CASE NO. 20-1766

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

DONTE PARRISH

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT CLARKSBURG

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The government concedes that Parrish did not need to file a new notice of appeal. Govt. Br. 11. It concedes that *Heck v. Humphrey*, 512 U.S. 477 (1994), tolled the statute of limitations until at least January 25, 2017—which means that his complaint was timely even without application of the prison mailbox rule. Govt. Br. 12. As a result, the government now also concedes—as it must—that "this aspect of" the district court's decision "was likely incorrect." Govt. Br. 14. Those concessions should resolve this appeal.

Remarkably, after spending five years litigating this case on the basis that Parrish's complaint was filed *too late*—and winning on that basis—the government now argues for the first time on appeal that Parrish's administrative tort claims were filed *too early*. The government now asserts that *Heck* barred the Bureau of Prisons ("BOP") from reviewing Parrish's administrative tort claims until his disciplinary record was expunged, that the BOP's rejection of those claims therefore did not count, and that accordingly Parrish never properly exhausted his administrative remedies. This eleventh hour U-turn is thoroughly waived, and entertaining it would unfairly prejudice Mr. Parrish. It is also meritless. The government points to no evidence that the BOP applies any *Heck*-like rule in its internal process, and the BOP did not think that Parrish's administrative tort claims

were premature here. The BOP rejected those claims on the merits and told Mr. Parrish that he had six months to sue.

Any remaining issues with Parrish's compliance with the six-month statute of limitations appear to have dropped out of the case. But if the Court were to find otherwise, it should hold that Parrish satisfied the deadline. The government pairs an inaccurate understanding of the prison mailbox rule with an atextual reading of the statute of limitations to argue that Parrish's complaint was untimely.

ARGUMENT

I. PARRISH EXHAUSTED HIS ADMINISTRATIVE REMEDIES, AND BOP'S DENIAL OF HIS ADMINISTRATIVE TORT CLAIMS WAS FINAL AGENCY ACTION

The government now acknowledges that the BOP's June 3, 2016, rehearing order did not expunge Parrish's prison disciplinary record. Govt. Br. 14. The government also recognizes that *Heck* tolled Parrish's statute of limitations for filing in district court under the Federal Tort Claims Act ("FTCA") until his record was expunged. Govt. Br. 14. As Parrish explained, that expungement did not occur until January 25, 2017. *See* Opening Br. at 25–26. The government floats October 18, 2017, as a potential alternative triggering date under *Heck*, but forswears any argument on that point because "nothing turns on it." Govt. Br. 14 n.1.[1]

[1] While the government abandons any argument to the contrary, January 25 is the correct date. As the government itself acknowledges, the Disciplinary Hearing Officer ("DHO") made his findings and directed that Parrish's record be expunged

Since those concessions make clear that Parrish's complaint was timely filed within six months of the BOP's denial of his administrative claims, the only issue left for this Court to resolve is the government's new assertion that Parrish failed to exhaust his administrative remedies under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), because his administrative claims were filed with and rejected by the BOP prior to when his claims became ripe for judicial review under *Heck*. Govt. Br. 12–14. That argument is both waived and meritless.

A. The Government Waived Its Non-Exhaustion Arguments

There is no reason for this Court to reach the government's argument that Parrish's administrative tort claims were not properly exhausted. This is "a court of review, not first view." *Biggs v. N. Carolina Dep't of Pub. Safety*, 953 F.3d 236, 243 (4th Cir. 2020). After five years of litigation, that argument is thoroughly forfeited and waived.

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on January 25, 2017. *See* Govt. Br. at 5. An inmate need only show that their conviction "has been reversed, expunged, invalidated, or otherwise called into question" to overcome the *Heck* bar to civil suit. *Riddick v. Lott*, 202 F. App'x 615, 616 (4th Cir. 2006). That occurred when the DHO found insufficient evidence to sustain Parrish's conviction following the January 25 hearing. Parrish argued for that date below and his argument was uncontested by the government. *See* JA 107, JA113, JA131–132; *infra* § I.A. If Parrish had waited the nearly nine months between the hearing and the purported "execution" of the Report, the government undoubtedly would have argued that Parrish failed to comply with the strict six-month deadline in § 2401(b)—exactly as it did below.

