cv-1556-WJM-GPG, 2020 WL 5321542, at *3 (D. Colo. Sept. 4, 2020) (“Because Plaintiffs have not alleged that they have exhausted their administrative remedies . . . the Court finds that Plaintiffs have not demonstrated that there is a substantial likelihood that they will prevail on the merits of their claims.”).

¹⁶¹ *Lewis*, 2020 WL 5321542, at *3 (“‘To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.’ . . . Moreover, Plaintiffs have not pled any facts suggesting that they are at a high risk for developing a serious illness should they contract COVID-19. Accordingly, the Court finds that Plaintiffs have failed to establish that they will suffer any non-speculative irreparable harm.” (quoting *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005))).

injunctive relief, courts have dismissed their claims due to a lack of exhaustion.¹⁶²

When evaluating motions seeking injunctive relief, including temporary restraining orders, district courts are reaching mixed results. For example, when evaluating a challenge to the Michigan Department of Corrections (DOC) COVID policies and procedures, the Eastern District of Michigan found that while the plaintiffs had not exhausted their administrative remedies, they were not required to do so in this instance.¹⁶³ Relying on previous Sixth Circuit decisions, the court explained that incarcerated plaintiffs are not required to exhaust administrative remedies for “non-grievable issues,”¹⁶⁴ which include complaints about DOC policies or procedures.¹⁶⁵ Conversely, the District of Maryland held that a plaintiff’s complaint seeking injunctive relief for COVID policies must be dismissed for failure to exhaust.¹⁶⁶ Instead of finding complaints regarding prison policies as “non-grievable issues,” the court found that excusing this failure to exhaust would defy the purpose of exhaustion requirements, namely giving administrations an opportunity to address complaints.¹⁶⁷

COVID litigation is still moderately novel and has yet to be truly evaluated by the higher courts, but it is clear that the district courts are struggling to determine whether the exhaustion requirement must remain mandatory, especially when upholding the requirement can lead to the petitioner’s infection or death.¹⁶⁸ For example, the District of

¹⁶² Covington v. Armstead, No. PX-20-2104, 2020 WL 5893628 (D. Md. Oct. 5, 2020) (requiring dismissal for lack of exhaustion, even though the grievance procedure at the Maryland facility can take up to ninety days with appeals).

¹⁶³ Blackburn v. Whitmer, No. 20-12579, 2021 WL 248686, at *4 (E.D. Mich. Jan. 26, 2021).

¹⁶⁴ *Id.* at *3.

¹⁶⁵ *Id.* (“But so far in this case, the treatment of exhaustion has missed an important rule. In unpublished but consistent opinions, the Sixth Circuit has held that prisoners ‘cannot be required to exhaust administrative remedies regarding non-grievable issues.’ Complaints about the ‘content of a policy or procedure’ are non-grievable under MDOC rules unless a prisoner is challenging how the policy was specifically applied to him.” (quoting Peoples v. Bauman, No. 16-2096, 2017 WL 7050280, at *4 (6th Cir. Sept. 5, 2017))).

¹⁶⁶ Miles v. Bell, No. DKC-20-2107, 2021 WL 229674, at *5 (D. Md. Jan. 22, 2021).

¹⁶⁷ *Id.* at *5 (explaining that the court should not be involved in this issue as “the remedy sought by [plaintiff] seemingly prevails upon this court to enforce the procedures already in place or, at the very least, to monitor the management of the prison to ensure corrective actions are taken” and “[t]his type of judicial involvement in the day-to-day management of correctional facilities is unwarranted where, as here, there is no evidence of any intentional imposition of unconstitutional conditions”).

¹⁶⁸ See, e.g., Brown v. Colon, No. 20-22147-Civ, 2020 WL 5653963 (S.D. Fla. Sept. 23, 2020) (dismissing plaintiff’s claim for failure to exhaust administrative remedies, even though the plaintiff was battling cancer and medically vulnerable); Blumling v. United States, No. 4:19cv2587, 2020 WL 4333006, at *8–9 (N.D. Ohio July 28, 2020) (dismissing plaintiff’s habeas

Massachusetts refused to apply the exhaustion requirement to a habeas claim, finding that the case arose from extraordinary circumstances and unprecedented public health risks.¹⁶⁹ Without relying on a previous exception established by the Supreme Court, the court found it an unnecessary requirement in the context of a dangerous health risk.¹⁷⁰

