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Unknowable Remedies: *Albino v. Baca*, The PLRA Exhaustion Requirement, and the Problem of Notice

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UNKNOWABLE REMEDIES: *ALBINO v. BACA*, THE PLRA EXHAUSTION REQUIREMENT, AND THE PROBLEM OF NOTICE

Abstract: On April 3, 2014, in *Albino v. Baca*, the U.S. Court of Appeals for the Ninth Circuit held that when a prisoner plaintiff has not been informed of a prison administrative remedy, that remedy is effectively unavailable to the prisoner for the purposes of the exhaustion requirement of the Prison Litigation Reform Act (PLRA). This decision conflicts with what a majority of other circuits have established and widens the gap between those circuits on this issue. This Comment argues for the U.S. Supreme Court to resolve this circuit split in a future case and hold that to fail to give a prisoner notice of an administrative remedy is to make that remedy effectively unavailable.

INTRODUCTION

Between 1972 and 1996, the number of lawsuits filed pursuant to 42 U.S.C. § 1983 in federal district courts increased by 1,153%.¹ In response to this significant increase in prisoner litigation in the federal court, Congress passed the Prison Litigation Reform Act of 1995 (“PLRA”).² The PLRA mandates that “inmates exhaust all available administrative remedies before filing any suit challenging prison conditions, including, but not limited to, suits under § 1983.”³ In evaluating the availability of administrative remedies, many courts do not consider whether a plaintiff was given notice of the administrative remedies.⁴ This reasoning undermines the policies behind the

¹ Barbara Belbot, *Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?*, 84 PRISON J. 290, 306 (2004); see 42 U.S.C. § 1983 (2012) (codifying the right to bring a civil action based on the deprivation of any rights, privileges, or immunities secured by the Constitution and laws).

² See Pub. L. No. 104-134, 110 Stat. 1321, 1321-71 (codified as amended at 42 U.S.C. § 1997e(a)); *Woodford v. Ngo*, 548 U.S. 81, 117 (2006) (“The competing values that Congress sought to effectuate by enacting the PLRA were reducing the number of frivolous filings, on one hand, while preserving prisoners’ capacity to file meritorious claims, on the other.”).

³ *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir.) (en banc), *cert. denied sub nom.*, Scott v. Albino, 135 S. Ct. 403 (2014); see 42 U.S.C. § 1997e(a) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

⁴ *Tope v. Fabian*, No. CIV 09-0734 DWF/RLE, 2010 WL 3307351, at *8 (D. Minn. July 29, 2010); see *Gonzales-Liranza v. Naranjo*, 76 F. App’x 270, 272 (10th Cir. 2003) (noting the irrelevance of notice to the issue of whether or not a prisoner exhausted administrative remedies); *Yousef v. Reno*, 254 F.3d 1214, 1221 (10th Cir. 2001) (holding that an assistant attorney general need not inform a prisoner plaintiff of the need to follow administrative procedures).

PLRA—judicial efficiency and administrative agency—and fails to prevent unfair treatment of inmates.⁵

In 2014, in *Albino v. Baca*, Plaintiff Juan Roberto Albino was arrested for rape under California Penal Code Section 261(a)(1) and placed in jail on May 11, 2006.⁶ Over the course of the next four months, Albino was raped and beaten by inmates three times in three different housing units.⁷ Before each attack, Albino had requested protective custody.⁸ Prison staff members declined the request and responded that it was Albino's attorney's job to protect him.⁹ According to Albino, he was not informed of any formal grievance system.¹⁰ Ultimately, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, held that Albino satisfied the exhaustion requirement, reasoning that when an inmate has not been informed of prison administrative remedies, those remedies are effectively unavailable to that inmate.¹¹

This Comment argues that the U.S. Supreme Court should grant certiorari in a future case dealing with this issue, and adopt the Ninth Circuit's reasoning that an administrative remedy is effectively unavailable to a prisoner when the prisoner has not been notified of that remedy.¹² Part I examines the PLRA, the scope of its exhaustion requirement, and the application of both to *Albino*.¹³ Part II examines the role of notice in the courts' determination of whether a plaintiff has exhausted all available administrative remedies.¹⁴ Finally, Part III argues for the U.S. Supreme Court to grant certiorari in the future for a case dealing with this issue, and hold that when a prisoner does not receive notice of an administrative remedy, that remedy is effectively unavailable.¹⁵ In doing so, the Court would further the policies underlying the PLRA—administrative agency and judicial efficiency—because a notice requirement would enable inmates to use administrative remedies instead of clogging courts with lawsuits that are likely to be dismissed on exhaustion

⁵ See Adam Slutsky, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. § 1997e(a) Unduly Burdens Courts and Prisoners*, 73 *FORDHAM L. REV.* 2289, 2298–2302 (2005) (identifying the protection of administrative agency authority and the promotion of judicial efficiency as the twin purposes of administrative exhaustion); *infra* notes 71–82 and accompanying text (discussing why a notice requirement advances the policies underlying the PLRA).

⁶ See 747 F.3d at 1166.

⁷ See *id.* at 1166–67.