Any lack of PLRA exhaustion is an affirmative, waivable defense. *See Jones v. Bock*, 549 U.S. 199, 216 (2007) ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints."); *Woodford v. Ngo*, 548 U.S. 81, 101 (2006) ("§ 1997e(c)(2)…mak[es] it clear that the PLRA exhaustion requirement is not jurisdictional"). So is the *Heck* rule. *See, e.g., Crittindon v. LeBlanc*, 37 F.4th 177, 190 (5th Cir. 2022) ("*Heck*…is a defense a party must assert as opposed to some sort of jurisdictional bar"); *Polzin v. Gage*, 636 F.3d 834, 837–38 (7th Cir. 2011) (internal citations omitted) ("The *Heck* doctrine is not a jurisdictional bar. Because it is not jurisdictional, the *Heck* defense is subject to waiver."); *Washington v. Los Angeles Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 & n.5 (9th Cir. 2016) (noting that "compliance with *Heck* most closely resembles the mandatory administrative exhaustion of PLRA claims, which constitutes an affirmative defense and not a pleading requirement," and that the defendant thus bears the burden of proof).[2]

[2] While there is some disagreement on how exactly to treat *Heck*-barred claims, *see, e.g.*, *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 n.2 (2020) (noting but declining to resolve circuit split on whether *Heck* dismissals were for failure to state a claim), there is broad consensus that *Heck* bars are not jurisdictional. *See Vuyanich v. Smithton Borough*, 5 F.4th 379, 389 (3d Cir. 2021) (holding *Heck* bars are nonjurisdictional); *Jiron v. City of Lakewood*, 392 F.3d 410, 413 n.1 (10th Cir. 2004) (noting *Heck* bar was not jurisdictional and "at best would only support a dismissal without prejudice"), *abrogated on other grounds by Pearson v.*

Defendants' new premature-exhaustion arguments are like "'a statutory time limitation[, which] is forfeited if not raised in a defendant's answer or in an amendment thereto'….and, as a rule, cannot be asserted on appeal." *Wood v. Milyard*, 566 U.S. 463, 470 (2012) (quoting *Day v. McDonough*, 547 U.S. 198, 202 (2006)). "It would be 'an abuse of discretion…to override a State's deliberate waiver of a limitations defense.'" *Id.* at 472–73 (quoting *Day*, 547 U.S. at 202). And only in "exceptional cases" can an appellate court evaluate a forfeited defense. *Id.* at 471, 473 (quoting *Day*, 547 U.S. at 211). To qualify, the omission must be "inadvertent" not "strategic[] withhold[ing]." *Id.* at 471–73 (internal brackets omitted) (quoting *Day*, 574 U.S. at 211). "Further, the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and 'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred." *Day*, 547 U.S. at 210 (quoting *Granberry v. Greer*, 481 U.S. 129, 136 (1987).

The government meets no criterion for an "exceptional" case, let alone all of them. Parrish has asserted at least since his response to the government's first motion to dismiss that *Heck* barred his claims in court until January 25, 2017,

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Callahan, 555 U.S. 223 (2009); *see also Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185, 1191 n.4 (11th Cir. 2020) (noting that the Eleventh Circuit has "called…into serious doubt" previous dicta suggesting that *Heck* is "jurisdictional.").

alerting the government to the potential for the argument it advances now. *See* JA107; JA113. The government could have filed a reply under N.D. W. Va. L.R. Civ. P. 7.02(b)(2) asserting this argument as grounds for dismissal, but did not. That omission clearly served the government's understanding of its strategic litigation interests. The central premise of the government's new argument—that *Heck* somehow applies in the BOP's administrative claim process to render *administrative* claims premature—would have confessed to the district court that *Heck* also clearly resolved any *judicial* untimeliness issues. For that reason, the government's argument should be regarded as affirmatively waived and thus outside of this Court's "authority to resurrect." *See Wood*, 566 U.S. at 471 n.5.

