SOMEONE MUST CARRY THE BURDEN: INTERPRETING THE PRISON LITIGATION REFORM ACT'S EXHAUSTION REQUIREMENT

Abstract: Legislators designed the Prison Litigation Reform Act (PLRA) to decrease the quantity and increase the quality of lawsuits brought by incarcerated individuals. The PLRA requires prisoners to exhaust all available administrative remedies before filing a lawsuit challenging prison conditions in federal court. Federal appellate courts remain split on which party carries the burden of proof when evaluating whether an incarcerated litigant exhausted their available administrative remedies. In 2022, in *Lamb v. Kendrick*, the U.S. Court of Appeals for the Sixth Circuit held the burden of proof falls on prison officials to show that the prisoner's ability to exhaust was not hindered. In doing so, the Sixth Circuit agreed with the Seventh Circuit that when prison officials assert the affirmative defense of failure to exhaust, they carry the burden of proof. The Second, Third, Ninth, Tenth, and Eleventh Circuits apply a different burden-shifting approach. Under this approach, prison officials only bear the initial burden of establishing that a relevant grievance process exists and then the burden shifts to the prisoner to prove factors that made the official procedure unavailable. This Note argues that the Sixth and Seventh Circuits' interpretation of the PLRA's exhaustion requirement is correct as it recognizes the relative positions of the parties and protects prisoners' rights.

INTRODUCTION

Steven Zick was beaten five times and raped while incarcerated at a juvenile prison.[1] He experienced a seizure-like reaction to a beating, and prison personnel did nothing to protect him.[2] Zick did not report the beating to the

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[1] *See* Minix v. Pazera, No. 04 CV 447, 2005 WL 1799538, at *1–2 (N.D. Ind. July 27, 2005) (outlining the five different attacks Zick experienced from 2002–03 while in custody at South Bend Juvenile Facility). The South Bend Juvenile Facility housed 138 boys ages twelve to eighteen. *See* Letter from Bradley J. Scholzman, Acting Assistant Att'y Gen., to Mitch Daniels, Governor of the State of Indiana 2 (Sept. 9, 2005), https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/split_indiana_southbend_juv_findlet_9-9-05.pdf [https://perma.cc/79AP-XZZ6] (describing the operations of the South Bend Juvenile Facility). It was a minimum-security juvenile prison that housed low and medium risk juveniles. *See id.* (explaining which incarcerated individuals were housed at South Bend Juvenile Facility). The facility closed in July 2012. *See* Press Release, Indiana Dep't of Corr., IDOC Announces Closure of South Bend Juvenile Correctional Facility (May 22, 2012), https://jjie.org/wp-content/uploads/2018/04/SBJ_Closure_Media_Release.pdf [https://perma.cc/QA52-RLJZ] (announcing the closure of the South bend Juvenile Facility).

[2] *See Minix*, 2005 WL 1799538, at *1 (describing Zick's reaction to a beating where he began to twitch and foam at the mouth in a seizure-like way).

staff because he feared further harm if he spoke up.[3] Zick knew that prison personnel facilitated beatings of juvenile prisoners, handcuffing teenagers so others could beat them.[4] After being raped, the prison placed Zick on suicide watch.[5] Zick's mother was concerned about his health and safety.[6] She tried to ensure his safety by advocating on his behalf with prison staff all the way up to the Governor's office.[7]

Zick's mother's advocacy did not relieve Zick of his obligation under the Prison Litigation Reform Act (PLRA).[8] The grievance procedure where Zick was housed required juvenile prisoners to file complaints within two days of an incident.[9] Because Zick himself did not pursue the administrative remedies

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[3] *See id.* at *2 (explaining Zick believed that if he reported the beatings to the staff, he would experience more beatings for being "a snitch"); *see also* Letter from Bradley J. Scholzman, *supra* note 1, at 3 (finding the South Bend Juvenile Facility did not protect the minors in its care). The investigation into the South Bend Juvenile Facility found that "there is an unacceptably high rate of youth violence at South Bend. The atmosphere at South Bend is chaotic and dangerous." Letter from Bradley J. Scholzman, *supra* note 1, at 4.

[4] *See Minix*, 2005 WL 1799538, at *2 (describing how prison personnel at South Bend Juvenile Facility assisted teenage inmates with beating each other in a process called "jumping").

[5] *See id.* at *1 (detailing the impact of Zick's beatings and rape on his mental health while incarcerated). Incarceration negatively impacts prisoners' mental health. *See* Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health,* PRISON POL'Y INITIATIVE (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/ [https://perma.cc/9XZE-24QW] (identifying trends among mental health of incarcerated individuals in the U.S. prison system). Suicide rates are disproportionately higher among current and former prisoners. *See generally* Erin Renee Morgan et al., *Incarceration and Subsequent Risk of Suicide: A Statewide Cohort Study*, 52 SUICIDE & LIFE-THREATENING BEHAV. 467 (2022) (analyzing suicide statistics among individuals who previously were or currently are incarcerated). The risk of suicide is 62% greater among current and formerly incarcerated individuals compared to the general population. *See id.* (comparing the risk of suicide within the general population compared to those that have been in prison).

[6] *See Minix*, 2005 WL 1799538, at *2 (describing what steps Minix, Zick's mother and natural guardian, took while Zick was experiencing abuse in prison). Minix reported her son's injuries to the South Bend Juvenile Facility staff. *See id.* (noting Minix observed bruising on Zick's face and upper body during her visits and reported these injuries to staff). Minix contacted two Juvenile Magistrate Judges about her safety concerns after additional beatings. *See id.* (stating Minix contacted St. Joseph Juvenile Justices Peter Nemeth and Jane Miller). One of the Magistrate Justices notified Indiana Governor Frank O'Bannon about concerns regarding the safety of Zick and other juveniles housed at South Bend Juvenile Facility. *See id.* (explaining Magistrate Judge Nemeth wrote to Governor O'Bannon). Minix then arranged a meeting with Superintendent Phil Gibson, but the meeting did not occur. *See id.* (describing that on March 7, 2003, Minix went to meet with Superintendent Gibson, but she was detained at the building and the meeting did not happen).

[7] *See id.* at *4 (noting Minix contacted the Governor of Indiana after she was unable to meet with Superintendent Gibson).

[8] *See id.* at *5 (holding Minix's efforts did not satisfy Zick's obligation under the Prison Litigation Reform Act (PLRA)).

[9] *See id.* at *3 (stating prisoners housed at South Bend Juvenile Facility must file a grievance within two workdays of the event being cited in the grievance).

available to him, the PLRA's exhaustion requirement meant the court had to dismiss his complaint.[10]

Milton Alvarado Benavidez shattered his right femur because of prison personnel's negligence while he was a prisoner.[11] Benavidez did not receive medical attention for several hours, which worsened his injury.[12] After his surgery, Benavidez was wheelchair-bound for two months and did not receive therapy or further medical care.[13] He did not file a grievance directly with the prison.[14] Instead, Benavidez filed a lawsuit against the prison and medical staff involved.[15]

Benavidez did not speak or understand English, yet the prison only had the grievance handbook printed in English.[16] As a result, Benavidez was unable to read and understand the grievance process.[17] The prison's failure to give Benavidez a copy of the handbook in Spanish did not excuse Benavidez's fail-

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[10] *See id.* at *5 (holding Zick did not exhaust the administrative remedies accessible to him because Zick did not file the grievances himself).

[11] *See* Benavidez v. Stansberry, No. 07 CV 03334, 2008 WL 4279559, at *4 (N.D. Ohio Sept. 12, 2008) (explaining how Benavidez fell down a staircase while incarcerated and alleging it was caused by the negligence of prison staff).

[12] *See id.* (describing that Benavidez's access to medical attention was delayed by "a few hours" after his fall, which caused intense pain and resulted in unnecessary complications during his surgery).

[13] *See id.* (alleging that prison medical staff did not provide Benavidez with therapy or care after his surgery, rather, they verbally abused him). Prisoners are supposed to receive the same level of medical care as available to the general population. *See* Ashley Wennerstrom et al., *'You Have to Be Almost Dead Before They Ever Really Work on You in Prison': A Qualitative Study of Formerly Incarcerated Women's Health Care Experiences During Incarceration in Louisiana, U.S.*, 30 HEALTH & SOC. CARE IN CMTY. 1764, 1764 (2022) (citing G.A. Res. 70/175, annex, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Dec. 17, 2015)), https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf [https://perma.cc/4NYR-72QP]). Healthcare access for incarcerated individuals is the state's responsibility, and incarcerated persons should receive the same standard of care as the general population. *Id.* There is a shortage of qualified medical professionals working in prisons. *See id.* (documenting the difficulties the former Louisiana Department of Public Safety & Corrections medical director faced in recruiting and hiring medical professionals). Two out of every three physicians working for Louisiana's prison system have restricted medical licenses for misconduct. *See id.* (finding two thirds of physician employed by Louisiana's prison system have restricted licenses because of physician misconduct including sexual abuse of patients and illegally selling drugs).

[14] *See Benavidez*, 2008 WL 4279559, at *2 (stating that Benavidez did not file any complaints with the prison while he was incarcerated, thus failing to satisfy the PLRA's exhaustion requirement).

[15] *See id.* at *1 (noting that Benavidez filed a complaint against prison staff and medical personnel).

[16] *See id.* at *3 (stating Benavidez did not speak English and the prison staff was aware he only spoke Spanish, but the prison staff did not provide Benavidez with a copy of the handbook in Spanish that contained the procedure for filing prisoner grievances); *see also* Peter Jan Honigsberg, *Linguistic Isolation: A New Human Rights Violation Constituting Torture, and Cruel, Inhuman and Degrading Treatment,* 12 NW. J. INT'L HUM. RTS. 22, 23 (2014) (arguing that isolating prisoners through linguistic barriers may qualify as cruel treatment or torture).

[17] *See Benavidez*, 2008 WL 4279559, at *3–4 (describing that Benavidez did not understand English and that he was only provided an English language handbook).

ure to exhaust available administrative remedies.[18] The court dismissed Benavidez's complaint because of the PLRA's exhaustion requirement, regardless of the merits.[19]

A correctional officer sexually assaulted Jessica Woods twice while she was incarcerated.[20] Four correctional officers reported seeing Woods' perpetrator remove her from her cell, but they did not report the sexual assault.[21] The prison opened an internal investigation into the perpetrator, during which time he continued to work with female prisoners.[22] The investigation revealed that the perpetrator had sexually abused and threatened another female prisoner.[23] The perpetrator voluntarily resigned, and the prison accepted his resignation.[24] Woods participated in interviews conducted as part of the investigation into the perpetrator.[25] Apart from sharing her testimony in those interviews, she did not

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[18] *See id.* at *4 (holding the PLRA's exhaustion requirement does not allow the court to make an exception for language barriers).

[19] *See id.* (holding Benavidez did not to exhaust his administrative remedies because he failed to comply with the grievance procedure outlined in the handbook).

[20] *See* Woods v. York County., 534 F. Supp. 2d 153, 156 (D. Me. 2008) (describing that Woods was a victim of sexual assault by Corrections Officer Pray on August 11, 2004, and again on August 13, 2004).

[21] *See id.* (explaining that four corrections officers on duty at the time of Woods' first assault filed a report against Pray for having a prisoner outside of her cell at a wrong time and for not wearing the full officer uniform).

[22] *See id.* (stating that personnel opened the internal investigation the day after the four reports were filed against Pray by the other corrections officers). A year before Woods' assault, an investigation had investigated Pray for improper conduct with another female prisoner. *See id.* (noting there was a 2003 internal investigation into Pray).

[23] *See id.* at 157 (explaining Corrections Officer Pray sexually assaulted multiple female prisoners during his employment). Male correctional officers are often permitted to watch female prisoners when they dress, shower, and use the bathroom. *See Words from Prison: Sexual Abuse in Prison,* ACLU (June 12, 2006), https://www.aclu.org/other/words-prison-sexual-abuse-prison [https://perma.cc/ASX4-8LDC] (detailing the lived experiences of female incarcerated individuals who experienced sexual assault while incarcerated). Female prisoners report that they are groped and sexually assaulted by male correctional officers while being pat frisked and searched. *See id.* (explaining moments when female prisoners experience heightened vulnerability and abuse by male correctional officers).

[24] *See Woods*, 534 F. Supp. 2d at 157 (noting that prison personnel interviewed Pray on August 27, 2004, as part of the internal investigation into his actions, and at the conclusion of the interview, Pray voluntarily resigned). Male correctional officers often sexually abuse female prisoners with no repercussions. *See Words from Prison: Sexual Abuse in Prison*, *supra* note 23 (describing the lack of punishment male prison guards experience after sexually abusing female prisoners).

[25] *See Woods*, 534 F. Supp. 2d at 157 (detailing the two interviews Woods participated in as part of the internal prison investigation into Pray's conduct). During her first interview, Woods denied sexual interactions with Pray but did report that Pray had removed her from her cell and asked if she wanted a soda. *See id.* (describing Woods' interview on August 18, 2004). After speaking with an attorney, Woods participated in a second interview where she again denied sexual interactions between herself and Pray but did disclose that Pray had requested her to participate in a sexual act in a trade for a cigarette. *See id.* (describing Woods' interview on August 19, 2004, where she elaborated on her interaction with Pray).

submit any grievances.[26] Nevertheless, Woods did file a lawsuit against prison staff and her perpetrator.[27] The court dismissed Woods' lawsuit.[28] The internal prison investigation into the perpetrator of Woods' sexual assault resulted in the discovery of repeated sexual abuse of female prisoners.[29] The PLRA's exhaustion requirement prevented Woods from holding her perpetrator legally accountable for his abuse.[30]

The experiences of Zick, Benavidez, and Woods highlight the current issues facing incarcerated litigants under the PLRA.[31] Under the PLRA's exhaustion requirement, incarcerated individuals cannot file lawsuits challenging any condition of confinement in federal court until they exhaust the administrative remedies available at their prison.[32] This requires incarcerated litigants to comply with every stage and deadline of their prison's inmate grievance process and use every appeal available to them.[33] If the prisoner fails to do this, a court must, in accordance with the PLRA's exhaustion requirement, dismiss

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[26] *Id.* at 157 (explaining that Woods did not submit any inmate grievances despite York County Jail having an inmate reporting process). Woods contended that the investigation in response to the four incident reports and her participation in those interviews would have been the same course of action had she filed an inmate grievance. *See id.* at 158 (detailing Woods' belief that participating in the August 18 and 19, 2004, interviews with an internal investigator and a corrections officers substituted the requirement for her having to file an inmate grievance). Female prisoners are hesitant to report incidents of sexual assault to prison staff. *See Words from Prison: Sexual Abuse in Prison*, *supra* note 23 (explaining the rationale for why many female prisoners do not report sexual assault). The unbalanced power dynamic between female prisoners and prison guards results in prisoners relying on the guards for basic needs, which can be withheld easily by guards. *See id.* (explaining how gender roles coupled with the vulnerability of prisoners exacerbates the imbalance of power within the prison).

[27] *See Woods*, 534 F. Supp. 2d at 157–58 (stating Woods filed a lawsuit claiming breaches of 42 U.S.C. § 1983, negligent oversight, and intentional and negligent infliction of emotional distress).

[28] *See id.* at 162 (granting defendants' motion for summary judgment and dismissing Woods' lawsuit).