⁸ See *id.*

⁹ See *id.* at 1167 (“Of the ap[p]rox. 10 or so times plaintiff begged defendant custodial deputies to be placed in segregation or for the[m] to help me, defendants[] responded that it was my attorney’s job to protect me. As these were sworn peace officers, I was of the belief that I had to seek my trial attorney’s help.”).

¹⁰ See *id.* at 1177.

¹¹ See *id.*

¹² See *infra* notes 61–82 and accompanying text.

¹³ See *infra* notes 18–47 and accompanying text.

¹⁴ See *infra* notes 47–60 and accompanying text.

¹⁵ See *infra* notes 61–82 and accompanying text.

grounds.¹⁶ This notice requirement would prevent unfair treatment of prisoners, including the hide-and-seek behavior on the part of prison administrators.¹⁷

I. THE PLRA AND THE SCOPE OF ITS EXHAUSTION REQUIREMENT

In response to a dramatic increase in prisoner lawsuits, Congress enacted the PLRA to reduce the quantity and improve the quality of prisoner suits.¹⁸ The PLRA requires inmates to exhaust all available administrative remedies at a prison or jail before filing suit.¹⁹ As the facts of *Albino* illustrate, whether or not an inmate satisfies the exhaustion requirement may hinge on whether the remedies were in fact available to the prisoner.²⁰ Section A discusses the PLRA, the exhaustion requirement, and the policies behind them.²¹ Section B explores the role of availability in the exhaustion requirement.²² Further, section B then identifies the facts of *Albino* that supported the holding that remedies were effectively unavailable to Albino.²³

A. The Prison Litigation Reform Act

Congress enacted the PLRA to reduce the quantity and improve the quality of prisoner suits.²⁴ Central to the PLRA is the exhaustion require-

¹⁶ See *Albino*, 747 F.3d at 1169; *Russell v. Unknown Cook Cnty. Sheriff's Officers*, No. C 3786, 2004 WL 2997503, at *4 (N.D. Ill. Dec. 27, 2004) (asserting that a notice requirement comports with the goal of fostering internal administrative resolutions in lieu of litigation in the courts); *Burgess v. Garvin*, No. 01 CIV 10994(GEL), 2004 WL 527053, at *3 (S.D.N.Y. Mar. 16, 2004) (“[I]f the matter can be resolved without recourse to the federal courts . . . then the purpose of judicial economy is fulfilled.”); *infra* notes 71–75 and accompanying text (discussing how a notice requirement would reinforce the policies underlying the PLRA).

¹⁷ See *Goebert v. Lee County*, 510 F.3d 1312, 1323 (11th Cir. 2007) (“[I]f we allowed jails and prisons to play hide-and-seek with administrative remedies, they could keep all remedies under wraps until after a lawsuit is filed and then uncover them and proclaim that the remedies were available all along.”); see also *Burgess*, 2004 WL 527053, at *5 (“[Congress] cannot have meant that prisoners would be expected to exhaust remedies of which they were kept entirely ignorant.”); *infra* notes 79–82 and accompanying text (discussing how a notice requirement would prevent unfair treatment of prisoners).

¹⁸ *Porter v. Nussle*, 534 U.S. 516, 524 (2002); see 42 U.S.C. § 1997e(a) (2012); *infra* note 28 and accompanying text (discussing the goal of the PLRA to reduce the quantity and improve the quality of prisoner suits).

¹⁹ 42 U.S.C. § 1997e(a) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

²⁰ *Albino*, 747 F.3d at 1166.

²¹ See *infra* notes 24–34 and accompanying text.

²² See *infra* notes 35–40 and accompanying text.

²³ See *infra* notes 41–47 and accompanying text.

²⁴ See 42 U.S.C. § 1997e(a); *Porter*, 534 U.S. at 524; see *Jones v. Bock*, 549 U.S. 199, 203 (2007) (“In 2005, nearly 10 percent of all civil cases filed in federal courts nationwide were prisoner complaints challenging prison conditions or claiming civil rights violations. Most of these

ment.²⁵ The exhaustion requirement requires inmates to exhaust all administrative remedies regarding complaints about prison conditions before initiating a lawsuit.²⁶ This exhaustion requirement protects administrative agency authority by giving prison officials notice of a problem and allowing them to resolve disputes internally before being haled into court.²⁷ Further, the exhaustion requirement promotes efficient resolution of claims because claims may be heard more quickly and economically in internal prison proceedings rather than in litigation.²⁸ Moreover, the exhaustion requirement promotes the kind of judicial efficiency necessary for courts to hear meritorious claims in any reasonable timeframe.²⁹

Failure to exhaust administrative remedies under the PLRA is an affirmative defense.³⁰ The defendant must show that there was an available administrative remedy and that the prisoner did not exhaust that available remedy.³¹ The burden then shifts to the plaintiff to provide evidence showing that the generally available administrative remedies were effectively unavailable.³² The availability of an administrative remedy is determined objectively: would a similarly situated person of ordinary firmness have considered the remedy

cases have no merit, many are frivolous.”); *see also* 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (noting that roughly 94.7 percent of prisoner lawsuits in 1994 were dismissed before pretrial); 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) (“Federal prison lawsuits have risen from 2,000 in 1970 to 39,000 in 1994.”).

²⁵ *See* 42 U.S.C. § 1997e(a); *Jones*, 549 U.S. at 204.

