No. 16-15597

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL R. FUQUA,
Plaintiff—Appellant,

v.

CHARLES L. RYAN, et al.,
Defendants—Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
JUDGE NEIL V. WAKE L, DISTRICT JUDGE • CASE NO. CV 15-00286-PHX-NVW (JFM)

APPELLANT'S SUPPLEMENTARY BRIEF

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JURISDICTIONAL STATEMENT

Plaintiff Michael Ray Fuqua, an inmate in the Arizona prison system, filed this action in the United States District Court for the District of Arizona against eighteen prison officials for deprivation of his civil rights. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 & 1343 because the action, which challenges Mr. Fuqua's treatment for refusing to work at his prison job on a religious holiday, arises under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1, and the First Amendment to the United States Constitution (via 42 U.S.C. § 1983).

After allowing limited discovery, the district court granted the defendants' motion for summary judgment on March 2, 2016, dismissing the action without prejudice and terminating the case. (1 ER-14.) The district court's ruling was based on its finding that Mr. Fuqua failed to fulfill applicable administrative-exhaustion requirements before filing suit. (1 ER-14.) Mr. Fuqua filed a reconsideration motion on March 14, which the district court denied the next day. (1 ER-4, 2 ER 29-34.) On April 4, he filed a timely notice of appeal from the court's summary-judgment order. (2 ER-28); *see* Fed. R. App. P. 4(a)(1)(A). This Court therefore has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

Absent compelling circumstances, RLUIPA forbids prison officials from substantially burdening the religious exercise of inmates in their care. 42 U.S.C § 2000cc-1; *see also Holt v. Hobbs*, 135 S.Ct. 853, 859 (2015) (stressing RLUIPA provides "very broad protection for religious liberty" in prison). RLUIPA further grants prisoners the right to sue in federal court to obtain relief from such burdens on religious exercise, conditioned only on compliance with the Prisoner Litigation Reform Act (PLRA)—including the latter Act's rule that inmates must exhaust administrative

remedies before bringing suit. 42 U.S.C. §§ 1997e, 2000cc-2. The purpose of the PLRA's exhaustion rule is to allow prisons a "fair opportunity to correct their own errors" and, in turn, "improve the quality of prisoner suits." *Woodford v. Ngo*, 548 U.S. 81, 94 (2006).

By its terms, the PLRA does not insist that inmates pursue every conceivable administrative remedy; rather, it requires them to exhaust only such remedies "as are available." 42 U.S.C. § 1997e(a). And as the Supreme Court clarified just last term in *Ross v. Blake*, inmates also need not pursue remedies that may be on the books but are nonetheless too "opaque" to be actually capable of use. 136 S.Ct. 1850, 1859 (2016).

In light of the PLRA's text and *Ross*'s take on what it means to have exhausted "available" remedies to satisfy that Act, four questions arise:

(1) Whether, contrary to the district court's finding, Mr. Fuqua in fact satisfied the PLRA to sue over violations of his religious liberty for mistreatment in his prison job. Mr. Fuqua filed no inmate grievance but nonetheless challenged his treatment on religious-liberty grounds through a disciplinary appeal process, which Arizona requires in lieu of a grievance where the primary issue is already within the "scope" of that appeal.

(2) Whether, in light of the Arizona scheme's written prohibition of grievances on issues in the "scope" of a disciplinary appeal, any unwritten or other provision to the contrary would have been too "opaque" to be understood by an ordinary prisoner and therefore excused under *Ross*.

(3) Whether, in the alternative, the district court's finding of non-exhaustion should be reversed and remanded for consideration of the Supreme Court's intervening decision in *Ross*, as the district court did not have the benefit of the *Ross* formulation of what the PLRA means by "available" remedies—a formulation that includes fact-based inquiries.

(4) Whether, on any reversal and remand, certain defendants who are subject to suit on Mr. Fuqua's religious-liberty claims but were either dismissed at the screening phase or omitted from his pro-se complaint should be reinstated or allowed to be added on subsequent amendment to that complaint.

STATEMENT OF THE CASE

A. Arizona inmate Michael Fuqua is assigned a kitchen job but asks to be relieved from work on Old Testament holidays.

Michael Fuqua is an inmate in the Arizona State Prison system. At the time of the incident in this case, he resided in Special Management Unit 1 of the Arizona State Prison Complex–Eyman. (2 ER-128.)[1]

At approximately 1 a.m. on September 21, 2014, Mr. Fuqua was awoken by prison staff with the news he had been assigned a job in the kitchen. (2 ER-47, 133.) He was directed to report to work at 6:30 a.m. (2 ER-47.) Mr. Fuqua wanted to do the job, but his religious beliefs forbid him from working on Saturdays and periodic Old Testament Israelite holidays. (2 ER-133-34.)