[29] *See id.* at 156–57 (stating an internal investigation revealed that Correctional Officer Pray had engaged in sexual abuse of multiple female prisoners).

[30] *See id.* at 158–59 (holding Woods did not satisfy the PLRA's exhaustion requirement when she did not file a written grievance as required by the prison's procedure).

[31] *See* Benavidez v. Stansberry, No. 07 CV 03334, 2008 WL 4279559, at *11 (N.D. Ohio Sept. 12, 2008) (holding the PLRA's exhaustion requirement applied despite of the language barrier and Benavidez's failed to exhaust his available administrative remedies); *Woods,* 534 F. Supp. 2d at 158–59 (holding because Woods did not file a written grievance she did not exhaust the available administrative remedies); Minix v. Pazera, No. 04 CV 447, 2005 WL 1799538, at *4 (N.D. Ind. July 27, 2005) (holding the PLRA's exhaustion requirement applied to Zick and he did not exhaust the available administrative remedies).

[32] *See* 42 U.S.C. § 1997e(a) (containing the PLRA's exhaustion requirement); *see also* Woodford v. Ngo, 548 U.S. 81, 93 (2006) (holding that prisoners must abide by all the prison's procedures before attaining exhaustion under the PLRA).

[33] *See* White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997) (affirming dismissal of a prisoner's lawsuit for failing to appeal denial of grievance within the prison system). Prisoners must use every appeal available. *See* Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001) (holding that PLRA requires that prisoners fully use all the administrative remedies available to them and failure to make use of available remedies results in lawsuits being dismissed).

the prisoner's complaint regardless of its merits.[34] Zick, Benavidez, and Woods were not given the opportunity to be heard on their merits in a court of law because of the PLRA's exhaustion requirement.[35]

When reviewing an affirmative defense of failure to exhaust brought by prison staff in response to an incarcerated plaintiff's lawsuit, a court must decide which party carries the burden of proof.[36] Federal appellate courts have differed on who carries the burden of proof under the PLRA.[37] The majority approach is to view the burden as shifting between the two parties.[38] The defendant must first establish that there was an available administrative remedy, and that the incarcerated plaintiff did not exhaust that available remedy.[39] When the defendant has fulfilled their burden, the burden then shifts to the incarcerated plaintiff to present sufficient evidence demonstrating the administrative process was unavailable to them.[40] Even among the circuits that have

[34] 42 U.S.C. § 1997e(a); *see, e.g.*, *Woodford*, 548 U.S. at 92–93 (finding the PLRA's exhaustion requirement to be similar to the doctrine of exhaustion in administrative law and thus proper exhaustion is a prerequisite for incarcerated litigants to be heard in court).

[35] *See Benavidez*, 2008 WL 4279559, at *11–12 (granting defendants' motion for summary judgment for plaintiff's failure to comply with PLRA's exhaustion requirement); *Woods,* 534 F. Supp. 2d at 159, 162 (same); *Minix*, 2005 WL 1799538, at *7 (same).

[36] *See, e.g.*, Hubbs v. Suffolk Cnty. Sheriff's Dep't, 788 F.3d 54, 59 (2d Cir. 2015) (explaining when a defendant raises the affirmative defense of failure to exhaust that courts must decide which party bears the burden of presenting evidence as the PLRA does not provide guidance). An affirmative defense is a defense in which the defendant introduces evidence, which if found to be credible by the court, will negate the defendant's liability. *See Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019) (providing the legal definitions for various forms of legal defenses, including an affirmative defense).

[37] *Compare* Lamb v. Kendrick, 52 F.4th 286, 295 (6th Cir. 2022) (holding only the defendants carry the burden of proof), Gooch v. Young, 24 F.4th 624, 627 (7th Cir. 2022) (same), Surles v. Andison, 678 F.3d 452, 457 n.10, 458 (6th Cir. 2012) (same), *and* Davis v. Mason, 881 F.3d 982, 985 (7th Cir. 2018) (holding it was not the plaintiff's burden to demonstrate that the prison's complaint process was unavailable), *with Hubbs*, 788 F.3d at 59 (holding defendants bare the initial burden of establishing that a relevant complaint process exists and then the burden shifts to the incarcerated plaintiff to demonstrate that there were factors that made the official procedure unavailable as a matter of fact), Geter v. Baldwin State Prison, 974 F.3d 1348, 1356 (11th Cir. 2020) (same), Rinaldi v. United States, 904 F.3d 257, 268 (3d Cir. 2018) (same), Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014) (same), Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011) (same), *and* Turner v. Burnside, 541 F.3d 1077, 1082–83 (11th Cir. 2008) (same).

[38] *See Hubbs*, 788 F.3d at 59 (adopting a burden-shifting approach where the defendant bears the initial burden of establishing that grievance procedures were in place at the prison and then the burden of proof shifts to the incarcerated plaintiff to prove the procedure was not available); *Geter*, 974 F.3d at 1356 (same); *Rinaldi*, 904 F.3d at 268 (same); *Albino*, 747 F.3d at 1172 (same); *Tuckel*, 660 F.3d at 1254 (same); *Turner*, 541 F.3d at 1082–83 (same).

[39] *See, e.g.*, *Hubbs*, 788 F.3d at 59 (explaining that, when raising the affirmative defense of failure to exhaust, the defendant bears the initial burden of proof).

[40] *See, e.g.*, *Rinaldi*, 904 F.3d at 268 (asserting the burden then shifts to the plaintiff to provide sufficient evidence that demonstrates the grievance procedure was not available because of their factual circumstances).

adopted the majority approach, there is variation regarding what is required for the plaintiff to fulfill their burden.[41]

The minority approach is to view the burden as only resting on the defendants.[42] In this approach, the defendants are not able to shift their burden onto the plaintiff, rather, the defendants alone must demonstrate there was an available administrative remedy and the remedy was fully accessible to the plaintiff.[43] In 2022, in *Lamb v. Kendrick*, the Sixth Circuit reaffirmed its use of the minority approach.[44]

This Note discusses federal appellate courts' different interpretations of which party carries the burden of proof in disputes involving the PLRA's exhaustion requirement.[45] Part I of this Note provides an overview of the PLRA's exhaustion requirement and its involvement in *Lamb*.[46] Part II of this Note examines the interpretations of the PLRA's exhaustion requirement in the U.S. Court of Appeals for the Sixth and Seventh Circuits compared to the burden-shifting interpretation of the Second, Third, Ninth, Tenth, and Eleventh Circuits.[47] Finally, Part III of this Note argues that the Sixth and Seventh Circuits were correct in holding that, if an incarcerated litigant claims they were prevented from exhausting their administrative remedies in accordance with the PLRA, the burden of proof falls on prison officials to show that there was no hindrance to the prisoner's ability to exhaust.[48]

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[41] *Compare Hubbs*, 788 F.3d at 59 (holding the defendants must present legally sufficient sources that demonstrates grievance procedures were in place and then the burden shifts to the plaintiff), *Turner*, 541 F.3d at 1085 (holding the plaintiff must fulfill a two-part test showing both objectively and subjectively that the complaint process was unavailable), *Tuckel*, 660 F.3d at 1254 (same), *and Rinaldi*, 904 F.3d at 268 (same), *with Albino*, 747 F.3d at 1171–72 (holding the exhaustion requirement places a burden first on the defendant and then on the plaintiff in accordance with the exhaustion requirement of the Torture Victim Protection Act).

[42] *See Lamb*, 52 F.4th at 295 (rejecting the burden-shifting approach and holding only the defendants carry the burden of proof); *Gooch*, 24 F.4th at 627 (same).

[43] *See, e.g.*, *Lamb*, 52 F.4th at 295 (explaining defendants are unable to place the burden of proof onto plaintiffs because defendants have an easier ability to produce evidence regarding administrative remedies).

[44] *See id.* (explicitly rejecting the burden-shifting approach and aligning itself with the Seventh Circuit); *see also* Surles v. Andison, 678 F.3d 452, 457 n.10, 458 (6th Cir. 2012) (interpreting the affirmative defense of exhaustion to place the burden on the defendants).

[45] *See Lamb*, 52 F.4th at 295 (holding the defendants carry the burden of proof); *Gooch*, 24 F.4th at 627 (7th Cir. 2022) (same); Davis v. Mason, 881 F.3d 982, 985 (7th Cir. 2018) (holding it was not the plaintiff's burden to prove that the complaint process was unavailable); *Hubbs*, 788 F.3d at 59 (holding defendants bear the initial burden of proving that a relevant complaint process exists and then the burden shifts to the plaintiff to prove that there were factors that made the official procedure unavailable as a matter of fact); *Rinaldi*, 904 F.3d at 268 (same); *Albino*, 747 F.3d at 1171–72 (same); *Tuckel*, 660 F.3d at 1254 (same); Geter v. Baldwin State Prison, 974 F.3d 1348, 1356 (11th Cir. 2020) (same).

[46] *See infra* notes 49–137 and accompanying text.

[47] *See infra* notes 138–229 and accompanying text.

[48] *See infra* notes 230–270 and accompanying text.

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *LAMB V. KENDRICK*

In 2022, in *Lamb v. Kendrick*, the U.S. Court of Appeals for the Sixth Circuit held that under the PLRA, if a prisoner claims they were impeded from exhausting their administrative remedies, the defendants hold the burden of presenting evidence that demonstrates the prisoner's ability to exhaust was not obstructed.[49] Section A of this Part discusses the PLRA and its exhaustion requirement.[50] Section B of this Part presents the factual and procedural history of *Lamb*.[51]

A. An Overview of the PLRA and Its Exhaustion Requirement

1. The Political History of the PLRA

Congress passed the PLRA and President Clinton signed the Act into law in 1996.[52] The PLRA is the outcome of decades of rising political tensions surrounding prisoners' litigation rights.[53] In 1964, in *Cooper v. Pate*, the Court granted state prisoners access to the federal courts by allowing prisoners to file lawsuits when their rights were violated by prison regulations and practices.[54] Following *Cooper*, there was a noticeable increase in litigation brought by incarcerated plaintiffs in federal district courts.[55] In the mid-1990s, the Republi-

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[49] *See* 52 F.4th at 295 (holding that in situations where a prisoner argues they were impeded from exhausting their administrative remedies, a requirement under the PLRA, prison officials shoulder the burden of proving the prisoner was not impeded from exhausting remedies).

[50] *See infra* notes 52–98 and accompanying text.

[51] *See infra* notes 99–137 and accompanying text.

[52] *See* BERNARD D. REAMS & WILLIAM H. MANZ, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, Pub. L. No. 104-134, 110 Stat. 1321, at vii (1997) (providing a timeline of the legislative history surrounding the PLRA). Senator Orrin Hatch was a co-sponsor of the PLRA, and he believed "prisons are not intended to be pleasant places and it had become clear that the Federal courts had gone too far in exercising their equitable remedial powers to micromanage our Nation's prisons at the expense of the proper roles of the democratic branches and of the States." *The Role of the U.S. Department of Justice in Implementing the Prison Litigation Reform Act: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1996) (statement of Senator Orrin Hatch). *But see id.* at 4 (statement of Senator Edward M. Kennedy) ("[M]y Republican colleagues should look in the mirror. They have only themselves to blame. They passed a bad bill . . . . The Prison Litigation Reform Act was a mistake.").

[53] *See* Peter Hobart, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981, 982 (1999) (explaining the number of lawsuits filed by incarcerated individuals grew from 6,600 in 1975 to 39,000 in 1994, which Congress responded to by passing the PLRA).

[54] *See* 378 U.S. 546, 546 (1964) (reversing the Court's previous restriction on state prisoners' legal remedies and henceforth allowing state prisoners to make use of the federal judicial process).

[55] *See* Brian J. Ostrom, Roger A. Hanson & Fred L. Cheesman, *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1530 (2003) (documenting that the number of prisoner litigation grew from 218 lawsuits filed in 1966 to 2,500 in 1969 and did not decrease through 1995).

can party campaigned to gain control of the House of Representatives by presenting a "Contract with America" that supported the Taking Back Our Streets Act.[56] The Taking Back Our Streets Act intended to decrease the number of lawsuits filed by incarcerated individuals.[57] The PLRA followed the Taking Back Our Streets Act and was an even more rigorous bill by Republican lawmakers to reduce prisoners' access to district courts.[58] There was limited opposition to the PLRA among Democrats.[59] Congressional Republicans passed the PLRA as part of a bargain where they agreed to end a budget dispute that had caused a government shutdown.[60]

The PLRA is subject to much criticism.[61] Critics believe the Act creates barriers to accessing justice for incarcerated individuals.[62] For example, opponents accuse the PLRA of allowing sexual abuse against incarcerated individuals to occur without consequences.[63] Others also allege that the Act violates

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[56] *See* MARGO SCHLANGER, SHEILA BEDI, DAVID M. SHAPIRO & LYNN S. BRANHAM, INCARCERATION AND THE LAW: CASES AND MATERIALS 747 (10th ed. 2020) (detailing the Republican effort led by Rep. Newt Gingrich and Rep. Dick Armey to have the Republican party regain control of the House of Representatives).

[57] *See id.* (describing the relevance of the Taking Back Our Streets Act in relation to the PLRA by identifying the shared goal of reducing the number of lawsuits filed by incarcerated individuals).

[58] *See id.* (comparing the PLRA to the Taking Back Our Streets Act and describing the PLRA as being even more aggressive in restrictions); *see also* 141 CONG. REC. 26448–49 (1995) (statement of Sen. Spencer Abraham) (describing the PLRA as necessary for reestablishing the American people's confidence in the government's ability keep the public safe). The PLRA aimed to restore normalcy to the U.S. prison systems by reducing the number of inconsequential lawsuits brought by prisoners. *See* 141 CONG. REC. 26449 (1995) (statement of Sen. Spencer Abraham) (outlining the Republican lawmaker's key talking points in favor of the PLRA).

[59] *See* SCHLANGER ET AL., *supra* note 56, at 747 (characterizing Democrats' response to the PLRA as modest).

[60] *See id.* (explaining how Republicans managed to gain sufficient Democratic support to pass the PLRA through Congress in exchange for ending the ongoing budget dispute).

[61] *See* Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/K2CQ-KWB5] (providing an overview of the variety of arguments made against the PLRA).

[62] *See id.* (providing quantitative data that suggests the PLRA's exhaustion requirement, three strikes rule, and physical injury requirement are preventing incarcerated plaintiffs from accessing resolutions through the judicial system); HUM. RTS. WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 3 (2009), https://www.hrw.org/reports/us0609web.pdf [https://perma.cc/4F35-BYHZ] (documenting that the number of legal complaints by incarcerated individuals decreased sixty percent from 1995 to 2006). If the PLRA were removing meritless complaints as promised by the bill's supporters, incarcerated individuals should be winning a greater percentage of lawsuits. *See* HUM. RTS. WATCH, *supra*, at 3 (explaining that the PLRA's advocates believed the PLRA would remove frivolous prisoner lawsuits, allowing those with merits to proceed and seek recourse). Incarcerated plaintiffs are winning fewer lawsuits after the passage of the PLRA than they were prior to its passing. *See id.* (documenting that incarcerated litigants are having less success in their lawsuits after 1996 than prior).