²⁶ *See* 42 U.S.C. § 1997e(a); *Jones*, 549 U.S. at 204.

²⁷ *See Jones*, 549 U.S. at 204; *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (“Exhaustion serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.”), *superseded by statute on other grounds as stated in Booth v. Churner*, 532 U.S. 731, 740–41 (2001); *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004) (noting that the PLRA exhaustion requirement is designed to provide notice to corrections officials so that they may address complaints internally).

²⁸ *See Woodford*, 548 U.S. at 89 (explaining how the exhaustion requirement promotes efficiency). *But cf.* Collin O’Connor Udell, *Parading the Saurian Tail: Projection, Jung, and the Law*, 42 ARIZ. L. REV. 731, 768 (2000) (asserting that “the PLRA provisions are plainly attempts by the collective to ‘circumvent prior, and to constrain future, judicial decisions’ affecting [the prisoner] population”).

²⁹ *See* 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (“The crushing burden of these frivolous suits makes it difficult for courts to consider meritorious claims.”).

³⁰ *See* 42 U.S.C. 1997e(a); *Albino*, 747 F.3d at 1166.

³¹ *Albino*, 747 F.3d at 1172. *See generally* 42 U.S.C. 1997e(a) (codifying the exhaustion requirement).

³² *Albino*, 747 F.3d at 1172.

available.³³ Where a generally available administrative remedy is effectively unavailable, the court will excuse a prisoner's failure to exhaust.³⁴

B. Effectively Unavailable: The Availability of Administrative Remedies and Their Role in Albino

Courts have held that a generally available administrative remedy can be effectively unavailable due to the action of prison officials.³⁵ For example, when a prison official prevents a prisoner from utilizing an administrative remedy, that remedy is effectively unavailable.³⁶ Moreover, a defendant may be estopped from raising a non-exhaustion defense if the prisoner was intimidated by prison staff or was misled about the availability of administrative remedies.³⁷

It is less clear what kinds of *inaction* on the part of prison officials render an otherwise available administrative remedy effectively unavailable.³⁸

³³ See *Hemphill v. New York*, 380 F.3d 680, 688 (2nd Cir. 2004) (articulating the objective standard in the context of determining whether a prisoner exhausted available administrative remedies). A remedy is available when it is capable of use, at hand, or otherwise available as a practical matter. See *Albino*, 747 F.3d at 1171.

³⁴ See *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010) (excusing a prisoner plaintiff's failure to exhaust because prison officials prevented the prisoner from utilizing a grievance procedure).

³⁵ See, e.g., *id.* (asserting that an administrative remedy becomes effectively unavailable when a prison official prevents, thwarts, or hinders a prisoner's efforts to utilize the remedy); *Lyon v. Vande Krol*, 305 F.3d 806, 808 (8th Cir. 2002) (holding that a prisoner does not need to exhaust administrative remedies when prison officials have prevented the prisoner from exhausting such remedies); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (holding that a grievance procedure was unavailable to a prisoner when prison officials failed to respond to the prisoner's requests for grievance forms).

³⁶ *Pavey v. Conley*, 663 F.3d 899, 906 (7th Cir. 2011) ("An administrative remedy is not 'available,' and therefore need not be exhausted, if prison officials erroneously inform an inmate that the remedy does not exist or inaccurately describe the steps he needs to take to pursue it."); *Aquilar-Avellaveda v. Terrell*, 478 F.3d 1223, 1225 (10th Cir. 2007) (finding that district courts must ensure that prisoners have not failed to exhaust administration remedies due to the action or inaction of prison officials.").

³⁷ See *Martin v. Sizemore*, No. Civ.A 05-CV-105-KKC, 2005 WL 1491210, at *3-4 (E.D. Ky., June 22, 2005) (holding that prison administrator defendants are estopped from raising exhaustion defense when the complaint system in the prison was set up such that the inmates must confront the subject of the complaint in order to submit a grievance); *Simpson v. Gallant*, 223 F. Supp. 2d 286, 292 (D. Me. 2002) (holding that a prison staff member who tells plaintiff his issue is not grievable is estopped from claiming non-exhaustion). *But see Mendez v. Herring*, No. 05-1690 PHX/JAT, 2005 WL 3273555, at *2 (D. Ariz., Nov. 29, 2005) (finding that inmates are not excused from exhausting administrative remedies when they have been told their complaint is not grievable).

³⁸ Compare *Bey v. Johnson*, 407 F.3d 801, 809 n.9 (6th Cir. 2005) (holding that prison staff do not need to affirmatively provide information on how to file a grievance), *judgment vacated*, 549 U.S. 1190 (2007), *abrogated by Jones v. Bock*, 549 U.S. 199 (2007), *Yousef v. Reno*, 254 F.3d 1214, 1221 (10th Cir. 2001) (holding that prison officials need not advise prisoners of the need to follow administrative procedures), and *Hahn v. Armstrong*, No. 1:08 CV 169 LMB, 2010

For example, the U.S. Court of Appeals for the Tenth Circuit has found that whether or not a plaintiff was ever informed of an administrative remedy is irrelevant to a determination of availability.³⁹ In contrast, the U.S. Court of Appeals for the Eleventh Circuit has held that when an administrative remedy is “unknown and unknowable” to a prisoner, it is effectively unavailable.⁴⁰

