

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEANNE S. WOODFORD, ET AL., :

4 Petitioners, :

5 v. : No. 05-416

6 VIET MIKE NGO. :

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8 Washington, D.C.

9 Wednesday, March 22, 2006

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:00 a.m.

13 APPEARANCES:

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15 Francisco, California; on behalf of the Petitioners.

16 DAN HIMMELFARB, ESQ., Assistant to the Solicitor General,

17 Department of Justice, Washington, D.C.; for the

18 United States, as amicus curiae, supporting the

19 Petitioners.

20 MEIR FEDER, ESQ., New York, New York; on behalf of the

21 Respondent.

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P R O C E E D I N G S

[11:00 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next
in 05-416, Woodford versus Ngo.

Ms. Perkell.

ORAL ARGUMENT OF JENNIFER G. PERKELL
ON BEHALF OF PETITIONERS

MS. PERKELL: Mr. Chief Justice, and may it
please the Court:

The question presented in this case is whether,
in enacting the Prison Litigation Reform Act's exhaustion
requirement, Congress intended to require inmates to
comply with administrative grievance procedures or whether
Congress intended to permit inmates to ignore those
procedures.

Petitioners submit that Congress intended to
require inmates to comply with administrative grievance
procedures, for three principal reasons:

One, the established principle of exhaustion in
the administrative law context requires a grievance -- a
grievant to timely comply with administrative agency
proceedings.

Two, in enacting the Prison Litigation Reform
Act's exhaustion requirement, Congress was responding to
this Court's decision in McCarthy v. Madigan, in which

1 this Court presumed that an express or mandatory
2 exhaustion requirement for prisoners would necessitate
3 compliance with prison filing deadlines.

4 And, three, Congress's objectives in enacting
5 the Prison Litigation Reform Act's exhaustion requirement
6 are directly facilitated by a rule in which inmates must
7 comply with administrative grievance procedures, including
8 filing deadlines; whereas, those objectives are invariably
9 subverted when an inmate is permitted to ignore those
10 procedures.

11 In the administrative law context, the
12 established principle of exhaustion generally requires
13 that a grievant comply with administrative agency
14 proceedings in a proper and timely manner in order to be
15 able to proceed to Federal Court. In this case, Congress
16 has, indeed, enacted an administrative exhaustion
17 requirement. Even the court of appeals agreed that in so doing
18 Congress was attempting to bring the exhaustion rule for
19 prisoners more into line with established administrative
20 exhaustion rules that apply in other contexts.

21 JUSTICE SOUTER: What do you say to the argument
22 that that really is an inapposite argument because the 1983
23 proceeding is de novo?

24 MS. PERKELL: I would suggest -- I -- we concede
25 there's that distinction. However, I would suggest it's

1 irrelevant for purposes of how Congress would have
2 understood the term "exhaust" in enacting the statute.
3 The definition of the "principle of exhaustion" in
4 administrative law is one in which there's an obligation
5 to comply with the agency's grievance proceedings. And
6 so, that is the definition of exhaustion that Congress was
7 presumably -- I would suggest was presumably invoking in
8 this context.

9 JUSTICE GINSBURG: But that's the -- a function
10 of -- you want the first-line decisionmaker -- you need
11 that decision, because, at the second rung, in -- at the
12 court level, deference is owed to it. But in the prison
13 setting, there's no deference owed to it. So, I would
14 think that this kind of requirement, that you must file
15 someplace else first, a place that won't get deference, is
16 more like the EEOC example and the Age Discrimination Act.

17 MS. PERKELL: Well, Your Honor, in the first
18 instance --

19 CHIEF JUSTICE ROBERTS: I'm sorry, Ms. Perkell,
20 could I ask you to speak up just a bit?

21 MS. PERKELL: Oh, sure. I --

22 CHIEF JUSTICE ROBERTS: Thanks.

23 MS. PERKELL: -- I apologize.

24 Again, we're submitting that Congress understood
25 the term "exhaust" in a particular way, given how it's

1 just generally used in the administrative context. And
2 with respect to the EEOC context, we think that that is
3 inapposite, because primarily that -- the relevant
4 statutes in those contexts invoke the word "commence,"
5 which --

6 JUSTICE GINSBURG: Invoke what?

7 MS. PERKELL: The word "commence" instead of
8 "exhaust," which this Court has expressly, again,
9 distinguished from an exhaustion requirement.

10 Moreover, under those statutes Congress has
11 limited the meaning of "commencement" in such a way that
12 this Court has interpreted Congress to expressly preclude
13 the possibility of a procedural default by virtue of a
14 failure to comply with State filing provisions.

15 JUSTICE GINSBURG: Are you -- are you saying,
16 then, that those two go together, they're inextricably
17 tied together? If you've got an exhaustion rule, then
18 embedded in it is always a procedural default rule?

19 MS. PERKELL: I'm suggesting in that -- in the
20 -- excuse me -- in the administrative law context, which
21 is the context in which Congress was legislating under
22 this statute, that that is, indeed, the established
23 conception of that term.

24 JUSTICE BREYER: They're saying that it's
25 special here. If you look at the language of the text,

1 the language talks -- is almost identical to the language
2 that was in CRIPA, or whatever is -- you know, CRIPA. Is
3 that the correct pronunciation of the concatenation of --

4 MS. PERKELL: I'm sorry, I'm not sure what Your
5 Honor --

6 JUSTICE BREYER: I'm think -- oh, well, I guess
7 it isn't -- unlike IIRIRA, it is apparently unknown.

8 MS. PERKELL: Oh.

9 JUSTICE BREYER: There was a predecessor act,
10 and the predecessor act used this same language, just
11 about. And what it said was, "Judge, you may require
12 exhaustion of such remedies as are available." And, given
13 that language, nobody thought that was a procedure default
14 rule; it just meant the judge, if there's a remedy
15 available, can say, "Prisoner, go do it," in an
16 appropriate case. And all that happened here, if you look
17 at the history, is, they changed the "may" to a "must."
18 And all the people that wrote in were writing in about
19 that. Nobody dreamt, nobody said, nothing suggests, that
20 what Congress intended to do was to bring in the
21 procedural default aspect of it. And there would have
22 been a lot of objections if they had. So, that's the
23 argument the other way.

24 Now, I'd like to know what do you have at all
25 that overcomes what I just said?

1 MS. PERKELL: Well, I would suggest that, in
2 part, the language of the CRIPA, which is -- I believe, is
3 -- that's how I pronounce it; I believe that's what Your
4 Honor is referring to -- in part, precluded the
5 possibility of a default -- procedural default bar largely
6 because it required a continuance of a case for 90 -- or I
7 believe it started out as 180 days, and then became 90
8 days. And -- in order to permit the judge to order the
9 inmate to go back and exhaust -- and under those
10 circumstances, even if he had been untimely by virtue of
11 the continuance language, he was, nonetheless, permitted
12 to return to Federal Court. So, I think by virtue of the
13 language of the statute, it's at least possible that
14 Congress had a -- deliberately excluded that possibility.

15 Moreover, I think that the statutory history and
16 the statutory purposes in this case support the conclusion
17 that Congress intended inmates to require with applicable
18 grievance proceedings.

19 And if I may refer to the statutory history, in
20 this Court -- excuse me, in Booth v. Churner, this Court
21 recognized that this Court's prior decision in McCarthy v.
22 Madigan constituted a substantial portion of the statutory
23 history from the PLRA's exhaustion requirement. And, in
24 relevant part, for purposes of the question presented here,
25 that decision observed that -- or assumed that an exhaustion --

1 a mandatory exhaustion requirement for prisoners would
2 necessitate the compliance of administrative filing
3 deadlines.