[63] *See* HUM. RTS. WATCH, *supra* note 62, at 18–19 (contending the exhaustion requirement is preventing incarcerated individuals who have been raped in prison from seeking a resolution).

international human rights.[64] Consequently, some lawmakers recently proposed a resolution to repeal the PLRA.[65]

2. The PLRA's Exhaustion Requirement

Congress enacted the PLRA to reduce the volume and increase the quality of lawsuits brought by prisoners in federal district courts.[66] To reduce federal court involvement in prison management, the PLRA contains numerous requirements that a prisoner must comply with prior to filing a complaint in court.[67] A prisoner challenging their conditions of confinement under the PLRA

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[64] *See id.* at 37 (explaining that the International Covenant on Civil and Political Rights, a human rights treaty, states that all people are to be equal before a court, a principle which the PLRA directly violates by restricting only prisoners' access to courts).

[65] *See* H.R. Res. 702, 117th Cong. 17 (2021) (advocating to repeal the PLRA to restore agency to prisoners). Representative Ayanna Pressley brought forward this resolution. *Id.*; *see also* Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. 1145, 1192–97 (2023) (discussing the benefits of repealing the PLRA's exhaustion requirement and the current advocacy by scholars calling for a complete elimination of the exhaustion requirement and stating that an amendment would not be sufficient).

[66] *See* Porter v. Nussle, 534 U.S. 516, 524–25 (2002) (explaining that Congress enacted the PLRA's exhaustion requirement to decrease the number of prisoner complaints in the court system and increase the quality of those filed). *But see* Fenster & Schlanger, *supra* note 61 (providing data that show despite Congress's argument that lawsuits by prisoners were inundating the federal courts, when the PLRA passed in 1996 the frequency of prison lawsuits was on the decline, having been at the highest in the late 1970s).

[67] *See Porter*, 534 U.S. at 524–25 (explaining the PLRA was designed to allow prison officials increased "time and opportunity" to respond to complaints prior to court involvement). The PLRA includes more than just the exhaustion requirement. *See, e.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1627–33 (2003) (summarizing all the changes the PLRA established from filing fees to telephonic hearings). An in-depth discussion of these elements is beyond the scope of this Note; nevertheless, it's worth acknowledging the other elements. *See id.* (describing the numerous elements set forth in the PLRA). The PLRA requires that prisoners pay court fees in full. *See* 28 U.S.C. § 1915(b) (noting the PLRA regulation that requires incarcerated individuals to pay the entire court fee). If a prisoner is unable to pay the entire fee upfront, they may pay the fee in installments over time. *Id.* The PLRA asserts that court filing fees will not be waived for incarcerated individuals. *Id.* The PLRA also contains a three-strikes provision. *See id.* § 1915(g) (providing the PLRA regulation that established the three-strikes provision for prisoners filing lawsuits in federal courts). Under this provision, each incarcerated individual is only entitled to three strikes before they are no longer allowed to file lawsuits in court without paying the entire fee upfront. *Id.* A prisoner gets a strike when their lawsuit or appeal is dismissed by a judge because it is frivolous, malicious, or does not state a claim. *Id.* Lawsuits that are dismissed for failing to comply with the PLRA's exhaustion requirement count as a strike. *Id.*; *see also* ACLU, *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf [https://perma.cc/4LMP-GQZY] (providing a comprehensive overview of the impact the of PLRA's three-strike provision). Additionally, the PLRA does not allow prisoners to file lawsuits for emotional or mental injury unless there is also an accompanying physical injury. *See* 42 U.S.C. § 1997e(e) (providing the PLRA's requirement of a physical injury being present to file suit in federal court). The physical injury requirement only applies to lawsuits seeking money damages. *Id.*

cannot bring a lawsuit "until such administrative remedies as are available are exhausted," which is known as the PLRA's exhaustion requirement.[68]

In 2006, in *Woodford v. Ngo*, the Court clarified the conditions and justifications for the PLRA's exhaustion requirement.[69] Exhaustion requires following all of the prison's grievance process's deadlines.[70] Additionally, incarcerated prisoners must adhere to all procedural rules of the administrative remedies.[71] The Court provided two justifications for the exhaustion requirement.[72] First, it protects the prison's authority.[73] Requiring incarcerated individuals to meet all of the prison's deadlines and requirements discourages prisoners from ignoring the administrative remedies in place.[74] This ensures prisons have the opportunity to address complaints directly before being brought into court.[75] Second, the exhaustion requirement is efficient.[76] Prisons are able to address complaints faster if incarcerated individuals inform the staff through the grievance procedure rather than through a lawsuit.[77] Economic efficiency is pro-

[68] 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted."). Prison conditions include claims of excessive force. *See* Freeman v. Francis, 196 F.3d 641, 644 (6th Cir. 1999) (holding "prison conditions" within the PLRA's exhaustion requirement encompass allegations of excessive force).

[69] *See* 548 U.S. 81, 89–91 (2006) (outlining that plaintiffs must comply with all deadlines and policies to satisfy exhaustion to protect the authority of prisons and promote efficiency).

[70] *See* Surles v. Andison, 678 F.3d 452, 455 (6th Cir. 2012) (interpreting *Woodford*, 548 U.S. at 90–91) (asserting a necessary element of exhaustion is complying with all the grievance procedure's deadlines).

[71] *See* Rinaldi v. United States, 904 F.3d 257, 271 (3d Cir. 2018) (interpreting *Woodford*, 548 U.S. at 90–91) (explaining that prisoners must pursue all the stages of the prison's grievance procedure in accordance with the regulations).

[72] *See Woodford*, 548 U.S. at 89–90 (outlining the two policy justifications supporting the Court's interpretation of the exhaustion requirement as being mandatory for incarcerated plaintiffs).

[73] *See id.* (asserting that allowing the prison to directly manage complaints by the incarcerated individuals housed in its facility protects the prison and its staff member's authority over matters that occur under its supervision).

[74] *See id.* (explaining the influence of the PLRA's exhaustion requirement on shaping incarcerated individual's handling of grievances).

[75] *See id.* (promoting that prisons having the opportunity to address complaints before they are escalated to a court is beneficial). Yet many prisons are not responsive to complaints and incarcerated individuals have experienced physical injury and emotional distress because they were required to notify prison officials of their grievances before notifying a court. *See, e.g.*, *Rinaldi*, 904 F.3d at 262 (describing how the plaintiff filed a complaint with prison staff notifying them that his first cellmate assaulted him and prison staff responded by transferring the plaintiff to a new cell with a new cellmate, knowing the new cellmate was going to attempt to kill the plaintiff); Tuckel v. Grover, 660 F.3d 1249, 1251 (10th Cir. 2011) (showing the plaintiff was the target of an attack by other prisoners at the direction of prison staff because the plaintiff had filed a complaint with the prison staff).

[76] *See Woodford*, 548 U.S. at 89 (claiming the exhaustion requirement is economically efficient and allows for recourse to occur faster than through litigation).

[77] *See id.* (asserting that the prison grievance process is faster than litigation).

moted by having prisons directly handle grievances and avoid litigation.[78] Moreover, the exhaustion requirement results in clear documentation of grievances, which better facilitates any future litigation.[79]

The exhaustion requirement as defined by the Court in *Woodford* prioritizes the prison's autonomy.[80] The Court believed incarcerated individuals did not want to use the grievance procedures available to them in the prisons.[81] The exhaustion requirement was therefore interpretated in *Woodford* to incentivize incarcerated individuals to use the grievance procedures.[82] This gives prisons the opportunity to resolve grievances without court interference.[83]

Under the PLRA, an administrative remedy is available if it can afford any form of relief or respond in any way to a complaint.[84] The only exception to the PLRA's exhaustion requirement is that a prisoner needs only to exhaust *available* administrative remedies.[85] Exhaustion is achieved by a prisoner when the

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[78] *See id.* (finding that prisons save money from handling complaints within their own systems rather than having to engage in litigation).

[79] *See id.* (asserting the exhaustion requirement results in better documentation of prisoner complaints). *But see* Brief of Appellant at 9, Turner v. Burnside, 541 F.3d 1077 (11th Cir. 2008) (No. 07-14791-D) (stating the plaintiff filed a complaint in accordance with the prison's policies but the grievance was ripped to pieces by the prison staff before the plaintiff, and the plaintiff was instructed not to file any additional grievances or lawsuits).

[80] *See Woodford*, 548 U.S. at 90 (explaining that the exhaustion requirement assists the prison's ability to have a fair chance at handling their own matters).

[81] *See id.* (speculating that prisoners do not want to use the administrative remedies available to them). Incarcerated individuals may not be able to understand the grievance procedures. *See, e.g.*, Benavidez v. Stansberry, No. 07 CV 03334, 2008 WL 4279559, at *3, *4 (N.D. Ohio Sept. 12, 2008) (stating the prison staff was aware that the plaintiff did not speak English, yet the staff gave the handbook containing instructions for the prison's grievance procedure to the plaintiff only in English). Incarcerated individuals may face physical harm and intimidation from prison staff if the prisoner were to use the grievance procedure. *See, e.g.*, Minix v. Pazera, No. 04 CV 447, 2005 WL 1799538, at *1 (N.D. Ind. July 27, 2005) (explaining that the plaintiff did not file a complaint because he was aware that some of the prison staff were known to assist attacks on prisoners by handcuffing prisoners so other incarcerated individuals could beat up the prisoner).

[82] *See Woodford*, 548 U.S. at 90 (holding an incarcerated individual must exhaust all available administrative remedies before being able to proceed with a lawsuit).

[83] *See id.* (explaining the exhaustion requirement scales back court involvement in prison matters by allowing prison officials to be notified directly of prisoner grievances and therefore given the chance to respond without engaging in a formal litigation process).

[84] *See* COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER'S MANUAL 375, 386 (12th ed. 2020) (citing Booth v. Churner, 532 U.S. 731, 736 (2001)) (explaining what it means in the context of the PLRA's exhaustion requirement for a remedy to be available). The relief provided does not need to be the relief desired by the prisoner. *See id.* (explaining what forms of remedies incarcerated individuals may or may not receive).

[85] *See* Ross v. Blake, 578 U.S. 632, 648 (2016) (holding the one exception to the PLRA's exhaustion requirement is when administrative remedies are not available). The basis for this exception is found in the PLRA's own text, stating "until such administrative remedies as are *available* are exhausted." 42 U.S.C. § 1997e(a) (emphasis added); *see Ross*, 578 U.S. at 648 (asserting that basis for the exception is found in the PLRA's text itself when stating "available"). There are three situations that the Supreme Court identified as instances when a prisoner is not bound to the PLRA's exhaustion requirement due to no administrative remedies being available. *See Ross*, 578 U.S. at 643–44 (provid-

incarcerated individual has complied with all the prison's deadlines and procedural rules.[86] This requires prisoners to take their complaint through the entirety of the applicable internal complaint process, using every appeal available.[87] There is no uniform federal exhaustion standard.[88] Rather, each correctional institution has its own procedural rules that a prisoner must comply with.[89]

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ing the three situations where exhaustion is not required for an incarcerated individual). The first situation is when, regardless of what the regulations and guidance say, the prisoner faces a "dead end" as prison staff is unable or unwilling to give any relief to the prisoner. *See id.* at 643 (holding exhaustion is not required when sufficient evidence is presented that the complaint procedure resulted in a dead end). The second situation is when the administrative process is so confusing that no reasonable incarcerated individual could understand the procedure and navigate the system. *See id.* at 643–44 (holding exhaustion is not required when sufficient evidence is presented that demonstrates the complaint process was so confusing that no ordinary prisoner could comprehend it); *see also* Katrina M. Smith, *We're Tired: The Exhaustion Requirement of the Prison Litigation Reform Act*, 6 UCLA CRIM. JUST. L. REV. 1, 10 (2022) (explaining the PLRA's standard of what an "ordinary" inmate can comprehend does not accommodate for inmates who have mental disabilities and reduced mental capacities, which make up 20% of the prison population). The final situation is when prisoners are thwarted from pursuing a grievance process because prison officials have engaged in intimidation or misrepresentation. *See Ross*, 578 U.S. at 644 (holding if prison staff members attempted to thwart a prisoner from accessing the grievance procedure, then exhaustion is not required from the prisoner).

[86] *See Woodford*, 548 U.S. at 90–91 (holding prisoners must abide by all the prison's procedures before attaining exhaustion). Multiple circuits constructed a "special circumstances exception" to the PLRA exhaustion requirement that allowed prisoners to circumvent the exhaustion requirement and progress with their lawsuits in situations of extreme abuse by prison officials. *See* Smith, *supra* note 85, at 6 (first citing Giano v. Goord, 380 F.3d 670, 675 (2d Cir. 2004), *abrogated by Ross*, 578 U.S. 632; and then citing Blake v. Ross, 787 F.3d 693, 698 (4th Cir. 2015), *vacated by Ross*, 578 U.S. 632) (determining there are context-specific exceptions to the exhaustion requirement). In 2016, the Supreme Court shut down the special circumstances exception in *Ross v. Blake* on the basis that it was judge-created law. *See Ross*, 578 U.S. at 641–42 (holding the PLRA does not allow for any unique circumstances exceptions).

[87] *See* White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997) (affirming dismissal of a prisoner's lawsuit for failure to appeal the denial of his complaint within the prison system); *see also* Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001) (holding that the PLRA requires prisoners to use all available administrative remedies and failure to do so results in lawsuits being dismissed).

[88] *See* Jones v. Block, 549 U.S. 199, 218 (2007) (clarifying the PLRA does not set forth a universal standard for exhausting prison complaint processes).

[89] *See id.* (explaining that every prison has its own procedure that the incarcerated individual must follow and exhaustion will be evaluated in light of the individual prison's standard); *see also* COLUM. HUM. RTS. L. REV., *supra* note 84, at 379 (explaining to pro se prisoners how to comply with the PLRA's exhaustion requirement and instructing them to follow the grievance procedure as set out by their own institution). The Federal Rules of Civil Procedure apply to the PLRA's exhaustion requirement. *See* COLUM. HUM. RTS. L. REV., *supra* note 84, at 379 (citing *Jones*, 549 U.S. at 210–12) (describing the relationship between the Federal Rules of Civil Procedure and the PLRA). Thus, a prisoner has the right to amend their complaints throughout the litigation process. *See id.* (citing FED. R. CIV. P. 15(a)) (instructing that incarcerated individual may make changes to their complaints in accordance with the Federal Rules of Civil Procedure). This allows prisoners to add additional grievances to their already filed initial complaint if they have exhausted all available administrative remedies applicable to all the grievances included. *Id.*

An incarcerated individual must comply with the PLRA and exhaust all administrative remedies available before filing a lawsuit in court.[90] If they fail to exhaust all available administrative remedies, their case will be dismissed.[91] Once a lawsuit has been filed in federal court by an incarcerated litigant, it is common for the defendants to assert the affirmative defense of PLRA exhaustion.[92] This is done by filing a motion for summary judgment asserting that the plaintiff failed to exhaust their available administrative remedies prior to filing the lawsuit and thus fails to meet the PLRA's exhaustion requirement.[93]

In 2007, in *Jones v. Bock*, the Court held that exhaustion under the PLRA is an affirmative defense that must be plead and proved by a defendant.[94] The PLRA's exhaustion requirement does not support deviating from the Federal Rules of Civil Procedure regarding affirmative defenses.[95] Yet PLRA requirements often mean that courts have to screen incarcerated plaintiffs' lawsuits early in the process.[96] Courts have exercised significant discretion in creating

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[90] 42 U.S.C. § 1997e(a). The four most common allegations in prison condition federal lawsuits are "physical assaults . . . , inadequate medical care, alleged due process violations relating to disciplinary sanction, and more general living-condition claims (relating, for example, to nutrition or sanitation)." *See* Schlanger, *supra* note 67, at 1571 (identifying trends in federal litigation filed by prisoners).