In *Albino*, administrative remedies were not available to Albino due to the inaction of prison officials.⁴¹ For example, Albino claims he was never informed of a prison grievance system, that he was not given an inmate orientation, and that he did not encounter a manual describing complaint procedures.⁴² Although Albino begged approximately ten times to be placed in protective custody, prison officials told Mr. Albino to consult his attorney and never notified, constructively or otherwise, Albino of the option to file a grievance.⁴³

Albino proceeded as a pro se litigant in the U.S. District Court for the Central District of California against Los Angeles County Sheriff Lee Baca, several Doe defendants, and Los Angeles County, alleging violations of 42 U.S.C. § 1983, as well as several state laws, arising out of injuries Albino suffered while confined in Los Angeles County jail.⁴⁴ The district court granted Baca’s motion for summary judgment because Albino had failed to exhaust his administrative remedies, as required by the PLRA.⁴⁵ Although a three-judge panel for the U.S. Court of Appeals for the Ninth Circuit affirmed, the Ninth Circuit, sitting en banc, subsequently held that Albino satisfied the exhaustion requirement, reasoning that when an inmate has not been informed of prison administrative remedies, those remedies are effectively

WL 575748, at *4 (E.D. Mo., Feb. 11, 2010) (holding that a prison guard failing to assist a prisoner complete a grievance procedure is insufficient to avoid Summary Judgment), *with* *Sadler v. Rowland*, No. 3:01CV1786(CFD)(WIG) 2004 WL 2061518, at *7 (D. Conn., Sept. 13, 2004) (declining to dismiss a claim when a Connecticut prisoner who transferred to a Virginia prison sought to complain about Virginia prison conditions and was not told to file a grievance in both prisons), *and* *Hall v. Sheahan*, No. 2000 C. 1649, 2001 WL 111019, at *2 (N.D. Ill., Feb. 2, 2001) (noting that a grievance procedure that is not made known to inmates is effectively unavailable to those inmates).

³⁹ *Gonzales-Liranza*, 76 F. App’x at 272 (holding that “whether or not a plaintiff was ever advised or informed of a prison’s grievance procedures was not relevant” to a determination of exhaustion).

⁴⁰ *See Goebert*, 510 F.3d at 1322–23 (finding that a prison grievance procedure described in a manual provided only to staff was not “available”).

⁴¹ *See* 747 F.3d at 1177.

⁴² *Id.* In fact, such a manual was not available, or even known, to the prisoners. *Id.* at 1175. Moreover, Albino did not encounter complaint forms or a complaint box. *See id.* at 1176.

⁴³ *See id.* at 1175.

⁴⁴ *See Albino v. Baca*, No. CV 08-3790-GAF(MLG), 2010 WL 883856, at *1 (C.D. Cal. Mar. 10, 2010), *rev’d en banc*, 747 F.3d 1162 (9th Cir. 2014).

⁴⁵ *See id.* at *5. The district court accepted the recommendation of the magistrate judge, who recommended granting summary judgment for Baca because Albino did not exhaust available remedies at the jail. *See id.* at *1.

unavailable to that inmate.⁴⁶ On October 20, 2014, the U.S. Supreme Court denied Baca's petition for certiorari.⁴⁷

II. UNKNOWN REMEDIES: THE ROLE OF NOTICE IN THE EXHAUSTION OF ADMINISTRATIVE REMEDIES

In 2014, in *Albino v. Baca*, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, held that the administrative remedies in the jail were not available to Albino within the meaning of the PLRA.⁴⁸ In reaching this holding, the court stressed the lack of notice given to Albino by prison officials of the grievance system.⁴⁹ The Ninth Circuit's emphasis on the lack of notice is consistent with how the U.S. Court of Appeals for the Eleventh Circuit has approached issues of exhaustion.⁵⁰

In 2004, in *Goebert v. Lee County*, the Eleventh Circuit held that a prison grievance procedure, which was described in a manual that inmates were

⁴⁶ See *Albino*, 747 F.3d at 1177. The Ninth Circuit also held that an exhaustion defense under the PLRA must be treated within the framework of the Federal Rules of Civil Procedure, rather than as an "unenumerated Rule 12(b)" motion. *Id.* at 1166 (overruling *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003)).

⁴⁷ See generally *Scott v. Albino*, 135 S. Ct. 403 (2014) (denying certiorari for Albino).

⁴⁸ See 747 F.3d 1162, 1166 (9th Cir. 2014), *cert. denied sub nom.*, *Scott v. Albino*, 135 S. Ct. 403 (2014). In addition to holding that the administrative remedies in the jail were not available to Albino within the meaning of the PLRA, the Ninth Circuit also held that a failure to exhaust administrative remedies should be analyzed under the existing Federal Rules of Civil Procedure rather than as an unenumerated Rule 12(b) motion, overruling prior precedent. *Id.*

⁴⁹ See *id.* at 1167 ("Albino states in a declaration . . . that he was given no orientation when he was brought to the jail . . ."). In discussing this lack of notice, the court noted:

The jail had a manual describing a procedure for handling inmate complaints, but this manual was for staff use only and was not made available to inmates [Complaint] forms had to be requested by an inmate and were never provided to Albino, despite his repeated complaints. Nor was Albino told that he could write a complaint on an ordinary piece of paper and hand it to one of the deputies.

