

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - x
3 MICHAEL ROSS, :
4 Petitioner : No. 15-339
5 v. :
6 SHAIDON BLAKE. :
7 - - - - - x

8 Washington, D.C.
9 Tuesday, March 29, 2016

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 The above-entitled matter came on for
oral argument before the Supreme Court of the United
States at 11:06 a.m.

APPEARANCES:

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 General, Baltimore, Md.; on behalf of
 Petitioner.

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 General, Department of Justice, Washington,
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 supporting Petitioner.

PAUL W. HUGHES, ESQ., Washington, D.C.; on behalf of
 Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 15-339, Ross v. Blake.

Ms. Bernhardt.

ORAL ARGUMENT OF JULIA DOYLE BERNHARDT

ON BEHALF OF THE PETITIONER

MS. BERNHARDT: Thank you, Your Honor.

Mr. Chief Justice, may it please the Court:

In this case, the Fourth Circuit adopted a nontextual exception to the requirement of the Prison Litigation Reform Act that a prisoner exhaust available administrative remedies. That exception, if accepted, would eviscerate Congress's intent in adopting the Prison Litigation Reform Act and requiring exhaustion of administrative remedies.

In the Fourth Circuit States where this exception now applies, district courts are now charged with examining prison procedures to see how murky they are. They are dispensing with the requirement of exhaustion at all if there's been an internal investigation --

JUSTICE KAGAN: Ms. Bernhardt, could I just ask you to talk about the procedures? Could you explain to me what they are?

1 MS. BERNHARDT: Certainly, Your Honor.

2 And I'd like to begin with the Inmate
3 Grievance Commission -- or, I'm sorry -- Office,
4 formerly the Commission -- which is the primary
5 administrative remedy for an inmate with
6 use-of-force or other condition of confinement.

7 JUSTICE KAGAN: Could I start you off in
8 the reverse around? Because the ARP seems to be the
9 low-level one, and in the initial understandings of
10 this case, everybody was being told the ARP is where
11 you file. And you file there irrespective of
12 whether there's an IIU investigation.

13 Do you continue to take that view, or do
14 you think that that is no longer true?

15 MS. BERNHARDT: Well, Your Honor, the
16 view's been consistent throughout, and that is the
17 Inmate Grievance Office is the primary remedy. The
18 Inmate Grievance Office can itself require --

19 JUSTICE KAGAN: I really did ask you to
20 start with the ARP.

21 MS. BERNHARDT: I'm trying to, yes, Your
22 Honor.

23 JUSTICE KAGAN: Are you supposed to file
24 with the ARP even when there's an IIU in --

25 MS. BERNHARDT: Yes, Your Honor. Yes, you

1 are.

2 JUSTICE KAGAN: Well, why do all of these
3 cases suggest that, when that happens, the ARP
4 throws out the case on the view that there's an IIU
5 investigation?

6 MS. BERNHARDT: When this case arose in
7 2007, the warden was not required to dismiss it.
8 And so in some cases -- in some of the cases that
9 are before the Court, that is, indeed, what
10 occurred. There's cases with three wardens where --
11 a collection of cases where there was a dismissal,
12 but --

13 JUSTICE SOTOMAYOR: Do you have any example
14 anywhere of the AR -- ARP responding and actually
15 investigating and looking at the issue and making a
16 recommendation or ruling?

17 MS. BERNHARDT: The -- we don't have the
18 paperwork. The cases in Petitioner's lodging are
19 cases involving an IIU investigation where it
20 proceeded through the ARP process. In other words,
21 there was a complaint --

22 JUSTICE SOTOMAYOR: In your reply brief, I
23 looked for one ARP case where the prisoner filed and
24 the ARP itself made a determination. Is there
25 anything in the record?

1 MS. BERNHARDT: There's nothing in the
2 record like that, Your Honor. And if I might
3 explain that this was not an issue in the district
4 court. And so there was no evidence presented on
5 either side on that point.

6 JUSTICE KAGAN: Well, you've lodged now
7 quite a number of materials, and we can talk about
8 the materials that you've lodged, but now, you know,
9 both parties have lodged materials, and nobody has
10 come up with a case in which the ARP has adjudicated
11 a complaint when there was an IIU complaint
12 investigation going on; is that right?

13 MS. BERNHARDT: That's right, Your Honor.
14 And there's a four-year retention policy for these
15 records, and this case arose in 2007. And so this
16 issue was not brought up until the Respondent's
17 briefing in this Court --

18 JUSTICE GINSBURG: But at least it would
19 show that there are papers staying -- saying as
20 clearly as it could possibly say, "You involved an
21 ARP; there is an IIU investigation; ARP dismissed."
22 Couldn't be clearer.

23 So you say, well, other cases went beyond
24 the way. Then it sounds like the State is making
25 inconsistent rulings, nobody knows what the law of

1 Maryland really is.

2 So those letters say, unmistakably, "Your
3 complaint is dismissed because there is an IIU
4 investigation." They can't just erase that. That's
5 what they say.

6 MS. BERNHARDT: Yes, Your Honor. The forms
7 also say right on the front that your appeal rights
8 are on the back. And the directives and the
9 handbook all advise the -- that's only the first
10 stage of the process.

11 And in Maryland, proper exhaustion is
12 always an appeal to the commissioner and then to
13 file complaint with the Inmate Grievance Office,
14 which holds a quasi adjudicatory hearing in every
15 one of these cases.

16 And all one need do is look at the
17 decisions in Petitioner's lodging. You'll see these
18 were all IIU investigation cases, and all of these
19 inmates had a full adjudicatory hearing on the
20 merits, and some of them got substantial amounts of
21 money.

22 So there is an available remedy in Maryland
23 for prisoners who are assaulted by guards and where
24 there is an internal investigation. And that --

25 JUSTICE GINSBURG: Let's go back to the --

1 the procedure for the employee -- I mean, for the
2 prisoner.

3 There is an IAU investigation. The
4 prisoner then files an ARP. Under Maryland's
5 regime, what is to happen to that ARP complaint?

6 MS. BERNHARDT: At the time of this case
7 and today, the warden had discretion to reach the
8 merits of it or to administratively dismiss it.
9 Both of those are appealable orders.

10 JUSTICE KAGAN: Ms. Bernhardt, can I just
11 ask, because in the materials you lodged yesterday,
12 in three different places you appeared -- the office
13 appears actually to have a rubber stamp. I mean,
14 it's the same stamp on all these things. And it
15 says, "Dismissed for procedural reasons. This issue
16 is being investigated by IIU. Since this case shall
17 be investigated by IIU, no further action shall be
18 taken under the ARP."