4 JUSTICE GINSBURG: But that was a comment made
5 when the decision itself held that there was no
6 exhaustion. The -- wasn't that so? I mean, the holding
7 in Madigan was in favor of the Petitioner.

8 MS. PERKELL: That is so. This Court --

9 JUSTICE GINSBURG: I mean McCarthy.

10 MS. PERKELL: This Court made that observation.

11 It was one of two grounds upon which this Court relied in
12 holding that this Court would not judicially impose a
13 mandatory exhaustion requirement for prisoners under that
14 decision. So, the first part of the decision evaluated
15 the text of the former version of 1997(e), and, in the
16 second part of this decision, this Court said,
17 "Nonetheless, notwithstanding that the statute doesn't
18 expressly require exhaustion, we will not judicially
19 impose exhaustion in this case for the reason that such a
20 requirement would, indeed, represent a possibility of
21 forfeiture of a claim for an inmate's failure to comply
22 with deadlines."

23 And, again, as this Court recognized in Booth v.
24 Churner, that decision is a significant part of the
25 statutory history of this provision, and this Court

1 presumed that Congress was responding to that decision
2 when it revised 1997(e).

3 JUSTICE GINSBURG: Well, there was -- in
4 McCarthy, itself, the wording was something that -- of the
5 kind proposed. And so, it's not clear whether it's
6 referring to -- what was proposed was a rule that would
7 incorporate a procedural default motion. It's not clear,
8 just from the -- reading that opinion.

9 MS. PERKELL: Your Honor, I would respectfully
10 dispute that, in that our reading of the opinion, as well
11 as the Government's brief in that case, seemed to propose
12 no unusual rule of exhaustion. It appeared that the rule
13 of exhaustion that was being discussed was an ordinary
14 rule of exhaustion. So, I don't believe that there was
15 anything unusual about the exhaustion concept that was at
16 issue in that case.

17 Finally, I would submit that Congress's purposes
18 in enacting --

19 JUSTICE BREYER: Before you get to the purposes,
20 you quote in your brief -- the only legislative history I
21 could find here -- you said that Congressman LoBiondo
22 referred to McCarthy, which you find relevant, because
23 McCarthy indicated that the word "exhaustion" would carry
24 along with it a procedural default rule. So, what did the
25 Congressman say?

1 MS. PERKELL: What did Representative LoBiondo --
2 JUSTICE BREYER: Uh-huh.
3 MS. PERKELL: -- say?
4 JUSTICE BREYER: Uh-huh.
5 MS. PERKELL: The significance of excerpting
6 that provision was to, in part, demonstrate that Congress
7 was, indeed, aware, consistent --
8 JUSTICE BREYER: All right. So, I take it from
9 your answer he didn't really say anything helpful to you
10 --
11 MS. PERKELL: He --
12 JUSTICE BREYER: -- except to refer to the name
13 of the case --
14 MS. PERKELL: Well --
15 JUSTICE BREYER: -- in which case, what we have
16 on the -- all right. Is that right?
17 MS. PERKELL: Your Honor, I think there are two
18 relevant things about that statement. First is the
19 significance of his referencing the McCarthy case and
20 demonstrating affirmatively that Congress was, indeed,
21 aware of that decision when it revised the statute. But,
22 moreover, it was another iteration of the purposes that
23 Congress sought to achieve through enactment of the
24 statute.
25 So, speaking to the third point, which was

1 purposes of the statute, our position is that those
2 purposes are directly served by a rule in which inmates
3 are required to comply with administrative grievance
4 proceedings.

5 By contrast, those rules are subverted by a rule
6 in which an inmate is permitted to file an untimely
7 appeal, which is rejected on procedural grounds, and
8 which, therefore, receives the benefit of no prior
9 administrative review.

10 JUSTICE GINSBURG: In thinking --

11 MS. PERKELL: It's --

12 JUSTICE GINSBURG: -- of what Congress might
13 have meant, one part of the picture is, we're not dealing
14 with statutes of limitations enacted by legislatures.
15 We're dealing with grievance procedures that vary from
16 State to State, and maybe even from prison to prison. And
17 some of them have a very short span. I think the brief
18 said some of them are 2, 3, 5 days.

19 MS. PERKELL: That is correct. Those were
20 proceedings that were noted on one of the briefs. I think
21 it's reasonable to presume that Congress was aware of the
22 variety of prison filing deadlines when it enacted this
23 statute. And I also think that it's reasonable to presume
24 that Congress intended for those -- for whatever grievance
25 procedure the State sets forth to be governing in this

1 instance. And this is because, under the former version
2 of the statute, the CRIPA, Congress had required that
3 grievance proceedings comply with specified standards,
4 specified Federal standards. And in the new version of
5 the statute, Congress dispensed with those requirements.
6 And I think that the obvious conclusion to draw from that
7 change was that Congress was intending for -- whatever
8 prison procedures are established in any given situation
9 are those that are going to govern the inmate's appeal
10 process.

11 JUSTICE STEVENS: So, you would treat a State
12 with a 2-day statute of limitations just like your State,
13 with a 15-day statute.

14 MS. PERKELL: I think the -- always, the
15 relevant inquiry, especially in light of the statute -- or
16 precisely because of the statutory language, the inquiry
17 is whether or not remedies are, indeed, available and
18 capable of use by the inmates. So, without any further
19 facts, yes, I would treat a 2-day --

20 JUSTICE STEVENS: It was --

21 MS. PERKELL: -- filing period.

22 JUSTICE STEVENS: -- available for 2 days, so
23 that satisfies -- so, I suppose it would be okay for 6
24 hours, too.

25 MS. PERKELL: It could conceivably be. As

1 long as remedies are, indeed,
2 available to the inmate, there is an obligation under the
3 statute that he exhaust --

4 JUSTICE SOUTER: Is that --

5 CHIEF JUSTICE ROBERTS: I suppose --

6 JUSTICE SOUTER: -- plausible?

7 CHIEF JUSTICE ROBERTS: I suppose there can
8 always be a specific objection to the reasonable
9 availability of a particular remedy. I mean, if this --
10 the prison remedy is, you know, within 5 minutes you've
11 got to file a complaint or something. But that's not the
12 question here. The question here is what the PLRA
13 requires, as a general matter, with respect to prison
14 remedies.

15 MS. PERKELL: Yes, Your Honor, that is correct.

16 And as -- we are submitting that it does, indeed,
17 require compliance with the administrative grievance --

18 JUSTICE KENNEDY: Would you agree that there's a
19 requirement that the exhaustion period be reasonable?

20 MS. PERKELL: I'm -- I -- the requirement that I
21 think is relevant under the statute is whether or not the
22 procedure is available.

23 JUSTICE SCALIA: Conceivably, if it's too short,
24 it's not reasonably available. I guess --

25 MS. PERKELL: That is -- yes, Your Honor, that

1 is --

2 JUSTICE SCALIA: Okay.

3 MS. PERKELL: -- that is a conceivable --

4 JUSTICE SCALIA: It's conceivable.

5 MS. PERKELL: -- conceivable --

6 JUSTICE SOUTER: Well --

7 MS. PERKELL: -- scenario.

8 JUSTICE SOUTER: -- what do you --

9 MS. PERKELL: I --

10 JUSTICE SOUTER: -- what do you make of the fact

11 that there was prior law that required -- I forget its

12 exact words, but something like "reasonable procedure,"

13 and that language was repealed?