Because Mr. Fuqua's first religious holiday (the Feast of Trumpets) was only three days away, he stayed up late into the night writing letters to the chaplain, work-program coordinator, and kitchen supervisor. (2 ER-83-85, 133-35.) Mr. Fuqua explained his religious observances,

[1] Because Mr. Fuqua filed a verified complaint, the allegations he makes there can be used as evidence in opposition to defendants' motion for summary judgment. *See Jones v. Blanas*, 393 F.3d 918, 935 (9th Cir. 2004).

identified upcoming dates, and requested that he be scheduled to avoid conflicts. (2 ER-83-85, 133-35.)

When Mr. Fuqua reported for work later that morning (at 6:30), he tried to give one of his letters to a correctional officer in the kitchen, but the officer refused to accept it. (2 ER-134.) Instead, the officer told Mr. Fuqua to give the letter to Sergeant Starns, the supervising correctional officer in the kitchen. (2 ER-134.)

B. Mr. Fuqua's supervisor responds to his request for religious accommodation, declaring "we don't do that shit here."

The next day, Mr. Fuqua returned to the kitchen for his shift. (2 ER-134.) Mr. Fuqua tried to give his letter to Sgt. Starns, but he also refused to take it. (2 ER-134.) When Mr. Fuqua explained the letter's request for religious accommodation, Sgt. Starns replied, "We don't do that shit here." (2 ER-134.)

Mr. Fuqua reported to work in the kitchen for a third day, this time approaching the kitchen manager to discuss his situation. (2 ER-135.) He told the manager the next day was a religious holiday, and that he would be unable to work due to his religious observance. (2 ER-135.) The manager replied, "Do what you have to do, but you will not have a job here." (2 ER-135.)

Late that evening, Mr. Fuqua received a response from the work-program coordinator to the letter he wrote the night he learned about the job. (2 ER-86, 135.) The coordinator noted the kitchen job would not require weekend work, but that for any religious holidays Mr. Fuqua must coordinate with Sgt. Starns. (2 ER-86, 135.) Mr. Fuqua wrote back, offering to swap Sundays off for his religious holidays or find another inmate to take the shifts that would conflict with those holidays. (2 ER-87, 135-36.)

C. Mr. Fuqua is fired and disciplined for not working a shift based on his religious need to abstain from work that day.

The next morning (September 24), Mr. Fuqua reported for work as scheduled even though he had made clear he could not perform any labor that day due to his observance of a religious holiday. (2 ER-136.) Once there, he made a last-ditch attempt to resolve the situation with Sgt. Starns and the kitchen manager by offering to switch shifts with another inmate kitchen worker. (2 ER-136.) Mr. Fuqua's request was refused. (2 ER-136.)

Mr. Fuqua was then verbally cited for a disciplinary infraction for refusing to work based on his religious beliefs and returned to his cell. (2 ER-77, 79, 136.) Later that afternoon, he was formally charged with

Aggravated Refusal of an Assignment, a 01B felony. (2 ER-77.) The attending report said Mr. Fuqua "refused to conduct assigned work duties [due] to a religious holiday." (2 ER-77.) Mr. Fuqua was found guilty of the charge, resulting in five days detention, 30 days extra duty, and 30 days loss of privileges. (2 ER-76.)

D. Arizona maintains a detailed process for inmate complaints involving discipline. It also has a grievance process, but that process defers to the disciplinary one if it covers the matter.

Arizona Department of Corrections (ADC) regulations include six processes to handle inmate complaints and appeals. *See* Department Order (DO) 802.01, 1.3 (2 ER-99).[2] Five are specialized, including one for disciplinary appeals. *See* DO 802.01, 1.3 (2 ER-99). The sixth is a grievance process that operates as a catch-all for complaints about prison conditions that fall "outside the scope" of the specialized processes. *See* DO 802.01, 1.4 (2 ER-99).

The disciplinary appeal process, outlined in Department Order 803, covers actions involving discipline and begins with a first-level appeal to

[2] Plaintiff has filed with this brief an addendum with all relevant legal provisions, including the versions of Department Orders 802 and 803 in effect in 2014.

the Deputy Warden. DO 803.09, 1.2.4. Based on a review of the record, the Deputy Warden is charged with considering "whether due process was afforded the inmate, there was adequate proof, and the penalties were assessed appropriately." DO 803.09, 1.2.2, 1.2.4. The Deputy has twenty days to make a decision, with a variety of options at his disposal including dismissal for lack of proof—with its attendant consequences. DO 803.09, 1.2.4.5, 1.2.4.2. Any dismissal for inadequate proof may not be returned for rehearing. DO 803.09, 1.2.4.2.