19 That's on a rubber stamp.

20 MS. BERNHARDT: Yes, Your Honor. And the
21 procedure there is the same in any other
22 use-of-force case, and that is the first-level
23 decision; that is appealable to the commissioner.
24 And then once those two stages within the prison are
25 exhausted, the internal remedy has been exhausted,

1 and the case can be submitted to the Inmates
2 Grievance Commission, which, as the court of appeals
3 of Maryland has stated, is the primary
4 administrative remedy --

5 JUSTICE KAGAN: Ms. Bernhardt, we took this
6 case on the view, which was the view that the office
7 represented to us at the time, that the ARP was the
8 proper place to go to receive a remedy, not the
9 proper place to go to receive a rubber stamp saying
10 "You've come to the wrong place," but the proper
11 place to go to receive a remedy even when there was
12 an IIU investigation going on.

13 MS. BERNHARDT: And that is true, Your
14 Honor.

15 JUSTICE KAGAN: Notwithstanding this rubber
16 stamp that says it's not true.

17 MS. BERNHARDT: Yes, Your Honor, because
18 the remedy will be received from the Inmate
19 Grievance Commission. The -- just the first --

20 JUSTICE SOTOMAYOR: Could you please tell
21 me why you can't -- what's the purpose of this
22 process? You have regulations and administrative
23 handbook that says, "Take all of these things to the
24 ARP. Take to the IGO directly only these things."

25 Why don't you just say take prison

1 brutality cases to the IGO? If you're not intending
2 to confuse prisoners, if you're not intending to
3 make this process totally opaque, why do you do it
4 that way?

5 MS. BERNHARDT: Because there's one process
6 for all use-of-force complaints, Your Honor, and it
7 will be confusing to inmates if you told inmates,
8 "Well, if you've requested an IIU investigation,
9 then you should use a different process."

10 And it's the one -- every use of force, the
11 inmate files the ARP with the warden, he appeals to
12 the commissioner, and then they go to the Inmate
13 Grievance Office. That's right in the handbook at
14 pages 79 to 80. It's --

15 JUSTICE SOTOMAYOR: All right. It's more
16 confusing to say, "If you filed a IIU, go to IGO."

17 MS. BERNHARDT: That would --

18 JUSTICE SOTOMAYOR: If you go to ARP, if
19 you haven't, if you have -- that's more confusing
20 than this process where they go to ARP and they
21 can't get anything.

22 MS. BERNHARDT: They do, because they
23 proceed up the -- up the process. They properly
24 exhaust -- all the examples that they produced in
25 the Respondent's lodging, they have four inmates who

1 did not properly exhaust and one who did. Mr. --

2 CHIEF JUSTICE ROBERTS: I'm sorry. Please
3 finish.

4 MS. BERNHARDT: He had properly
5 exhausted -- he had a hearing at the Inmate
6 Grievance Office.

7 CHIEF JUSTICE ROBERTS: We're talking about
8 what's in the lodgings and what they stand for.
9 These are not in the record before the Court, are
10 they?

11 MS. BERNHARDT: No, Your Honor.

12 CHIEF JUSTICE ROBERTS: Neither yours or
13 the other side, right?

14 MS. BERNHARDT: That's true, Your Honor.

15 CHIEF JUSTICE ROBERTS: I take seriously
16 the requirement that we limit appellate review to
17 the argument -- to the record that's before the
18 Court. I mean, factual issues like this are
19 something they could deal with in the district court
20 and flesh those out before the court of appeals.
21 And now, as far as I understand, we're the first
22 court that's looked at all these record material --
23 I mean, extra record materials, right?

24 MS. BERNHARDT: Yes, Your Honor. And we
25 would --

1 CHIEF JUSTICE ROBERTS: So how do we deal
2 with that? I mean, again, both of you are guilty of
3 what I think is a serious -- a serious question.
4 What's your proposal for dealing with the fact that,
5 so far as we have seen so far, the cases -- the case
6 might well turn on these lodgings if people are
7 going to look at them?

8 MS. BERNHARDT: Well, your Honor, we would
9 welcome a remand from this Court, decide the issue
10 in front of it. This issue is very important to the
11 States and to the Fourth Circuit States especially.
12 And we would gladly shoulder the burden on remand to
13 sort these availability issues out. We have much
14 more --

15 JUSTICE KENNEDY: Well, it seems to me that
16 we should dismiss your writ as improvidently
17 granted. You just -- we just simply didn't have
18 these materials in front of us, and it completely
19 changes the nature of the case.

20 MS. BERNHARDT: Well, Your Honor, the
21 district court rightly found that the remedy is
22 primary. There was no -- the Respondent, he never
23 tried to use any of these procedures. He disclaimed
24 any intention to do so.

25 JUSTICE KENNEDY: That's a different --

1 CHIEF JUSTICE ROBERTS: Well, I suppose
2 dismissing it would be based on a judgment about
3 what these extra record materials show. And if they
4 don't show what your adversary suggests, I don't
5 know why that would be an appropriate course to take
6 with respect to your position. On the other hand,
7 if they do, maybe it would be.

8 I don't -- again, it's -- it's, I think,
9 surprising -- and, again, I'm not criticizing just
10 you; I'm criticizing both of you -- that -- that we
11 have these materials now.

12 I mean, was -- was the individual
13 represented by counsel below the --

14 MS. BERNHARDT: Yes, Your Honor. And these
15 materials that were submitted present a very
16 misleading picture of the remedies available to
17 inmates. And we felt obligated to respond and --

18 JUSTICE BREYER: Yeah, I understand that.
19 But, as I look through, the reason that it wasn't
20 presented below, I would guess, is given the briefs
21 that I've read, which are very good briefs, people
22 have gone to an enormous amount of work. And that
23 enormous amount of work has produced all this
24 information that wasn't there before.

25 But I would like to know what you'd do if

1 you were me. That is to say, we took this case
2 because we thought that it raises a question of
3 whether the circuit can create an exception to the
4 exhaustion requirement that, to my knowledge so far,
5 is not a traditional exception. And that's why I
6 thought we took it.

7 Now we discover, having taken it, this new
8 issue that wasn't there. We thought the question
9 was, can you create an exception to the requirement
10 that they have to take into account of available
11 administrative remedies? The issue now is whether
12 there was an administrative remedy available on the
13 basis of what I've read.

14 It's so complicated that I don't know how a
15 genius would know how -- that he's supposed to go to
16 the -- to the whatever that AR thing is --

17 (Laughter.)

18 JUSTICE BREYER: -- you know, while an IIU
19 investigation is going on. You certainly could not
20 be illiterate. I mean, you'd have to -- there are
21 so many initials in this that -- that -- that --
22 okay.

23 So we could either go into this other issue
24 or we could send it back to prolong this or we
25 simply could grant a -- dismiss it as improvidently

1 granted.

2 So maybe it's an unfair question to ask
3 you. But if you were me, what would you do?

4 MS. BERNHARDT: Decide the question
5 presented, Your Honor, and that is because it's
6 squarely presented by this record.