Allowing the government to advance this new argument would also be highly inequitable. The BOP denied Parrish's administrative tort claims on the merits before his disciplinary appeal was complete and informed him that the deadline to file an FTCA action in court was six months from the date of its denial letter, October 7, 2016. JA75. Parrish then chose the only clear option available to him: he filed his complaint on April 7, 2017, within that six-month deadline but still after accrual of his FTCA claims under *Heck* on January 25, 2017. JA 22–23. He chose this date "want[ing] to make sure he covered all avenues in the event the court did not recognize the Jan 25, 2017 accrual date in accord with the laws of *Heck v. Humphrey*." JA107. The government suggests that Parrish should have

ignored its own agency's directions to proceed to district court, and concluded that his administrative tort claims had not been exhausted notwithstanding BOP's contrary assertions. Prisoners should not be punished for following the rules that the government itself articulates.

Parrish also will be significantly prejudiced if the Court now accepts the government's last-minute reversal. If the government had argued below that Parrish's administrative claims had been premature under *Heck* and needed to be re-filed, Parrish may still have had a reasonable opportunity to do so and then to re-file in court within the FTCA's limitations period. *See, e.g.*, *Jiron*, 392 F.3d 410, 413 n.1 (holding district court erred by dismissing allegedly *Heck*-barred claim with prejudice); *Taylor v. Whitaker*, 210 F.3d 362 (4th Cir. 2000) (noting, after the district court's dismissal without prejudice, that failure to demonstrate *Heck* favorable termination was a defect that was curable by amending the complaint); *cf. Rodriguez v. Ratledge*, 715 F. App'x 261, 265 (4th Cir. 2017) ("Failure to exhaust administrative remedies typically results in dismissal without prejudice, in order to allow the refiling of an action once the administrative process is complete."). By waiting nearly six years after the filing of Parrish's complaint to suggest, for the first time, that Parrish failed to exhaust his administrative remedies, the government has guaranteed that Parrish cannot do so.

B. The Government's Non-Exhaustion Argument Is Meritless

If the Court chooses to reach the government's new argument, it should reject that argument. The government is trying to retroactively invent a *Heck*-like rule within the BOP's administrative process, under which prisoners would have to wait to file an administrative tort claim until after the favorable resolution of separate disciplinary proceedings if the claim depends, in any way, on the premise that discipline should not have been imposed. But the government points to no evidence that BOP has ever articulated or followed such a rule, and BOP's own behavior in this case demonstrates that it does not.

The government wants to pretend that the BOP's final denials of Parrish's administrative tort claims somehow do not count, because under its new theory the BOP should not have resolved them prior to resolving the separate disciplinary appeal. JA12–14. But *Heck* does not preclude prison systems from considering administrative grievances in whatever fashion they choose. *Heck* is a ripeness rule for judicial claims in federal court that policies the boundaries between the historic roles of the *habeas corpus* remedy and remedies under federal statutes like the FTCA and 42 U.S.C. § 1983. Prison systems are not required to duplicate that complex structure note for note. Nor can any such rule can be derived from § 1997e(a). That statute just precludes "actions" until administrative remedies are exhausted. "Action" refers to "judicial, not administrative, proceedings." *E.g.*, *BP*

Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006). The statute obviously cannot be read to preclude *administrative proceedings* until all available administrative remedies are exhausted. *See id.* at 92 n.4 (noting absurdity of similar construction in interpreting 28 U.S.C. § 2415(a)).