If the inmate is unsatisfied with the first-level appeal, he may file a second-level appeal to the ADC Director, who shall again "[c]onsider the appeal's merits" based on due process, proof, and the propriety of the charge or penalty. DO 803.09, 1.2.5, 1.2.5.1.1, 1.2.5.1.2. The Director has the same option afforded the Deputy Warden, as well as plenary authority to reduce or eliminate the penalty. DO 803.09, 1.2.5.4.1. Once the Director makes a final decision, the regulations declare that "all administrative remedies shall be considered exhausted." DO 803.09, 1.2.5.5.

As for the catch-all grievance procedure, the ADC makes clear it is neither "a duplicate appeal process" nor "substitute appeal process" for a

disciplinary appeal. DO 802.01, 1.3 (2 ER-99.) In fact, an inmate is barred from filing a grievance where a disciplinary appeal would otherwise lie unless the "primary issue is outside the scope" of the latter process. DO 802.01, 1.4 (2 ER-99.) Inmates who try to file grievances in these situations are instead "instructed to follow the appeal process outlined" for the disciplinary appeal. DO 802.01, 1.4 (2 ER-99.)

If a grievance could successfully be brought, it must be filed within ten days of the incident at issue, and is subject to review by the Deputy Warden and, ultimately, the ADC Director. DO 802.02, 1.2; 802.03, 1.1, 1.5; 802.04, 1.1; 802.05, 1.1 (2 ER-100-02.)

E. Because the prison's treatment of the conflict between Mr. Fuqua's faith and job resulted in discipline, he challenges it using the disciplinary appeal process.

Because Mr. Fuqua's prison had disciplined him for abstaining from work because of his religious beliefs, he challenged the prison's actions under the disciplinary appeal process outlined in Department Order 803. (2 ER-75-76.) Promptly after discipline was imposed, Mr. Fuqua filed a first-level appeal to the Deputy Warden. (2 ER-75.) In his appeal, Mr. Fuqua defended his refusal to work based on his religion. (2 ER-75.) And although the Deputy Warden acknowledged Mr. Fuqua's faith, he upheld

the discipline, declaring "this is not a holiday observed by the Department of Corrections according to the Chaplian's [*sic*] Office." (2 ER-74.)

In his second-level appeal to the ADC Director, Mr. Fuqua again explained in writing his religious beliefs and protested his treatment. (2 ER-73.) The Director responded that "the issues you raise in your narrative have been considered," but upheld the discipline and denied the appeal. (2 ER-71.) In accordance with the Arizona regulations, this decision by the Director was final and rendered "all administrative remedies . . . exhausted." DO 803.09, 1.2.5.5.

F. Mr. Fuqua sues, but the trial court dismisses on summary judgment based on his failure to challenge the prison's actions under the grievance process.

Mr. Fuqua filed this suit on February 17, 2015, alleging violation of his religious-liberty rights under the First Amendment and RLUIPA and his rights to due process under the Fifth and Fourteenth Amendments. (2 ER-128, 130-45.) Mr. Fuqua's due-process claims were dismissed at the initial screening phase under the PLRA, while his First Amendment and RLUIPA claims survived. (1 ER-21.) And although the court dismissed certain government defendants from all three counts, it did so only in the

course of its due-process analysis. (*See* 1 ER-15, 20, 22.) The court offered no grounds for dismissing these defendants from the religious-liberty claims. (*See* 1 ER-15, 20-22.)

At the close of discovery, defendants moved for summary judgment claiming Mr. Fuqua failed to exhaust administrative remedies by not filing a grievance. (2 ER-111-12.) Mr. Fuqua responded, pointing to Arizona's regulations as evidence he could not have done so. (2 ER-38-40.)

The court granted defendants' motion on March 2, 2016. (1 ER-14.) It found Mr. Fuqua's disciplinary appeal was insufficient to exhaust his administrative remedies and that he was in fact required to file an inmate grievance before filing suit. (1 ER-11-14.) The district court dismissed the case without prejudice, but it appears Mr. Fuqua cannot refile as the ten-day period to lodge an inmate grievance has passed. *See* DO 802.02, 1.2 (2 ER-100).

Mr. Fuqua appealed the final judgment of the district court and the screening order dismissing his due-process claim and certain defendants, including ADC Director Charles Ryan. (2 ER-28.)

SUMMARY OF THE ARGUMENT

Congress unanimously passed RLUIPA to protect prisoners like Mr. Fuqua from unnecessary restrictions on their religious liberty. And although inmates seeking redress for a RLUIPA or other civil-rights violation must also satisfy the administrative-exhaustion rule of the PLRA, that rule requires exhaustion only of "available" remedies. 42 U.S.C. § 1997e(a). Moreover, as the Supreme Court clarified last spring in *Ross*, inmates need not pursue remedies that exist on paper if their use is too "opaque" to be understood. 136 S.Ct. at 1859. Because Mr. Fuqua exhausted the only non-opaque remedy he had—i.e., a disciplinary appeal—this Court must reverse the summary judgment; alternatively, it should remand in light of *Ross*, which post-dated that order.