7 The procedures in the -- the procedures
8 were taken to be clear in the court below. The --

9 JUSTICE BREYER: It's pretty hypothetical
10 if we are to answer the question, is there a special
11 kind of exception to the rule that you have to take
12 into -- that you have to follow available
13 administrative procedures if it is the case where
14 there was no such remedy availability.

15 MS. BERNHARDT: Well, Your Honor, we've
16 produced 13 inmates who used it. So it is
17 available. Inmates have used it successful, and
18 they've gotten large amounts of money. In the --

19 JUSTICE GINSBURG: And it's available to
20 some and it's not available to others.

21 MS. BERNHARDT: It's available to all, Your
22 Honor. And if -- if inmates are -- many more
23 inmates, you know, that we've proposed have used it
24 successfully than the few that they have who started
25 the process and then abandoned it.

1 JUSTICE GINSBURG: Let's talk about, then,
2 the current regulation. There's a question whether
3 that was always the practice in Maryland. But the
4 current regulation does say, does it not, if an IIU
5 investigation is launched, then you don't use the
6 ARP procedure. Isn't that what the current
7 regulation --

8 MS. BERNHARDT: That's not a regulation,
9 Your Honor. That's a directive. That's one of the
10 ARP directives. It does say that it should be
11 administratively dismissed and that that is an
12 appealable decision on the merits that goes to the
13 Inmate Grievance Office.

14 And if I might go back to what's happening
15 in the district court where this case began, is that
16 we had a procedure that was -- that was available on
17 its face, and there was never any challenge to
18 availability. The argument was that "Well, I went
19 to the internal affairs, and that serves the same
20 purpose. I don't have to exhaust."

21 And that doesn't serve the same purpose.
22 All one need do is compare the criminal
23 investigation report at JA 185 with the
24 administrative law decisions that resolve the civil
25 claims.

1 An IIU investigation doesn't produce an
2 administrative decision on a civil claim. It
3 doesn't give an opportunity to settle civil claim.
4 It serves a completely different purpose.

5 And yet in the Fourth Circuit States, a
6 criminal investigation is now an administrative
7 civil remedy. And that has -- having a very bad
8 effect on Maryland and the Fourth Circuit states.

9 And one need only look at experience in the
10 Second Circuit to see the effect that's been there.
11 It's totally contrary to the purpose of the Prison
12 Litigation Reform Act.

13 JUSTICE SOTOMAYOR: I have to say that when
14 I read the Fourth Circuit decision, there are lines
15 in the Fourth Circuit decision that seemed to be
16 deciding this on the burden of proof. They're
17 saying "Ross" -- meaning you -- "have offered no
18 evidence that would contradict Blake's belief that
19 the IIU's investigation removed his complaint from
20 the typical ARP process."

21 And the Fourth Circuit, that's at 787 F.3d
22 700.

23 It goes on to say, moreover, that "the
24 handbook regulations and directives do not
25 contradict Blake's belief that he had exhausted his

1 administrative remedies by removing the incident to
2 senior corrections officers, thereby initiating an
3 IIU investigation."

4 That's -- that's at the same page.

5 So I'm not sure what the Fourth Circuit was
6 doing with availability. And so if I'm not sure,
7 what do I do with respect to Justice Breyer's
8 question and Justice Kennedy's question, which is,
9 is this a availability determination?

10 MS. BERNHARDT: The Fourth Circuit assumed
11 it was available. If you look at Petition
12 Appendix 8, the district court found it was
13 available. The Fourth Circuit assumed that. So it
14 would certainly be appropriate, it seems to me, to
15 remand it to the Fourth Circuit so the Fourth
16 Circuit could sort out any availability issues that
17 have been newly raised. But there's a question
18 presented to be decided because of the effect that
19 it has on the administration of the Prison
20 Litigation Reform Act in the Fourth Circuit States.
21 It's a -- it's a profound impact.

22 It's -- it's -- it's a special
23 circumstance.

24 JUSTICE SOTOMAYOR: There's a new
25 regulation that has come in, correct, after this

1 case? And it makes official that the ARP process
2 will not handle an IIU proceeding?

3 MS. BERNHARDT: It's not a regulation, Your
4 Honor; it's a -- it's a prison directive.

5 JUSTICE SOTOMAYOR: Prison directive.
6 This --

7 MS. BERNHARDT: This was the first two
8 stages of the process, but not the third stage, not
9 the Inmate Grievance Office stage. That stage is
10 fully open and available to inmates who have IIU
11 investigations.

12 JUSTICE GINSBURG: But the IGO, or whatever
13 it is, that is described in this hierarchy as an
14 appellate remedy.

15 MS. BERNHARDT: No, Your Honor. It's a
16 contested case hearing under the States
17 Administrative Procedure Act. It's doesn't --
18 decision --

19 JUSTICE GINSBURG: The setup is, there are
20 these levels that you go to. And first you go to
21 the ARP, then you go to the commission, then you go
22 to IGO. So it's usually -- it comes in at the third
23 instance.

24 MS. BERNHARDT: But it's not an appeal,
25 Your Honor; it's a de novo contested case qua an

1 adjudicated hearing.

2 JUSTICE GINSBURG: Where is -- where in
3 this handbook or whatever it is, the grievance
4 procedures, does it tell an inmate, you can go or
5 you must go, in the first instance, to the IGO when
6 there's an IIU investigation underway? Where does
7 it say --

8 MS. BERNHARDT: It does not say that, Your
9 Honor.

10 JUSTICE GINSBURG: Yeah.

11 MS. BERNHARDT: The inmate has a -- the
12 inmate can always go to the IGO first. If the
13 Inmate Grievance Office determines that it should be
14 exhausted, it just gives --

15 JUSTICE GINSBURG: Where -- where -- where
16 does it say you can go to the IGO first?

17 MS. BERNHARDT: That's in the handbook. At
18 pages 79 to 80 is the description. It's -- Petition
19 Appendix 79 to 80 is the description of the -- of
20 how to file with the Inmate Grievance Office. And
21 there are additional materials available to inmates
22 that aren't in the record because this issue was not
23 brought up in the district court, the directives --
24 the set of directives especially geared to inmates
25 that are not in the record because this issue did

1 not come up in the district court.

2 There is additional information available
3 to show that this is an available remedy, again, not
4 in the record because this issue was not brought up
5 by Mr. Blake in the district court. So we would
6 strongly urge the Court that, if it has issues about
7 availability, that it would be most appropriate to
8 remand it and let this be sorted out on remand,
9 because, obviously, you know, not having known that
10 this issue was going to come up, we didn't present
11 the evidence.

12 The burden is on Mr. Blake to show he meets
13 an exception. He did not meet that burden in the
14 district court.

15 Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 ORAL ARGUMENT OF ZACHARY D. TRIPP

18 FOR UNITED STATES, AS AMICUS CURIAE,

19 SUPPORTING THE PETITIONER

20 CHIEF JUSTICE ROBERTS: Mr. Tripp?

21 MR. TRIPP: Mr. Chief Justice, and may it
22 please the Court:

23 We're asking the Court to do two things
24 here today. We think they're both straightforward.
25 And then you can vacate and remand to address these

1 more case-specific arguments that have come up in
2 the briefing.