[91] 42 U.S.C. § 1997e(a); *see also* COLUM. HUM. RTS. L. REV., *supra* note 84, at 376 (explaining the legal consequences for prisoners who do not exhaust their administrative remedies).

[92] *See, e.g.*, Lamb v. Reece, No. 20-cv-00265, 2021 WL 1200088, at *1 (S.D. Ohio Feb. 23, 2021) (explaining defendants filed motion for summary judgment prior to discovery on the grounds that plaintiff Lamb did not exhaust the administrative remedies under Ohio's prison grievance procedure), *rev'd*, Lamb v. Kendrick, 52 F.4th 286 (6th Cir. 2022).

[93] *See id.* at *1, *3 (outlining the defendants' claim that plaintiff did not complete all three steps of the relevant procedure and therefore his initial grievance complaint did not exhaust available remedies and should be dismissed under the PLRA). If an indigent prisoner's lawsuit is dismissed for lack of exhaustion of administrative remedies, it will count as a strike under § 1915(g) of the PLRA. 28 U.S.C. § 1915(g); *see also* Samuel B. Reilly, *Where Is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act's "Three Strikes" Rule,* 70 EMORY L.J. 755, 755 (2021) (explaining the impact of the PLRA's three-strike rule on indigent prisoners). The three-strikes rule is an element of the PLRA that prohibits incarcerated litigants from filing any complaints *in forma pauperis*, meaning without full prepayment of fees. Reilly, *supra*, at 755. This occurs if three or more of the prisoner's prior lawsuits were dismissed by a court as frivolous, malicious, or for failure to state a claim. *See id.* at 757 (describing how a prisoner acquires three strikes under 28 U.S.C. § 1915(g)). If a prisoner acquired three strikes, they are no longer allowed to file lawsuits, except if they are at imminent risk of serious bodily harm, or if they are able to fully pay the fees associated with filing a lawsuit. *See id.* at 758 (pointing out the consequences of 28 U.S.C. § 1915(g) on indigent prisoners' access to the courts). The three-strikes rule drastically decreased indigent prisoners' access to the judiciary. *See id.* at 757 (observing the consequences of 28 U.S.C. § 1915(g) on prison litigation).

[94] *See Jones*, 549 U.S. at 216 (categorizing a defendant's claim of plaintiff's failure to exhaust administrative remedies as an affirmative defense).

[95] *See id.* at 212 (instructing courts to prioritize the Federal Rules of Civil Procedure even when faced with policy considerations); *see also* Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999) (citing King v. Cooke, 26 F.3d 720, 724 (7th Cir. 1994)) (categorizing the affirmative defense of failure to exhaust remedies as an affirmative defense that is consistent with FED. R. CIV. P. 8(c)).

[96] *See Jones*, 549 U.S. at 202 (explaining the mandate contained in the PLRA that requires the judicial system to consider the issue of failure to exhaust early in the litigation).

exhaustion requirements that conform with *Jones*.[97] The U.S. Courts of Appeals remain split on the issue of which party carries the burden of proof when evaluating whether an incarcerated litigant exhausted their available administrative remedies.[98]

B. Factual History of Lamb v. Kenrick

On April 6, 2018, Toby Lamb argued with a correctional officer while in his prison cell.[99] Shortly after this altercation, six correctional officers handcuffed Lamb and removed him from his cell, bringing him into a secluded area.[100] The correctional officers knew that this area was not viewable on surveillance cameras.[101] The six correctional officers forced Lamb onto the ground while he remained handcuffed.[102] The officers proceeded to kick and punch Lamb's face and body.[103] They sprayed Lamb with pepper spray and struck his head with a solid object.[104] During this beating, a correctional officer stated a racial slur against Lamb.[105] Following this incident, Lamb received medical treatment.[106] Lamb's eyes were swollen closed and his facial injuries prevented him from being able to consume solid food.[107]

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[97] *See* Albino v. Baca, 747 F.3d 1162, 1170 (9th Cir. 2014) (explaining that courts interpreted the exhaustion requirement of the PLRA in a variety of manners).

[98] *Compare* Gooch v. Young, 24 F.4th 624, 627 (7th Cir. 2022) (holding that, under the PLRA, failure to exhaust administrative remedies qualifies as an affirmative defense which requires the defendants to bear the burden of proof), *and* Surles v. Andison, 678 F.3d 452, 457–58 (6th Cir. 2012) (holding defendants must provide evidence that demonstrates the plaintiff did not encounter any impediments to their capacity to exhaust administrative remedies), *with* Hubbs v. Suffolk Cnty. Sheriff's Dep't, 788 F.3d 54, 59 (2d Cir. 2015) (holding there is a burden-shifting approach where defendants bear the initial burden of proving there is a relevant grievance procedure and then the burden shifts to the plaintiff who must provide sufficient evidence showing the unavailability of those grievance procedures).

[99] *See* Complaint ¶ 1, Lamb v. Reece, No. 20-cv-00265, 2021 WL 1192892 (S.D. Ohio March 30, 2021) (alleging the series of events that occurred on April 6, 2018, against the plaintiff while he was incarcerated at Warren Correctional Institution in Ohio).

[100] *Id.* ¶¶ 1, 2.

[101] *See* Lamb v. Reece, No. 20-cv-00265, 2021 WL 1200088, at *1 (S.D. Ohio Feb. 23, 2021) (describing the defendants' actions on April 6, 2018), *rev'd*, Lamb v. Kendrick, 52 F.4th 286 (6th Cir. 2022).

[102] *See* Complaint, *supra* note 99, ¶¶ 16, 18 (detailing the state of the plaintiff).

[103] *See id.* ¶ 16 (explaining what actions the defendants took toward Lamb).

[104] *See id.* (describing what objects were used to injure Lamb).

[105] *See Reece*, 2021 WL 1200088, at *1 (citing Complaint, *supra* note 99, ¶ 17) (quoting the racial insult used against Lamb by a correctional officer during the attack as "I got your black ass").

[106] *See* Complaint, *supra* note 99, ¶ 25 (explaining that prison staff took Lamb to the prison infirmary after the attack for scans and treatment).

[107] *See id.* ¶¶ 25–27 (providing photos and a description of the physical condition the plaintiff was in when arriving at the prison's infirmary following the attack).

On April 9, 2018, Lamb filed an informal complaint resolution (ICR) to report the April 6th attack against him.[108] Lamb did not get a response to his April 9, 2018, ICR until March 2020.[109] Lamb filed an additional ICR later in April 2018 to record that force was exercised against him for no reason.[110] Lamb filed a third ICR regarding the April 2018 incident in November 2018, to which he never obtained a reply.[111] Lamb proceeded to file a civil rights action under 42 U.S.C. § 1983 in federal court.[112]

Lamb's lawsuit brought two claims for relief against prison staff.[113] The first was a claim of cruel and unusual punishment and use of excessive force by the six correctional officers that attacked Lamb while he remained hand-

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[108] *See Reece*, 2021 WL 1200088, at *3 (explaining an ICR is the first step of the prison's grievance procedure and Lamb filed an ICR with the prison on April 9, 2018). Lamb's ICR stated that the prison shift supervisor lied when stating that he refused to provide a "use of force" statement. *See id.* (recounting the plaintiff's April 9, 2018, written grievance.) Lamb stated in his complaint that the nurse who treated him could corroborate his recollection that he did not refuse to give a statement. *Id.* Lamb stated his vision was severely impaired after being beaten and pepper sprayed. *Id.*

[109] *See* Lamb v. Kendrick, 52 F.4th 286, 290 (6th Cir. 2022) (detailing the timeline of events from when the plaintiff filed the ICR to when he received a reply in March 2020). The day after the beating, Lamb was transferred to restrictive housing. *See Reece*, 2021 WL 1200088, at *3 (citing Complaint, *supra* note 99, ¶¶ 7–8) (explaining staff moved Lamb from the Warren Correctional Institution to the Lebanon Correction Institution and placed him in segregation "as a 'level 5' security prisoner"). The prison officials responded to Lamb's complaint via the JPay system on April 17, 2018, instructing him that he would have the opportunity to provide a statement during the use of force investigation. *See Lamb*, 52 F.4th at 290 (describing the prison officials' response to Lamb via the prison's internal computer system). Lamb did not receive this reply until March 2020 because he was unable to access the JPay system when living in restrictive housing at Lebanon Correction Institution. *See id.* (detailing Lamb's assertions that he did not have the ability to receive the response to his complaint for two years).

[110] *See Reece*, 2021 WL 1200088, at *3 (explaining Lamb's contention that he filed a second complaint within his prison's grievance procedure). The defendants contend that they never received Lamb's second ICR and that there is no record of the second complaint. *See Lamb*, 52 F.4th at 291 (describing prison officials' response to Lamb's assertion of the second ICR he filed). Lamb never received a response to his second complaint. *See Reece*, 2021 WL 1200088, at *3 (detailing the order of events regarding the plaintiff's filed grievances). In November 2018, Lamb asserted that he escalated his complaint about the events of April 6, 2018, by mailing an appeal to the Chief Inspector of the Ohio Department of Rehabilitation. *See Lamb*, 52 F.4th at 290 (explaining Lamb's recollection of events and his claim that he escalated his complaint).

[111] *See Lamb*, 52 F.4th. at 290 (elaborating on Lamb's third ICR filed). In Lamb's third ICR, he stated that prison staff beat him while he was restrained and inquired into the status of his previous complaint (to which he had never gotten a response). *Id.* The defendants uphold they never received Lamb's third ICR. *See id.* (explaining that Inspector Mahlman declared in his affidavit that the prison did not receive this correspondence).

[112] Complaint, *supra* note 99, ¶¶ 1–57. Section 1983 grants an individual the right to sue state government employees and others acting under color of state law for civil rights violations. 42 U.S.C. § 1983.

[113] Complaint, *supra* note 99, ¶¶ 36–52. Lamb's complaint originally included a third claim for relief, which was a state law claim for negligence. *See id.* ¶¶ 53–57 (describing the third claim for relief for willful, wanton, and reckless conduct by the defendants). Lamb withdrew his third claim for relief after filing the complaint. *See Reece*, 2021 WL 1200088, at *1 n.1 (stating that plaintiff withdrew his third claim for relief voluntarily).

cuffed.[114] The second was a claim for supervisory liability against Lieutenant Brant Kendrick.[115] Lamb alleged that Kendrick remained indifferent to the conduct of the other five correctional officers' actions while in his supervisory role.[116] Before discovery began, the defendants moved for summary judgment by raising the affirmative defense of PLRA exhaustion.[117] Defendants supported their motion by filing three declarations from prison officials.[118] Prison officials alleged that prison staff responded to Lamb's April 9, 2018, ICR on April 17, 2018.[119] The declaration also stated that there were no records of Lamb filing any additional complaints or appeals.[120] The additional declarations claimed that the grievance procedure was available to every prisoner regardless of their institution and housing situation.[121] Thus, the defendants argued that Lamb did not exhaust the prison's available grievance process before filing his lawsuit in federal court and that his suit must be dismissed in accordance with the PLRA's exhaustion requirement.[122]

On February 21, 2021, a Magistrate Judge issued a Report and Recommendation (R&R) suggesting that the defendants' motion for summary judg-

[114] *See* Complaint, *supra* note 99, ¶¶ 36–46 (detailing plaintiff's first claim for relief under 42 U.S.C. § 1983 against defendants Reece, Crowder, Carey, Maxwell, Hensley, and Kendrick).

[115] *See id.* ¶¶ 47–52 (detailing plaintiff's second claim for relief under 42 U.S.C. § 1983 against defendant Kendrick). Defendant Lieutenant Brant Kendrick was acting as an appointed lieutenant correctional officer, working for the Ohio Department of Rehabilitation and Correction, on April 6, 2018, when he participated in the attack on Lamb. *Id.*; *see also Lamb*, 52 F.4th at 290 (explaining Defendant Kendrick's position within the Ohio prison system at the time of Lamb's attack).

[116] *See Lamb*, 52 F.4th at 290 (summarizing the two claims for relief that Lamb brought against the correctional officers for the attack against him on April 6, 2018).

[117] *See Reece*, 2021 WL 1200088, at *1 (explaining the defendants moved for summary judgment, claiming Lamb failed to exhaust his administrative remedies under the PLRA prior to filing his § 1983 lawsuit in federal court).

[118] *See Lamb*, 52 F.4th at 291 (explaining that three declarations were filed by the defendants: one from Chief Inspector Antonio Lee, one from correctional officer Isaac Bullock, and one from Inspector Mahlman).

[119] *See id.* (explaining that WCI Institutional Inspectors replied to Lamb's grievance through the prison's computer JPay portal on April 17, 2018).

[120] *See id.* (explaining that upon review of Lamb's entire file, defendants found no records beside Lamb's April 9, 2018, file); *see also Reece*, 2021 WL 1200088, at *4 n.3 (describing the defendants' assertion that Inspector Mahlman dates and writes on every ICR received from prisoners, thus any ICR Lamb claims to have filed but that do not have a date stamp or written reply were never received).

[121] *See Reece*, 2021 WL 1200088. at *4 (describing the declaration from Officer Isaac Bullock that explains the access to grievance procedures that incarcerated individuals housed in the Ohio prison system have). Defendants allege that all incarcerated individuals, regardless of security level or housing location, can use the grievance process. *Id.* According to the defendants, ICR forms are available in restrictive housing blocks. *Id.* Prison staff placed Lamb in a restrictive housing block following the attack on April 6, 2018. *See id.* at *3 (citing Complaint, *supra* note 99, ¶¶ 7–8) (explaining correctional officers transferred Lamb from the Warren Correctional Institution to the Lebanon Correctional Institution "as a 'level 5' security prisoner").