There are three independent grounds for reversal here. First, Arizona's administrative scheme forbids inmates from grieving issues related to inmate discipline that are already within "the scope of the established appeals process" for such discipline. DO 802.01, 1.3-1.4 (2 ER-99.) Mr. Fuqua challenged in the disciplinary appeal process the prison's treatment of his need to abstain from work in accommodation of his religious beliefs. Because that treatment was within the "scope" of the

disciplinary appeal—indeed, Mr. Fuqua's religious practice was the chief basis for his appeal and was expressly considered and addressed by defendants there—Mr. Fuqua was prohibited under the state's scheme from filing the separate grievance the district court erroneously insisted on. Mr. Fuqua exhausted the only remedy available to him.

Second, even if the district court were correct that a grievance was also available on paper—it was not—Arizona's regulations governing discipline and grievances are, in light of *Ross*, so opaque that no ordinary prisoner would know he needed to file a grievance on issues already addressed in a disciplinary hearing. If for some unforeseen reason the regulations require such duplication, that possibility would at least be so confusing to an ordinary prisoner as to be effectively unavailable. Under *Ross*, therefore, reversal is required on that ground as well.

Third and finally, in the event this Court is not prepared to reverse and remand for trial, it should at least reverse and remand on the matter of exhaustion because the district court has not yet had the benefit of the intervening *Ross* decision. In *Ross* itself, the Fourth Circuit held on remand that further consideration by the district court was needed in light of the Supreme Court's rejection of that Circuit's prior approach to

exhaustion. *Blake v. Ross*, No. 13-7279, 2016 WL 4011152, at *1 (4th Cir. July 27, 2016). Although we believe further consideration by the district court is unnecessary to hold Mr. Fuqua satisfied the PLRA—under *Ross* or otherwise—the record is inadequate to reach the opposite conclusion.

The PLRA is meant to streamline, not steamroll, the protection of an inmate's civil rights. The district court's order must be reversed, lest Mr. Fuqua's religious-liberty claims be lost to the machine.

ARGUMENT

I. THIS COURT REVIEWS DE NOVO THE ENTRY OF SUMMARY JUDGMENT ON EXHAUSTION GROUNDS.

This Court reviews de novo a district court's summary judgment on the basis of failure to exhaust administrative remedies. *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015). Moreover, in this Court's review the evidence must be viewed in "the light most favorable to the non-moving party." *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014).

The defendant bears the burden to show an administrative remedy was available that the prisoner did not exhaust. *Id.* at 1172. Once that showing is made, a prisoner bears the burden of production to show exhaustion or that the remedy was unavailable. *Id.* The defendant, however, bears the ultimate burden of proof for exhaustion. *Id.*

II. THIS COURT SHOULD REVERSE BECAUSE MR. FUQUA EXHAUSTED THE ONLY REMEDY AVAILABLE FOR HIS MISTREATMENT: A DISCIPLINARY APPEAL.

The PLRA requires an inmate to exhaust only those administrative remedies that are "available." 42 U.S.C. § 1997e(a). And remedies are in fact available only when they are "capable of use" to obtain "some relief." *Ross*, 136 S.Ct. at 1859. Contrary to the district court's finding, Mr. Fuqua exhausted his administrative remedies for challenging his prison's mishandling of the conflict between his job and religion by exhausting a disciplinary appeal. Indeed, no other process was an option, as the issue there (and here)—i.e., whether Mr. Fuqua's abstention from work should have been allowed—was within the scope of the disciplinary appeal and therefore not separately grievable under Arizona regulations.

Because Mr. Fuqua's treatment resulted in a Class B violation, 01B ("Aggravated Refusal of an Assignment"), his challenge lay with the disciplinary appeal process. *See* DO 803, Attach. A at 3; (2 ER-76). Following that process, Mr. Fuqua filed a first-level appeal to the Deputy Warden, who determined, among other things, that Mr. Fuqua's absence from work was not justified for religious reasons because it was not a "holiday observed by the Department of Corrections." (2 ER-74-75); *see*

DO 803.09, 1.2.4. Mr. Fuqua next filed a second-level appeal to the ADC Director, who likewise rejected "the issues [Mr. Fuqua] raise[d] in [his] narrative"—which included invocation of his religious-liberty rights. (2 ER-71, 73); *see* DO 803.09, 1.2.5. And under Arizona's regulations, the decision of the Director is final and constitutes exhaustion of the process. DO 803.09, 1.2.5.5.