3 So, first, we're asking you to answer the
4 question presented. The PLRA means what it says.
5 It does not have any unwritten exceptions. Blake
6 doesn't even dispute the point.

7 Second, we're asking this Court to reject
8 the part of Blake's argument in Part 2 of his brief,
9 which we think is fairly encompassed within the QP,
10 that a prison's procedure has become unavailable and
11 that a prisoner can jump to federal court as soon as
12 he could reasonably but mistakenly think that he was
13 done with the grievance process.

14 A reasonable mistake standard is just
15 another way of saying that you only need to exhaust
16 plain procedures. That used to be the rule.
17 Congress deliberately eliminated it when it enacted
18 the PLRA. The rule now is that you need to exhaust
19 all available remedies. And that's critical to
20 making the prisons, not the Federal courts, the
21 primary place for resolving disputes about prison
22 life.

23 JUSTICE SOTOMAYOR: You do say in your
24 brief that if regulations are so confusing that
25 we're -- we're -- we're arguing about whether -- to

1 every inmate or every reasonable inmate or to a
2 reasonable inmate. I don't actually see that you
3 say "every reasonable inmate." That -- that's a
4 little -- that's not a standard I understand in any
5 context.

6 MR. TRIPP: So we definitely agree, as we
7 say in our brief, that -- that rules could be so
8 confusing that -- that they're no longer available.
9 As this Court said in Booth, "available" just has
10 its ordinary dictionary meaning of capable of being
11 used for a purpose. And so we think if they're so
12 confusing that they can't be used, if no reasonable
13 prisoner can use them, then --

14 JUSTICE SOTOMAYOR: No, you keep saying "no
15 reason." That a reasonable -- I would say,
16 consistent with how we always talk about this --

17 MR. TRIPP: Well -- and I don't --

18 JUSTICE SOTOMAYOR: -- no reasonable -- a
19 reasonable prisoner would not understand them.

20 MR. TRIPP: Well, I think there's a big
21 difference between a reasonable mistake standard,
22 which is what the court of appeals held. It held
23 that he made a reasonable mistake, and Blake is
24 trying to repackage that as a gloss --

25 JUSTICE SOTOMAYOR: I understand that

1 that's different.

2 MR. TRIPP: Right. And that's the thing
3 that we have trouble with. And -- and -- and so
4 there are two big differences between the reasonable
5 mistake standard and an availability standard, which
6 is the correct statutory standard. The first is
7 just the degree of uncertainty.

8 If you have a body of regulations, it
9 doesn't take that much to say that reasonable minds
10 could disagree about some aspect of the procedure.
11 It is quite another thing to say that they are so
12 confusing that they can't even be used.

13 JUSTICE BREYER: What words should we use?
14 The statute uses the word "exhausted." The word
15 "exhausted" in administrative law, where it's most
16 frequently found, has a huge meaning, with
17 exceptions, built up over the years. One such
18 exception is for a procedural rule that is, quote--
19 it comes from habeas corpus law -- "not firmly
20 established and regularly followed."

21 MR. TRIPP: You know, I think --

22 JUSTICE BREYER: Now, is that the way to
23 put the exception? To decide that, one, does the
24 word "exhausted" pick up its administrative law
25 meaning? That's a big question.

1 MR. TRIPP: So I'm --

2 JUSTICE BREYER: I'm not sure.

3 Two, if it does, is there such an exception
4 that I just said in administrative law?

5 And, three, how do you put it?

6 All right. Now, you say what you wanted to
7 say, because you wanted to say something.

8 (Laughter.)

9 MR. TRIPP: So I think the -- the point
10 that you're getting at about not regular followed is
11 that's better handled in a situation so -- at
12 Woodford and this Court's case law says that when
13 somebody has exhausted but has made some kind of a
14 procedural misstep, and the question is whether they
15 should suffer a procedural default, that -- that the
16 question there is, as this Court said in Woodford,
17 whether it's a critical procedural requirement. And
18 we think that the natural analogue is what you're
19 talking about from habeas corpus law, that you would
20 be asking whether it's an adequate and independent
21 State ground similar to that.

22 The inquiry here is different. The inquiry
23 here, he's just -- he's saying that it's just so
24 confusing that it's not available. And so we think
25 that the correct standard is the one that's said in

1 Booth, not capable of use for a purpose. The way we
2 articulate it in our brief we think is correct. If
3 you want to give some guidance, it's that no
4 reasonable prisoner can use it. But you don't need
5 to -- to -- to get that far down in the weeds to
6 reject his argument that a reasonable mistake is
7 enough.

8 So as I --

9 JUSTICE SOTOMAYOR: Please.

10 MR. TRIPP: There's two big differences
11 between a reasonable mistake standard and ours. The
12 first I was saying is just the degree of ambiguity.
13 The second is that it's myopic. It -- it overlooks
14 all the things a prison system can do to make a
15 system capable of being used even when it's a little
16 confusing.

17 So if I could just give an example of how
18 this works in the Federal system, when somebody
19 arrives in the prison, they're given a -- there's an
20 orientation. They're given a handbook. If they
21 have questions, there's somebody in each prison who
22 is available to answer questions, provide
23 assistance. And then, if you just file something
24 and you make some kind of procedural mistake, they
25 can do one of two things.

1 The prison can either just -- just accept
2 it and overlook the mistake, or what it can do is
3 tell him what he did wrong and give him a
4 reasonable -- a reasonable time to correct it. And
5 those are all things that a prison can do to make
6 its system just perfectly capable of being used,
7 even if there might be some reasonable ambiguity
8 somewhere in --

9 JUSTICE KAGAN: Can I --

10 MR. TRIPP: -- in the record. And --

11 JUSTICE KAGAN: Can I ask, it seems to me
12 that there are three kinds of unavailability. And
13 I'm wondering if you agree with each of the three.

14 One is where the prison says, you can get
15 your remedy over here. And then it turns out that
16 you can't get your remedy over here. So if the
17 prison here said, you can get your remedy at the
18 ARP, but you couldn't get your remedy at the ARP,
19 that's a kind of factual unavailability.

20 You agree with that?

21 MR. TRIPP: Yes, I think so.

22 JUSTICE KAGAN: In the hypothetical
23 sense --

24 MR. TRIPP: Yes.

25 JUSTICE KAGAN: -- not saying anything

1 about this case?

2 Now, the second is what you're saying.
3 It's like, if it's just so confusing that a
4 reasonable person can't use it. And that's your
5 standard; right?