14 MS. PERKELL: I presume, from that, that

15 Congress had shifted its focus in the new statute to the

16 purposes that we have articulated in the brief, one of

17 them being --

18 JUSTICE SOUTER: Well, if that's -- if that's

19 the case, then, on your own reasoning, you can't assume

20 that there's -- that availability requires any reasonable

21 availability. It's got to be availability as, I guess, a

22 physical possibility, and that's all.

23 MS. PERKELL: I would agree with that, Your

24 Honor. That is our --

25 JUSTICE SOUTER: Do you find --

1 MS. PERKELL: -- position.

2 JUSTICE SOUTER: -- it plausible that Congress,
3 in effect, would have intended these -- the statute of
4 limitations on 1983 to be truncated in that way?

5 MS. PERKELL: Yes, Your Honor, I do believe
6 that. Congress was legislating, enacted this statute for
7 the purpose of addressing a particular category of section
8 1983 actions in which it appears that Congress reached the
9 conclusion that there was be -- there was an abuse of that
10 process under 1983. And so, the purpose of -- what this
11 --

12 JUSTICE SOUTER: Yes, but the abuse was not
13 coming from people who filed -- or the -- let's say the
14 line that identifies the abuse was not a line between
15 those who file a grievance within 2 days and those who do
16 not. I mean, that's -- that -- it's true, if you -- if
17 you have a 2-hour statute of limitations, you're going to
18 keep out a lot of cases, but it's not a tool that is
19 particularly suited to the problem that Congress was
20 dealing with, which is frivolous actions.

21 MS. PERKELL: Well, Your Honor, I would first
22 dispute that a 2-hour time limitation would necessarily
23 keep out a lot of cases. As long as it's an available
24 remedy --

25 JUSTICE SOUTER: Wouldn't you like to have a 2-

1 hour time limit?

2 [Laughter.]

3 MS. PERKELL: Your Honor, it --

4 JUSTICE SOUTER: You'd have a lot -- you know, a
5 lot more time at the park.

6 [Laughter.]

7 MS. PERKELL: Your Honor, it wouldn't
8 necessarily be my preference, but I certainly wouldn't
9 suggest that it was a remedy unavailable or incapable of
10 use by anyone, if you take into consideration other
11 aspects of the prison grievance procedure.

12 JUSTICE GINSBURG: May I --

13 MS. PERKELL: So --

14 JUSTICE GINSBURG: May I ask you just one thing
15 --

16 MS. PERKELL: Yes.

17 JUSTICE GINSBURG: -- about how this operates
18 and who reviews what? One of the claims that was made --
19 this prisoner filed twice. And, the second time, as I
20 recall, he said, "Every day that I'm here, the clock
21 starts running again, because this is a continuing
22 violation. I'm restricted today, and I'll be restricted
23 tomorrow." And there was no -- is that something that
24 would be reviewable in court?

25 MS. PERKELL: I think what -- in this -- as

1 occurred in this case, the inmate has made this contention
2 that there was a continuing violation. It would be
3 incumbent upon the district court to evaluate that
4 question under the grievance proceeding at issue and under
5 the facts --

6 JUSTICE GINSBURG: Well, what --

7 MS. PERKELL: -- as presented.

8 JUSTICE GINSBURG: -- role would govern whether
9 a continuing violation occurred? Would it be --

10 MS. PERKELL: I would suggest that the law of
11 the prison grievance proceeding.

12 If there's --

13 JUSTICE GINSBURG: And what is the law of the
14 prison grievance proceeding on that point?

15 MS. PERKELL: Well, in California the
16 requirement is that an inmate must file a grievance within
17 15 working days or 3 weeks of the event or decision at
18 issue. The facts in this case --

19 JUSTICE GINSBURG: Well, he -- that -- his point
20 is that the event at issue happens every day.

21 MS. PERKELL: Well, I would submit that the
22 facts of this case actually show that the events at issue
23 are the two decisions that were made which resulted in
24 consequences with which the inmate was dissatisfied.
25 Those two decisions were the first decision --

1 JUSTICE GINSBURG: But your -- but your point --
2 your -- whatever the internal grievance procedure is,
3 there's no judge that would decide that, which you said,
4 this is all for the internal procedure.

5 MS. PERKELL: That is correct. And, again, the
6 district court could be called upon to address that
7 question, as appears to be the case here, and the district
8 court would endeavor to apply the rules of the grievance
9 proceeding to the facts regarding exhaustion. If, in the
10 event the grievance proceeding didn't, for instance,
11 sufficiently put the inmate on notice, didn't provide
12 clarity on whether or not -- on what he had to do under
13 circumstances where there's a continuing consequence to a
14 decision, perhaps in that instance it would be appropriate
15 for the district court to decide, yes, indeed, he had
16 exhausted, given the ambiguity on that point in the
17 regulations.

18 CHIEF JUSTICE ROBERTS: Ms. --

19 MS. PERKELL: If --

20 CHIEF JUSTICE ROBERTS: -- Perkell, perhaps
21 you'd like to save your remaining --

22 MS. PERKELL: Yes.

23 CHIEF JUSTICE ROBERTS: -- time for rebuttal.

24 MS. PERKELL: Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Mr. Himmelfarb, we'll hear now from you.

2 ORAL ARGUMENT OF DAN HIMMELFARB

3 FOR THE UNITED STATES, AS AMICUS CURIAE,

4 IN SUPPORT OF PETITIONERS

5 MR. HIMMELFARB: Mr. Chief Justice, and may it
6 please the Court:

7 The United States agrees with Petitioners'
8 submission that the Ninth Circuit's decision is
9 inconsistent with the text, history, and purposes of the
10 PLRA exhaustion requirement. We would add that the Ninth
11 Circuit's decision has consequences that Congress could
12 not have intended.

13 To begin with, under the Ninth Circuit's
14 interpretation, a prisoner can wait years to file an
15 administrative claim, such that it is virtually certain
16 that the prison will reject the claim as untimely and not
17 decide the claim on the merits. That is hardly different
18 from not requiring an exhaustion requirement -- not
19 requiring exhaustion at all. Indeed, Respondent candidly
20 concedes -- this is on page 43 of his brief -- that, under
21 his interpretation, if the prison system does not give
22 prison decisionmakers any discretion to decide an untimely
23 claim, the prisoner would not have to file an
24 administrative claim at all. All he would have to do is
25 wait for the filing deadline to pass.

1 In addition, if the Ninth Circuit's
2 interpretation is correct, the PLRA would be the only
3 context in the law in which a claimant who is required to
4 exhaust would be able to get into Federal Court by virtue
5 of untimely exhaustion; that is, without complying with
6 filing deadlines. It would be odd, to put it mildly, if
7 Congress intended to adopt such a uniquely forgiving
8 exhaustion rule as part of a statute whose very purpose
9 was to combat abusive litigation by prisoners.

10 Respondent's submission is that the
11 administrative law principle, the established
12 administrative law principle, that exhaustion requires
13 compliance with the agency's procedural rules, is
14 inapplicable here, because what we're dealing with is what
15 he calls an original proceeding rather than a review
16 proceeding.

17 JUSTICE KENNEDY: Is his best case, your
18 brother's best case, in your view -- and you probably --
19 may not think of it as a very persuasive case -- Fay and
20 Noia, is that the closest Respondents can come?

21 MR. HIMMELFARB: Well, probably, Justice
22 Kennedy. And that is a habeas corpus case that involves
23 exhaustion under the habeas corpus statute. It doesn't
24 involve administrative exhaustion. And, of course, the
25 Court abandoned that principle, which was the deliberate

1 bypass exception to the procedural default rule, years
2 ago, I believe in 1977, in favor of the cause and
3 prejudice exception in Wainwright versus Sykes, which was
4 subsequently codified by Congress in AEDPA. But there is
5 no administrative exhaustion context, of which we are
6 aware, where untimely exhaustion is sufficient.