[122] *See Lamb*, 52 F.4th at 290–91 (describing the defendants' argument for filing a summary judgment motion prior to discovery).

ment be granted and Lamb's complaint be dismissed.[123] The R&R held Lamb failed to comply with the prison's grievance procedure because he did not identify specific officers and did not provide physical descriptions of the officers in his April 9, 2018, IRC.[124] In Ohio, prisoners must be specific in their complaints regarding the time, date, and location, and must provide a physical description of personnel involved.[125] This is required even in situations where the prisoner does not know the identity of the personnel involved and files a "John/Jane Doe" complaint.[126] Failure to do so means the prisoner failed to exhaust available administrative remedies available.[127]

In his federal lawsuit, Lamb also argued that he qualified for the PLRA's exhaustion requirement exception because the prison's complaint process was unavailable to him.[128] Lamb alleged the prison staff actively impeded him from

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[123] *See Reece*, 2021 WL 1200088, at *7 (holding the defendant's met their burden of proof by demonstrating that Lamb failed to exhaust his administrative remedies when seeking relief for the events of April 6, 2018). The rationale provided was that Lamb did not exhaust his available administrative remedies under the PLRA's exhaustion requirement. *Id.*

[124] *See id.* at *4, *7 (explaining the R&R's rationale for recommending that Lamb's lawsuit be dismissed). Section 5120-9-31 of the Ohio Administrative Code explains the three-step process for resolving prisoner grievances in Ohio. *See* OHIO ADMIN. CODE § 5120-9-31 (2023) (outlining the proper procedure to address prisoner complaints in Ohio prisons). Step one requires the prisoner to file an ICR with the supervisor of the prison personnel named in the ICR within fourteen days of the incident. *Id.* § 5120-9-31(J)(1). The prison staff must reply to the ICR no more than seven days after having received the complaint. *Id.* If the prisoner is not satisfied with the reply, step two requires the prisoner to file a grievance with the inspector of institutional services within fourteen days of receiving the reply. *Id.* § 5120-9-31(J)(2). The inspector of institutional services must provide a written reply no more than fourteen days after receiving the complaint, but the fourteen-day period can be extended by the inspector if notice is given to the prisoner. *Id.* If the prisoner remains dissatisfied, step three requires the prisoner to file an appeal with the chief inspector's office no more than fourteen days after having received a reply from the inspector. *Id.* § 5120-9-31(J)(3). The chief inspector must provide a reply no more than thirty days after receiving the appeal. *Id.*

[125] OHIO ADMIN. CODE § 5120-9-31(J). Lamb's eyes were swollen closed, and he was unable to consume solid food. *See* Complaint, *supra* note 99, ¶ 26; *Reece,* 2021 WL 1200088, at *3 (reporting Lamb's April 9, 2018, ICR to have stated, "I couldn't even see after officers kicked me in the eye and maced me on the way to the infirmary").

[126] *See* OHIO ADMIN. CODE § 5120-9-31(J) (identifying the details that must be included by prisoners in an ICR for it to comply with the Ohio grievance procedure).

[127] *See Reece*, 2021 WL 1200088, at *4 (holding that Lamb's failure to provide physical descriptions of the correctional officers in his ICR meant he failed to comply with Ohio's grievance procedures and justified dismissing his lawsuit).

[128] *See id.* at *5 (describing Lamb's argument that prison staff prevented him from accessing the grievance process and therefore he qualified under the PLRA's exhaustion requirement exception); *cf.* Ross v. Blake, 578 U.S. 632, 643 (2016) (holding there are three situations where a prisoner is not subject to the PLRA's exhaustion requirement because no administrative remedies are available). Lamb stated that after receiving no replies to his ICRs, he requested additional grievance and complaint forms from a prison staff member. *See Reece*, 2021 WL 1200088, at *3 (explaining Lamb's argument that when he was at Lebanon Correctional Institution, he requested additional forms from staff). Lamb contended that he was told no additional forms were available. *See Lamb*, 52 F.4th at 290 (alleging officers told Lamb there were no grievance forms available to incarcerated individuals where he was housed).

accessing the grievance process.[129] The R&R held that Lamb presented no evidence that he reached a dead-end when requesting additional forms.[130] The R&R concluded that Lamb's description of events amounted to only "vague assertions" that did not suffice to create a legitimate issue of fact regarding the actions of prison staff.[131] Lamb filed an objection to the R&R.[132]

On March 30, 2021, the District Court adopted the Magistrate's R&R.[133] The court granted the defendants' motion for summary judgment due to Lamb's failure to exhaust available administrative remedies under the PLRA.[134] Lamb's complaint was subsequently dismissed.[135] Lamb then appealed the decision.[136] The Sixth Circuit reversed the lower court's opinion, thereby denying the defendants' motion for summary judgment and remanding the case for further proceedings.[137]

II. The Circuit Split on the PLRA's Exhaustion Requirement

The U.S. Courts of Appeals for the Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have all interpreted the PLRA's exhaustion requirement in cases where the dismissal of the plaintiff's complaint depended on which party was found to carry the burden of proof of exhaustion.[138] Sec-

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[129] *See Reece*, 2021 WL 1200088, at *3 (explaining Lamb recalled that he was told by Institutional Inspector Austin that filing additional complaints would be a waste of effort because he had missed the deadline).

[130] *See id.* at *5 (holding Lamb failed to present evidence that he met the PLRA's exhaustion requirement exception).

[131] *See id.* at *5–6 (holding Lamb did not present sufficient evidence to cast doubt on the prison staffs members' actions). The rationale provided in the R&R was that because Lamb did not state *when* he requested additional grievance forms or *when* he was told by Inspector Austin that filing an additional complaint would be a waste of time, his affidavit was too vague. *Id.* at *6.

[132] *See* Lamb v. Reece, No. 20-cv-00265, 2021 WL 1192892, at *1 (S.D. Ohio Mar. 30, 2021) (stating plaintiff filed an objection to the magistrate judge's R&R), *rev'd*, Lamb v. Kendrick, 52 F.4th 286 (6th Cir. 2022).

[133] *See id.* (holding the District Court reviewed the R&R and adopted its recommendation).

[134] *See id.* (granting the defendants' motion for summary judgment based on the affirmative defense of failure to exhaust under the PLRA).

[135] *See id.* (dismissing plaintiff's two claims for relief).

[136] *See Lamb*, 52 F.4th at 290–91 (providing the procedural history of *Lamb v. Kendrick*).

[137] *See id.* at 299 (holding that there were enough facts presented that allowed Lamb's lawsuit to withstand summary judgment and therefore reversing the lower court's decision).

[138] *Compare id.* at 295 (holding the defendants carry the burden of proof), Gooch v. Young, 24 F.4th 624, 627 (7th Cir. 2022) (same), *and* Davis v. Mason, 881 F.3d 982, 985 (7th Cir. 2018) (holding it was not the plaintiff's burden to demonstrate that the complaint process was not available), *with* Hubbs v. Suffolk Cnty. Sheriff's Dep't, 788 F.3d 54, 59 (2d Cir. 2015) (citing Hemphill v. New York, 380 F.3d 680, 687–88 (2d Cir. 2004)) (holding defendants carry the initial burden of establishing that a relevant complaint process exists and then the burden shifts to the incarcerated plaintiff to prove that there were factors that made the "nominally available procedure unavailable as a matter of fact"), Geter v. Baldwin State Prison, 974 F.3d 1348, 1356 (11th Cir. 2020) (same), Rinaldi v. United States, 904 F.3d 257, 268 (3d Cir. 2018) (same), Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014) (same), *and* Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011) (same).

tion A of this Part discusses the Seventh Circuit's holding that the burden of proof lies with prison officials.[139] Section B of this Part analyzes the Second, Third, Ninth, Tenth, and Eleventh Circuits' finding of a burden-shifting approach where the majority of the burden of proof lies with the incarcerated litigant.[140] Section C explains the Sixth Circuit's holding in *Lamb v. Kendrick*, which endorsed the Seventh Circuit's view.[141]

A. The Seventh Circuit's Approach

In 2022, in *Gooch v. Young,* the Seventh Circuit considered a summary judgment motion brought by prison officials asserting the affirmative defense of failure to exhaust administrative remedies in accordance with the PLRA.[142] The incarcerated individual filed a lawsuit against correctional officers alleging that the officers encouraged another prisoner to assault him.[143] The prisoner tried to use his prison's administrative remedies, but prison staff threatened him and thwarted his attempt.[144] The prisoner alleged that no administrative remedies were available to him within his prison, thus providing basis for filing a federal lawsuit.[145] The prison officials failed to demonstrate that redress-

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[139] *See infra* notes 142–150 and accompanying text.

[140] *See infra* notes 151–218 and accompanying text.

[141] *See infra* notes 219–229 and accompanying text.

[142] *See* 24 F.4th at 625–26 (stating the issue presented before the court was about a summary judgment motion by correctional officers Lieutenant S. Young and Officer J. Wilson under the PLRA's exhaustion requirement).

[143] *See id.* (asserting that correctional officers Young and Wilson provided another prisoner with false information regarding plaintiff Eric Gooch and instructed the prisoner to act upon this information). Correctional officers told the other prisoner that Gooch had taken property from his cell. *See* Opening Brief and Required Short Appendix for Plaintiff-Appellant at 6, Gooch v. Young, 24 F.4th 624 (7th Cir. 2022) (No. 21-1702) (describing the correctional officers' role in providing another inmate information that Gooch alleged to be false). The officers showed the prisoner a photo of Gooch and told the prisoner he should do something about Gooch's actions. *See id.* (explaining the correctional officers singled out Gooch out of over a thousand other prisoners and encouraged harm be done to Gooch). The prisoner then approached Gooch in the prison yard with a weapon. *See id.* (stating that the inmate had a belt with a lock tied on it for a weapon). Gooch began to protect himself. *See id.* (describing Gooch's inability to leave the prison yard and attempt to defend himself from the inmate). A correctional officer then intervened and made Gooch lie on the floor where the prisoner continued to beat Gooch. *See id.* (detailing the role and proximity of Officer Wilson in causing Gooch's injuries).

[144] *See* Reply Brief for Plaintiff-Appellant at 1, *Gooch*, 24 F.4th 624 (No. 21-1702) (stating the actions taken by prison staff at United States Penitentiary in Terre Haute, Indiana, that prevented Gooch from successfully using administrative remedies). Gooch's correctional counselor refused to give Gooch the necessary complaint form. *Id.* The counselor told Gooch that he should be careful "snitching on staff." *See id.* (describing the response Gooch received when he requested the correct form to report grievances at Terre Haute). Gooch received threats from prison personnel. *See id.* (stating prison guards told Gooch he was going to die if he filed a grievance).

[145] *See Gooch*, 24 F.4th at 628 (holding that because Gooch's assertions that remedies were unavailable to him went unanswered by the government, the government did not meet its burden that remedies were available). An administrative remedy is not available to a prisoner who is hindered

es *were available* to the plaintiff, thus they failed to meet the burden of proof.[146]

Gooch is consistent with the Seventh Circuit's long-held view that failure to exhaust administrative remedies is an affirmative defense.[147] The Seventh Circuit's interpretation of Rule 8(c) of the Federal Rules of Civil Procedure places the burden of proof on the party that raises the affirmative defense.[148] The application of the Federal Rules of Civil Procedure to the affirmative defense of failure to exhaust under the PLRA results in the defendants carrying the burden of pleading and proving the defense.[149] Therefore, in the Seventh Circuit, defendants are unable to shift the burden of proof to the incarcerated plaintiff.[150]

B. The Burden-Shifting Approach of the Second, Third, Ninth, Tenth, and Eleventh Circuits

The Second, Third, Ninth, Tenth and Eleventh Circuits adopted a burden-shifting approach when evaluating the affirmative defense of failure to exhaust under the PLRA.[151] The defendants bear the initial burden of establishing that

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from submitting a grievance because of threats or coercion by prison personnel. *See id.* (explaining when a remedy is available versus is not available to a prisoner in accordance with the PLRA)*; see also* Ross v. Blake, 578 U.S. 632, 643 (2016) (holding an administrative remedy is not available to a prisoner when, regardless of what the regulations and guidance say, the prisoner faces a dead end because prison staff is unable or unwilling to provide any assistance to the prisoner).

[146] *See Gooch*, 24 F.4th at 628 (instructing to vacate the summary judgment and remand the case for further proceedings because the defendants failed to meet the burden of proof). Gooch asserted that he did not have access to administrative remedies because the prison staff told him he would die if he proceeded to file a grievance. *See id.* (detailing Gooch's reasoning for believing he did not have access to administrative remedies). The defendants did not challenge nor respond to Gooch's assertation, thus failing to fulfill their burden of proving administrative remedies. *See id.* (holding the government's failure to respond to Gooch's allegation was sufficient to establish failure to meet their burden).

[147] *See id.* at 627 (holding failure to exhaust is an affirmative defense for which the defendant carries the burden of proof); Davis v. Mason, 881 F.3d 982, 985 (7th Cir. 2018) (same); Pyles v. Nwaobasi, 829 F.3d 860, 864 (7th Cir. 2016) (same); Hernandez v. Dart, 814 F.3d 836, 840 (7th Cir. 2016) (same); King v. McCarty, 781 F.3d 889, 893 (7th Cir. 2015) (same), *overruled by* Henry v. Hulett, 969 F.3d 769 (7th Cir. 2020); Kaba v. Stepp, 458 F.3d 678, 681 (7th Cir. 2006) (same); Westefer v. Snyder, 422 F.3d 570, 577 (7th Cir. 2005) (same); Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999) (same).

[148] FED. R. CIV. P. 8(c); *see Massey*, 196 F.3d 727 at 735 (citing King v. Cooke, 26 F.3d 720, 724 (7th Cir.1994)) (noting that, under FED. R. CIV. P. 8(c), failure to exhaust is an affirmative defense).

[149] *See, e.g.*, *Pyles*, 829 F.3d at 864 (citing Maddox v. Love, 655 F.3d 709, 720 (7th Cir. 2011)) (holding it is the defendants' burden to demonstrate the incarcerated plaintiff's failure to exhaust because failure to exhaust is an affirmative defense).

[150] *See Gooch*, 24 F.4th at 627 (rejecting a burden-shifting approach and holding that correctional officers could not place the burden of proof onto Gooch).

[151] *See* Hubbs v. Suffolk Cnty. Sheriff's Dep't, 788 F.3d 54, 59 (2d Cir. 2015) (holding failure to exhaust is an affirmative defense where the defendant bears the initial burden of establishing that grievance procedures were in place at the prison and then the burden of proof shifts to the incarcerated plaintiff to demonstrate the procedure was not available); Geter v. Baldwin State Prison, 974 F.3d 1348, 1356 (11th Cir. 2020) (same); Rinaldi v. United States, 904 F.3d 257, 268 (3d Cir. 2018)

a relevant complaint process exists and is applicable to the underlying dispute.[152] Prison officials can establish this by identifying the applicable statutes, regulations, or grievance procedures.[153] Once the existence of a relevant grievance procedure is established, the burden then shifts to the incarcerated plaintiff to demonstrate that there were factors that made official procedure unavailable as a matter of fact.[154]

Although the Second, Third, Ninth, Tenth and Eleventh Circuits all adopted a burden-shifting approach, they have variations regarding their reasoning and application of the rule.[155] The Second Circuit is unique in that it specifies that defendants cite to a legally adequate source to fulfill their burden before they can shift it to the incarcerated litigant.[156] Meanwhile the Third, Tenth, and Eleventh Circuits further developed the burden shifting for situations where the incarcerated litigant is claiming failure to exhaust because of intimidation by the defendants.[157] Furthermore, the Ninth Circuit stands out because it justifies its adoption of the burden-shifting approach due to similarities with the Torture Victim Protection Act (TVPA).[158]

1. The Second Circuit's Specification That Defendants Must Cite to Legally Adequate Sources

In 2015, in *Hubbs v. Suffolk County Sherriff's Department*, the Second Circuit reviewed a summary judgment motion brought by the defendants.[159]

(same); Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014) (same); Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011) (same); Turner v. Burnside, 541 F.3d 1077, 1082–83 (11th Cir. 2008) (same).

[152] *See, e.g.*, *Geter*, 974 F.3d at 1356 (interpreting the affirmative defense to require burden shifting, where the burden first falls on the defendants to prove the availability of administrative remedies).