The district court found Mr. Fuqua did not exhaust administrative remedies because he did not file a grievance under Department Order 803. (1 ER-11-14.) In so finding, the court rejected that Mr. Fuqua's disciplinary appeal satisfied the PLRA because, in its view, that appeal "did not address the merits of [Mr. Fuqua's] religious claims against Defendants, and it did not afford him a remedy against Defendants for their alleged violations of his right to freely practice his religion." (1 ER-13.) Not only is the district court's premise wrong—i.e., that a grievance was available—but so are the two steps of its analysis—i.e., that the disciplinary appeal neither addressed Mr. Fuqua's claims nor afforded a remedy.

First, the grievance process is available only when the "primary issue is outside the scope of [another] established appeals process." DO

802.01, 1.4 (2 ER-99.) In fact, an inmate who tries to file a grievance in the scope of a disciplinary appeal will instead be "instructed to follow" the latter process. DO 802.01, 1.4 (2 ER-99.) Mr. Fuqua would thus have been barred from filing a grievance, and redirected to a disciplinary appeal, because his claims were within the scope of that appeal.

Mr. Fuqua's insistence on the right to abstain from work on a religious holiday and resulting treatment for not working that day were central to the disciplinary appeal. The infraction for which Mr. Fuqua was fired and punished was, blandly enough, the "[r]efusal of any work assignment." DO 803, Attach. A at 3. But Mr. Fuqua's sole reason for refusing to work was observance of a religious holiday. (*See* 2 ER-48-49, 73-75, 77-80.) Indeed, Mr. Fuqua made that objection known at every step, from when he reported to the kitchen, to his discipline for refusing to work, to each level of appeal. (2 ER-77-80.) Because the matter of Mr. Fuqua's religious liberty fell within the "scope" of the disciplinary appeal, he could not have filed a grievance.

Second, the disciplinary appeal did in fact address the merits of Mr. Fuqua's religious claims. Mr. Fuqua's complaint alleges defendants violated the First Amendment and RLUIPA for "[f]iring plaintiff and

subjecting him to disciplinary punishment and exposure to a felony conviction for exercising his religious beliefs," as well as otherwise burdening his ability to work but observe the Sabbath. (2 ER-144.) And not only did Mr. Fuqua raise in his disciplinary appeal these very same concerns over the conflict between his work and faith, as just noted. But, sure enough, the prison system confirmed that these matters were within the scope of the disciplinary appeal because it evaluated the impact of Mr. Fuqua's religious beliefs and rights at every step.

From Mr. Fuqua's refusal to work in September 2014 to the ADC Director's denial of appeal in December 2014, defendants consistently and repeatedly understood Mr. Fuqua's religious-liberty rights were within the scope of the discipline and ensuing appeal. (*See* 2 ER- 71, 73, 79-80.) Prison staff noted at the outset and in his disciplinary hearing that Mr. Fuqua was defending his refusal to work based on his observance of a religious holiday. (*See* 2 ER-76-80.) Indeed, in a comment similar to the one Sgt. Starns had made in the kitchen, the hearing officer also told Mr. Fuqua "you know we don't do that shit." (2 ER-138.)

On appeal, both the Deputy Warden and ADC Director also addressed and rejected what the district court labeled the "religious

claims." (1 ER-13.) The Deputy Warden did so by citing the "Chaplian's [*sic*]" refusal to recognize the holiday in question, while the Director rejected the issues raised "in [Mr. Fuqua's] narrative"—a narrative that focused almost exclusively on religious rights. (2 ER-71, 74.) Indeed, Mr. Fuqua's so-called "narrative" not only claims the right to abstain from work based on his religious holiday but grounds it in the "right to freedom to exercise my religion." (2 ER-73.)

Third, the disciplinary appeal offered the promise of redress for Mr. Fuqua's claims. In his complaint, Mr. Fuqua challenges his termination and discipline as violations of his religious liberty, seeking the restoration of rights as well as expungement of discipline. (2 ER-139-145.) These remedies were expressly available to the Deputy Warden and ADC Director. *See* DO 803.09, 1.2.4.3, 1.2.5.4.1 (allowing revision and elimination of relevant penalties, including any attendant loss of work privileges); DO 803 at 21 (loss of privilege definition). Mr. Fuqua also seeks future accommodation in work assignments for religious holidays, which would have necessarily resulted, or at least been advanced, were the Deputy Warden or Director to have accepted Mr. Fuqua's only defense to discipline—i.e., the legal right to such days off, as opposed to

repeated claims by prison officials not to "do that shit." (2 ER-73, 75, 134, 138, 144-145.) Finally, while the monetary relief Mr. Fuqua seeks now was not available in the administrative process, the PLRA does not require that process to provide all legal remedies. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

Because Mr. Fuqua exhausted his administrative remedies, summary judgment for defendants on the issue of exhaustion was improper.