7 JUSTICE KENNEDY: You --

8 MR. HIMMELFARB: Respondent places --

9 JUSTICE KENNEDY: Could --

10 MR. HIMMELFARB: -- heavy --

11 JUSTICE KENNEDY: Would Respondent tell us,
12 well, that at least in some administrative law schemes,
13 generally there is a requirement that the exhaustion
14 period must be reasonable?

15 MR. HIMMELFARB: Well, the -- this Court has
16 made clear, in various cases, including in the very
17 context of the exhaustion provision at issue here, in the
18 Booth versus Churner decision, that there are no
19 exceptions to the exhaustion -- to an administrative
20 exhaustion requirement when Congress provides otherwise;
21 that is, in the context of statutory, as opposed to a
22 judge-made, exhaustion requirement. It is the case that
23 what is required under the PLRA is exhaustion of available
24 administrative remedies. So, under some of the
25 hypotheticals that the Court was suggesting -- for

1 example, if there were a 6-hour filing deadline; and, as
2 far as I'm aware, there is no prison that has a 6-hour
3 filing deadline -- but, if there were, and in that
4 particular case, for some reason, the prisoner were unable
5 to comply with the deadline, because, for example, forms
6 were unavailable or he was in a hospital bed,
7 incapacitated, or he was in solitary confinement, I think
8 it would be appropriate for a Federal Court to conclude
9 that the remedy at issue was not available; and,
10 therefore, that he didn't have to pursue that remedy; he
11 would be able to get into Federal Court, assuming he had
12 otherwise complied with the prison's procedural
13 requirements.

14 JUSTICE BREYER: Well, wouldn't it go --
15 wouldn't that apply -- that principle apply to reasonable
16 -- unreasonable remedies? You have to have a reasonable
17 remedy. I don't see how you can decide to import half of
18 administrative law and not the other half.

19 MR. HIMMELFARB: No, I don't think -- I don't
20 think reasonableness is the right way to think about it,
21 Justice Breyer. It is not a -- in our view, it's not a
22 categorical question of whether a particular filing
23 deadline is reasonable or not in the view of the Court.

24 JUSTICE BREYER: It's not just a filing
25 deadline. It's the whole procedure. I mean, Rehnquist --

1 Chief Justice Rehnquist, in McCarthy, lists a bunch of
2 reasons in cases where the process subjects the plaintiffs
3 to unreasonable delay, to an indefinite timeframe. And
4 there could be others. The normal thing is, you excuse
5 exhaustion where the exhaustion requirement was such that
6 the person couldn't reasonably comply.

7 Now, either you do want to import that into this
8 statute, or not. And if you do not, then I think you're
9 asking us to say we import what goes normally with the
10 word "exhaustion," where it favors the Government, but not
11 what normally goes with the word "exhaustion" where it
12 doesn't.

13 MR. HIMMELFARB: Our only point, Justice Breyer,
14 is that it wouldn't be appropriate for a court to look at
15 a particular filing deadline in a prison. Most of them,
16 incidently, are somewhere between 14 and 30 days. But if
17 there were, for example, a 24-hour filing deadline, our
18 submission is that it wouldn't be appropriate for a court
19 to look at that deadline and say, "We think that that's
20 just too short, and, therefore, unreasonable." It would
21 only be appropriate to say that the remedy wasn't
22 available if -- regardless of the length of the filing
23 deadline -- in a particular case, the facts were such that
24 literally the prisoner were unable to pursue that
25 administrative remedy. If he were literally unable to do

1 so, the remedy would not be available under the PLRA
2 exhaustion provision.

3 The case on which Respondent places --

4 JUSTICE STEVENS: Would that apply to a prisoner
5 who claimed he'd been raped by a guard or something, but
6 was afraid to bring the proceeding, for 2 or 3 weeks,
7 until the guard was transferred to another facility? And
8 he alleged those facts, and then he was denied relief
9 because it was over 15 days. Would that be --

10 MR. HIMMELFARB: Justice Stevens, I think there
11 would be cases -- and that might be one of them -- that
12 would present difficult questions. Under your
13 hypothetical, for example, if the -- if it were clear that
14 there were explicit threats --

15 JUSTICE STEVENS: Well, those are --

16 MR. HIMMELFARB: -- from the guard --

17 JUSTICE STEVENS: -- his allegations. These are
18 just his allegations. And when that -- and they then
19 said, "No, it's -- you're out of time." Could a Federal
20 Court take that case?

21 MR. HIMMELFARB: If a prisoner filed a 1983 or
22 Bivens action, and the --

23 JUSTICE STEVENS: No, he -- first he files a
24 prisoner complaint, 17 days late, but makes the
25 allegations I describe, and he's just denied because he's

1 too late. Could a Federal Court take that case, under
2 your view?

3 MR. HIMMELFARB: Well, I would think --

4 JUSTICE STEVENS: And then he'd have to file a
5 second -- subsequently file a 1983 case.

6 MR. HIMMELFARB: That could be an issue that
7 would have to be litigated in connection with a motion to
8 dismiss for failure to exhaust. If the prisoner alleged,
9 and could prove, for example, that he received explicit
10 threats from the prison guard that, if he filed this
11 administrative claim, harm would come to him, I would
12 think that a court could permissibly find that that wasn't
13 an available remedy. But short of -- short of explicit
14 threats, I think he would -- it would be a more difficult
15 issue --

16 JUSTICE STEVENS: So even --

17 MR. HIMMELFARB: -- and a much harder --

18 JUSTICE STEVENS: -- if it was seven --

19 MR. HIMMELFARB: -- case.

20 JUSTICE STEVENS: -- even after the 17th day,
21 the Federal Court could hear a -- have a factual hearing.

22 MR. HIMMELFARB: There would have -- if the
23 remedy was not available, because the prisoner --

24 JUSTICE STEVENS: He's just alleged it isn't -- in
25 -- and the only -- the only response from the State is,

1 "You're 2 days late." That's all -- that's all the State
2 has said.

3 MR. HIMMELFARB: That's right. But there -- you
4 would -- you would often have factual issues in connection
5 -- maybe not "often" -- you would sometimes have factual
6 issues in connection with a motion to dismiss which might
7 transform it, in effect, into a motion for summary
8 judgment when there is an exhaustion defense raised by the
9 prison. And that might be an example -- I think that
10 would be a rare case, but that might be an example of
11 where that would happen.

12 I do want to respond to Respondent's reliance on
13 the Oscar Mayer case. The distinction between Oscar Mayer
14 and this case is that that case did not involve an
15 exhaustion provision. The Court explicitly stated, in
16 Oscar Mayer, that the provision at issue, a provision of
17 the ADEA, does not stipulate an exhaustion requirement.
18 The requirement was one of commencement. It obligated the
19 claimant to go to a State administrative agency, wait 60
20 days, and then he was free to go into Federal Court.
21 Exhaustion requires a claimant to go to an agency and
22 complete his remedies. In Oscar Mayer, the Court relied
23 on features of the provision at issue there that are not
24 present here, and it said, correctly, that the provision
25 at issue there had the purpose of providing a claimant

1 with a limited opportunity to obtain relief in the State
2 administrative process.

3 The PLRA exhaustion provision was enacted to
4 give the prison a full and fair opportunity, not a limited
5 opportunity, to provide relief before a prisoner is
6 entitled to go into Federal Court.