One of the most highly litigated cases regarding COVID and the exhaustion requirement is *Valentine v. Collier*, first heard by the Southern District of Texas in April of 2020.¹⁷¹ In a series of appeals and remands, the district court granted the incarcerated plaintiffs' motion for a preliminary injunction, while the Fifth Circuit stayed the injunction.¹⁷² Notably, the Supreme Court declined to vacate the stay, but issued a memorandum opinion on the exhaustion requirement and the importance of protecting the country's incarcerated population.¹⁷³ Justices Ruth Bader Ginsburg and Sonia Sotomayor found that since the incarcerated plaintiffs filed suit before filing any grievance with the prison itself, they could not find a reason to claim that the Fifth Circuit erred in its decision, but still emphasized the dire situation faced by incarcerated persons across the country.¹⁷⁴

The Fifth Circuit seemed to reject the possibility that grievance procedures could ever be a "dead end" even if they could not provide relief before an inmate faced a serious risk of death. But if a plaintiff has established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like COVID-19, the procedures may be "unavailable" to meet the

claim for failure to exhaust, noting that "[d]istrict courts within this Circuit have found that the 'requirement of exhaustion applies equally to § 2241 petitions in which COVID-19 is the backdrop for the relief sought'" (quoting *Cottom v. Williams*, No. 4:20-cv-574, 2020 WL 2933574, at *1 (N.D. Ohio June 3, 2020)).

¹⁶⁹ *Baez v. Moniz*, 460 F. Supp. 3d 78, 83 n.5 (D. Mass. 2020) ("This case arises from extraordinary circumstances and unprecedented public health risks, both in general and in the specific context of a prison setting.").

¹⁷⁰ *Id.* at 82–83.

¹⁷¹ *Valentine v. Collier*, 978 F.3d 154 (5th Cir. 2020).

¹⁷² The Southern District of Texas granted the plaintiffs a preliminary injunction on April 16, 2020, which the Fifth Circuit stayed pending appeal. *Valentine v. Collier*, 956 F.3d 797, 801–06 (5th Cir. 2020). On June 5, 2020, the Fifth Circuit vacated the preliminary injunction and remanded the case back to the southern district for further proceedings on the permanent injunction. *Valentine v. Collier*, 960 F.3d 707 (5th Cir. 2020). The southern district granted the permanent injunction. *Valentine v. Collier*, 490 F. Supp. 3d 1121 (S.D. Tex. 2020), *rev'd*, 993 F.3d 270 (5th Cir. 2021). Subsequently, the Fifth Circuit stayed the permanent injunction. *Valentine v. Collier*, 978 F.3d 154 (5th Cir. 2020). The plaintiffs appealed to the Supreme Court, which declined to vacate the stay. *Valentine v. Collier*, 141 S. Ct. 57 (2020).

¹⁷³ *Valentine v. Collier*, 140 S. Ct. 1598 (2020).

¹⁷⁴ *Id.* at 1598 ("Under the circumstances of this case, where the inmates filed a lawsuit before filing any grievance with the prison itself, it is hard to conclude that the Fifth Circuit was demonstrably wrong on this preliminary procedural holding.").

plaintiff's purposes, much in the way they would be if prison officials ignored the grievances entirely. . . . But I caution that in these unprecedented circumstances, where an inmate faces an imminent risk of harm that the grievance process cannot or does not answer, the PLRA's textual exception could open the courthouse doors where they would otherwise stay closed.¹⁷⁵

While the memorandum opinion was issued in agreement with the Fifth Circuit's holding, it is evident that the Justices also believed that a global pandemic is a situation in which stringent adherence to the textual definition of "available" only serves to do more harm than good.¹⁷⁶

In the most recent appeal of *Valentine*, the Fifth Circuit once again found that the plaintiffs' claim must fail due to a failure to exhaust administrative remedies.¹⁷⁷ Citing *Ross v. Blake*, the court held that the exhaustion requirement is mandatory and courts have zero discretion to hear unexhausted claims.¹⁷⁸ The court rejected the district court's analysis, which found that the grievance procedure was unavailable and thus excused, and held that special circumstances do not matter, even when posed by global pandemics.¹⁷⁹ In coming to this conclusion, the court noted that since the PLRA's exhaustion requirement was set by Congress, only Congress has the power to amend it.¹⁸⁰ The Eleventh Circuit, in *Swain v. Junior*, also found that failure to exhaust is an affirmative defense and that special circumstances cannot be taken into account.¹⁸¹ As these are two of the few COVID cases that have been litigated in the circuit courts thus far, these holdings have more authority on the district courts, even in nonbinding jurisdictions, than less novel issues of litigation.¹⁸²

¹⁷⁵ *Id.* at 1600–01 (internal citations omitted).