[153] *See Hubbs*, 788 F.3d at 59 (quoting Mojias v. Johnson, 351 F.3d 606, 610 (2d Cir. 2003)) (holding that defendants must present "legally sufficient source[s]" which include statutes, regulations, and prison complaints to meet their burden of proof).

[154] *See, e.g.*, *Rinaldi*, 904 F.3d at 268 (holding that once a defendant has successfully pleaded and proved the existence of grievance procedures, the burden shifts to the incarcerated plaintiff to demonstrate remedies were not available based on the prisoner's factual circumstances).

[155] *See infra* notes 159–218 and accompanying text (addressing each circuit's approach in turn).

[156] *See infra* notes 159–168 and accompanying text.

[157] *See infra* notes 169–200 and accompanying text.

[158] *See infra* notes 201–218 and accompanying text.

[159] *See* 788 F.3d 54, 56 (2d Cir. 2015) (explaining the issue before the court was to interpret the burden of proof for an exhaustion claim under the PLRA). Hubbs' lawsuit arose from an incident that occurred in the courthouse's holding area while in the custody of Sheriff's Deputies. *See* Plaintiff-Appellant's Brief at 3–5, Hubbs v. Suffolk Cnty. Sheriff's Dep't, 788 F.3d 54 (2d Cir. 2015) (No. 14-2472-cv) (explaining Suffolk County Sherriff's Deputies assaulted Hubbs in the court's holding area after Hubbs' court appearance at the Suffolk County Supreme Court). While in the holding area, Hubbs spoke with a detainee, telling the detainee "I wish you the best." *See id.* at 6 (detailing the conversation between Hubbs and Mr. Oddone, a detainee in the holding area). The Deputy Sheriff shouted a profanity at Hubbs and informed Hubbs that the other detainee was responsible for the death

The plaintiff argued on appeal that the district court's granting of summary judgment in favor of the defendants was incorrect because there were no administrative remedies available to him while incarcerated.[160] The summary judgment relied on a failure to exhaust claim, which is an affirmative defense.[161]

In the Second Circuit, the defendants carry the initial burden of establishing that there was a grievance procedure in place at the time of the plaintiff's incarceration and that the grievance procedure is applicable to the plaintiff's complaint.[162] Defendants must provide a legally adequate source to satisfy this burden.[163] Legally adequate sources include relevant regulations, statutes, or grievance guidelines that corroborate the existence of the proper grievance procedure.[164]

If the defendants satisfy their initial requirement, then the burden shifts to the incarcerated plaintiff to prove the remedies were in fact not available.[165] The plaintiff must demonstrate the existence of factors that prevented the grievance procedure from being accessible to the plaintiff.[166] One of the factors

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of an officer. *See id.* (describing Deputy Sheriff Moran's response to hearing Hubbs wish Mr. Oddone the best). Hubbs was then dragged out of his holding cell, beaten and choked by the officers, which caused Hubbs to suffer a seizure during the attack. *See Hubbs*, 788 F.3d at 57 (outlining what happened to Hubbs during the attack and that doctors determined Hubbs experienced a seizure, among other injuries). Another detainee witnessed the attack and testified that the sheriffs continued to strangle Hubbs while he was seizing, only stopping when another sheriff said, "enough you are going to kill him." *See* Plaintiff-Appellant's Brief, *supra*, at 6–7 (summarizing the testimony of Ms. Desir, another detainee, who witnessed the attack against Hubbs by the sheriffs from her holding cell and later contacted Hubbs' mother to inform her of the attack).

[160] *See Hubbs*, 788 F.3d at 56 (outlining the procedural history whereby the defendants filed a motion for summary judgment asserting the affirmative defense of failure to exhaust); *id.* at 58 (identifying the plaintiff's argument on appeal). The district court judge granted the defendants' motion for summary judgment, which the incarcerated plaintiff then appealed. *Id.* at 56.

[161] *See id.* at 58–59 (asserting that a prisoner's failure to exhaust administrative remedies at the prison is an affirmative defense that prison personnel can assert in response to a lawsuit filed by an incarcerated plaintiff).

[162] *See id.* at 59 (holding that when asserting the affirmative defense of failure to exhaust, defendants carry the burden of proof and must demonstrate that an applicable grievance procedure did exist).

[163] *See* Mojias v. Johnson, 351 F.3d 606, 610 (2d Cir. 2003) (citing Snider v. Melindez, 199 F.3d 108, 114 (2d Cir. 1999)) (asserting that a court has an obligation to evaluate "a legally sufficient source" to determine if there was an applicable administrative remedy). Courts are to review the relevant grievance procedure when evaluating a dismissal of an incarcerated plaintiff's complaint for failure to exhaust. *See id.* (emphasizing the fact-specific inquiry each court must comply with when evaluating failure to exhaust claims).

[164] *See Hubbs*, 788 F.3d at 59 (citing *Mojias*, 351 F.3d at 609) (detailing what evidence defendants may present to fulfill their burden); s*ee also* Brief for the Defendants-Appellees at 17, *Hubbs*, 788 F.3d 54 (No. 14-2472-cv) (explaining the defendants' argument that the Inmate Handbook was applicable to Hubbs, proving remedies were accessible to him).

[165] *See Hubbs*, 788 F.3d at 59 (holding the affirmative defense allows for the burden to shift to the incarcerated plaintiff once the defendants satisfy their obligation).

[166] *See id.* (explaining what the incarcerated plaintiff must establish to defeat the defendants' affirmative defense).

a plaintiff may attempt to use as evidence is threats from the defendants.[167] If the plaintiff is unable to establish their part of the burden, the defendants prevail on their affirmative defense.[168]

2. The Third, Tenth, and Eleventh Circuits' Requirement for the Plaintiff to Satisfy a Two-Part Test When Alleging Intimidation by the Defendants

In 2008, in *Turner v. Burnside*, the Eleventh Circuit clarified the burden of proof that incarcerated plaintiffs must meet when responding to a failure to exhaust affirmative defense.[169] The plaintiff was electrocuted by 220 volts when moving an electric oven in the prison's kitchen as instructed by the prison staff.[170] The defendants observed the plaintiff's electrocution and did nothing to stop it, despite the plaintiff's pleas.[171] Medical personnel at the prison initially refused to treat the plaintiff stating that, because the severe shock did not kill him, there was no need for him to be evaluated.[172] The plaintiff became permanently disabled from the shock.[173] The plaintiff then filed a grievance with prison staff.[174] Next, the Warden ripped up the plaintiff's grievance in the plaintiff's presence.[175] Prison staff told the plaintiff that they did not want to be made aware of another grievance or lawsuit regarding the plaintiff's electrocution.[176] Undeterred, the plaintiff filed a lawsuit in district court where the de-

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[167] *See id.* (providing that threats made by officers toward the incarcerated plaintiff may be used by a plaintiff to demonstrate that grievance procedures were not available).

[168] *See id.* (holding that to defeat a defendant's assertion of failure to exhaust, an incarcerated plaintiff must prove that administrative remedies were not available based on their unique factual circumstances).

[169] *See* 541 F.3d 1077, 1085 (11th Cir. 2008) (holding that an incarcerated plaintiff must first establish the threat was grave enough that a reasonable inmate would be dissuaded from filing a complaint and second, establish that the threat did inhibit the incarcerated plaintiff from filing a grievance).

[170] *See* Brief of Appellant, *supra* note 79, at 7 (stating plaintiff was electrocuted by a 200-volt electric oven that he had been assigned to move by prison staff). The prison staff failed to de-energize the oven prior to instructing the plaintiff to move it. *See id.* at 7–8 (explaining defendants Wright and Hinkle did not disconnect the electric oven prior to ordering the plaintiff to move it).

[171] *See id.* at 8 (detailing that during the plaintiff's electrocution, the plaintiff requested the supervising prison staff to switch off the breaker, which the staff did not do).

[172] *See id.* (detailing plaintiff's interactions with Dr. Burnside, who refused to provide medical treatment to the plaintiff following the electrocution).

[173] *See id.* (asserting the electrocution burned the plaintiff's muscles and his nervous system, which eventually resulted in permanent disability).

[174] *See Turner*, 541 F.3d at 1080 (detailing that the plaintiff filed an informal grievance six days after the incident, asserting that he had been electrocuted and failed to receive proper treatment).

[175] *See* Brief of Appellant, *supra* note 79, at 9 (stating that defendant Tydus Meadows, the Warden, ripped up the plaintiff's grievance in front of him).

[176] *See Turner*, 541 F.3d, at 1081 (summarizing plaintiff's conversation with defendant Meadows, who informed the plaintiff not to file an additional complaint or take further legal action about the electrocution).

fendants raised the affirmative defense of failure to exhaust administrative remedies.[177]

In the Eleventh Circuit, like in the Second, Third, Ninth, and Tenth Circuits, the affirmative defense of failure entails burden shifting, meaning the defendants must first establish the plaintiff did not exhaust the available grievance process.[178] Once this is established, the burden shifts and the plaintiff must demonstrate that there were factors that made the official procedure unavailable as a matter of fact.[179] When a plaintiff alleges that administrative remedies were not available because of intimidation by prison personnel the Third, Tenth, and Eleventh Circuit created an additional test for the plaintiff.[180] In these three circuits, the plaintiff must prove two elements—one subjective and one objective.[181] First, the incarcerated plaintiff must establish that they themselves were deterred from filing a grievance because of a threat from prison personnel.[182] Then, the plaintiff must demonstrate the threat was grave enough that a reasonable prisoner would be dissuaded from filing a complaint.[183] In 2020, in *Geter v. Baldwin State Prison*, the Eleventh Circuit clarified that the plaintiff carries the burden of proof for this additional two-part test.[184]

[177] *See* Turner v. Burnside, No. 06-cv-293, 2007 WL 2908417, at *1, *2 (M.D. Ga. Sept. 28, 2007) (providing the procedural history in which the plaintiff filed a complaint in district court, and defendants filed a motion to dismiss based on the PLRA's exhaustion requirement), *vacated*, 541 F.3d 1077 (11th Cir. 2008).

[178] *See* Hubbs v. Suffolk Cnty. Sheriff's Dep't, 788 F.3d 54, 59 (2d Cir. 2015) (holding failure to exhaust is an affirmative defense where the defendant bears the initial burden of establishing that grievance procedures were in place at the prison and then the burden of proof shifts to the incarcerated plaintiff to demonstrate the procedure was not available); Geter v. Baldwin State Prison, 974 F.3d 1348, 1356 (11th Cir. 2020) (same); Rinaldi v. United States, 904 F.3d 257, 268 (3d Cir. 2018) (same); Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014) (same); Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011) (same); *Turner*, 541 F.3d at 1082–83 (same).

[179] *See, e.g.*, *Turner*, 541 F.3d at 1082–83 (holding the affirmative defense of the plaintiff's failure to fulfill the PLRA's exhaustion requirement creates a burden of proof that first rests with the defendants).

[180] *See id.* (providing a two-part test for plaintiffs who allege administrative remedies were not available because of intimidation by the defendants); *Rinaldi*, 904 F.3d at 268 (same); *Tuckel*, 660 F.3d at 1254 (same); *Geter*, 974 F.3d at 1356 (same).

[181] *See Turner*, 541 F.3d, at 1085 (introducing the new two-part test used for evaluating claims of intimidation by prison staff); *Rinaldi*, 904 F.3d at 268 (embracing the two-part test created in *Turner*); *Tuckel*, 660 F.3d at 1254 (same); *Geter*, 974 F.3d at 1356 (same).

[182] *See Turner*, 541 F.3d at 1085 (instructing that the plaintiff must make a showing of fact that proves the intimidation they faced from defendants did prevent them from using their prison's grievance process).

[183] *See id.* (providing that the plaintiff must prove that the threat made by the defendants would dissuade a reasonable prisoner of "ordinary firmness and fortitude" from availing themselves of the grievance process).

[184] *See* 974 F.3d at 1356 (reaffirming the two-part test established in *Turner* and clarifying that the affirmative defense of exhaustion has a burden-shifting element, which means the burden of the two-part objective and subjective test falls on the plaintiff).

In 2018, in *Rinaldi v. United States*, the Third Circuit considered what was required for an incarcerated plaintiff claiming intimidation by the defendants to overcome the defendants' summary judgment motion.[185] In the Third Circuit, the affirmative defense of failure to exhaust under the PLRA requires the defendants to plead and prove that the plaintiff did not make use of all available administrative remedies.[186] Once the prison personnel establish the incarcerated plaintiff did not resort to administrative remedies, the burden then shifts to the plaintiff to demonstrate that the remedies were not accessible.[187]

Michael Rinaldi submitted a complaint through his prison's grievance procedure after being assaulted by his first cellmate.[188] Prison staff then informed the plaintiff that if he continued to file complaints about his first cellmate, they would move him to a new cell with a second cellmate that had a reputation for assaulting prisoners.[189] The prison staff then acted on this threat and transferred the plaintiff because he did not heed the staff's warnings.[190]

In *Rinaldi*, the Third Circuit explicitly adopted the two-part test for intimidation as established by the Eleventh Circuit in *Turner*.[191] Thus, a plaintiff

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[185] *See* 904 F.3d at 262 (stating the issue presented before the court by Rinaldi's appeal of the district court's dismissal of his complaint).

[186] *See id.* at 268 (citing Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002)) (asserting that the affirmative defense of failure to exhaust creates a burden that falls on the defendant to plead and establish).

[187] *See id.* (holding that after the defendant establishes the presence of grievance procedures, the burden shifts to the incarcerated plaintiff to demonstrate the remedies were not accessible).

[188] *See id.* at 262–63 (describing that the incarcerated plaintiff was unable to get help through his prison's grievance procedure and therefore filed a pro se complaint in court). On January 29, 2012, Rinaldi filed a complaint through the prison inmate resolution system stating that he was assaulted by his cellmate. *See id.* at 262 (explaining the motivation behind the plaintiff's first informal complaint). Rinaldi's informal complaint was denied so he escalated the complaint to a formal complaint, which was also denied for lacking a basis of his accusations. *See id.* (explaining how the plaintiff navigated through the prison grievance process seeking a resolution to his assault).

[189] *See* Brief for Plaintiff/Appellant at 8, Rinaldi v. United States, 904 F.3d 257 (3d Cir. 2018) (No 16-1080) (detailing prison personnel's reaction to plaintiff filing a complaint through the prison's grievance process). Rinaldi reported the threat that Officer Baysore made about placing Rinaldi in a cell with a prisoner who had a reputation for assaulting cellmates to a supervisor, Officer Kissell. *See id.* (explaining that plaintiff sought out assistance regarding the threat made toward him by prison staff). Kissell told Rinaldi that the staff was annoyed by Rinaldi filing complaints through the grievance procedure and that Officer Kissell was not going to do anything about Officer Baysore's threat. *See id.* (describing the prison staff's unwillingness to act when informed of threats made by other staff members toward the plaintiff).

[190] *See id.* at 9 (informing that the plaintiff's new cellmate had disclosed to prison officials that he intended to kill the plaintiff). Officer Gee told Rinaldi that the reason for moving him was because Rinaldi did not heed Officer Baysore's instructions to quit filing grievances. *See id.* (providing the rationale for the defendants' decision to move the plaintiff to live with a cellmate that threatened to assault him and did, in fact, repeatedly assault the plaintiff).