6 MR. TRIPP: Right.

7 JUSTICE KAGAN: And the third is some of
8 these cases arise in the context where the State is
9 deliberately trying to interfere with or trick the
10 inmate or something like that. And you would count
11 that as available too?

12 MR. TRIPP: Yeah, in, like, a -- sort of a
13 threat hypothetical, that kind of thing.

14 JUSTICE KAGAN: A threat or just deception
15 or something like that.

16 MR. TRIPP: Yeah, we think that's -- as we
17 said in our brief, we think that's fairly usually
18 dealt with under availability. You could have a
19 case where maybe estoppel principles come in. But
20 in, I think, all or virtually all cases,
21 availability is the appropriate focus. And it's
22 going to take over. That's the way this has been
23 working in the lower courts.

24 I mean, because availability is the -- the
25 statutory exception, there is a mountain of lower

1 court case law on this. And -- and -- and so I
2 think the proper way for this Court to -- to delve
3 into these issues is in some case where it's
4 properly presented on cert.

5 The question here, it is squarely
6 presented. The district court here held squarely
7 that he could have filed a grievance. The court of
8 appeals appeared to assume that that was right and
9 just said that it didn't matter because there was an
10 unwritten exception to the PLRA, where --

11 JUSTICE GINSBURG: Mr. Tripp, are you --

12 MR. TRIPP: -- it asked this Court to
13 reverse that in his effort to repackage it.

14 JUSTICE GINSBURG: Are you taking -- are
15 you -- I assume that you're taking no position on
16 whether the remedy is available to this -- to Blake.

17 MR. TRIPP: The Maryland-specific question?

18 JUSTICE GINSBURG: Yes.

19 MR. TRIPP: Yeah, we -- we just frankly
20 don't have an interest in the outcome of that
21 question, and -- and don't think this Court would
22 have ever granted cert on it. And we think that
23 that's -- that's proper -- the proper approach here
24 is -- is -- is, as we're saying, to answer the
25 question presented, the portion of Blake's argument

1 that we think is fairly encompassed within it, and
2 then it's up to the court of appeals to figure out
3 what to do with all the late-breaking evidence.

4 If there are no further questions?

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Hughes.

7 ORAL ARGUMENT OF PAUL W. HUGHES

8 ON BEHALF OF THE RESPONDENT

9 MR. HUGHES: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 We submit that the proper outcome of the
12 case would be to dismiss it as improvidently granted
13 or, alternatively, to affirm.

14 If the Court were to consider affirming
15 this context, we think the first place for the Court
16 to begin is what the term "available" means in the
17 statutory context. We submit that --

18 JUSTICE ALITO: Well, before you get to
19 that, the Fourth Circuit seemed to assume that there
20 was a procedure that was available. And it held
21 that there -- this -- it was excused here even
22 though it was available.

23 Now, do you defend that argument?

24 MR. HUGHES: Your Honor, I -- I would
25 disagree. I don't think the court of appeals

1 thought that there was something that was available,
2 and it certainly did not think the State had met its
3 burden of showing so.

4 As was pointed out earlier, at Petition
5 Appendix page 13, the court of appeals said "Ross
6 has proffered no evidence that would contradict
7 Blake's belief that the IIU's investigation removed
8 his complaint from the typical ARP process."

9 And at the next page, Petition Appendix 14
10 to 15, the court of appeals added, "Ross has
11 provided no practical examples of an inmate being
12 allowed to file an ARP or IGO grievance during or
13 after an IIU investigation."

14 JUSTICE ALITO: Well, what was the legal
15 rule that -- that the Fourth Circuit adopted?

16 MR. HUGHES: Well, Your Honor, the -- the
17 Fourth Circuit did adopt a legal rule, as has been
18 discussed, as that there could be implicit
19 exceptions to the exhaustion requirement.

20 JUSTICE ALITO: Yeah. And that was my
21 question. Is that correct? Do you defend that?

22 MR. HUGHES: We think that's a correct
23 statement, yes, Your Honor. We do think that that
24 is a correct understanding of implicit exceptions
25 that exist to exhaustion requirements.

1 That said, we think the starting place here
2 should be the meaning of -- of the plain term
3 "available" that exists in the statute. And if
4 we're correct about what the term "available" means,
5 I don't think the Court necessarily needs to even
6 reach the -- the rule that was adopted by the court
7 of appeals. We think it was correct --

8 JUSTICE KAGAN: Do we think that the Fourth
9 Circuit was wrong with respect to that? I mean,
10 it's a problem leaving it on the books, isn't it?

11 MR. HUGHES: Well, Your Honor, I think the
12 Court could, though, still, even if it thinks that
13 the court -- the court of appeals was wrong about
14 that, still recognize that the additional argument,
15 what the term "available" means in this context that
16 we're correct about, and that, for multiple reasons,
17 the system that Maryland has in place doesn't meet
18 any conceivable understanding of what available
19 would be.

20 So I think the Court could certainly do
21 that. We -- we would disagree with the submission
22 that the -- the court of appeals was wrong, but we
23 certainly think the starting place here is what
24 "available" means. And -- and that, as applied to
25 this case and given what we now know as how Maryland

1 has -- has explained it, structured its system, it's
2 certainly not one that would qualify as
3 unavailable --

4 CHIEF JUSTICE ROBERTS: But if we know what
5 we --

6 MR. HUGHES: Go ahead.

7 CHIEF JUSTICE ROBERTS: I was just going to
8 say "what we now know." Do you have any help for me
9 with my concern that none of this is in the record
10 in this case? None of it was before the court of
11 appeals. None of it was before the district court.
12 What should I do about that?

13 MR. HUGHES: Yes, Your Honor. I have two
14 principal responses to that.

15 First, is the material that I just read
16 from the court of appeals made quite clear the court
17 of appeals recognized that the -- the State had
18 failed to identify any examples where any remedy in
19 these circumstances was available. Our principal
20 argument throughout the district court and the court
21 of appeals -- mind you, after we got past the waiver
22 argument -- our first argument was waiver -- our
23 second on the merits of this -- was that when an IIU
24 investigation was underway, there was no ARP process
25 whatsoever. Our consistent argument was the State

1 had failed to meet its burden in showing that that
2 was in fact wrong.

3 We made that argument to the court of
4 appeals, which, I think, it --

5 CHIEF JUSTICE ROBERTS: Well, I'm not --
6 I'm not so much talking about waiver; I'm talking
7 about evidentiary record. You may have made that
8 argument, but you did not submit any of this
9 material as a record. If it had been presented to
10 the district court, they'd go through a normal
11 process. Your Honor, you know, move for the
12 admission of this as Exhibit A. You authenticate
13 it. Somebody comes in and says -- and you'd have
14 discovery on -- on that.

15 I mean, I don't know that there aren't 180
16 other cases out there that make the exact opposite
17 point or make your point. And it just seems to me
18 that if the case is going to -- well, it seems to me
19 to present a real serious problem of how we should
20 consider the lodging.