¹⁷⁶ *Id.*

¹⁷⁷ *Valentine*, 978 F.3d at 160–62.

¹⁷⁸ *Id.* at 160 (citing *Ross v. Blake*, 578 U.S. 632, 635–36 (2016)).

¹⁷⁹ *Id.* at 161 ("In other words, the grievance process is not amenable to current circumstances. But under *Ross*, special circumstances—even threats posed by global pandemics—do not matter. We reiterate that the spread of COVID-19 in the Pack Unit is an emergency that demands prison officials' full attention. But as we recognized in the aftermath of Hurricane Katrina, emergencies are not 'license to carve out new exceptions to the PLRA's exhaustion requirement, an area where our authority is constrained.'" (quoting *Dillon v. Rogers*, 596 F.3d 260, 270 (5th Cir. 2010)) (citing *Ross*, 578 U.S. at 638)).

¹⁸⁰ *Id.* at 162 ("As the Supreme Court has emphasized, the PLRA's exhaustion requirement was set by Congress, and Congress alone can change it.").

¹⁸¹ *Swain v. Junior*, 958 F.3d 1081, 1092 (11th Cir. 2020).

¹⁸² *Valentine v. Collier* has been cited in decisions by the Sixth Circuit (*Wilson v. Williams*, 961 F.3d 829, 841–42 (6th Cir. 2020)) and the Ninth Circuit (*Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960 (9th Cir. June 17, 2020)), as well as district courts in Maryland (*Duvall v.*

B. *The Exhaustion Requirement Is Unnecessary in the Context of a Global Pandemic and Other Emergency Situations*

The mandatory exhaustion requirement of the PLRA is extremely harmful in the context of a global pandemic and a national emergency. As federal courts have noted, and is now evident to most people, the COVID pandemic presents a unique risk to public safety, one that has been ravaging the United States for more than two years and taking hundreds of thousands of lives in the process.¹⁸³ Exhaustion of all administrative remedies can take ninety days to complete,¹⁸⁴ in some states as many as 105 business days,¹⁸⁵ at which point a medically vulnerable incarcerated person could be infected with COVID or potentially deceased. If an incarcerated person is at high risk for severe illness or death from COVID infection, due to age or underlying medical conditions, a mandatory two to three month waiting period can make the relief sought futile if they are infected during this time.¹⁸⁶ Even

Hogan, No. ELH-94-2541, 2020 WL 3402301, at *8, *13 (D. Md. June 19, 2020)), Michigan (Wilcox v. Washington, No. 2:20-cv-221, 2020 WL 6737431, at *4 (W.D. Mich. Nov. 17, 2020)), New Mexico (United States v. Baca, No. CR 16-1613, 2020 WL 5369078, at *6 (D.N.M. Sept. 8, 2020)), California (Torres v. Milusnic, 472 F. Supp. 3d 713, 734 (C.D. Cal. 2020)), and New York (Chunn v. Edge, 465 F. Supp. 3d 168, 200 (E.D.N.Y. 2020)). *Swain v. Junior* has been cited in decisions by the Sixth Circuit (Wilson v. Williams, 961 F.3d 829, 841–42 (6th Cir. 2020)) and the Ninth Circuit (Ahlman v. Barnes, No. 20-55568, 2020 WL 3547960, at *7, *9 (9th Cir. June 17, 2020) (Nelson, J., concurring in part and dissenting in part)), as well as district courts in Michigan (Hannon v. Skipper, No. 1:21-cv-666, 2022 WL 405877, at *6 (W.D. Mich. Feb. 10, 2022)), New York (Chunn v. Edge, 465 F. Supp. 3d 168, 201–02 (E.D.N.Y. 2020)), Ohio (Smith v. DeWine, 476 F. Supp. 3d 635, 663 (S.D. Ohio 2020)), Oregon (Maney v. Brown, 464 F. Supp. 3d 1191, 1212 (D. Or. 2020)), and Connecticut (Gibson v. Rodriguez, No. 3:20-CV-953, 2021 WL 4690701, at *7 (D. Conn. Oct. 7, 2021)).