III. UNDER *ROSS*, NO GRIEVANCE WAS AVAILABLE TO MR. FUQUA BECAUSE ARIZONA'S PROCESS WAS SO OPAQUE NO PRISONER IN HIS CASE WOULD KNOW TO GRIEVE.

A. *Ross* held an administrative process is unavailable where it is so opaque no ordinary prisoner can navigate it.

The Supreme Court held in *Ross* that an administrative scheme is not available under the PLRA where it is "so opaque" that "some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it." 136 S.Ct. at 1859. Although reasonable mistakes by prisoners might not be excused, remedies that are unreasonably confusing, unknown, or unknowable need not be pursued. *Id.* at 1859-60 (citing Solicitor General at oral argument; *Goebert v. Lee County*, 510

F.3d 1312, 1323 (11th Cir. 2007); and *Turner v. Burnside*, 541 F.3d 1077, 1084 (11th Cir. 2008)). *Ross* and its freshly developing progeny offer some helpful examples.

In *Ross*, for instance, the opaqueness concern arose from an internal investigative process that considered the merits of the prisoner's underlying complaint. 136 S.Ct. at 1855, 1860-62. According to the plaintiff, prison practices prevented him from filing a grievance over the same issues. *Id.* at 1860. In fact, the prisoner contended that once the internal investigation commenced, any grievance would have been rejected as procedurally improper. *Id.* at 1860-61. Consequently, the Court remanded to the Fourth Circuit to determine whether the defendant's grievance system was "so confusing that no such [ordinary prisoner in Blake's situation] could make use of it." *Id.* at 1862.

In *Williams v. Priatno*, the Second Circuit likewise held a grievance process too opaque because it did not explain how the inmate should have continued through that process where the officer—to whom the inmate gave his grievance—failed to forward it to the grievance staff before the filing deadline, as required. 829 F.3d 118, 126 (2d Cir. 2016). The Second Circuit held that, even if technically available, the grievance process was

so confusing as to be incapable of use. *Id.* at 124. The court noted, "the regulations simply [did] not contemplate the situation in which Williams found himself, making it practically impossible for him to ascertain whether and how he could pursue his grievance." *Id.*

Finally, in *Shumanis v. Lehigh County*, the plaintiff alleged his jail prevented inmates from filing grievances involving federal law, barring him from pursuing a grievance over claims that prison officials condoned an attack on him by fellow inmates. No. 16-2017, 2017 WL 192957, at *1-2 (3d Cir. Jan. 18, 2017). In remanding, the Third Circuit noted that language excluding issues of federal law from the normal grievance process at the very least raised the question of whether the process was actually available. *Id.* at *4, n.1. Accordingly, the district court was instructed to consider whether the ambiguity in the regulation rendered the policy too opaque. *Id.*

Ross, Williams, and *Shumanis* illustrate that the existence of an administrative-grievance process does not mean in practice that it is available to address the prisoner's complaint. Specifically, where prison regulations do not adequately describe whether or how an inmate may

grieve, they are "prohibitively opaque, such that no inmate could actually make use of [them]." *Williams*, 829 F.3d. at 126.

B. No reasonable prisoner in Mr. Fuqua's position would have known a grievance was possible, much less required.

Even under the district court's presumed construction of Arizona's regulations, their inability to instruct an inmate in Mr. Fuqua's position whether or how he could resolve his issue would render them so opaque they were, practically speaking, unavailable to him. *Williams*, 829 F.3d at 126. Indeed, at least three aspects of these regulations demonstrate opaqueness sufficient to excuse the filing of any grievance by Mr. Fuqua.

First, Arizona's grievance process not only disclaims issues covered by what it calls the "independent" disciplinary appeal process, that latter process states that "all administrative remedies shall be considered exhausted" at its level-two appeal to the ADC Director. DO 803.09, 1.2.5.5. To the contrary, a grievance or its appeal can be made in such cases only where the "primary issue is outside the scope" of the disciplinary process. DO 802.01, 1.4 (2 ER-99.) And any inmate who tries to file an overlapping grievance will be shunted back to that process. DO 802.01, 1.4 (2 ER-99.) Arizona insists so strongly on separate processes

that officials receiving grievances can reject them on this basis with the check of a box. (*See* 2 ER-81.) In the face of such written obstacles, no ordinary prisoner would persist in filing a grievance. *Turner*, 541 F.3d at 1083.