21 MR. HUGHES: Well, first, Your Honor, I
22 still think it does only support our burden
23 argument, and -- and we still would think our burden
24 argument sufficient.

25 But, additionally, in the -- the papers to

1 this Court, Maryland has consistently said that the
2 IIU and the ARP process were entirely distinct. At
3 page 5 of the reply brief in support of certiorari,
4 for example, they explained the argument saying that
5 the 2008 directive codified then-existing practice.
6 They said that that was plainly wrong.

7 CHIEF JUSTICE ROBERTS: They said that in
8 the district court and court of appeals; right?

9 MR. HUGHES: Yes, Your Honor. But what we
10 did in the lodging was we identified in part briefs
11 that the Maryland attorney general's office, the
12 office responsible for litigating these cases in
13 Maryland Federal court, briefs that they filed that
14 were -- made materially different representations on
15 these critical questions. That's at our lodgings --

16 CHIEF JUSTICE ROBERTS: And is there any
17 reason that couldn't have been done before the
18 district court and before the court of appeals and
19 included in the record before this Court?

20 MR. HUGHES: Well, Your Honor, I think
21 these materials, because they are briefs that the
22 court -- that the State of Maryland submitted in
23 these cases are things that are properly submitted
24 by this Court as legal documents. I think the Court
25 frequently takes -- considers briefs that parties

1 have filed in other filings that are --

2 CHIEF JUSTICE ROBERTS: Well, these are not
3 briefs.

4 MR. HUGHES: Your Honor, we do submit two
5 briefs to the Court. So I point to -- in our
6 lodging to pages 23 and 24, as well as lodging page
7 5. We're submitting briefs that they filed to the
8 Maryland district court.

9 CHIEF JUSTICE ROBERTS: Well, you're also
10 submitting documents that were filed, I guess, by
11 prisoners in particular cases?

12 MR. HUGHES: Your Honor, most of these
13 documents were submitted by the State of Maryland as
14 attachments to their briefs that they filed in
15 Federal court. All these documents that we have
16 were -- the vast majority were submitted as -- by
17 Maryland as attachments to their briefs. A few were
18 submitted by prisoners as attachments to a
19 complaint, for example. But --

20 CHIEF JUSTICE ROBERTS: But not part of the
21 record in this case?

22 MR. HUGHES: They -- they were not
23 introduced in -- in -- in the court of appeals,
24 that's right, Your Honor.

25 But, again, it's consistent with our

1 argument that the State has never worn its -- met
2 its burden of demonstrating that the ARP is, in
3 fact, available in these circumstances. We still
4 think they've never shown their burden to
5 demonstrate it's available, but --

6 JUSTICE ALITO: Why should this issue of
7 availability be decided by this Court as opposed to
8 the district court or court of appeals on remand?

9 MR. HUGHES: Your Honor, I certainly think
10 that could be one possible outcome if the Court were
11 to say that "available" as a legal matter means what
12 we think it means, but that there could be
13 subsidiary questions that would be left for remand.
14 We would not quarrel with that outcome.

15 JUSTICE SOTOMAYOR: I'm sorry. What's your
16 definition of "availability"?

17 MR. HUGHES: Yes, Your Honor. We think
18 that for a remedy to properly qualify as available
19 within the meaning of the PLRA, the prison system
20 must sufficiently inform an inmate as to which
21 administrative remedy he or she needs to use to --
22 to press a particular kind of claim and then
23 additionally needs to explain so a reasonable inmate
24 would know the steps that he or she needs to take to
25 have properly exhausted that remedy.

1 JUSTICE ALITO: What is the difference
2 between that and what the statute used to say before
3 it was amended where it required exhaustion of such
4 plain -- plain, speedy, and effective administrative
5 remedies as are available?

6 MR. HUGHES: Yes, Your Honor.

7 JUSTICE ALITO: I think it's saying it has
8 to be plain.

9 MR. HUGHES: No, Your Honor. I think there
10 is a substantial amount of daylight between
11 requiring administrative remedy on one hand to be
12 plain, on the other hand to have sufficient clarity
13 that a reasonable prisoner would understand how it
14 works.

15 And perhaps an example, a prison remedy
16 could -- a prison system could create administrative
17 remedy that is, in fact, quite complex, that has
18 several steps, perhaps some of the steps are
19 conditional based on the kind of claim an individual
20 is raising or based on the adjudication at the lower
21 steps.

22 That might be very complicated, but it
23 would be perfectly fine so long as the prison
24 accompanies that with sufficiently clear guidance
25 that a reasonable inmate would know how to actually

1 navigate the system. No --

2 JUSTICE KAGAN: Do you think that there is
3 also substantial daylight between your standard and
4 the solicitor general's standard? In other words,
5 what I took the solicitor general to be saying with
6 respect to this clarity question is that the
7 standard is if the procedures are so confusing that
8 a reasonable person could not use them. That's his
9 standard.

10 Do you think that there is a difference
11 between yours and his?

12 MR. HUGHES: Honestly, I don't think
13 there's a substantial difference, Your Honor. I
14 think we certainly agree with the solicitor general
15 that a reasonableness is incorporated into this.

16 We disagree with the test that was
17 articulated in their brief at page 21 where they
18 suggest that the standard must be so high that, if
19 any conceivable reasonable inmate could satisfy the
20 test, that that would be sufficient.

21 We think that is certainly too high a test
22 because if one of a hundred or one of a thousand
23 inmates happens to get it right, that might not mean
24 it's a reasonable system; it just might mean if an
25 inmate is reduced to guesswork, sometimes the

1 inmate's going to guess correctly.

2 JUSTICE BREYER: This is quite important to
3 me, and the solicitor general, I think, has --
4 has -- has made very clear why this is such an
5 important question, not just your client, but I mean
6 in general in the system.

7 The Fourth Circuit copied a full page of
8 what it said was the Second Circuit's special
9 exceptions test, and then it listed it. And the
10 rest of the opinion that you cite really is meant to
11 be an application of that test. What you were
12 talking about is simply the procedure leg of that
13 test.

14 So whatever words I or anyone else write
15 here are going to take on a lot of importance in the
16 prison system. So I'm nervous, as always, when that
17 kind of thing happens. I'm not an expert in it.

18 Now, there are several ways we could go. I
19 mean, it sounds to me, even though I did write, and
20 I think correctly, that there are exceptions, such
21 as for constitutional issues, for example,
22 traditionally there is no exception for the
23 reasonable mistake. I'm not aware of any. And it
24 sounds as if reasonable mistake is put best under
25 the rubric of availability.

1 Now, that's just tentative. But if I'm
2 right in thinking that what we have here is simply
3 a -- an aspect of the availability question, then
4 maybe the thing to do is send it back and argue out
5 all the availability, including this, in the court
6 below rather than us trying to write a standard.