¹⁸³ See *Blake v. Tanner*, No. 3:20-cv-1250-G-BN, 2020 WL 3260091, at *3 (N.D. Tex. May 20, 2020) (“[T]he COVID-19 pandemic presents an extraordinary and unique public-health risk to society, as evidenced by the unprecedented protective measures that local, state, and national governmental authorities have implemented to stem the spread of the virus.” (quoting *Sacal-Micha v. Longoria*, 449 F. Supp. 3d 656, 665 (S.D. Tex. 2020))); *Duvall*, 2020 WL 3402301, at *2 (“Without a doubt, the COVID-19 pandemic is the worst public health crisis the country has experienced since 1918.”); *Coronavirus in the U.S.: Latest Map and Case Count*, *supra* note 16.

¹⁸⁴ *Nellson v. Barnhart*, 454 F. Supp. 3d 1087, 1093 (D. Colo. 2020).

¹⁸⁵ *McPherson v. Lamont*, 457 F. Supp. 3d 67, 79 (D. Conn. 2020).

¹⁸⁶ See *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 770 (E.D. Mich. 2020) (“[G]rievance procedures do not appear to provide an avenue for medically-vulnerable inmates to seek release on the basis of the serious and deadly risk COVID-19 poses.”), *vacated in part*, 815 F. App’x 978 (6th Cir. 2020); *Sowell v. TDCJ*, No. CV H-20-1492, 2020 WL 2113603, at *3 (S.D. Tex. May 4, 2020) (“In light of the alarming speed with which COVID-19 continues to spread throughout the states and their prison systems, TDCJ’s administrative grievance procedures are not ‘capable of use’ to obtain the swift and particularized relief needed by vulnerable, high-risk state prisoners.”); *Honig v. Doe*, 484 U.S. 305, 326–27 (1988) (holding that an exception to exhaustion exists “where exhaustion would be futile or inadequate”).

where courts are noting that medically vulnerable incarcerated plaintiffs are likely to suffer imminent serious medical complications or death if they contract COVID,¹⁸⁷ relief is still denied, largely due to the procedural requirements imposed by the PLRA.¹⁸⁸

Even the Supreme Court, while still finding the exhaustion requirement controlling, implied that in unprecedented circumstances such as this, administrative remedies may be deemed unavailable.¹⁸⁹ The district courts have also reiterated that there is a duty on prison administrations to ensure the health and safety of all incarcerated populations, even if the mandated exhaustion requirement prevents the judicial system from providing the requested relief.¹⁹⁰ Even if it could be agreed that COVID creates a special circumstance, the lower federal courts are bound by the plain language of the PLRA.¹⁹¹ Without an amendment to the PLRA, those incarcerated must either wait in fear of contracting a serious disease or be left without any possibility for relief due to a procedural error in the administrative grievance process.¹⁹²

The lack of adequate healthcare and overcrowding only adds to the peril of this situation, as incarcerated people do not have the autonomy to maintain social distancing nor do they have the adequate personal

¹⁸⁷ *Hallinan v. Scarantino*, 466 F. Supp. 3d 587, 608 (E.D.N.C. 2020) (“The court finds petitioners have sufficiently established likelihood of irreparable harm. The medically vulnerable subclass members are likely to suffer imminent serious medical complications (including death) if they contract COVID-19.”).

¹⁸⁸ *See id.* at 603 (“[I]n the absence of a properly filed civil action that complies with the PLRA, the court lacks jurisdiction to order injunctive relief.”); *Ivory v. CDCR*, No. 2:20-cv-1819, 2020 WL 6146344 (E.D. Cal. Oct. 20, 2020) (dismissing case due to failure to exhaust administrative remedies, even though the plaintiff was awaiting a kidney transplant, which made him especially vulnerable to COVID infection).

¹⁸⁹ *Valentine v. Collier*, 140 S. Ct. 1598, 1600–01 (2020) (Sotomayor, J., concurring) (“But I caution that in these unprecedented circumstances, where an inmate faces an imminent risk of harm that the grievance process cannot or does not answer, the PLRA’s textual exception could open the courthouse doors where they would otherwise stay closed.”).