To the contrary, the Supreme Court has made clear that procedural rules governing the filing of administrative claims, including timeliness rules, are "defined not by the PLRA, but by the prison grievance process itself." *Jones v. Bock*, 549 U.S. 199, 218 (2007). Prison grievance procedures "will vary from system to system and claim to claim," but "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Id.* The government points to no BOP rule suggesting that prisoners cannot file administrative claims that relate in some fashion to prison discipline until the prisoner has prevailed in a separate administrative challenge to that discipline. And appellate counsel cannot invent procedural requirements for inmate administrative filings that the prison system itself has not adopted. *See Jones*, 549 U.S. at 218 ("As [the prison system's] procedures make no mention of naming particular officials, the Sixth Circuit's rule imposing such a prerequisite to proper exhaustion is unwarranted.") In support of its position, the government proffers nothing more than dicta in one vacated judicial opinion that administrative tort claims "should" be dismissed as premature if a related underlying conviction has yet to be expunged. Govt. Br. 14

(quoting *Alvarez-Machain v. United States*, 96 F.3d 1246, 1250 (9th Cir.), *opinion amended and superseded*, 107 F.3d 696 (9th Cir. 1996), *rev'd sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692, 718 (2004), *and vacated*, 374 F.3d 1384 (9th Cir. 2004)). The government points to no basis for that prudential suggestion, and no case suggesting that BOP has ever followed it.

Even if the BOP did have a rule like the one that government counsel now posits, the BOP did not rely on it here. The BOP did not reject either of Parrish's administrative tort claims on the ground that they were premature or barred by any *Heck*-like principle; it investigated those claims, resolved them on the merits, issued a final decision, and informed him that the six-month clock to file in federal court was already running. *See* JA75. Courts cannot second-guess and micro-manage the BOP's implementation of its own procedural rules. "[M]ost grievance systems give administrators the discretion to hear untimely grievances." *Woodford*, 548 U.S. at 101. All eight circuits "to have considered the issue have concluded that the PLRA exhaustion requirement is satisfied if prison officials decide a potentially procedurally flawed grievance on the merits." *Reyes v. Smith*, 810 F.3d 654, 657–58 (9th Cir. 2016) (collecting cases). "[T]o preserve its procedural objection, the prison must affirmatively invoke the procedural rule at the administrative level," *Whatley v. Smith*, 898 F.3d 1072, 1084, 1086 (11th Cir. 2018) (collecting cases); *cf.* 13B Charles Alan Wright & Arthur R. Miller, Federal

Practice and Procedure, § 3532.6 (5th ed.), Westlaw (database updated April 2022) (citing *Newport News Shipbuilding & Dry Dock Co. v. Dir., Off. of Workers' Comp. Programs*, 474 F.3d 109 (4th Cir. 2006)) ("[Courts] should defer to an agency determination that a dispute is ripe for decision, recognizing that Article III constraints do not apply directly to agency adjudication and that the agency may have a better sense of the needs that weigh for and against present decision.").

Finally, even if Parrish's administrative tort claims were premature under an administrative equivalent to *Heck* when they were filed, that defect would have been cured by the subsequent exhaustion of his disciplinary appeals. If the government wants to import judicial *Heck* principles into BOP's administrative process, the government should be consistent about it—and we do not believe a court would dismiss a lawsuit on *Heck* grounds if the defect had been cured before anyone noticed it. In *Cabrera v. City of Huntington Park*, the complaint would have been barred by *Heck* when filed, but the plaintiff was subsequently acquitted. 159 F.3d 374, 377, 380–82 (9th Cir. 1998). The Ninth Circuit held that "[t]he fact that [the plaintiff] filed suit before his conviction was overturned does not now affect the validity of his claim." *Id.* at 380 n. 8. "At most, the district court should have dismissed it without prejudice" pending resolution of the *Heck* issue, but its failure to do so was by then irrelevant. *Id.*

That resolution accords with this Court's "general policy of law to find a way in which to prevent loss of valuable rights, not because something was done too late but rather because it was done too soon." *Henderson v. E. Freight Ways, Inc.*, 460 F.2d 258, 260 (4th Cir. 1972) (holding post-complaint issuance of statutorily required "suit-letter" by Equal Employment Opportunity Commission cured defect in complaint); *see also Patterson v. Cnty. of Fairfax*, 45 F.3d 427, at *3 (4th Cir. 1995) (noting policy remained unchanged). As discussed earlier, *Heck* is not jurisdictional. And unless a statute specifically dictates that a requirement must be satisfied at the time of the filing of a complaint, this Court has generally allowed defects to be cured by subsequent events. *See Rodriguez v. Ratledge*, 715 F. App'x 261, 265 (4th Cir. 2017) (ruling failure to exhaust remedies for habeas claim before filing was cured by subsequent exhaustion before district court's grant of summary judgement).