7 Or a second, maybe we adopt the SG
8 standard. Or maybe we adopt your standard. I don't
9 know what rubric we'd put it under. Under the
10 rubric of exception? Under the rubric of
11 availability?

12 Now, that's a general musing-type question,
13 designed to provoke on your part a general response.

14 MR. HUGHES: Well, we certainly think that
15 the outcome here was correct. So that's certainly
16 our starting point. We think the best way to get
17 there, the proper rubric that would apply in this
18 case and all other cases, is an understanding of
19 what "available" properly means.

20 So I -- I would suggest, I think, the
21 statutory text and what "available" fairly -- has
22 been held to mean by this Court in Booth and
23 elsewhere does the work, certainly in this case, and
24 I think in the vast majority of cases.

25 As the Court said in Booth, "available"

1 here means "accessible or capable of use." I don't
2 think anyone would fairly describe a prison
3 administrative remedy as one that's accessible or
4 capable of use.

5 A reasonable prisoner wouldn't know which
6 remedy it is he or she is supposed to use in the
7 circumstances or wouldn't know the proper steps that
8 he or she needs to take in order to avoid procedural
9 default under Woodford standard.

10 The system has to have that -- that minimal
11 degree of clarity for one to actually have been
12 described as available. Certainly Congress retained
13 the word "available" after it amended the PLRA from
14 the prior CRIPA, and "available" must have meaning.
15 Congress certainly didn't say any standard -- or any
16 remedy or all remedies.

17 And, again, I don't think Maryland even
18 disagrees with us on this point because they say at
19 the reply brief at page 5, they agree that if the --
20 if the administrative remedy, in their words, is
21 undecipherable, that would not be one that qualifies
22 as available.

23 So I think there's broad agreement that
24 the -- the prison system can't take the rule book,
25 lock it in a box, not let any inmate understand how

1 it works, and still call that system one that is --
2 is fairly available. So --

3 JUSTICE KAGAN: If I could understand you,
4 though, I mean, one argument that you would have,
5 whether here or below or -- is this notion of the
6 prison system didn't meet this level of clarity,
7 whatever it is.

8 But there's another argument, don't you
9 think -- or do you think -- that you have, which is
10 just, they said to go to the ARP, and the ARB -- the
11 ARP was not in the business of giving this remedy.
12 So we did exactly what we were told to do, and it
13 turns out the remedy is unavailable because it's
14 just not available.

15 MR. HUGHES: I think that's precisely
16 correct. I absolutely agree with that view, that
17 here, in all of the cases that anyone has
18 identified -- and, again, with both our lodging, but
19 also in every case in Petitioner's lodging -- and I
20 just point the Courts to their lodging at page 25,
21 32, 37, 46, 93, 231, and there are others. Every
22 example that anyone has identified, the ARP has
23 always said, "You've come to the wrong place.
24 Because of the IIU is underway, there can be no
25 relief had here." I think that's plainly an

1 unavailable system.

2 As the Court in Booth said for -- in a
3 system, administrative remedy to qualify as
4 available, the administrative officers must have
5 some authority to provide relief in the
6 circumstances.

7 CHIEF JUSTICE ROBERTS: I don't -- I don't
8 mean to beat a dead horse, but the -- the citations
9 you cited, it is true that that's to the lodgings.
10 But I don't have any confidence that these lodgings
11 represent the complete universe to allow me to make
12 a judgment about the procedures under Maryland law,
13 because this wasn't litigated or -- or subject to
14 discovery in the district court or court of appeals.

15 MR. HUGHES: So, your Honor, two things.
16 First, again, we would not disagree if -- if a
17 remand could be appropriate for some of these
18 issues; but, second, I think there is enough that is
19 undisputed in the -- the record currently that --
20 that doesn't even require a look in -- in the hole
21 to the lodgings to find that this was not an
22 available system.

23 To begin with, the IIU exclusivity
24 regulation that we discussed at page 17 of the red
25 brief made quite clear at the time of this incident

1 that the IIU had exclusive authority whenever there
2 was a referral that was made to the IIU at that
3 point and that no other agency could proceed.

4 That, again, has nothing to do with the
5 lodging material and, I think, makes quite clear
6 that the ARP was not the proper place to go.

7 We have the additional briefs, which we
8 think are on somewhat different footing than some of
9 the -- the other agency materials, and we have the
10 2008 directive that did happen after the case but
11 made quite clear that the ARP is simply the not --
12 not the correct place for these cases to go.

13 So I think all of these things, even
14 independent from the lodgings, demonstrate that
15 there was an enormous amount of confusion as to how
16 the system works and is not one that could be
17 described in any sense as available without even --

18 JUSTICE ALITO: You would argue that even
19 if the ARP procedure turns out to have been
20 available as a formal matter, suppose that this --
21 that issue were remanded, and the district court
22 explored it thoroughly and concluded that, although
23 there's a lot of -- there are these materials that
24 might suggest otherwise, as a formal matter, it is
25 available, even when the IIU procedure is going --

1 is going forward. All right?

2 I don't know whether that would happen.
3 Maybe it wouldn't. Assume that that's the case.
4 You would still argue that the procedure was
5 unavailable because, although it was available as a
6 former matter -- a formal matter, it is simply too
7 confusing; right? And no reasonable inmate could
8 take advantage of it.

9 MR. HUGHES: That's right.

10 JUSTICE ALITO: That's a separate
11 agreement?

12 MR. HUGHES: Yes, Your Honor. Yes. So --
13 and --and that is why I --

14 JUSTICE ALITO: As to that argument,
15 your -- your client did not try to use any
16 procedure; isn't that correct?

17 MR. HUGHES: No, Your Honor.

18 JUSTICE ALITO: How was he confused?

19 MR. HUGHES: So on the day of the event --
20 this is at the Joint Appendix, page 229 to 230, he
21 filed a very detailed report of the incident. And
22 he said, at the bottom of -- of page 229 -- this is
23 three and four lines from the bottom -- "I'm asking
24 for a formal internal investigation." The next
25 page, after his signature, "P.S. I will repeat this

1 exact statement under oath at any time you need.

2 Please investigate this incident."

3 He filed this very clear report that
4 described the entire incident. And he asked for the
5 prison to respond. The prison did in fact respond
6 the next day. It instituted the IIU investigation.

7 So I think the question is, after he had
8 taken this clear affirmative step, would someone in
9 these circumstances, a reasonable prisoner, known
10 that he had to do something else? And I think
11 everything that -- that we know shows that a
12 reasonable prisoner wouldn't have understood he had
13 to do anything else beyond the IIU investigation.
14 So, again, I think very clear affirmative steps he
15 took. And the only question is, would he have known
16 he had to go to the ARP process? He wouldn't have
17 known because of the IIU exclusivity regulation. He
18 wouldn't have known because of the practice in
19 Maryland prisons.