7 JUSTICE BREYER: Why did they use the word
8 "until," instead of the word "unless"?

9 MR. HIMMELFARB: There are lots of statutory
10 exhaustion requirements that are framed in lots of
11 different types of language. Some say "until," some say
12 "unless," some say "before," some say "after," some say
13 "only if." But, in every single context of which I am
14 aware, they incorporate the settled administrative law
15 principle that a claimant has to comply with the agency's
16 procedural requirements.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr.
18 Himmelfarb.

19 Mr. Feder.

20 ORAL ARGUMENT OF MEIR FEDER

21 ON BEHALF OF RESPONDENT

22 MR. FEDER: Thank you, Mr. Chief Justice, and
23 may it please the Court:

24 There are three basic reasons that a procedural
25 default rule should not be read into the PLRA. The first

1 is, the text of section 1997(e) is most naturally read as
2 requiring simple exhaustion, which is satisfied once --
3 when there are no remedies available at the time the suit
4 is filed.

5 JUSTICE SCALIA: I would -- I would not describe
6 "exhaustion" that way. I would -- I would describe a
7 failure to file within the prescribed time, not as an
8 exhaustion of remedies, but as a failure to exhaust
9 remedies. I mean, I guess I'm having a terminological
10 problem in this case, as I did in the previous case.

11 MR. FEDER: Well, Your Honor, I think -- I think
12 that in the habeas cases the Court has consistently read
13 "exhaustion" as referring simply to "no remedies presently
14 available."

15 JUSTICE SCALIA: Yes, well, we're talking about
16 administrative law, which is a field I used to know
17 something about, and I've never thought "exhaustion"
18 included "failure to exhaust," which --

19 MR. FEDER: Well --

20 JUSTICE SCALIA: -- which is --

21 MR. FEDER: -- first --

22 JUSTICE SCALIA: -- what happens when you simply
23 don't file within the prescribed period.

24 MR. FEDER: Well, first of all, Your Honor, I
25 don't think we're -- that administrative law is the

1 appropriate analogy here. There are a number of reasons
2 why habeas provides a much closer source of meaning for
3 the word and concept of "exhaustion" here, both because of
4 the similarity of the language in the exhaustion provision
5 here, and the habeas exhaustion provision, because of the
6 fact that both are prisoner litigation. There is an
7 overlap between habeas cases and section 1983 cases in
8 this context. And --

9 JUSTICE KENNEDY: Well, I'm not sure. It seems
10 to me, as Justice Scalia's question indicates -- I was
11 surprised that we're talking about procedural default. I,
12 too, thought this was an administrative law case. And
13 it's an administrative law case, because we want the input
14 of the administrative -- of the administrative body. In
15 the habeas cases, we're simply giving deference as a
16 matter of comity and courtesy to the State Courts. Is it
17 --

18 MR. FEDER: Well, actually, Your Honor, I don't
19 think there's any indication that Congress was focused on
20 input from the prison grievance system. In fact, the way
21 -- the way it works is that once the prison grievance
22 system addresses the claim that's of no effect in the
23 subsequent Federal suit, which starts over from square one
24 --

25 JUSTICE KENNEDY: Well, not so much maybe input,

1 but so that they can -- they can resolve the program --
2 the problem within the institution, and not have to come
3 to the courts.

4 MR. FEDER: Well, two things. First, as I say,
5 there are a number of reasons why, in looking at the
6 language Congress was using, it's more reasonable to look
7 to the habeas statute. But even in the administrative law
8 context, this is dramatically different from most
9 administrative law circumstances, because in those
10 situations you have an administrative decision that is in
11 some way being reviewed, the administrative agency record
12 may have some effect. Here, you don't have that aspect of
13 review, and the administrative context that is close to
14 this, if you're looking for an administrative analogy, is
15 the Title VII and Age Discrimination Act cases, because
16 those cases, similarly, provided for invocation of State
17 remedies that were designed to give the State an
18 opportunity to resolve the case voluntarily, if that would
19 satisfy the prospective plaintiff, but if the plaintiff
20 were not satisfied, he'd be able to move on.

21 And I think that both opposing counsel have made
22 a point of saying that the Oscar Mayer case pointed out
23 that it was not an exhaustion requirement in Oscar Mayer,
24 but, rather, that it used the word "commence." But I
25 think it's important to look at what the Court said it

1 meant by saying it wasn't an exhaustion requirement. And
2 this is at 441 U.S. at 761, and the Court said, "section
3 14(b) does not stipulate an exhaustion requirement. The
4 section is intended only to give State agencies a limited
5 opportunity to settle the grievances of ADEA claimants in
6 a voluntary, localized manner so that the grievants
7 thereafter have no need or desire for independent Federal
8 relief." So, the sense in which the Court was saying that
9 that's not an exhaustion requirement is basically saying
10 that that scheme is like this one, where the PLRA does not
11 approach attempting to reduce the Federal prisoner claims
12 by kicking cases out of court indiscriminately or by
13 defaults; it aims to reduce it by raising the degree of
14 difficulty for the prisoner in getting to Federal Court in
15 various ways --

16 JUSTICE SCALIA: But how does it do that? I
17 mean, if there's any object that Congress had in mind,
18 surely it was to reduce the number of frivolous prisoner
19 claims that are coming into Federal district courts. And
20 it hoped to do this by sending the -- making sure that
21 they went through the prison system first. Whether we
22 looked at what the prison system did or not, we hoped that
23 the prison system would get rid of a large -- a large
24 number of these frivolous claims.

25 Now, can you tell me how that purpose is

1 possibly served --

2 MR. FEDER: Certainly, Your Honor.

3 JUSTICE SCALIA: -- by saying, "Do nothing. So
4 long as you don't even try to go through the prison
5 grievance system, you can come directly into court." It
6 seems to me this --

7 MR. FEDER: Well, we're not --

8 JUSTICE SCALIA: -- this --

9 MR. FEDER: -- we're not saying that, Your
10 Honor.

11 JUSTICE SCALIA: Oh, no, "You -- you have to go
12 there late. You" --

13 MR. FEDER: Yes.

14 JUSTICE SCALIA: -- "you just sit around until
15 it's too late, file a grievance that you know will not be
16 accepted, because it's too late, and then you can come
17 into Federal Court." This is going to cut back
18 considerably on the number of frivolous claims?

19 MR. FEDER: Your Honor, I think that -- there
20 are a few points to respond to there -- I think that the
21 provision does make sense that way. I mean, first, it's
22 worth noting that the PLRA was working very well before
23 procedural default even came into the picture. The first
24 court of appeals decision recognizing procedural default
25 under the PLRA was in 2002. The Petitioner has statistics

1 -- Petitioners have statistics in their brief showing that
2 between 1995 and 2000 there was already a nearly 50
3 percent drop in the rate of inmate filings. But going
4 specifically --

5 JUSTICE SCALIA: Maybe because they thought they
6 had to file on time.

7 MR. FEDER: But there is no -- there is no
8 indication anywhere of there being widespread defaults.
9 But I should address your question about how this advances
10 -- why the provision wouldn't be meaningless without
11 procedural default. And there are least three ways that
12 it is still meaningful. The first is, it removes any
13 rational incentive for the prisoner to evade the grievance
14 system. I'll come back to that in a second. I just want
15 to say the second and third things are, it gives the State
16 an opportunity to address the grievance, if it wants to,
17 and, at a minimum, it delays and raises the degree of
18 difficulty for the prisoner.