See *id.* at 1177

⁵⁰ *Goebert v. Lee County*, 510 F.3d 1312, 1322–23 (11th Cir. 2007). In denying Baca's petition for certiorari, the U.S. Supreme Court also implicitly endorsed the approach taken by the Ninth Circuit. See *Scott v. Albino*, 135 S. Ct. 403, 403 (2014). Additionally, the Third Circuit, in dicta, has suggested that it would follow the Eleventh Circuit's approach to notice. See *Small v. Camden Cnty.*, 728 F.3d 265, 271 (3rd Cir. 2013) ("Remedies that are not reasonably communicated to inmates may be considered unavailable for exhaustion purposes."). Other courts, like the U.S. Courts of Appeals for the Second and Eighth Circuit, have held that, although a prisoner's subjective knowledge of prison procedure is irrelevant to exhaustion, objective notice of the grievance procedure may at least be a relevant consideration. See *Tope v. Fabian*, No. CIV 09-0734 DWF/RLE, 2010 WL 3307351, *9 (D. Minn. July 29, 2010) (holding that, although some courts have held that a prisoner's subjective knowledge is immaterial, objective notice of the grievance procedure is still a relevant consideration.) Nevertheless, an inmate may not close his eyes to a prison grievance system and then claim there were no available administrative remedies. *Hall v. Sheahan*, No. 2000 C. 1649, 2001 WL 111019, at *2 (N.D. Ill., Feb. 2, 2001) ("[A]n inmate may not close his eyes to what he reasonably should have known.").

never permitted to see and which was not included in a handbook that was provided to inmates, was effectively unavailable.⁵¹ The court stressed that a remedy that has not been made known to an inmate is effectively unavailable to that inmate.⁵² Under this reasoning, defendants must show that they informed the plaintiff of the grievance procedure.⁵³ When an inmate does not know about a remedy and cannot discover it through reasonable effort, that remedy is effectively unavailable.⁵⁴ A prison official's failure to provide a prisoner with information about administrative remedies may excuse the prisoner's failure to exhaust administrative remedies.⁵⁵

The Ninth and Eleventh Circuit's approach to notice is in contrast to the strict approach advocated by the dissent in *Albino*, as well as the U.S. Courts of Appeals for the Sixth, Seventh, and Tenth Circuits.⁵⁶ Under this stricter analysis, prison officials are under no duty to inform prisoners of a grievance process.⁵⁷ A notice requirement is not necessary because prisoners are presumed to know about prison procedures.⁵⁸ This approach is consistent with the idea that the statutory exhaustion requirement is mandatory, and futility and other exceptions should not be read into it.⁵⁹ Under the strict approach, a court need not expend precious judicial resources determining the details of a prison's grievance procedure implementation.⁶⁰

⁵¹ See 510 F.3d at 1322–23.

⁵² *Id.* at 1323 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001) (“That which is unknown and unknowable is unavailable; it is not ‘capable of use for the accomplishment of a purpose.’”)).

⁵³ See *Tope*, 2010 WL 3307351, at *8; *Hall*, 2001 WL 111019, at *2 (“An institution cannot keep inmates in ignorance of the grievance procedure and then fault them for not using it.”).

⁵⁴ *Goebert*, 510 F.3d at 1324.

⁵⁵ See *Arnold v. Goetz*, 245 F. Supp. 2d 527, 537 (S.D.N.Y. 2003).

⁵⁶ Compare 747 F.3d at 1177 (holding that administrative remedies were effectively unavailable to a prisoner who was not informed of prison grievance procedures), and *Goebert*, 510 F.3d at 1321–23 (finding that a prison grievance procedure described in a manual provided only to staff was effectively unavailable), with *Twitty v. McCoskey*, 226 F. App'x 594, 596 (7th Cir. 2007) (asserting that a prisoner is strictly responsible for exhausting administrative remedies absent any affirmative misconduct on the part of prison officials), *Bey v. Johnson*, 407 F.3d 801, 809 n.9 (6th Cir. 2005) (noting that prison officials do not have to affirmatively provide information on how to utilize grievance procedures), *judgment vacated*, 549 U.S. 1190 (2007), *abrogated by Jones v. Bock*, 549 U.S. 199 (2007), and *Yousef v. Reno*, 254 F.3d 1214, 1221 (10th Cir. 2001) (holding that prison officials need not advise prisoners of the need to follow administrative procedures).

⁵⁷ See *Gonzales-Liranza v. Naranjo*, 76 F. App'x 270, 272 (10th Cir. 2003) (“[A]s a matter of law, any factual dispute between the parties as to whether or not plaintiff was ever advised or informed of the prison's grievance procedures was not relevant.”).

⁵⁸ *Albino*, 747 F.3d at 1182 (Smith, J., dissenting) (“[L]itigants . . . [are] presumed to have knowledge of duly enacted laws, regulations, and procedures. Grievance procedures in California jails are promulgated under the direction of state laws and regulations.” (citation omitted)).

⁵⁹ See *Booth*, 532 U.S. at 741 n.6 (“[W]e stress the point . . . that we will not read futility or other exceptions into [PLRA's] statutory exhaustion requirement . . .”).