20 And even if he had shown up there, we now
21 understand that in all cases, it was dismissed.
22 There was a rubber-stamp that was used to dismiss
23 all of these claims. So for both of those reasons,
24 he wouldn't have known to have gone there; and if he
25 had gotten there, he would have shown up to a place

1 that was going to dismiss --

2 JUSTICE ALITO: He received -- he received
3 materials from the prison saying that that -- the
4 ARP procedure is available in cases of -- of
5 excessive use of force; isn't that right?

6 MR. HUGHES: He did, Your Honor, but none
7 of that material said anything whatsoever about the
8 IIU. The IIU exclusivity regulation, however, was
9 specific, and generally the specific is going to,
10 you know, govern over the general. And so on the
11 one hand, when you have a regulation that says the
12 very specific IIU mechanism is exclusive, all other
13 agencies --

14 JUSTICE ALITO: What did he see that said
15 that the IIU procedure was specific?

16 MR. HUGHES: Well, it -- it was in the --

17 JUSTICE ALITO: I'm sorry. Was exclusive?

18 MR. HUGHES: It was in the -- the
19 regulations that -- again, all of the regulations
20 that Maryland had enacted that would be available to
21 prisoners --

22 JUSTICE ALITO: And he read those?

23 MR. HUGHES: No, Your Honor, I don't think
24 there is direct evidence that he read those, but I
25 think the question is what an objectively reasonable

1 prisoner would have understood. And the only
2 guidance that was specific to the IIU that had
3 anything to do -- that would inform a prisoner, once
4 you're in the IIU channel, what is it that you
5 should be doing at that point, said this was the
6 exclusive mechanism; all other agencies have to
7 relinquish authority. So I think that very tailored
8 guidance would certainly trump the broad policy
9 statements that exist in the other regulations in
10 the Maryland handbook that say nothing whatsoever as
11 to an inmate as to what he should do when the IIU
12 investigates.

13 I should also add that one of the
14 interesting things about this case is the IIU
15 investigations are the investigations where the
16 Maryland prison itself, it initiates them, because
17 it thinks those are the most serious incidents in
18 the prison. That's where Maryland thinks that its
19 own prison officials may have engaged in criminal
20 wrongdoing, and therefore they need to undertake
21 this process. What Maryland has done is -- is
22 created very substantial trips and traps for only
23 the cases that are most likely to correspond to the
24 very worst conduct in Maryland prisons.

25 So I think that's a particularly pernicious

1 aspect of creating the system where you're confused,
2 told to go to the ARP, but then the ARP, in all
3 cases, is going to dismiss your claim, telling you
4 that you've come to absolutely the wrong place.

5 And, again, I think all of the material at
6 this point is -- is totally consistent on the view
7 that this is how the ARP would have worked. It was
8 codified by the 2008 directive that we discussed at
9 the red brief at page 18, and I think there is
10 little question at this point that there was a
11 codification of existing practice that happened in
12 2008, because all of the examples anyone has
13 identified is consistent with the view that the 2008
14 directive served to codify what was --

15 JUSTICE SOTOMAYOR: Where is that in the
16 record?

17 MR. HUGHES: Sorry?

18 JUSTICE SOTOMAYOR: The recent amendment.

19 MR. HUGHES: It's at page 367 of the Joint
20 Appendix.

21 And this is part of the directives.
22 It's -- it's a long directive that provides several
23 different pieces of guidance as to how the ARP
24 procedure works. And at -- towards the bottom of
25 Joint Appendix page 367, it explains: "The warden

1 or institutional coordinator shall issue a final
2 dismissal of a request for procedural reasons when
3 it has been determined that the basis of the
4 complaint is the same basis of an investigation
5 under the authority of the IIU." It provides some
6 additional details, and it says -- it provides the
7 text that now appears on the rubber-stamp, which is,
8 "Your request is dismissed for procedural reasons.
9 Final. The issue is being investigated by IIU.
10 Case Number," blank. "Since this case shall be
11 investigated by IIU, no further action shall be
12 taken within the ARP process."

13 So this is, I think, a quite clear
14 regulation as to how the system now works.

15 I will note that Maryland's view at -- at
16 footnote 9 of their reply brief is that even today,
17 notwithstanding this new directive, their view is
18 the way the system works is a prisoner still has to
19 go to the ARP to properly exhaust their claims in
20 these circumstances, despite the fact that this
21 regulation, I think, is crystal clear that, if you
22 do so, your claim is going to be denied.

23 And you're not told, contrary to the
24 suggestion that you would be -- you would know to
25 appeal, you're not told that you should appeal this

1 dismissal anywhere. There is not a shred of
2 guidance that says, when you have your ARP dismissed
3 because you've told -- been told you have come to
4 the wrong place, the proper thing is just to keep
5 appealing it. You're told that you're -- it's being
6 dismissed because of the IIU investigation. So I
7 think a reasonable prisoner would be quite clearly
8 led to believe that the IIU is, in fact, the only
9 thing that needs to happen in his particular case
10 and would clearly be misled into not actually
11 appealing.

12 So I think it's -- it's much more likely
13 that it's the unreasonable prisoners who disregard
14 the clear guidance that they're getting who continue
15 to appeal in these circumstances.

16 Now, one additional point: The -- Maryland
17 referenced the McCullough case, saying that there is
18 State authority that -- that indicates that the
19 Inmate Grievance Office is the exclusive avenue for
20 these kinds of cases, and it rests on the McCullough
21 case here. I think that argument is misplaced.

22 The McCullough case that they cite was
23 decided in 1989. The internal investigative unit
24 that's at issue here was not established until 1999,
25 a full decade later. So I think the -- the use in

1 the reply brief of the McCullough case to say that
2 the IGO is this broad-based mechanism is not
3 responsive in any event to what happens now with the
4 IIU investigation, because the IIU simply didn't
5 exist at the time that -- that the McCullough case
6 was decided.

7 So I think that our view is quite clear
8 that if Maryland's system in this case were
9 endorsed, that would become a very clear model for
10 what other prisons could enact, this sort of
11 upside-down system, where you're told you have to go
12 to the ARP process to properly exhaust, but once you
13 get there, you're told that you've absolutely come
14 to the wrong place and, despite any guidance, you
15 have to somehow know that you need to appeal,
16 contrary to the instructions that you're being
17 given, in order to properly exhaust your claim.

18 As the Court said in Woodford, to properly
19 exhaust and to avoid procedural default, the
20 prisoner needs to use the steps that the prison
21 properly holds out. Here, the State is doing the
22 very opposite of holding out these steps as
23 available to the prisoners. The State is saying,
24 you've come to the wrong place; you're using the
25 wrong steps. That can't be what I think the Court

1 meant for proper exhaustion as is required by
2 Woodford.

3 I would be pleased to take any more
4 questions that the Court might have.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 The case is submitted.

7 (Whereupon, at 11:57 a.m., the case in the
8 above-entitled matter was submitted.)

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