19 But going back to the incentives, there are two
20 basic reasons why an inmate might rationally want to evade
21 the grievance process. And, I mean, there's this notion
22 here of prisoners scheming to get around the grievance
23 process and deliberate bypass. And it's completely
24 overblown, because the -- there are two basic reasons the
25 prisoner might want to. First, if proceeding with the

1 grievance and having it adjudicated in the prison
2 grievance system could somehow harm his later Federal
3 suit. Second would be to get to Federal Court faster.
4 Neither one of these things happens under the PLRA, even
5 without a procedural default rule being read into it.

6 On the first thing, the prisoner is not affected
7 in Federal Court, unlike, say, a habeas case, where a
8 prisoner may want to evade a State Court decision, because
9 that decision will get deference in the later Federal
10 habeas proceeding. Here, the grievance decision is of no
11 force and effect. That incentive is not there.

12 CHIEF JUSTICE ROBERTS: Yes it is. Because the
13 whole -- one of the reasons you have reasonably short time
14 is that you get the witnesses there, they remember it.

15 If you have to file within 15 days with the
16 prison, the prisoner does that, the guard is there, "Do
17 you remember what happened?"

18 "Yes. This, this, and this."

19 "Who else was there?"

20 "These people were there."

21 You wait 3 months, the prisoner files a
22 complaint, they ask the guard, "Do you remember?"

23 "Not really. It was 3 months ago."

24 "Who else was there?"

25 "I'm not sure."

1 Then he has -- you know, the evidence against
2 him is much weaker when he files his claim in Federal
3 Court.

4 MR. FEDER: I -- Your Honor, I don't -- I don't
5 think it really makes sense to say that, within this kind
6 of time periods that we're talking about, that that's
7 really going to help the inmate's claim, because -- I
8 mean, we're dealing here within --

9 CHIEF JUSTICE ROBERTS: No, the point is that if
10 he complies with the time limit, it's going to hurt his
11 claim; therefore, he doesn't want to comply with the time
12 limit.

13 MR. FEDER: I understand, Your Honor, but
14 everything here is within the framework of the section
15 1983 statute of limitations. And -- which is set,
16 presumably, to be able to adjudicate claims with -- on the
17 theory that it's fresh enough -- reasonably fresh if it's
18 within whatever that period is in the particular State; 2
19 years, in many States. So, the idea that something --
20 that the guard is not going to be able to testify 6 months
21 later is, I think, you know, maybe at the margins. It's
22 not likely to affect this.

23 CHIEF JUSTICE ROBERTS: Well, you were
24 suggesting that the prisoner had no incentive not to
25 comply and go through the State grievance procedure. And

1 it seems to me that the reason you have the short
2 procedures are to maintain a fresh record that more
3 accurately reflects the truth, and, since Congress was
4 acting against the backdrop in which they thought there
5 were too many frivolous cases, they thought that might be
6 one way to limit those.

7 JUSTICE SCALIA: And the more frivolous the
8 case, the more likely it is that it won't be remembered by
9 a guard. I mean, you know, the suit is, "A guard spat on
10 my painting," or something like that, you know. Who's
11 going to remember anything like that 4 months later?

12 MR. FEDER: Well, Your Honor, again, I think
13 that, at a minimum -- even if you grant that there may --
14 the prisoner may see some advantage in that, there is, at
15 a minimum, a substantially smaller incentive than you
16 would -- than you would have in, for example, a habeas
17 case. But I want to get to the second thing, which is, I
18 think, the more likely incentive that existed before the
19 PLRA.

20 Before the PLRA is passed, if a prisoner wants
21 to get to Federal Court as quickly as possible, the
22 prisoner, the day after he suffers whatever injury he
23 feels he has suffered, can go about filing his Federal
24 claim. The PLRA, with or without a procedural default
25 rule, prevents that. He can't do that, because, first of

1 all, he has to wait until -- if he's going to avoid the
2 grievance system for some reason, he has to wait until
3 that time has run. But he then can't just go and file in
4 Federal Court. If he just files in Federal Court, he's
5 going to get bounced back, because he still has a
6 potential remedy in the grievance system that he hasn't
7 filed.

8 The United States says that we've conceded that
9 in systems where there isn't some sort of discretion that's
10 clear to consider a late claim, that, in that case, the
11 prisoner is not going to have to file. We do not concede
12 that at all. I don't -- you can look at our brief, at
13 page 43 -- I don't think we concede that. We do refer to
14 the fact that California and many other States provide for
15 discretion. But the fact is that, in any event, we're not
16 talking, here, about -- with -- in -- with grievance time
17 limits, we're not talking about something like a notice-
18 of-appeal requirement that's jurisdictional, that's going
19 to bar it from being appealed. If -- there's always a
20 possibility, particularly since many of these systems are
21 internal rules of the grievance system, that, one way or
22 another, it can be considered. And I think --

23 JUSTICE BREYER: Yes, all right, but the thing I
24 don't understand in this, which is hard -- Is there any
25 answer to this point from the other side? What this

1 statute does seem to be about is exhaustion, which
2 normally does carry with it the notion, "If you don't
3 exhaust, you lose." Dozens of cases say that. And it
4 seems to make it a requirement, not leaving it to the
5 discretion of the prisoner. Well, your interpretation
6 leaves it up to the prisoner. If the prisoner doesn't
7 want to do it, he doesn't do it. He pays a price, he has
8 to wait, but it's up to him. Now, that's the point that
9 is bothering me the most, frankly.

10 MR. FEDER: And what I'm saying now, Your Honor,
11 is that he can't just wait and not file.

12 JUSTICE BREYER: Why not?

13 MR. FEDER: Because he will not have exhausted
14 until he files and has --

15 JUSTICE BREYER: No, no, but, I mean, that's a
16 -- that sounds to me like a verbal gimmick, to tell you
17 the truth. If he waits, and he waits to past the
18 deadline, sure, he'll put a piece of paper in, but it'll
19 be denied.

20 MR. FEDER: Well, two things about that.

21 JUSTICE BREYER: Isn't that true? So, I'm not
22 counting he puts a piece of paper in, and it's -- in my
23 way of speaking, if what's left for him to do in the
24 system, because there is this deadline, 6 months, it's
25 passed, it's now 9 months, so he says, "Here's my paper.

1 I'm exhausting."

2 MR. FEDER: Part of --

3 JUSTICE BREYER: Denied.

4 MR. FEDER: Part of --

5 JUSTICE BREYER: Okay. Now, I'd say that's --
6 means he isn't exhausting. He's failed to exhaust, as I'm
7 using the term.

8 MR. FEDER: Well, Your Honor, I think -- again,
9 first of all, it's a -- it's important to understand that
10 we are saying he will have to file, in all circumstances.

11 It's not necessarily clear --

12 JUSTICE BREYER: All right.

13 MR. FEDER: -- that the State --

14 JUSTICE BREYER: Now, I want to get rid of that
15 argument. Use my --

16 MR. FEDER: I understand.

17 JUSTICE BREYER: -- terminology --

18 MR. FEDER: Putting that --

19 JUSTICE BREYER: -- and now answer what I am,
20 frankly, bothered by the most --

21 MR. FEDER: Yes, certainly.

22 JUSTICE BREYER: -- which is what I just said.
23 It leaves it up to him.

24 MR. FEDER: First of all, there is always the
25 possibility, depending on the nature of the grievance,

1 that the prison may address it. For instance, if the
2 complaint is a failure-to-protect claim, and the prisoner
3 is being harmed by being placed with another prisoner, who
4 is -- who's dangerous to him, if the State gets that
5 complaint late, they may -- they may very well still want
6 to act on it and ameliorate that situation, and that's the
7 kind of thing that could, in the end, satisfy the prisoner
8 and have him not sue. But the other thing is, even if the
9 State -- assuming the State doesn't address it, the
10 prisoner, again, has to not just file that; there is an
11 appeals process that normally he'll have to go through,
12 although, in this case, the California -- the -- excuse me
13 -- the prison appeals coordinator just said, "I'm not even
14 going to file it, so you can't appeal." Normally, though,
15 you would think you would be able to appeal. He'll have
16 to go through the entire system. At best, for him, he's
17 delayed a long time. And the way Congress approached this
18 was to -- by provisions like for costs and fees and so
19 forth -- was to attempt to dissuade prisoners from filing.
20 This, at a minimum, is going to help to dissuade him from
21 filing, coupled with the fact that, because he is not
22 getting to court faster, he doesn't have what, before the
23 PLRA, would have been the main incentive to bypass a
24 system that otherwise isn't going to hurt him.