¹⁹⁰ *Baez v. Moniz*, 460 F. Supp. 3d 78, 92 (D. Mass. 2020) (“[P]rocedural requirements such as exhaustion of administrative remedies before filing a section 1983 conditions claim, in no way dilute the legal and moral obligations borne by the Attorney General, PCCF, and other officials personally responsible for the health and safety of persons who are imprisoned in their custody.”).

¹⁹¹ *Sanchez v. Brown*, No. 3:20-cv-00832-E, 2020 WL 2615931, at *17 (N.D. Tex. May 22, 2020) (“Even if the COVID-19 created a ‘special circumstance,’ this Court would be bound both by the plain language of the PLRA text and Supreme Court precedent, from granting relief on such grounds.”).

¹⁹² *See Bland v. Diaz*, No. 1:20-cv-00895-NONE-SKO, 2020 WL 6682552 (E.D. Cal. Nov. 12, 2020) (recommending that a plaintiff’s claim for failure to exhaust should be dismissed because the plaintiff received grievance responses after the filing date of the suit, indicating he did not fully exhaust before filing).

protective equipment to attempt to keep themselves safe.¹⁹³ Furthermore, due to the congregate environment of a prison, namely that people work, live, and eat within the same crowded environment, it is extremely difficult to stop the spread of COVID once it enters a facility.¹⁹⁴ In many respects, the country's incarcerated population are the most vulnerable to COVID infection, as they do not have the ability to protect themselves or remove themselves from their highly infectious environment.

While some states have created their own emergency grievance procedures,¹⁹⁵ those procedures should be available in all states. The specific state in which one is incarcerated should not determine whether they remain healthy and uninfected. There is a relevant federal rule for expedited procedures if the grievance is deemed emergent, but various cases have exemplified that prison administrators do not classify COVID as an emergency as it is affecting all incarcerated persons.¹⁹⁶ Even in other emergency situations, such as the devastating aftermath of Hurricane Katrina, the courts felt constrained to the exhaustion requirement.¹⁹⁷ The Fifth Circuit held that Hurricane Katrina was not a special circumstance that provided the court the liberty to create new exceptions to the PLRA's exhaustion requirement, as this is an area in

¹⁹³ See *Sowell v. TDCJ*, No. CV H-20-1492, 2020 WL 2113603, at *3 (S.D. Tex. May 4, 2020) (emphasizing that “[t]he Court is well aware of the concerns and fears engendered by COVID-19, especially for prisoners who have little control over their immediate environment”); *Blake v. Tanner*, No. 3:20-cv-1250-G-BN, 2020 WL 3260091, at *2 (N.D. Tex. May 20, 2020) (explaining that “the State owes a duty to [prisoners] that effectively confers upon them a set of constitutional rights that fall under the Court’s rubric of ‘basic human needs’” (quoting *Hare v. City of Corinth*, 74 F.3d 633, 639 (5th Cir. 1996))); *Duvall v. Hogan*, No. ELH-94-2541, 2020 WL 3402301, at *3 (D. Md. June 19, 2020) (“The WHO has recognized that incarcerated people ‘are likely to be more vulnerable to the coronavirus disease (COVID-19) outbreak than the general population because of the confined conditions in which they live together for prolonged periods of time.’” (quoting WORLD HEALTH ORG., PREPAREDNESS, PREVENTION AND CONTROL OF COVID-19 IN PRISONS AND OTHER PLACES OF DETENTION 1 (2020))).

¹⁹⁴ *Duvall*, 2020 WL 3402301, at *3 (“[T]he CDC has observed that because incarcerated people ‘live, work, eat, study, and recreate within congregate environments,’ it will be difficult to stop the spread of COVID-19 once it enters a facility.” (quoting CTRS. FOR DISEASE CONTROL & PREVENTION, INTERIM GUIDANCE ON MANAGEMENT OF CORONAVIRUS DISEASE 2019 (COVID-19) IN CORRECTIONAL AND DETENTION FACILITIES 2 (2020))).

¹⁹⁵ *Fletcher v. Menard Correctional Ctr.*, 623 F.3d 1171, 1174 (7th Cir. 2010) (explaining that Illinois has an emergency grievance procedure available).