Second, the ambiguity created by the text of Arizona's regulations would have only been heightened had Mr. Fuqua tried the district court's approach, with its false assumption that the disciplinary process did not address his "religious claims." (1 ER-12-13.) Because the latter did address those claims—Mr. Fuqua's right to exercise his religion was the sole reason for his appeal, and was considered and denied at each step, *ante* at 18-21—any supposed need to present them again in a duplicative grievance would have confused any inmate.

The trial court's approach would require a prisoner to inexplicably guess that he should defy, rather than conform to, Arizona's warning in Department Order 802 that a grievance should not be used as "a duplicate appeal process." DO 802.01, 1.3 (2 ER-99); *see also Goebert*, 510 F.3d at 1322-23 (rejecting application of the PLRA where inmate was kept "in the dark about the path she was required to follow," akin to a "Queen of Hearts' Croquet game"). It's a headscratcher to say the least.

Third and finally, any supposed grievance process initiated by Mr. Fuqua would start with the Deputy Warden and end with the ADC Director. *See* DO 802.03, 802.04, 802.05 (2 ER-101-102). Having just pursued an appeal before those same officials over his religious-liberty claim not to be forced to work on his holidays, no reasonable prisoner in Mr. Fuqua's shoes would have believed he would have to start another process that would end up before them again. Indeed, the Deputy Warden and Director did not merely reject Mr. Fuqua's right to abstain from work, they upheld discipline against him. The aphorism often attributed to Einstein comes to mind: "the definition of insanity is doing the same thing over and over and expecting a different result."

Ultimately, any unforeseen requirement that Mr. Fuqua had to file both an administrative appeal and a grievance over the same set of facts before the same set of people was too opaque under *Ross* to be required.

IV. ALTERNATIVELY, THIS COURT SHOULD REVERSE AND REMAND IN LIGHT OF THE SUPREME COURT'S FACT-DEPENDENT AND INTERVENING HOLDING IN *ROSS*.

In *Ross*, the Supreme Court clarified that the appropriate factor for excusing exhaustion of certain remedies under the PLRA is not "special circumstances" or similar judge-made exceptions, as several circuits had

held, but whether those remedies were, in the words of the statutory text, not in fact "available" to the inmate. 136 S.Ct. at 1856. And, as described above, opaqueness is among the illustrative examples the Court cited for such unavailability; the Court also mentioned a remedy that "operates as a simple dead end" or one whose pursuit prison officials have thwarted. *See id.* at 1859-60. Rather than deciding exhaustion itself, however, the Court remanded "under the principles set out [t]here"—recognizing not only that it had established a new uniform standard but also that its approach might require examination of previously unexamined facts. *Id.* at 1862. This Court should follow that example and remand here, too.

As *Ross* made clear, decisions about whether an administrative remedy is unavailable in certain circumstances will often involve fact-intensive inquiries, especially if, as in *Ross* and here, the evidence at least suggests a material dispute as to the availability of those remedies. In remanding the case to the Fourth Circuit, the Supreme Court noted that "[t]he materials we have seen are not conclusive; they may not represent the complete universe of relevant documents, and few have been analyzed in the courts below." *Ross*, 136 S.Ct. at 1862.

On remand, the Fourth Circuit remanded further with instructions that the parties be allowed to "augment the record so that it contains any pertinent evidence relating to whether or not the inmate remedies are 'available.'" *Blake v. Ross*, No. 13-7279, 2016 WL 4011152, at *1 (4th Cir. July 27, 2016). Similarly, in *Shumanis* the Third Circuit remanded in light of the holding in *Ross*, observing that the Supreme Court made it clear there that, when in doubt, "lower courts are better positioned to make factual findings regarding the actual availability of administrative remedies under the PLRA." *Shumanis*, 2017 WL 192957 at *3. *Shumanis* is instructive because it involved a situation where, as here, there is a dispute over what a grievance can or cannot address; there, claims under federal law and here, discipline-related matters. *Id.* at *2.

Because, among other things, Mr. Fuqua contests the actual availability of the grievance procedure under *Ross*, any defense motion for summary judgment would at least need further factual development in light of that landmark decision. It must be remembered that failure to exhaust administrative remedies is an affirmative defense: "a defendant will have to present probative evidence—in the words of *Jones*, to 'plead and prove'—that the prisoner has failed to exhaust available

administrative remedies." *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014) (quoting *Jones v. Bock*, 549 U.S. 199, 204 (2007)). Given this burden and in light of *Ross*, once Mr. Fuqua produces evidence that a remedy was effectively unavailable to him, the defendants must do more than merely point at the regulation. *See Albino*, 747 F.3d at 1172 (noting that "the ultimate burden of proof remains with the defendant"). And, in any event, on summary judgment the district court may not decide disputed issues of material fact and must construe all facts in favor of the non-moving party. *Id.* at 1173.