⁶⁰ See *Griffin v. Romero*, 399 F. App'x 349, 351 (10th Cir. 2010) (explaining that Congress intended to spare courts the need to spend countless hours educating themselves as to details of prison administrative processes); *Concepcion v. Morton*, 306 F.3d 1347, 1354 (3d Cir. 2002)

III. THE U.S. SUPREME COURT SHOULD RESOLVE THE CIRCUIT SPLIT AND ADOPT THE NINTH AND ELEVENTH CIRCUIT APPROACH TO THE ISSUE OF NOTICE

The U.S. Supreme Court should resolve the circuit split, adopt the approach taken by the Eleventh Circuit Court of Appeals in *Goebert v. Lee County*, and hold that to fail to give a prisoner notice of an administrative remedy is to make that remedy effectively unavailable.⁶¹ Section A argues that, although the Court denied *Baca*'s petition for certiorari in this case, the Court should grant certiorari in the future to address the circuit split and lend uniformity and clarity to this area of the law.⁶² Section B argues that when the Court grants certiorari on this issue, the Court should adopt the approach taken by the Eleventh Circuit in *Goebert* and explicitly require notice of administrative remedies because this is most consistent with the policies underlying the Prison Litigation Reform Act ("PLRA").⁶³

A. The U.S. Supreme Court Should Grant Certiorari on This Issue in the Future

The U.S. Supreme Court should grant certiorari to address the circuit split and lend uniformity and clarity to this area of the law.⁶⁴ As the law currently stands, the Eleventh and Ninth Circuits have held that a prisoner must receive notice of an administrative remedy for the remedy to be available, but the Sixth, Seventh, and Tenth Circuits have held that a prisoner need not receive notice of an administrative remedy in order for it to be available.⁶⁵ Be-

("Congress did not intend for courts to expend scarce judicial resources examining how and by whom a prison's grievance procedure was implemented.").

⁶¹ See 510 F.3d 1312, 1323 (11th Cir. 2007); *supra* note 56 and accompanying text (illustrating the circuit split regarding whether a lack of notice of prison procedures excuses a prisoner's failure to exhaust administrative remedies).

⁶² See *infra* notes 64–70 and accompanying text.

⁶³ See *infra* notes 71–82 and accompanying text.

⁶⁴ See *Albino v. Baca*, 747 F.3d 1162, 1181 (9th Cir. 2014) (en banc) (Smith, J., dissenting) ("[T]he majority's opinion creates a split with the Eighth and Tenth Circuits . . ."), *cert. denied sub nom.*, *Scott v. Albino*, 135 S. Ct. 403 (2014). Although the Court denied certiorari in *Albino*, the issue raised in *Albino* will inevitably be raised again in the future due to the frequency of prisoner lawsuits. *Scott*, 135 S. Ct. at 403; see *Goebert*, 510 F.3d at 1324; *Twitty v. McCoskey*, 226 F. App'x 594, 596 (7th Cir. 2007); *Belbot*, *supra* note 1, at 396 (noting the high frequency of prisoner lawsuits).

⁶⁵ Compare *Albino*, 747 F.3d at 1177 (finding that administrative remedies were unavailable when a prisoner was not informed of prison grievance procedures), and *Goebert*, 510 F.3d at 1321–23 (holding that a remedy was unavailable when it was described in a manual provided only to prison officials), with *Twitty*, 226 Fed. App'x at 596 (noting that only affirmative conduct and not general inaction by prison officials may excuse a failure to exhaust), *Bey v. Johnson*, 407 F.3d 801, 809 n.9 (6th Cir. 2005) (asserting that prison officials do not have to affirmatively provide information on how to utilize grievance procedures), *judgment vacated*, 549 U.S. 1190 (2007), *abrogated by Jones v. Bock*, 549 U.S. 199 (2007), and *Yousef v. Reno*, 254 F.3d 1214, 1221 (10th

yond this split in authority, confusion in this area of the law is exacerbated by how the issue has been discussed in court opinions.⁶⁶ For example, even when a court has addressed the issue of notice in the context of exhaustion, the legal authority for ruling on this issue is not always clear.⁶⁷ Further, courts often implicitly take into account whether a prisoner received notice in determining whether administrative remedies are exhausted, but decline to address the issue explicitly or only address it in dicta.⁶⁸ The detrimental effects of these shortcomings are particularly dangerous given the high frequency of lawsuits subject to the PLRA.⁶⁹ Because of the lack of uniformity among the

Cir. 2001) (holding that prison officials need not advise prisoners of the need to follow administrative procedures). *See generally* *Chelette v. Harris*, 229 F.3d 684 (8th Cir. 2000) (explaining that Section 1997e(a) is silent on a prisoner's subjective beliefs about available administrative remedies).

