IN THE SUPREME COURT OF THE UNITED STATES

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JEANNE S. WOODFORD, ET AL., :

Petitioners, :

v. : No. 05-416

VIET MIKE NGO. :

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Washington, D.C.

Wednesday, March 22, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

JENNIFER G. PERKELL, ESQ., Deputy Attorney General, San Francisco, California; on behalf of the Petitioners.

DAN HIMMELFARB, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioners.

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

C O N T E N T S

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

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

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

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

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

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

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

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

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

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

MS. PERKELL: Oh, sure. I --

CHIEF JUSTICE ROBERTS: Thanks.

MS. PERKELL: -- I apologize.

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

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

JUSTICE GINSBURG: Invoke what?

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

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

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

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

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

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

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

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

MS. PERKELL: Oh.

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: I mean McCarthy.

MS. PERKELL: This Court made that observation. It was one of two grounds upon which this Court relied in holding that this Court would not judicially impose a mandatory exhaustion requirement for prisoners under that decision. So, the first part of the decision evaluated the text of the former version of 1997(e), and, in the second part of this decision, this Court said, "Nonetheless, notwithstanding that the statute doesn't expressly require exhaustion, we will not judicially impose exhaustion in this case for the reason that such a requirement would, indeed, represent a possibility of forfeiture of a claim for an inmate's failure to comply with deadlines."

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

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

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

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

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

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

MS. PERKELL: What did Representative LoBiondo --

JUSTICE BREYER: Uh-huh.

MS. PERKELL: -- say?

JUSTICE BREYER: Uh-huh.

MS. PERKELL: The significance of excerpting that provision was to, in part, demonstrate that Congress was, indeed, aware, consistent --

JUSTICE BREYER: All right. So, I take it from your answer he didn't really say anything helpful to you --

MS. PERKELL: He --

JUSTICE BREYER: -- except to refer to the name of the case --

MS. PERKELL: Well --

JUSTICE BREYER: -- in which case, what we have on the -- all right. Is that right?

MS. PERKELL: Your Honor, I think there are two relevant things about that statement. First is the significance of his referencing the McCarthy case and demonstrating affirmatively that Congress was, indeed, aware of that decision when it revised the statute. But, moreover, it was another iteration of the purposes that Congress sought to achieve through enactment of the statute.

So, speaking to the third point, which was

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

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

JUSTICE GINSBURG: In thinking --

MS. PERKELL: It's --

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

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

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

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

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

JUSTICE STEVENS: It was --

MS. PERKELL: -- filing period.

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

MS. PERKELL: It could conceivably be. As

long as remedies are, indeed,
available to the inmate, there is an obligation under the
statute that he exhaust --
JUSTICE SOUTER: Is that --
CHIEF JUSTICE ROBERTS: I suppose --
JUSTICE SOUTER: -- plausible?
CHIEF JUSTICE ROBERTS: I suppose there can
always be a specific objection to the reasonable
availability of a particular remedy. I mean, if this --
the prison remedy is, you know, within 5 minutes you've
got to file a complaint or something. But that's not the
question here. The question here is what the PLRA
requires, as a general matter, with respect to prison
remedies.
MS. PERKELL: Yes, Your Honor, that is correct.
And as -- we are submitting that it does, indeed,
require compliance with the administrative grievance --
JUSTICE KENNEDY: Would you agree that there's a
requirement that the exhaustion period be reasonable?
MS. PERKELL: I'm -- I -- the requirement that I
think is relevant under the statute is whether or not the
procedure is available.
JUSTICE SCALIA: Conceivably, if it's too short,
it's not reasonably available. I guess --
MS. PERKELL: That is -- yes, Your Honor, that

is --

JUSTICE SCALIA: Okay.

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

JUSTICE SCALIA: It's conceivable.

MS. PERKELL: -- conceivable --

JUSTICE SOUTER: Well --

MS. PERKELL: -- scenario.

JUSTICE SOUTER: -- what do you --

MS. PERKELL: I --

JUSTICE SOUTER: -- what do you make of the fact that there was prior law that required -- I forget its exact words, but something like "reasonable procedure," and that language was repealed?

MS. PERKELL: I presume, from that, that Congress had shifted its focus in the new statute to the purposes that we have articulated in the brief, one of them being --

JUSTICE SOUTER: Well, if that's -- if that's the case, then, on your own reasoning, you can't assume that there's -- that availability requires any reasonable availability. It's got to be availability as, I guess, a physical possibility, and that's all.

MS. PERKELL: I would agree with that, Your Honor. That is our --

JUSTICE SOUTER: Do you find --

MS. PERKELL: -- position.

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

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

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

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

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

hour time limit?

[Laughter.]

MS. PERKELL: Your Honor, it --

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

[Laughter.]

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

JUSTICE GINSBURG: May I --

MS. PERKELL: So --

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

MS. PERKELL: Yes.

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

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

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

JUSTICE GINSBURG: Well, what --

MS. PERKELL: -- as presented.

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

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

If there's --

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Ms. --

MS. PERKELL: If --

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

MS. PERKELL: Yes.

CHIEF JUSTICE ROBERTS: -- time for rebuttal.

MS. PERKELL: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you.

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

ORAL ARGUMENT OF DAN HIMMELFARB

FOR THE UNITED STATES, AS AMICUS CURIAE,

IN SUPPORT OF PETITIONERS

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: You --

MR. HIMMELFARB: Respondent places --

JUSTICE KENNEDY: Could --

MR. HIMMELFARB: -- heavy --

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

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

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

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

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

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

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

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

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

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

The case on which Respondent places --

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

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

JUSTICE STEVENS: Well, those are --

MR. HIMMELFARB: -- from the guard --

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

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

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

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

MR. HIMMELFARB: Well, I would think --

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

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

JUSTICE STEVENS: So even --

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

JUSTICE STEVENS: -- if it was seven --

MR. HIMMELFARB: -- case.