25 JUSTICE SCALIA: It seems to me you're

1 understating the amount of time that he's saving by
2 failing to exhaust. It's not just if he waits six months
3 and then puts it in. If he had filed within the right
4 period, he would get a hearing at one level. And there
5 may be as many as two other levels of review before he's
6 fully off -- before he's fully exhausted. Now, here's a
7 guy who -- you know, he's lying around in jail. He's --
8 this is a frivolous filer. He wants to get out of the
9 jail, downtown, you know, to the district court in L.A.,
10 where he can look at the beautiful people and relieve the
11 humdrum of prison life. He wants to get to district court
12 as soon as he can.

13 MR. FEDER: Yes, there are a lot of provisions
14 in the PLRA that may prevent him from actually attending,
15 but --

16 [Laughter.]

17 MR. FEDER: -- in -- in any event, I guess the
18 point here is, first of all, he has -- there are appeal
19 levels, whether or not -- no matter what the grounds
20 something is rejected on, there are -- normally would be
21 an appeal through the entire system. There is nothing
22 requiring the State to speed it through the appeals
23 process if the State feels that it's important for the
24 prisoner not to be able to get to Federal Court as quickly
25 as possible.

1 And, also -- I mean, one thing that we're not
2 getting to here, that I think is important -- well, I
3 should state one more thing before leaving that. I mean,
4 Booth also tells us that Congress did see value in
5 requiring prisoners to file, even when it seemed very
6 unlikely that they would get the relief that they were
7 seeking. And the ways in which this requires a prisoner
8 to file, and delays him, are significant in many of the
9 same ways.

10 But the other very important point here is that
11 in considering the reasonableness of doing this with or
12 without a procedural default requirement, sure, with
13 procedural -- excuse me, a procedural default rule -- with
14 that, of course, you're going to make the provision
15 somewhat more effective, but there's a tradeoff. And the
16 tradeoff is, you're going to make it more effective by
17 kicking prisoners out of court on a nonmerits ground. And
18 Congress -- the sponsors of the legislation made it clear
19 they were not meaning to kick out potentially meritorious
20 claims. You also are creating another bad incentive,
21 which is, with this procedural default rule, the prison
22 officials have the incentive to try to get rid of cases on
23 nonmerits grounds, because if they rule on a -- on a
24 procedural ground, then the prisoner can't file. If they
25 rule -- if they address it on the merits, then the

1 prisoner has the chance of going there. So, in that
2 respect, the -- a procedural default rule makes it less
3 likely something gets affected on the merits.

4 But the point is, there's a policy tradeoff
5 here, that there is --

6 JUSTICE KENNEDY: Well, but --

7 MR. FEDER: -- no indication --

8 JUSTICE KENNEDY: -- but as I interpret your
9 argument, you're saying that there is some merit, some
10 benefit, to avoiding the State administrative procedures.

11 What you're saying is that, "You know, these" --

12 MR. FEDER: No, Your Honor.

13 JUSTICE KENNEDY: -- "administrative procedures
14 aren't all that -- they're cracked up to be. There's a
15 good reason to avoid them." I --

16 MR. FEDER: No, I'm --

17 JUSTICE KENNEDY: That's a --

18 MR. FEDER: -- saying --

19 JUSTICE KENNEDY: -- that's a -- that's a
20 difficult argument for us --

21 MR. FEDER: To --

22 JUSTICE KENNEDY: -- to accept.

23 MR. FEDER: No, to the contrary, Your Honor.

24 I'm saying there's -- there is -- there is no good reason
25 to avoid them. I certainly don't mean to be suggesting

1 that, if I -- if I misspoke.

2 But I think -- the important point here is,
3 though, there's a real policy tradeoff. There is no
4 indication anywhere in the language of the Act, or
5 anywhere in the legislative history, that this is a policy
6 tradeoff that Congress actually was willing to make. And
7 I guess I didn't touch on the language, but there are
8 numerous textual indications, as we argue in detail in our
9 brief, even aside from getting to the word "exhausted,"
10 that Congress contemplated simple exhaustion, and there's
11 no sign of any contemplation of a procedural default rule.

12 The word "exhausted" itself, again, I think that habeas,
13 for a number of reasons, is a much closer analogy,
14 including the fact that this was passed practically
15 contemporaneous with AEDPA. There was -- at one point,
16 there were provisions in the same bill that -- one of
17 which was an exhaustion provision in AEDPA, and one of
18 which was the early version of this. There's no
19 indication that exhaustion was used in different contexts
20 there. And the habeas cases make clear that a defaulted
21 claim is exhausted, and it's a timely requirement.

22 On the legislative history, if there was an
23 expectation that there would be this sort of procedural
24 default rule and prisoners would forfeit claims -- and, as
25 you can tell with 2- or 3-day filing deadlines some

1 places, and other technical requirements elsewhere --
2 there would be expected to be a number of forfeitures, no
3 indication in the legislative history that Congress
4 thought one of the ways the PLRA would reduce suits was by
5 causing forfeitures.

6 And, in addition, it's important to understand
7 that, although, as we concede, the provision will be --
8 it will not be as effective without a procedural default
9 rule, but it still does have some effect without the
10 procedural default rule, the problem with imposing a
11 procedural default rule is that the consequences of that
12 are very troubling, because what you'd be doing then is
13 essentially incorporating every State, and local jail
14 facility, for that matter, filing deadline as a de facto
15 statute of limitations --

16 JUSTICE BREYER: Not necessarily.

17 MR. FEDER: -- for section 1983 --

18 JUSTICE BREYER: That -- that's what I find
19 interesting. It might be, if you're representing the
20 interests of defendants here, you'd love this to have the
21 procedural default rule, because it will end up with the
22 Federal judges all over the country systematically
23 reviewing the exhaustion procedures -- or the -- yes, the
24 remedies in the prisons. And where those remedies are not
25 right or unfair or too short or have other problems with

1 them, the judges will say, "You can't have this kind of
2 remedy. If you want me to apply exhaustion principles,
3 you can't do it."

4 MR. FEDER: I would like --

5 JUSTICE BREYER: And, therefore, we'll get a
6 force for improvement. And that's, I thought, maybe why
7 nobody wanted, really, to bring it up.

8 MR. FEDER: I would like to think that, Your
9 Honor, but, actually, as opposing counsel has indicated,
10 Congress eliminated the language -- the pre-existing
11 language that placed some sort of requirement -- it
12 removed the "plain, speedy, and effective" language,
13 removed the "minimum standards" language. The indication
14 was that they wouldn't be reviewed for the adequacy of the
15 standards.

16 JUSTICE KENNEDY: And I suppose you could add to
17 that, that Mr. Himmelfarb wouldn't even accept
18 "reasonable." He said it has to be "impossible" to comply
19 with.