¹⁹⁶ See *Tippins v. Holden*, No. 1:20-cv-426, 2020 WL 2764362, at *6 (W.D. Mich. May 28, 2020); *Wilson v. Ponce*, No. CV 20-4451-MWF, 2020 WL 5118066, at *6 (C.D. Cal. July 14, 2020).

¹⁹⁷ *Dillon v. Rogers*, 596 F.3d 260, 270 (5th Cir. 2010); see also *Williams v. Aulepp*, No. 16-3044-JWB, 2018 WL 5807105, at *10 (D. Kan. Nov. 6, 2018) (rejecting the argument that Hurricane Harvey, among other reasons, excused the plaintiff's failure to exhaust).

which it is particularly restrained.¹⁹⁸ When facing national disasters, such as a hurricane or a pandemic, this procedural barrier should not prevent the courts from remedying the unconstitutional treatment of some of the most vulnerable in the population, solely to defer to the legislative authority of Congress. When constitutional violations occur, it is within the government's interest, and that of society, to remedy it,¹⁹⁹ and the judiciary should have the authority to do so when it sees fit.

III. PROPOSAL

The exhaustion requirement should be amended to allow for a flexible and faster procedure when an incarcerated person is seeking relief, whether through release or other injunctive remedy, due to an emergency situation, such as serious threat of illness or death from COVID. The PREA altered the exhaustion requirement once before, to provide an expedited procedure for an incarcerated person who was a victim of sexual assault.²⁰⁰

The PREA exception should be used as a framework for emergency situations, which, similar to sexual assault, cannot be properly remedied with the current grievance procedures.²⁰¹ Various federal courts that found that exhaustion was not required, even though ultimately denying relief to the petitioners on other grounds, were in agreement that this crisis should preempt the administrative requirement.²⁰²

¹⁹⁸ *Dillon*, 596 F.3d at 270 (explaining that Hurricane Katrina and the aftermath that followed does not “grant[] us license to carve out new exceptions to the PLRA’s exhaustion requirement, an area where our authority is constrained”).

¹⁹⁹ *Banks v. Booth*, 459 F. Supp. 3d 143, 160 (D.D.C. 2020) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.’ There is no harm to the Government when a court prevents unlawful practices. Additionally, granting injunctive relief which lessens the risk that Plaintiffs will contract COVID-19 is in the public interest because it supports public health. No man’s health is an island. If Plaintiffs contract COVID-19, they risk infecting others inside the DOC facilities. Plaintiffs also risk infecting DOC staff members who work inside DOC facilities but also live in the community, thus increasing the number of people vulnerable to infection in the community at large.” (quoting *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012))).

²⁰⁰ 28 C.F.R. § 115.52(c) (2012); see *Smith*, *supra* note 118, at 1616–17.

²⁰¹ Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 149 (2008).

²⁰² See, e.g., *Sowell v. TDCJ*, No. CV H-20-1492, 2020 WL 2113603, at *3 (S.D. Tex. May 4, 2020) (“In light of the alarming speed with which COVID-19 continues to spread throughout the states and their prison systems, TDCJ’s administrative grievance procedures are not ‘capable of use’ to obtain the swift and particularized relief needed by vulnerable, high-risk state prisoners.”); *Maney v. Brown*, 464 F. Supp. 3d 1191, 1207 (D. Or. 2020); *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 769 (E.D. Mich.), *vacated in part*, 815 F. App’x 978 (6th Cir. 2020).

Instead of requiring the district courts to force a global pandemic into one of the three narrow exceptions created by the Supreme Court,²⁰³ an amendment would allow for a more efficient litigation process. Since one of the reasons for the exhaustion requirement is to promote judicial efficiency,²⁰⁴ an amendment will create more efficiency, rather than constant appeals and reversals as the district courts and courts of appeals continue to decide COVID litigation without proper guidance.²⁰⁵

Another reason for the exhaustion requirement is to allow administrative agencies the opportunity to resolve disputes before litigating in court.²⁰⁶ However, when a highly contagious disease is spreading through a facility, there is little that an administrative agency can do to resolve the threat to a high-risk incarcerated person. In this situation especially, it is more prudent to allow the judicial system to handle these claims, as it may be more equipped to do so, especially if a petitioner is seeking release or home confinement.²⁰⁷