In *Ross*, the plaintiff had the opportunity in discovery to produce documents obtained from administrative dispositions in other cases as well as prior briefs filed by the state that lent credence to his claim that the administrative procedure was unavailable. *Ross*, 136 S.Ct. at 1860-61. Even still, the Court remanded to permit additional factual development. Given Mr. Fuqua's showing here that the Arizona grievance process was unavailable to him for reasons outlined in *Ross*, summary judgment for the defendants is inappropriate absent an attendant opportunity for Mr. Fuqua to marshal and present additional materials.

The Supreme Court in *Ross* observed that, in light of the principles it developed, the issue of unavailable remedies had "taken on new life" there. 136 S.Ct. at 1860. Faced with the seemingly "bewildering features" of the Maryland grievance process, it held remand was appropriate. *Id.* So too here.

V. ON REMAND, THIS COURT SHOULD ALSO REINSTATE AFFECTED DEFENDANTS DISMISSED ON SCREENING.

Finally, this Court should direct on any remand of Mr. Fuqua's religious-liberty claims (under RLUIPA and the First Amendment) the reinstatement of defendants 1 and 6-18—including ADC Director Ryan—as the district court erroneously dismissed these government officials from those claims when screening out the due-process claim. (1 ER 19-21.) We further ask this Court to instruct the district court to allow Mr. Fuqua to amend his pro-se complaint to include any other appropriate defendant.

"Dismissal for failure to state a claim is reviewed de novo." *Barrett v. Belleque*, 544 F.3d 1060, 1061 (9th Cir. 2008). Moreover, pro-se plaintiffs are entitled to have their filings construed liberally. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). In rejecting Mr. Fuqua's due-process claim on screening, the district court dismissed defendants 1 and

6-18—all government officials. Although the court went on to sustain Mr. Fuqua's RLUIPA and First Amendment claims, it retained as defendants only those it understood to be personally involved in his mistreatment (as opposed to any administrative challenge thereto). (1 ER-17-21.)

But RLUIPA authorizes suits against a "government" for substantially burdening an inmate's religious exercise, and further defines government to include a state "official" or "any other person acting under color of State law." 42 U.S.C. §§ 2000cc-1, 5. Moreover, suits for violations of the First Amendment against government officials in their official capacities can include any state official who can "appropriately respond to injunctive relief." *Hartmann v. California Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013).

The district court found that Mr. Fuqua had adequately stated RLUIPA and First Amendment claims. But having already dismissed defendants 1 and 6-18, the district court failed to recognize that—liberally construed or not—Mr. Fuqua's claims include not only the retained defendants but also the dismissed defendants, who are all government officials and were at least sued in their official capacities. (1 ER-15, 20-22.) Some of these defendants, in fact, are likewise subject to

suit in their individual capacities to the extent their actions or inactions violated Mr. Fuqua's religious-liberty rights. *See Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011) (noting that a supervisor may be liable in his individual capacity "for his own culpable action or inaction in the training, supervision, or control of his subordinates [or] for his acquiescence in the constitutional deprivation").

Consequently, the district court should be directed to reinstate these defendants. Additionally, Mr. Fuqua should be granted leave to amend his complaint to include any appropriate additional defendants. *See Eldridge v. Block*, 832 F.2d 1132, 1135-36 (9th Cir. 1987) (explaining the policy of favoring amendments to pleadings should be applied with "extreme liberality" to pro-se plaintiffs).[3]

CONCLUSION

This Court should reverse summary judgment and remand for trial on the ground that Mr. Fuqua exhausted his administrative remedies, whether because his disciplinary appeal was sufficient to exhaust under

[3] As indicated in the certificate of service, Appellant is serving these previously dismissed and never-served government defendants through the Arizona Attorney General's Office. That Office has refused to accept such service, but out of an abundance of caution these defendants are included alongside their co-workers already represented by the Office.

Arizona's regulations or because those regulations were so opaque as to make any grievance effectively unavailable.

Alternatively, this Court should reverse and remand to the district court so that it may analyze in the first instance, and receive any attendant evidence on, the availability of administrative remedies under the Supreme Court's intervening decision in *Ross*.

Finally, this Court should reinstate those defendants subject to Mr. Fuqua's religious-liberty claims and instruct the district court to allow an amendment to his pro-se complaint for any other appropriate defendant.

March 3, 2017

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STATEMENT OF RELATED CASES

We are not aware of any pending appeals related to this appeal. *See* 9th Cir. R. 28-2.6.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C)]

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March 3, 2017
Date

s/ James A. Sonne
ATTORNEY NAME

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2017, I electronically filed the foregoing **APPELLANT'S SUPPLEMENTARY BRIEF (Filed Concurrently with Excerpts of Record • Volumes 1-2)** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Signature: s/ James A. Sonne