⁶⁶ *See Albino*, 747 F.3d at 1177 (failing to provide legal authority to support its holding that an administrative remedy is effectively unavailable when a prisoner has not received notice of the remedy); *infra* note 68 and accompanying text (providing examples of cases in which courts implicitly took into account whether a prisoner received notice but declined to address the issue explicitly). Some cases, like *Dillon v. Rogers*, note the importance of inmates having avenues for discovering administrative remedies, but fail to explicitly address the role of notice. *See* 596 F.3d 260, 268 (5th Cir. 2010) (emphasizing the "importance of ensuring that inmates have avenues for discovering the procedural rules governing their grievances," but declining to elaborate on the role of notice). Moreover, some courts explicitly acknowledge when a prisoner *has* been given notice of prison procedures, but fail to elaborate on the topic any further. *See, e.g.*, *King v. Iowa Dep't of Corr.*, 598 F.3d 1051, 1053 (8th Cir. 2010) (noting that a grievance response form advised a prisoner of his right to appeal, but the prisoner failed to do so); *Alexander v. Tippah Cnty.*, 351 F.3d 626, 630 (5th Cir. 2003) ("The Detention Facility's grievance procedures were explained in the inmate handbook given to Alexander when he first arrived. Alexander admits that he knew how to prepare a handwritten grievance."); *Lyon v. Vande Krol*, 305 F.3d 806, 809 (8th Cir. 2002) ("There is no question in this case that there was [a procedure available], that Mr. Lyon was aware of it, and that he chose not to follow the steps that the procedure outlined. Mr. Lyon was never told that there was not a procedure . . ."); *Knowles v. N.H. Dep't of Corr. Comm'r*, 538 F. Supp. 2d 453, 462 (D.N.H. 2008) ("Nor does the plaintiff claim that he had not received notice of the three-level grievance procedure, or was otherwise unaware of it in a way that might arguably have made it unavailable to him.").

⁶⁷ *See Albino*, 747 F.3d at 1175, 1181, n.1 (Smith, J., dissenting) (noting that the majority failed to cite a single case to support its holding that prison officials must inform prison procedure); *Knowles*, 538 F. Supp. 2d at 462 (failing to provide legal authority after noting that a prisoner did not claim that he had not received notice of prison procedure); *Hall v. Sheahan*, No. 2000 C. 1649, 2001 WL 111019, at *2 (N.D. Ill., Feb. 2, 2001) (failing to provide legal authority for the proposition that a grievance procedure that is not made known to inmates is effectively unavailable).

⁶⁸ *See, e.g.*, *Small v. Camden Cnty.*, 728 F.3d 265, 271 (3rd Cir. 2013) (noting in dictum that "[r]emedies that are not reasonably communicated to inmates may be considered unavailable for exhaustion purposes"); *King*, 598 F.3d at 1053 (finding that a prisoner did not exhaust available administrative remedies when he failed to appeal his formal complaint because the response form advised him of his right to appeal); *Frentzel v. Boyer*, No. 4:05-CV-2304 CAS, 2007 WL 1018663, at *5 (E.D. Mo. Mar. 29, 2007) ("In *Chelette* . . . however, unlike the present case, there was no evidence that the prisoner plaintiff did not know and was not informed of the existence of administrative remedies."), *aff'd*, 297 F. App'x 576 (8th Cir. 2008).

⁶⁹ Belbot, *supra* note 1, at 306 (noting the dramatic increase of prisoner lawsuits).

circuits, the lack of clarity among holdings on this issue, and the quantity of cases subject to these shortcomings, the U.S. Supreme Court should grant a writ of certiorari if and when this issue presents itself to the Court in the future.⁷⁰

B. The U.S. Supreme Court Should Adopt The Ninth and Eleventh Circuit Approach to Notice

The U.S. Supreme Court should resolve the circuit split and conclude that an administrative remedy is effectively unavailable to a prisoner when the prisoner has not been notified of the remedy.⁷¹ This approach is most consistent with the policies that underlie the PLRA—administrative agency and judicial efficiency.⁷²

Because a prison populace that is informed of administrative remedies may be more likely to use these remedies, a notice requirement protects administrative agency by fostering administrative resolutions to prisoner complaints.⁷³ Additionally, providing notice of administrative remedies promotes judicial efficiency because it invites inmates to use administrative remedies instead of clogging courts with lawsuits that are likely to be dismissed on exhaustion grounds.⁷⁴ Thus, a notice requirement promotes the

⁷⁰ See *Albino*, 747 F.3d at 1181 (Smith, J., dissenting) (“[T]he majority’s opinion creates a split with the Eighth and Tenth Circuits.”); *King*, 598 F.3d at 1053 (finding that a prisoner did not exhaust available administrative remedies when he failed to appeal his formal complaint because the response form advised him of his right to appeal); *Belbot*, *supra* note 1, at 306.

⁷¹ See *Albino*, 747 F.3d at 1177; *Goebert*, 510 F.3d at 1323–24; *Burgess v. Garvin*, No. 01 CIV 10994(GEL), 2004 WL 527053, at *5 (S.D.N.Y. Mar. 16, 2004).

⁷² See *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (“Exhaustion serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.”), *superseded by statute on other grounds as stated in Booth v. Churner*, 532 U.S. 731 (2001); see also *Burgess*, 2004 WL 527053, at *5 (“[Congress] cannot have meant that prisoners would be expected to exhaust remedies of which they were kept entirely ignorant.”); 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (noting that roughly 94.7 percent of prisoner lawsuits in 1994 were dismissed before pretrial); 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) (“Federal prison lawsuits have risen from two thousand in 1970 to 39,000 in 1994.”).