Furthermore, when enacting the PLRA its proponents emphasized that its purpose was not to curtail incarcerated people from bringing legitimate claims, but rather to reduce the influx of meritless claims from pro se incarcerated plaintiffs.²⁰⁸ However, since its enactment there has been a drastic reduction of filed claims, as well as a reduction in successful claims, which critics have attributed to the overwhelming barriers encompassed in the PLRA—exhaustion being only one.²⁰⁹ In fact, when the PREA was first proposed, its proponents argued that the PLRA exhaustion requirement frustrated Congress’s purpose of eliminating sexual assault in prison, as many victims were unable to bring claims due to the strict deadlines for filing administrative grievances.²¹⁰ In response, Congress eliminated the timing restriction

²⁰³ See *Booth v. Churner*, 532 U.S. 731, 736 (2001); *Ross v. Blake*, 578 U.S. 632, 643–44 (2016).

²⁰⁴ H.R. REP. NO. 104-21, at 7 (1995) (“Title II—Stopping Abusive Prisoner Lawsuits—places sensible limits on the ability of detained persons to challenge the legality of their confinement. Too many frivolous lawsuits are clogging the courts, seriously undermining the administration of justice.”); see also *Branham*, *supra* note 68, at 513.

²⁰⁵ See, e.g., cases cited *supra* note 172 (discussing the remands and appeals in *Valentine v. Collier*).

²⁰⁶ *McCarthy v. Madigan*, 503 U.S. 140, 144–45 (1992); see *Branham*, *supra* note 68, at 513–14.

²⁰⁷ *Duvall v. Hogan*, No. ELH-94-2541, 2020 WL 3402301, at *8 (D. Md. June 19, 2020) (explaining that judicial assistance is needed where the facility’s “administrative grievance process does not allow a detainee to request his or her release, which is the relief that plaintiffs seek”).

²⁰⁸ *Schlanger & Shay*, *supra* note 201, at 141–42.

²⁰⁹ *Id.* at 142–43.

²¹⁰ *Id.* at 149.

and loosened the requirements for meeting exhaustion when bringing a sexual assault claim.²¹¹

The emergency faced by incarcerated persons fearing COVID infection is as necessary to combat as sexual assault, and Congress should respond to this crisis in a similar manner by amending the exhaustion requirement as it pertains to COVID claims. As one critic stated, “A requirement of administrative exhaustion that punishes failure . . . and allows no exceptions for emergencies, is simply unsuited for the circumstances of prisons and jails, where physical harm looms so large and prisoners are so ill-equipped to comply with legalistic rules.”²¹² Rather than allowing the administrations the freedom to remedy constitutional infringements of their own accord, the exhaustion requirement has been argued to instead have the effect of obstructing judicial oversight of conditions of confinement.²¹³

There are also a multitude of other barriers encompassed in the PLRA, such as only granting release as a remedy if a three-judge panel determines that the statutory requirements for release have been met.²¹⁴ These already existing statutory barriers will reduce the number of requests granted by the courts.²¹⁵ Furthermore, when plaintiffs’ claims have not been dismissed due to the exhaustion requirement, the physical injury requirement of the PLRA has still circumvented the court from issuing relief.²¹⁶ The PREA exception did not result in overflow of litigated cases but merely provided a better system for the most vulnerable of the prison population.²¹⁷ An amendment that allows for exhaustion to be satisfied by reporting the grievance, combined with

²¹¹ *Id.*; 28 C.F.R. § 115.52(b)(1) (“The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse.”).

²¹² Schlanger & Shay, *supra* note 201, at 151.

²¹³ Hill, *supra* note 99, at 200.

²¹⁴ 18 U.S.C. § 3626(a)(3)(B), (E) (1997).

²¹⁵ See Elizabeth A. Etchells, Note, *Please Pass the Dictionary: Defining De Minimis Physical Injury Under the Prison Litigation Reform Act § 1997e(e)*, 100 IOWA L. REV. 803, 823 (2015) (discussing other barriers encompassed in the PLRA that will preclude meritless suits).