[191] *See Rinaldi*, 904 F.3d at 269 (asserting that the court finds value in the *Turner* test and adopts it); Turner v. Burnside, 541 F.3d 1077, 1085 (11th Cir. 2008) (establishing a two-part test that requires an incarcerated plaintiff to establish the threat was grave enough that a reasonable inmate would be

attempting to fulfill their burden by claiming intimidation by prison staff in the Third Circuit must prove both the subjective and objective prong of the *Turner* test.[192]

In 2011, in *Tuckel v. Grover*, the Tenth Circuit reviewed an incarcerated plaintiff's appeal.[193] The plaintiff filed an administrative complaint in accordance with the prison's remedy procedure when a prison official refused to transfer the plaintiff to a vocational program despite their prior agreement.[194] Then, at the recommendation of the prison staff, a group of prisoners assaulted the plaintiff after he filed his grievance.[195] Fearing additional retaliation, the plaintiff did not file another grievance with the prison's administrative system.[196] Rather, he filed a lawsuit in court.[197]

Defendants carry the burden of proof when asserting the affirmative defense of failure to exhaust.[198] Under the burden-shifting approach, once the defendants prove the plaintiff did not exhaust administrative remedies, the burden shifts to the plaintiff to demonstrate they were unable to access those remedies.[199] In *Tuckel,* the plaintiff claimed the administrative procedures were unavailable because of intimidation, and the Tenth Circuit directly adopted and applied the two-part test from *Turner*.[200]

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dissuaded from filing a complaint and that the threat did inhibit the incarcerated plaintiff from filing a grievance).

[192] *See Rinaldi*, 904 F.3d at 269 (providing further specifications that an incarcerated plaintiff must satisfy if alleging the reason for being unable to access grievance procedures was threats from the defendants); *Turner*, 541 F.3d, at 1085 (establishing a subjective and objective prong that an incarcerated plaintiff must establish). Rinaldi alleged he was unable to access the prison's grievance procedures because of the harassment and retaliation by defendants Baysore, Gee, and Kissell. *See* Brief for Plaintiff/Appellant, *supra* note 189, at 12 (detailing plaintiff's argument on appeal for why he met the burden of proof required under the affirmative defense raised by defendants).

[193] *See* 660 F.3d 1249, 1249 (10th Cir. 2011) (providing the procedural history in which the plaintiff filed a complaint against two prison personnel, and the district court granted the prison personnels' summary judgment motion).

[194] *See* Appellant/Petitioner's Opening Brief at 2(e), Tuckel v. Grover, 660 F.3d 1249 (10th Cir. 2011) (No. 10-1353) (explaining that defendant Major Grover made an oral promise to Mark Tuckel that if he finished a welding project for the defendant, the defendant would transfer the plaintiff to a vocational welding program). The defendant breached the agreement. *See id.* (showing despite plaintiff's completion of the welding project, the defendant did not move the plaintiff to the vocational welding program).

[195] *See Tuckel*, 660 F.3d at 1251 (explaining prison staff encouraged other prisoners to attack the plaintiff and the plaintiff did suffer from such an attack).

[196] *Id.*

[197] *See* Appellant/Petitioner's Opening Brief, *supra* note 194, at 2(a) (describing that Tuckel filed a complaint pursuant to 42 U.S.C. § 1983 against the defendants).

[198] *See Tuckel*, 660 F.3d at 1254 (holding the affirmative defense of failure to exhaust first places the burden of proof on the defendants).

[199] *See id.* (viewing the affirmative defense as having a burden-shifting approach that then requires the incarcerated plaintiff to demonstrate the lack of access to remedies).

[200] *See id.* (claiming the *Turner* analysis provides the best test for evaluating the PLRA's exhaustion requirement in situations where the plaintiff claims lack of access because of intimidation by defendants); *see also* Turner v. Burnside, 541 F.3d 1077, 1085 (11th Cir. 2008) (establishing a two-

3. The Ninth Circuit's Reliance on the Torture Victim Protection Act

In 2013, in *Albino v. Baca*, the Ninth Circuit reversed a granting of summary judgment in accordance with the PLRA's exhaustion requirement.[201] While incarcerated under the custody of the defendant, the plaintiff was raped once and beaten three separate times.[202] The plaintiff requested that the defendants place him in protective custody after the first and second assaults.[203] The defendant's denied the plaintiff's request for protection every time, instead placing him in general population where he was routinely injured by other prisoners.[204] The plaintiff proceeded pro se and filed a lawsuit in court seeking relief from the defendants.[205]

The Ninth Circuit looked for similarities in other legislation when seeking to determine who carries the burden in failure to exhaust claims under the PLRA.[206] The TVPA has an exhaustion burden.[207] Congress passed the TVPA in 1991 (five years prior to the passing of the PLRA).[208] The TVPA provides

part test that requires an incarcerated plaintiff to establish the threat was grave-enough that a reasonable inmate would be dissuaded from filing a complaint and that the threat did inhibit the incarcerated plaintiff from filing a grievance).

[201] *See* Albino v. Baca, 747 F.3d 1162, 1177 (9th Cir. 2014) (reversing the district court's decision to grant the defendants' motion for failure to exhaust administrative remedies).

[202] *See id.* at 1166–67 (describing the plaintiff's experience while incarcerated at Los Angeles County Men's Central Jail). Albino was arrested for rape. *See id.* at 1166 (explaining that authorities arrested the plaintiff in California for rape where the victim was not a minor). The other incarcerated individuals at Los Angeles County Men's Central Jail were *incorrectly* informed by the jail staff that Albino was arrested for a sexual crime against a minor. *See* Brief in Opposition at 2, Scott v. Albino, 574 U.S. 968 (2014) (No. 14-82) (asserting the jail staff knew the plaintiff was arrested for rape, not for sexual acts against a minor, and incorrectly informed the other incarcerated individuals). Male prisoners raped Albino once and attacked Albino three separate times over the course of four months at the Los Angeles County Men's Central Jail. *See id.* (explaining other incarcerated individuals housed with the plaintiff injured him three separate times and caused him permanent injuries).

[203] *See Albino*, 747 F.3d at 1167 (detailing the plaintiff's interactions with jail staff and the lack of action taken by jail staff). The first time that Albino requested to be housed in protective custody the jail staff responded by saying it was Albino's lawyer's job to protect him. *See id.* (summarizing the conversation between plaintiff and jail staff when the plaintiff requested a higher level of protection). A public defender represented Albino. *See* Brief in Opposition, *supra* note 202, at 3 (stating the plaintiff was represented by a public defender following his arrest).

[204] *See* Brief in Opposition, *supra* note 202, at 3 (stating the plaintiff was returned to general population following every assault).

[205] *See Albino*, 747 F.3d at 1166 (noting the plaintiff filed his complaint pro se in district court). A prisoner is pro se when they advocate for themselves in a legal matter without the assistance of an attorney. *See Pro se*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining pro se as when a litigant represents themselves in a legal matter).

[206] *See Albino*, 747 F.3d at 1171–72 (providing the rationale that the court underwent to interpret the PLRA's failure to exhaust requirement).

[207] *See id.* at 1172 (quoting Hilao v. Est. of Marcos, 103 F.3d 767, 778 n.5 (9th Cir. 1996)) (detailing the burden of proof associated with the TVPA's exhaustion requirement).

[208] *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 93 (1992) (codified at 28 U.S.C. § 1350); *see also* REAMS & MANZ, *supra* note 52, at vii (providing a timeline of the legislative history surrounding the PLRA).

the right of U.S. citizens and non-citizens to bring civil lawsuits in U.S. courts for claims of torture and extrajudicial killings perpetrated abroad.[209] The TVPA expanded the recourse available in the Alien Tort Statute by having it apply to U.S. citizens tortured overseas.[210] The legislative intent for the exhaustion requirement of the TVPA is documented through Senate Reports.[211]

The TVPA's exhaustion provision adopts a burden-shifting approach.[212] Defendants who raise the affirmative defense of non-exhaustion of remedies must prove that domestic remedies do exist, and that the plaintiff did not use them.[213] If the defendant successfully fulfills their obligation, the burden moves to the plaintiff to show that the domestic remedies were unavailable.[214]

The Ninth Circuit transposed the burden-shifting approach of the TVPA onto the PLRA.[215] First, the defendant must prove the existence of a remedy that was applicable to the incarcerated plaintiff and that the plaintiff did not exhaust that remedy.[216] If the defendant satisfies their burden, then the burden shifts onto the incarcerated plaintiff.[217] The plaintiff must present evidence demonstrating there was a specific obstacle that prevented the typically available grievance procedure from being accessible to the plaintiff.[218]

C. The Sixth Circuit Joins the Seventh Circuit

In 2022, in *Lamb v. Kendrick*, the Sixth Circuit directly addressed the circuit split and rejected the burden-shifting approach of the Second, Third,

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[209] *See* Torture Victim Protection Act § 1350 (providing the requirements for liability under the TVPA).

[210] *See* Ekaterina Apostolova, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act,* 28 BERKELEY J. INT'L L. 640, 642, 645 (2010) (outlining how the TVPA built upon the Alien Tort Statute by allowing a course of action for U.S. citizens that experienced torture overseas).

[211] *See Albino*, 747 F.3d at 1172 (quoting *Hilao*, 103 F.3d at 778 n.5) (detailing the burden of proof associated with the TVPA's exhaustion requirement as originally explained in the Act's Senate Report).

[212] *See id.* (explaining that the TVPA is modeled on procedural practices of international rights tribunals that use a burden-shifting model).

[213] *See id.* (describing the burden that international rights tribunals place on respondents who assert the claimant did not exhaust the remedies available domestically prior to filing a complaint in an international tribunal).

[214] *See id.* (describing that when the respondents fulfill their burden, the burden shifts to the claimants before the international tribunals).

[215] *See id.* at 1171–72 (holding the proper procedure under the PLRA is the procedure used in international tribunals, which the TVPA adopted in the United States).

[216] *See id.* at 1172 (holding that defendants asserting an affirmative defense of failure to exhaust in response to an incarcerated plaintiff's complaint must prove the existence of a grievance procedure and that the grievance procedure is applicable to the circumstances of the plaintiff's complaint).

[217] *See id.* (asserting that the Ninth Circuit adopts a burden-shifting approach interpretation of the PLRA's exhaustion requirement).

[218] *See id.* (explaining what an incarcerated plaintiff must demonstrate to overcome a defendant's assertion of the affirmative defense of exhaustion).

Ninth, Tenth, and Eleventh Circuits.[219] In 2012, in *Surles v. Andison*, the Sixth Circuit first held that defendants bear the burden of proof on the issue of exhaustion under the PLRA.[220] In *Lamb*, the Sixth Circuit explicitly aligned itself with the Seventh Circuit when holding that only the defendants carry the burden of proof when asserting the affirmative defense of failure to exhaust, not the incarcerated plaintiff.[221]

The Sixth Circuit rejected the burden-shifting approach and stated that the relative positions of the parties require that the burden of proof falls solely on the defendant.[222] The court in *Lamb* explained that incarcerated plaintiffs lack access to resources.[223] Specifically, plaintiffs operate in a restrictive setting that makes it difficult to investigate the grievance procedure process.[224] Thus, incarcerated plaintiffs have a limited ability to illustrate to the court what actions the defendants may have taken that prevented the plaintiff from being able to access administrative remedies.[225] Meanwhile, defendants in PLRA lawsuits are prison officials who have greater access to resources than the incarcerated plaintiff.[226] Defendants have superior access to administrative records and legal representation.[227] Increased access to legal representation allows for easier access in filing and presenting evidence to the court.[228] Therefore, because the burden of proof must be carried by either the prison personnel or the incarcerated individual, and the circumstances make it significantly easier for defend-

[219] *See* 52 F.4th 286, 294–95 (6th Cir. 2022) (responding to defendant's assertion that the court should join the majority approach of its sister circuits that adopt a burden-shifting approach).

[220] *See* 678 F.3d 452, 457 n.10, 458 (6th Cir. 2012) (holding the defendant carries the burden when asserting the affirmative defense of failure to exhaust and must provide evidence proving that nothing impeded the ability of the incarcerated plaintiff to exhaust).

[221] *See Lamb*, 52 F.4th at 295 (clarifying that the court does not subscribe to the burden-shifting approach but rather holds the burden of proof lies only with the defendant). The Sixth Circuit found it reassuring that the Seventh Circuit also rejected the burden-shifting approach. *See id.* (citing Gooch v. Young, 24 F.4th 624, 627 (7th Cir. 2022)) (holding failure to exhaust places a burden solely on the defendants, not the incarcerated plaintiff).

[222] *See Lamb*, 52 F.4th at 295 (citing Lawson v. LMDC, No. 16-CV-00728, 2019 WL 8953354, at *5 (W.D. Ky. Oct. 10, 2019)) (believing a court must account for the different places in society that the plaintiff and defendants each occupy as well as their relationship to one another).

[223] *See id.* (claiming incarcerated plaintiffs do not have access to basic resources, such as technology needed for typing legal documents and making photocopies of authorities and other documents for a court).

[224] *See id.* (explaining that incarcerated individuals have a limited ability to view the handling of grievance procedures).

[225] *See id.* (citing Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002)) (describing the obstacles incarnated plaintiffs face that impact their ability to communicate with the court).

[226] *See id.* (highlighting the unbalanced distribution of resources available to defendants compared to incarcerated plaintiffs).

[227] *See id.* (citing *Ray,* 285 F.3d at 295) (asserting prison staff have greater access to resources compared to incarcerated plaintiffs).

[228] *See id.* (explaining how defendants' increased access to resources facilitates their ability to argue before the court).

ants to establish failure to exhaust than it is for the plaintiffs, the burden falls solely on the defendants in the Sixth Circuit.[229]

III. THE SIXTH AND SEVENTH CIRCUITS' INTERPRETATION OF THE PLRA'S EXHAUSTION REQUIREMENT PROPERLY ACKNOWLEDGES THE RELATIVE POSITIONS OF THE PARTIES

The U.S. Court of Appeals for the Sixth Circuit correctly followed the U.S. Court of Appeals for the Seventh Circuit when interpreting the PLRA's exhaustion requirement to place the burden of proof only on the defendants and not the incarcerated plaintiff.[230] The Second, Third, Ninth, Tenth, and Eleventh Circuits disregard the relative positions of the parties.[231] Meanwhile, the Sixth Circuit's acknowledgement of the disparities between prison staff and incarcerated individuals correctly addresses the lived realities of these two groups.[232] Section A of this Part describes the systemic barriers incarcerated individuals face to access courts.[233] Section B highlights the advantages prison officials have compared to prisoners when confronted with legal issues.[234]

A. The Systemic Barriers Prisoners Face to Accessing the Courts

Incarceration creates obstacles to accessing justice in the courts that are distinctive to prisoners.[235] In 1969, in *Johnson v. Avery*, the U.S. Supreme Court held that incarcerated individuals have a constitutional right of access to the

[229] *See id.* (citing *Ray,* 285 F.3d at 295) (acknowledging that the burden of proof must fall upon either the defendants or the plaintiffs and holding that it is preferable for it to fall on the defendants).