⁷³ See *Russell v. Unknown Cook Cnty. Sheriff’s Officers*, No. C 3786, 2004 WL 2997503, at *4 (N.D. Ill. Dec. 27, 2004) (“[A notice requirement] is fully consonant with the goals of the PLRA, which aims to foster internal administrative resolutions to inmates’ complaints in lieu of litigation in the courts.”).

⁷⁴ See *Russell*, 2004 WL 2997503, at *4 (explaining that providing notice “direct[s] inmates to follow mandatory grievance procedures, instead of letting them file lawsuits that will be dismissed for failure to exhaust administrative remedies”); *Burgess*, 2004 WL 527053, at *3 (“If the matter can be resolved without recourse to the federal courts . . . then the purpose of judicial economy is fulfilled.”); *Slutsky*, *supra* note 5, at 2298 (“The PLRA seeks to deter frivolous suits by improving judicial efficiency. Administrative exhaustion is a prime example of a provision that attempts to accomplish this goal.”).

consideration of meritorious claims by preventing frivolous suits from reaching court.⁷⁵

In addition to advancing the policies underlying the PLRA, the notice requirement addresses a weakness of the strict approach advocated by the dissent in *Albino*.⁷⁶ Under the strict approach, a prisoner who is unaware of administrative remedies may be precluded from both timely administrative relief *and* legal relief.⁷⁷ In contrast, because a prisoner who is put on notice of administrative remedies is more likely to utilize such remedies, a notice requirement decreases the likelihood of a prisoner being completely denied the opportunity for relief.⁷⁸

A notice requirement also protects against unfair treatment of prisoners and furthers policies of basic fairness.⁷⁹ For example, a notice requirement protects against hide-and-seek behavior on the part of prison administrators.⁸⁰ Similarly, it protects prisoners who are unaware of their obligation to investigate administrative remedies through no fault of their own.⁸¹ Finally, a notice requirement comports with how courts have read objectivity into their interpretation of the availability of remedies: that is, similarly situated individuals of ordinary firmness may not deem remedies available when such remedies have not been communicated to them.⁸²

⁷⁵ See *Royal v. Kautzky*, 375 F.3d 720, 730 (8th Cir. 2004) (observing that the PLRA was intended to prevent frivolous lawsuits and ensure that courts are limited to hearing legitimate violations of prisoners' rights); Tracy M. Sullivan, *Prisoners Seeking Monetary Relief for Civil Rights Claims: Must They Exhaust Administrative Remedies Under § 1997e Before Filing a Claim in Federal Court?*, 8 WASH. U. J.L. & POL'Y 419, 422 (2002) ("Proponents of the PLRA regarded many of the prisoner civil rights lawsuits as wasting judicial resources and depriving others of quality justice.").

⁷⁶ See 747 F.3d at 1181 (Smith, J., dissenting) (opposing the majority's holding that jail officials must show they informed prisoners of administrative remedies); *Gonzales-Liranza v. Naranjo*, 76 F. App'x 270, 272 (10th Cir. 2003) ("[A]s a matter of law, any factual dispute between the parties as to whether or not plaintiff was ever advised or informed of the prison's grievance procedures was not relevant.").

⁷⁷ See *Yousef*, 254 F.3d at 1221 (10th Cir. 2001) (affirming the dismissal of a prisoner lawsuit because a prisoner failed to exhaust administrative remedies).

⁷⁸ See *Albino*, 747 F.3d at 1177 (refusing to dismiss a prisoner lawsuit for failure to exhaust when prison officials did not inform the prisoner of the availability of administrative remedies).

⁷⁹ See *id.* at 1169; *Goebert*, 510 F.3d at 1323 ("If we allowed jails and prisons to play hide-and-seek with administrative remedies, they could keep all remedies under wraps until after a lawsuit is filed and then uncover them and proclaim that the remedies were available all along."); *Romanelli v. Suliene*, No. 3:07-cv-00019-bbc, 2008 WL 4587110, at *6 (W.D. Wisc. Jan. 10, 2008) (justifying a notice requirement because of the incentive for prison officials to conceal grievance procedures).

⁸⁰ *Goebert*, 510 F.3d at 1323 (noting the risks of allowing prison officials to engage in hide-and-seek behavior with administrative remedies).

⁸¹ See *Romanelli*, 2008 WL 4587110, at *6 ("It would be unfair to require the prisoner to conduct his own investigation, particularly because in many cases he would be unaware of his obligation to do so.").

⁸² See *Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004) ("The test for deciding whether the ordinary grievance procedures were available must be an objective one: that is, would

CONCLUSION

The U.S. Court of Appeals for the Ninth Circuit's decision in *Albino v. Baca* reinforces the stance held by the Eleventh Circuit Court of Appeals that to fail to give a prisoner notice of an administrative remedy is to make that remedy effectively unavailable. The decision widens the circuit split on this issue, creating an opportunity for the U.S. Supreme Court to clarify the issue of notice in the context of exhaustion and ultimately affirm the approach held by the Eleventh and the Ninth Circuits. In doing so, the Court could further the policies underlying the Prison Litigation Reform Act and prevent unfair treatment of prisoners.

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'a similarly situated individual of ordinary firmness' have deemed them available."); *supra* note 33 and accompanying text (discussing the objective standard for determining whether or not administrative remedies were available).