²¹⁶ 42 U.S.C. § 1997e(e) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act”); see also *Arnold v. St. Clair Cnty. Intervention Ctr.*, No. 20-11410, 2020 WL 4700812, at *4 (E.D. Mich. Aug. 13, 2020) (“Unlike Plaintiff Smith, who asserts that he was infected with COVID-19, Plaintiff Arnold has alleged no physical injury and will be dismissed from the Complaint with prejudice.”).

²¹⁷ See Smith, *supra* note 118, at 1635. The author explains that the PREA helped incarcerated litigants gain the ability to redress their claims in court and highlights the principle that “accountability and expansion of the Eighth Amendment benefits people in custody and society more broadly and reinforces the principle that no person is above the law or unworthy of the law’s protection.” *Id.*

either a mandatory expedited review process by the administration or removal of the appeals process for administrative grievances, will provide an incarcerated person with a route to relief less impeded by procedural barriers. Furthermore, if the judicial system is able to provide relief for these grievances, ultimately the administrations will either release their medically vulnerable population or implement better procedures, which would benefit not only the plaintiffs, but also the administration and society in general.²¹⁸ This amendment will not erode the rationales for the exhaustion requirement, but rather will make the judicial system more humane during a national crisis.

At the time of this Note's publication, the House Judiciary Committee's Subcommittee on Crime was drafting a narrowly focused bill aimed at amending the PLRA exhaustion requirement in emergency circumstances.²¹⁹ The proposed bill contains an "Emergency Circumstance Exception,"²²⁰ which states that "[d]uring an emergency circumstance, a prisoner who is confined to any jail, prison, or other facility need not exhaust administrative remedies with respect to prison conditions that pose a significant risk of harm to prisoners before filing a suit concerning prison conditions or access to counsel."²²¹ It also contains a provision defining "emergency circumstances," which include declarations of emergency from the President or state authorized designee, a public health emergency pursuant to the Public Health Service Act, or a situation at any correctional facility that presents an immediate and significant risk of harm to incarcerated people.²²² At the time of this publication, this bill was still in the process of being revised, but its writers were driven to propose this amendment largely from the COVID-19 pandemic and the resulting litigation under the PLRA as it currently stands.²²³ Without support for these changes, or others like them, incarcerated people, and the judiciary, will remain bound to the language of the PLRA.

²¹⁸ The PREA created more opportunities for administrations to address sexual assault in their facilities. *Id.* at 1634. "[The PREA] has yielded unanticipated and useful opportunities for oversight by legislatures, courts, and the public, and has expanded the Eighth Amendment by incorporating the PREA standards as part of its evolving standards of decency." *Id.*

²¹⁹ Email from Ben Hernandez-Stern, Counsel to House Judiciary's Subcomm. on Crime, to Betsy Ginsberg, Professor of L., Benjamin N. Cardozo Sch. of L. (Feb. 18, 2021, 2:27 PM) (on file with author).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

CONCLUSION

As the world enters its third year facing a global pandemic, the infection rate in the United States only continues to worsen. On February 22, 2021, *The New York Times* reported that 500,000 Americans had died from COVID infection, a disheartening milestone.²²⁴ The United States' death toll is higher than any other country in the world, and more Americans have now died from COVID than have died from World War I, World War II, and the Vietnam War combined.²²⁵ This situation is not resolving on its own and has only served to infect more people and claim more lives. While individuals can use personal measures to protect themselves, such as wearing personal protective equipment and cleaning their own belongings and common spaces, incarcerated people are not entitled to that luxury. While it is common knowledge that those incarcerated are not entitled to the same freedoms as other individuals, they are entitled to retain their health and safety while finishing their debt to society. However, as the pandemic has only made more evident, procedural barriers can stand in the way of medically vulnerable people receiving the assistance they require.

When federal judges and Supreme Court Justices are remarking their empathies toward the incarcerated population, without being able to legally provide the relief requested, it should emphasize to Congress how dire the situation is. The exhaustion requirement of the PLRA was amended from its predecessor to be stricter and less open to exceptions, which it did accomplish. However, in doing so, it also removed the opportunity for relief from unconstitutional conditions of confinement from hundreds of thousands of incarcerated people, many of whom have legally valid claims, but are prevented from redressing them. Since this requirement was amended in the PREA to curtail the prevalence of prison sexual assault, it clearly can and should be amended to prevent the needless death of people all over the country.

²²⁴ Tompkins, Smith, Bosman & Pietsch, *supra* note 140.

²²⁵ *Id.*