20 MR. FEDER: I think -- I think that's right.
21 And I think that that's actually an indication that
22 Congress was not expecting it to have this sort of harsh
23 consequence, where you're taking whatever procedural rule
24 from whatever State.

25 Another thing about the PLRA, aside from

1 removing the old language, is that one of the goals of the
2 PLRA was to remove intrusive Federal judicial oversight
3 from prison systems. And if you were going to be in a
4 position of reviewing everything for reasonableness, you
5 have exactly that kind of oversight saying, you know,
6 "Your procedure is adequate. Yours isn't adequate." And
7 that's what -- that's what Congress removed.

8 The consequences also mean that if this
9 procedural default rule is accepted, you could have even
10 continuing violations, continuing unconstitutional conduct
11 that would not be challengeable, could be insulated from
12 Federal review after the passage of a short deadline or
13 violation of whatever other procedure, fair or unfair,
14 that a State -- that a State creates --

15 JUSTICE STEVENS: Let me be sure --

16 JUSTICE GINSBURG: Mr. Feder --

17 JUSTICE STEVENS: -- I understand one thing
18 about your position. You do agree, do you not, that in
19 order to exhaust, even if the time has run the 15-day
20 period, there is an obligation to go to the State and ask
21 them to hear the case, even though it's untimely?

22 MR. FEDER: Yes. I think there clearly is.

23 JUSTICE STEVENS: So that you do say that you at
24 least will give the State the opportunity to decide
25 whether it wants to try and remedy it in an informal or

1 hasty manner.

2 MR. FEDER: Yes.

3 JUSTICE STEVENS: Yes.

4 JUSTICE KENNEDY: And is that true even if the
5 State does not have a procedure for reopening for late
6 claims?

7 MR. FEDER: Yes. I think -- I think it is.
8 Because I think that until it becomes absolutely clear
9 that the State --

10 JUSTICE KENNEDY: Well, suppose --

11 MR. FEDER: -- or the grievances --

12 JUSTICE KENNEDY: -- the State says, "We don't
13 consider late claims." As they do here.

14 MR. FEDER: Sorry?

15 JUSTICE KENNEDY: Suppose the State says, "We
16 don't consider late claims."

17 MR. FEDER: And may -- and if it does it as a
18 binding rule that's not -- that's not subject to change, I
19 suppose that that -- that that would be possible. But the
20 fact is -- actually, a good example is, in one of the
21 administrative cases that the United States cites in their
22 brief, the United States versus L.A. Tucker Lines, what --
23 the argument there is, "We didn't need to present this
24 argument to the Interstate Commerce Commission, because
25 they had a rule that meant that they couldn't accept our

1 claim, and the court -- and the court says no to exhaust.

2 You do have to present the claim. They may change it."

3 JUSTICE ALITO: What if the claim is presented
4 in a way that's gibberish, it's impossible to understand?

5 MR. FEDER: Then it'll -- then, presumably, if
6 the State rejects it on that ground, if he tries to file
7 in Federal Court, he'll get sent back for having failed to
8 actually complete his exhaustion obligations until he
9 manages to file a --

10 JUSTICE ALITO: But he can --

11 MR. FEDER: -- claim that would satisfy --

12 JUSTICE ALITO: But it can never be procedurally
13 defaulted, because the claim isn't presented in a
14 comprehensible form to the -- to the prison grievance
15 officials?

16 MR. FEDER: I think that maybe it's possible, in
17 some cases, as a sanction for bad-faith conduct.
18 Conceivably -- I'm not sure where that would come from --
19 but if he fails to present the claim in a -- in a way that
20 it can be addressed, he has to -- he can't come to Federal
21 Court until he presents it to them in a way in which it at
22 least could have been addressed.

23 JUSTICE SCALIA: Why is that procedural rule
24 binding on him, but the time procedural rule not binding
25 on him? I don't know why. I mean, if --

1 MR. FEDER: It's only binding --

2 JUSTICE SCALIA: -- they're procedural rules,
3 you have to set it forth in a comprehensible manner, and
4 you have to be on time.

5 MR. FEDER: Well, Your Honor, I think that if
6 the State were to say that you -- that, "This is
7 definitively rejected, and we're not going to let him
8 amend it," then, in that case, you would have satisfied
9 exhaustion, as far as the -- but only if it's definitive.

10 Otherwise -- well -- and I should just go back to the --
11 to the point I was making about a continuing violation.
12 For instance, let's say there is a failure-to-protect
13 claim. Someone is in danger, doesn't file. He's in --
14 he's in one of the States where it's 2 days. I think
15 Michigan is one of those. He doesn't file within 2 days.

16 The State has -- after that, can say, "You can't go to
17 Federal Court, because you haven't met our deadline."

18 In this case, here, there was a continuing
19 violation that was alleged, and the -- and the State
20 basically said, "Our rule is, even if it's continuing, you
21 have to file it within 30 days -- or 15 days of when it
22 first arose." And, I mean, you can imagine a number of
23 circumstances where this rule here would mean -- again,
24 any prison or local jail procedural rule, no matter -- is
25 a -- presumably, until you get to the point of violating

1 due process, would be a basis for saying that prisoners
2 don't have to go to court. There is nothing in the words
3 of the statute that suggest that, nothing in the
4 legislative history of the statute that suggest it. The
5 only real argument on the other side is that Congress must
6 have meant to include it, because that's what "exhaustion"
7 usually means.

8 JUSTICE GINSBURG: Mr. Feder, there is one
9 anomaly that the Government points out. And I -- before
10 you sit down, I'd like to know what your answer is. They
11 said, "Imagine one prisoner who begins the grievance
12 process on time, he goes to step two, goes to step three,
13 then he stops. And then another prisoner who waits til
14 the time has come and gone, she files. The prison says,
15 'We don't take late filings.' The second prisoner gets to
16 court, and the first, who did go through three steps, but
17 stopped short of the fourth, doesn't have any access to
18 Federal Court."

19 MR. FEDER: Well, except that he's not
20 permanently barred, because if he -- if he hasn't
21 exhausted, he gets sent back and has to at least file the
22 last appeal.

23 Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr. Feder.

25 Ms. Perkell, you may have a minute for rebuttal.

1 REBUTTAL ARGUMENT OF JENNIFER G. PERKELL

2 ON BEHALF OF PETITIONERS

3 MS. PERKELL: Three quick points, Your Honors.

4 It's not so much that the Ninth Circuit's rule
5 creates an incentive for an inmate to file untimely, it's
6 that it doesn't create the incentive to file timely.

7 Moreover, Respondent is relying on the habeas
8 corpus analogy, but, at the same time, he wants the
9 results under the PLRA to be different from under the
10 habeas corpus statute.

11 And, third, untimely -- the rule of untimely
12 exhaustion adopted by the Ninth Circuit undermines the
13 purposes of the statute, because, first, prisons will
14 usually enforce their deadlines, and grievances will not
15 receive any merits review before they reach Federal Court.

16 And, second, because grievances filed untimely, and
17 particularly months or years untimely, deprive prisons of
18 a genuine opportunity to investigate and respond to
19 prisoner -- or they do deprive prisons of a genuine
20 opportunity to investigate and respond to prisoner
21 grievances, because oftentimes witnesses, evidence, and,
22 in particular, recollections, are no longer available.

23 Unless the Court has any --

24 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

25 MS. PERKELL: Thank you.

1 CHIEF JUSTICE ROBERTS: The case is submitted.

2 [Whereupon, at 12:02 p.m., the case in the
3 above-entitled matter was submitted.]

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