[230] *See id.* (holding that when the affirmative defense of failure to exhaust is brought forth by defendants, the burden to plead and prove the failure to exhaust lies solely with the defendants). The Sixth Circuit looked to the Seventh Circuit for guidance. *See id.* (citing Gooch v. Young, 24 F.4th 624, 627 (7th Cir. 2022)) (holding failure to exhaust places a burden solely on the defendants, not the incarcerated plaintiff).

[231] *See* Hubbs v. Suffolk Cnty. Sheriff's Dep't, 788 F.3d 54, 59 (2d Cir. 2015) (placing a burden of production of evidence on the plaintiff without acknowledging the obstacles incarcerated plaintiffs face compared to their defendant counterparts); Geter v. Baldwin State Prison, 974 F.3d 1348, 1356 (11th Cir. 2020) (same); Rinaldi v. United States, 904 F.3d 257, 268 (3d Cir. 2018) (same); Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014) (same); Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011) (same); Turner v. Burnside, 541 F.3d 1077, 1082–83 (11th Cir. 2008) (same).

[232] *See Lamb*, 52 F.4th at 295 (citing Lawson v. LMDC, No. 16-CV-00728, 2019 WL 8953354, at *5 (W.D. Ky. Oct. 10, 2019)) (asserting a court must acknowledge the roles in society that the plaintiff and defendants each occupy and their relationship to one another).

[233] *See infra* notes 235–260 and accompanying text.

[234] *See infra* notes 261–270 and accompanying text.

[235] *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 271 (2010) (outlining the challenges faced by incarcerated individuals filing pro se when seeking legal recourse because of limited access to physical and financial resources).

courts as a means of redress of their grievances.[236] In 1977, in *Bounds v. Smith*, the Court explained prisons have an affirmative duty to provide prisoners meaningful access to the courts.[237] *Bounds* specified that prisoners were to have access to a law library or to assistance from individuals with legal training.[238] Yet, in 1996, in *Lewis v. Casey*, the Court created the actual injury requirement.[239] This hindered a prisoner's ability to enforce their right to access the courts.[240] *Lewis* also narrowed prisoners' already limited right of access to the courts to the right to file initial documents, not to litigate comprehensively before a court.[241]

1. Incarcerated Litigants Lack Access to Physical Resources Needed to Handle Legal Matters from Within a Prison

The resources prisoners do have access to are extremely limited and of poor quality.[242] Law libraries in prisons often do not have fundamental legal resources for incarcerated individuals to use.[243] In the modern legal landscape, computers are necessary for conducting legal research in law libraries as information, including significant case law, is stored exclusively on computers.[244] Yet prisoners are restricted in their computer usage.[245] Additionally,

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[236] *See* 393 U.S. 483, 488, 490 (1969) (holding Tennessee's proposed rule to block illiterate prisoners from accessing a court of law was unconstitutional). The Court's 1969 decision in *Johnson v. Avery* clarified that prison personnel "must consider prisoner rights and not enact rules that prohibited inmates from accessing the courts." David Hudson, *Remembering* Johnson v. Avery*, the Jailhouse Lawyer Case*, TENN. BAR ASS'N L. BLOG (Apr. 1, 2017), https://www.tba.org/index.cfm?pg=LawBlog&blAction=showEntry&blogEntry=27573 [https://perma.cc/P62V-QRU3].

[237] *See* 430 U.S. 817, 828 (1977) (holding prison staff have an obligation to protect and promote an incarcerated individual's right of access to the court), *abrogated by* Lewis v. Casey, 518 U.S. 343 (1996).

[238] *See id.* (clarifying the duty placed on prisoner staff includes ensuring the prisoner's access to resources either in the form of law libraries or personnel).

[239] *See* 518 U.S. at 349 (establishing that a prisoner who alleges a constitutional right violation while incarcerated must prove that the violation resulted in an actual injury).

[240] *See* Robbins, *supra* note 235, at 284 (explaining the consequence of the Supreme Court's 1996 opinion in *Lewis v. Casey* on pro se incarcerated litigants).

[241] *See Lewis*, 518 U.S. at 355 (narrowing prisoners' constitutional right of access to courts to include the right to adequately file a complaint with a court, not a right to effectively litigate the matter in court).

[242] *See* Robbins, *supra* note 235, at 279 (asserting prison law libraries have restricted hours, the materials may lack pages, and prisoners' access to the internet and print materials is restricted).

[243] *See* Christopher E. Smith, *Examining the Boundaries of* Bounds*: Prison Law Libraries and Access to the Courts*, 30 HOW. L.J. 27, 31–32 (1987) (discussing a 1973 report of resources available in prison law libraries). Federal prisons lack citation books applicable to federal case law. *See id.* (documenting that none of the federal prison law libraries included in the study had a citation manual). Over 40% of the law libraries in state prisons lacked a legal dictionary. *See id.* (reporting that 44% of the state prisons evaluated in the report did not have a legal dictionary for prisoners to use).

[244] *See* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996,* 41 HARV. C.R.-C.L. L. 299, 325 (2006) (explaining how, in Florida, some prisons replaced paper copies of federal case reporters with electric copies that require computer usage to access); *see also* Kelsey Brown, *How Twenty-First Century*

technological changes to law libraries present additional burdens for prisoners that lack the knowledge of how to operate a computer.[246] Further, the ratio of computers to incarcerated individuals in prison makes it extremely difficult and inefficient for prisoners to conduct legal research.[247]

2. Incarcerated Litigants Lack Access to Educated Staff

Prisoners' access to the courts involves the right to have assistance navigating legal resources.[248] Nevertheless, the law libraries that fulfill this right to assistance are typically staffed by law clerks who are prisoners selected for the job.[249] The qualifications to become a law clerk in a prison are minimal—in fact, the clerk does not need to have any legal education.[250] Reliance on law

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Technology Affects Inmates' Access to Prison Law Libraries in the United States Prison System, 21 MARQ. BENEFITS & SOC. WELFARE L. REV. 83, 104 (2020) (finding forty-five states and the entire federal prison system have converted to carrying digital materials in their prison law libraries). O'Bryant is an incarcerated individual in the Florida Department of Corrections and taught himself about the law through a paralegal course. *See* O'Bryant, *supra*, at 299 n.1 (explaining the author's unique perspective on the obstacles faced by incarcerated individuals when trying to access the court).

[245] *See, e.g.*, O'Bryant, *supra* note 244, at 326 (explaining that prisoners in the Florida Department of Corrections do not have permission to use the computers located in the law library). Prisoners must be able to tell the law clerks the citation and name of the case they hope to look up. *See id.* (detailing the procedure for accessing a case because the prisoner cannot physically touch the computer themselves). The prisoner is not permitted to touch the computer nor keyboard and therefore, must rely on the law clerk for scrolling through the materials on the computer. *See id.* (describing the author's experience as a prisoner and the policies in place that made viewing legal sources on a computer difficult and time consuming).

[246] *See* Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1212 (2013) (describing lawsuits brought forward by prisoners who were unable to have meaningful access to the courts because they did not know how to operate a computer)*; see also* Stephen Raher & Andrea Fenster, *A Tale of Two Technologies: Why "Digital" Doesn't Always Mean "Better" for Prison Law Libraries*, PRISON POL'Y INITIATIVE (Oct. 28, 2020), https://www.prisonpolicy.org/blog/2020/10/28/digital-law-libraries/ [https://perma.cc/WFM2-27UD] (finding in 2018 that 88% of states implemented exclusively digital research mechanisms in prison law libraries).

[247] *See* O'Bryant, *supra* note 244, at 326 (stating that, in the Florida Department of Corrections, the 1,400 incarcerated individuals were to all share one computer in the law library).

[248] *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (holding prisons are required to provide prisoners access to resources either in the form of law libraries or personnel), *abrogated by* Lewis v. Casey, 518 U.S. 343 (1996).

[249] *See* O'Bryant, *supra* note 244, at 319–21 (explaining that working in the law library is a job available to prisoners provided they meet the minimum qualifications and complete rudimentary training); *see also* Raher & Fenster, *supra* note 246 (stating that South Dakota used to provide legal assistance to prisoners by contracting with attorneys and paralegals to visit the prisons, but since 2017 South Dakota has stopped providing human assistance and now provides a digital research program for prisoners to use).

[250] *See* O'Bryant, *supra* note 244, at 319–21 (listing the qualifications required for an incarcerated individual requesting to be employed as a law clerk). The only educational requirements in Florida for law clerks is a high school diploma or its equivalent. *See id.* (explaining that within Florida prisons, law clerks working in a prison law library only need to have graduated from high school or completed educational programming that is considered the equivalent of completing high school).

libraries alone is not pragmatic in gaining access to the courts.[251] Moreover, the complexity of legal research today requires access to a variety of search tools.[252] Even if prisoners had access to a robust law library, their lack of formal legal training makes the resources nearly useless.[253]

3. Incarcerated Litigants Lack Education and Access to Legal Assistance

Forty-one percent of incarcerated individuals did not complete their secondary education.[254] This stands in stark contrast to the only eighteen percent of the general population who did not complete high school.[255] Additionally, many prisoners are illiterate.[256] This lack of education makes most prisoners unable to properly file legal papers.[257] Additionally, language barriers are common among prisoners and prevent them from being able to present evidence and be a self-advocate.[258] Yet, a majority of incarcerated individuals do not have the financial means to hire legal representation.[259] Even if a prisoner could afford legal representation, many attorneys are unwilling to represent an incarcerated plaintiff.[260]

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[251] *See* Smith, *supra* note 243, at 36 (citing Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982)) (holding that the resources found in a prison law library are not enough for a prisoner to access the courts because of the complexity in accessing and understanding the materials).

[252] *See* Robbins, *supra* note 235, at 308 (referencing the complexity of the court system and the expertise needed to use search engines such LexisNexis and Westlaw as being obstacles for incarcerated individuals).

[253] *See* Smith, *supra* note 243, at 36 (explaining that the issue is not only the lack of resources but the lack of the prisoners' ability to understand the resources).

[254] *See* Robbins, *supra* note 235, at 279–80 (quantifying the low levels of educational attainment among a large portion of individuals incarcerated in state and federal prisons and jails).

[255] *See id.* (contextualizing the number of prisoners who lack a secondary education with the comparatively low percentage of the general population in the United States that did not complete high school).

[256] *See* Abel, *supra* note 246, at 1192 (citing Johnson v. Avery, 393 U.S. 483, 487 (1969)) (holding that many incarcerated individuals are "totally or functionally illiterate").

[257] *See id.* at 1202 (quoting Hooks v. Wainwright, 536 F. Supp. 1330, 1349 (M.D. Fla. 1982)) (explaining the low level of education and diminished mental capacity most prisoners have, which prevents them from being able to navigate the legal process), *rev'd*, 775 F.2d 1433 (11th Cir. 1985)).

[258] *See* Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 FORDHAM L. REV. 1219, 1225 (2011) (citing literacy and language barriers as obstacles that prevents prisoners from successfully representing themselves in legal matters).

[259] *See id.* at 1227 (stating that most incarcerated individuals lack the financial resources required to obtain legal counsel in civil matters, where counsel is not appointed).

[260] *See* Robbins, *supra* note 235, at 280 (explaining that attorneys are hesitant to take on the ethical responsibilities associated with investigating prisoners' claims).

B. The Advantages Prison Officials Have Compared to Incarcerated Litigants When Confronted with Legal Issues

Only sixteen states require correctional officers to have a minimum level of education.[261] Only ten states require background and criminal record checks prior to hiring correctional officers.[262] Only seven states require correctional officers to have "good moral character."[263] And only three states mandate correctional officers to complete a legal issues training.[264] Nevertheless, prison officials are better equipped to handle their involvement in lawsuits.[265] Correctional officers can be union members, which grants them legal representation.[266] The ease with which prison officials can access legal representation through their employment stands in stark contrast with the difficulties incarcerated plaintiffs face in accessing representation.[267] Moreover, prison officials and their attorneys have easier access to technology and documentation of administrative regulations than incarcerated plaintiffs.[268]

The PLRA's public policy goals were to decrease the quantity and improve the caliber of lawsuits brought by incarcerated individuals in district courts.[269] Here, the Sixth and Seventh Circuits are improving the quality of lawsuits brought by placing the burden of proof on the defendants, as they are the party with the greater access to evidence and legal assistance.[270]

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261 *See* Melissa A. Kowalski, *Hiring and Training Requirements for Correctional Officers: A Statutory Analysis*, 100 PRISON J. 98, 115 (2020) (detailing the findings of a study that evaluated hiring qualifications and requirements for correctional officers in all 50 states).

262 *See id.* (reporting 20% of states required correctional officers to pass a background check).

263 *See id.* (reporting 14% of states require correctional officers to have "good moral character").

264 *See id.* at 117 (reporting only 6% of states required correctional officers to complete basic legal training).

265 *See* Lamb v. Kendrick, 52 F.4th 286, 295 (6th Cir. 2022) (holding prison staff are comparatively better equipped to meet an evidentiary production requirement than incarcerated plaintiffs).

266 *See* Mark Scolforno & Michael Rubinkam, *Guards Union Warns Wolf of Legal Action Over Vaccine Mandate,* ASSOCIATED PRESS (Aug. 12, 2021), https://apnews.com/article/health-coronavirus-pandemic-59833d5242e38ca83be315cecbf06ec5 [https://perma.cc/CF88-CFLA] (providing an example of legal resources prison guards have access to because of their employment).

267 *Cf. Lamb*, 52 F.4th at 295 (holding prison personnel have access to lawyers when named in lawsuits); *supra* notes 259–260 and accompanying text (discussing the difficulty prisoners face to access legal representation).

268 *See Lamb*, 52 F.4th at 295 (explaining that prison personnel and their representatives have access to administrative records, computers, and photocopies that facilitate the production of evidence before a court).

269 *See* Porter v. Nussle, 534 U.S. 516, 524 (2002) (explaining that Congress enacted the PLRA's exhaustion requirement to "reduce the quantity and improve the quality of prisoner suits").

270 *See Lamb*, 52 F.4th at 295 (rejecting the burden-shifting approach that places a production burden on incarcerated plaintiffs and holding the parties relative positioning allows defendants to better produce evidence in lawsuits regarding failure to exhaust); Gooch v. Young, 24 F.4th 624, 627 (7th Cir. 2022) (same).

CONCLUSION

In 2022, in *Lamb v. Kendrick*, the U.S. Court of Appeals for the Sixth Circuit held that if a prisoner claims they were unable to exhaust their administrative remedies in accordance with the PLRA, the burden of proof falls solely on prison officials to show that there was no hindrance to the prisoner's ability to exhaust. In doing so, the Sixth Circuit agreed with the Seventh Circuit and held that when prison officials assert the affirmative defense of PLRA exhaustion, they carry the burden of proof. The Second, Third, Ninth, Tenth, and Eleventh Circuits apply an opposite burden-shifting approach. The Sixth and Seventh Circuits correctly acknowledge the respective positions of each party. Because the burden of proof must lie with someone, the Sixth and Seventh Circuits correctly find that prison officials have greater access to resources and legal representation and therefore should be responsible for carrying the burden. Placing the burden on prison personnel furthers the PLRA's public policy goals of increasing the quality of lawsuits brought by incarcerated litigants. Therefore, courts that have yet to take a stance on this issue should adopt the Sixth and Seventh Circuits' interpretation of the PLRA exhaustion requirement.

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