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Himmelfarb.

Mr. Feder.

ORAL ARGUMENT OF MEIR FEDER

ON BEHALF OF RESPONDENT

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

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

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

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

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

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

MR. FEDER: Well --

JUSTICE SCALIA: -- which is --

MR. FEDER: -- first --

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

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

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

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

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

JUSTICE KENNEDY: Well, not so much maybe input,

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

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

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

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

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

Now, can you tell me how that purpose is

possibly served --

MR. FEDER: Certainly, Your Honor.

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

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

JUSTICE SCALIA: -- this --

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

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

MR. FEDER: Yes.

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

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

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

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

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

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

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

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

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

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

"Yes. This, this, and this."

"Who else was there?"

"These people were there."

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

"Not really. It was 3 months ago."

"Who else was there?"

"I'm not sure."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Why not?

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

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

MR. FEDER: Well, two things about that.

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

I'm exhausting."

MR. FEDER: Part of --

JUSTICE BREYER: Denied.

MR. FEDER: Part of --

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

MR. FEDER: Well, Your Honor, I think -- again, first of all, it's a -- it's important to understand that we are saying he will have to file, in all circumstances. It's not necessarily clear --

JUSTICE BREYER: All right.

MR. FEDER: -- that the State --

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

MR. FEDER: I understand.

JUSTICE BREYER: -- terminology --

MR. FEDER: Putting that --

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

MR. FEDER: Yes, certainly.

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

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

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

JUSTICE SCALIA: It seems to me you're

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

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

[Laughter.]

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

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

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

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

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

JUSTICE KENNEDY: Well, but --

MR. FEDER: -- no indication --

JUSTICE KENNEDY: -- but as I interpret your argument, you're saying that there is some merit, some benefit, to avoiding the State administrative procedures. What you're saying is that, "You know, these" --

MR. FEDER: No, Your Honor.

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

MR. FEDER: No, I'm --

JUSTICE KENNEDY: That's a --

MR. FEDER: -- saying --

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

MR. FEDER: To --

JUSTICE KENNEDY: -- to accept.

MR. FEDER: No, to the contrary, Your Honor. I'm saying there's -- there is -- there is no good reason to avoid them. I certainly don't mean to be suggesting

that, if I -- if I misspoke.

But I think -- the important point here is, though, there's a real policy tradeoff. There is no indication anywhere in the language of the Act, or anywhere in the legislative history, that this is a policy tradeoff that Congress actually was willing to make. And I guess I didn't touch on the language, but there are numerous textual indications, as we argue in detail in our brief, even aside from getting to the word "exhausted," that Congress contemplated simple exhaustion, and there's no sign of any contemplation of a procedural default rule. The word "exhausted" itself, again, I think that habeas, for a number of reasons, is a much closer analogy, including the fact that this was passed practically contemporaneous with AEDPA. There was -- at one point, there were provisions in the same bill that -- one of which was an exhaustion provision in AEDPA, and one of which was the early version of this. There's no indication that exhaustion was used in different contexts there. And the habeas cases make clear that a defaulted claim is exhausted, and it's a timely requirement.

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

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

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

JUSTICE BREYER: Not necessarily.

MR. FEDER: -- for section 1983 --

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

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

MR. FEDER: I would like --

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

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

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

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

Another thing about the PLRA, aside from

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

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

JUSTICE STEVENS: Let me be sure --

JUSTICE GINSBURG: Mr. Feder --

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

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

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

hasty manner.

MR. FEDER: Yes.

JUSTICE STEVENS: Yes.

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

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

JUSTICE KENNEDY: Well, suppose --

MR. FEDER: -- or the grievances --

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

MR. FEDER: Sorry?

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

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

claim, and the court -- and the court says no to exhaust. You do have to present the claim. They may change it."

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

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

JUSTICE ALITO: But he can --

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

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

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

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

MR. FEDER: It's only binding --

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

MR. FEDER: Well, Your Honor, I think that if the State were to say that you -- that, "This is definitively rejected, and we're not going to let him amend it," then, in that case, you would have satisfied exhaustion, as far as the -- but only if it's definitive. Otherwise -- well -- and I should just go back to the -- to the point I was making about a continuing violation. For instance, let's say there is a failure-to-protect claim. Someone is in danger, doesn't file. He's in -- he's in one of the States where it's 2 days. I think Michigan is one of those. He doesn't file within 2 days. The State has -- after that, can say, "You can't go to Federal Court, because you haven't met our deadline."

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

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

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

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

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Feder.

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

REBUTTAL ARGUMENT OF JENNIFER G. PERKELL

ON BEHALF OF PETITIONERS

MS. PERKELL: Three quick points, Your Honors.

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

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

And, third, untimely -- the rule of untimely exhaustion adopted by the Ninth Circuit undermines the purposes of the statute, because, first, prisons will usually enforce their deadlines, and grievances will not receive any merits review before they reach Federal Court. And, second, because grievances filed untimely, and particularly months or years untimely, deprive prisons of a genuine opportunity to investigate and respond to prisoner -- or they do deprive prisons of a genuine opportunity to investigate and respond to prisoner grievances, because oftentimes witnesses, evidence, and, in particular, recollections, are no longer available.

Unless the Court has any --

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

MS. PERKELL: Thank you.

CHIEF JUSTICE ROBERTS: The case is submitted.

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