Even Article III ripeness can be satisfied by post-complaint developments, and *Heck* is very much like a ripeness rule. *See, e.g.*, *Anderson v. Green*, 513 U.S. 557, 559 (1995) (internal quotations marks and brackets omitted) (quoting *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974)) ("[R]ipeness is peculiarly a question of timing, and it is the situation now rather than the situation at the time of the decision under review that must govern."); *Mejia v. Harrington*, 541 F. App'x 709 (7th Cir. 2013) ("*Heck* …deal[s] with

timing rather than the merits of litigation[, and u]ntil the conviction or disciplinary decision is set aside, the claim is unripe, and the statute of limitations has not begun to run."). Courts should not treat a judge-made doctrine like *Heck* as more rigid than a statutory or Article III requirement.

II. IF THE DISTRICT COURT WAS CORRECT ON THE DATE OF ACCRUAL, PARRISH'S COMPLAINT WOULD STILL SATISFY THE STATUTE OF LIMITATIONS

If this Court agrees with the parties that Parrish's claims did not accrue until January 25, 2017, then Parrish plainly satisfied the six-month statute of limitations in 28 U.S.C. § 2401(b). *See* JA16–25 (docketing complaint less than four months later, on May 3, 2017). But if this Court disagrees with the parties and holds that Parrish's claims accrued on June 3, 2016, as the district court found, JA 132, then his complaint would still be timely under the prison mailbox rule or a proper reading of § 2401(b).

A. Parrish's Complaint Was Timely Filed Within Six Months of Final Agency Denial Under the Prison Mailbox Rule

The Government offers no response to Parrish's demonstration that the prison mailbox rule applies in FTCA cases. The government also concedes that April 7, 2017, when Parrish says he gave his complaint to prison authorities, is six months from the final denial of Parrish's '710 filing, satisfying § 2401(b). Govt. Br. 15. The Government argues that this Court must accept its conjecture as to when Parrish mailed his complaint as true. Govt. Br. at 15–16. But the evidence

the government points to was not properly before the district court on a 12(b)(6) motion, and Parrish's own affidavit creates a material issue of fact precluding summary judgment.

The district court did not grant summary judgment on Parrish's '710 claims and could not have done so. The court explicitly dismissed Parrish's '710 claims on Fed. R. Civ. P. 12(b)(6) grounds. JA127 n.2. The opinion never mentions summary judgment. While the court's *Roseboro* notice advised Plaintiff that motions to dismiss with affidavits could be construed as motions for summary judgement, Dkt. 67 at 2,[3] the court did not follow that procedural path and lacked the power to do so. *Pro se* litigants must not only be allowed an opportunity for discovery prior to summary judgment but must be specifically informed of their right to seek it. *See, e.g.*, *Pledger v. Lynch*, 5 F.4th 511, 526 (4th Cir. 2021) (holding the district court abused its discretion by granting summary judgment when *pro se* plaintiff was "never informed of his right to seek discovery under Rule 56(d)"). The *Roseboro* notice sent to Parrish never mentions discovery,

[3] The government mistakenly cites Dkt. 104, a *Roseboro* notice sent after the dismissal of the '710 claims. This second *Roseboro* notice is associated with dismissal of the remaining '283 claims, which the government concedes were timely. Govt. Br. 15 n.2. Reflecting the standards the court ultimately ruled on in each instance, the first *Roseboro* notice discusses only 12(b)(6) motions, Dkt. 67 at 1, while the second *Roseboro* notice discusses both 12(b)(1) and 12(b)(6) motions, *compare* Dkt. 104 at 1–2, *with* JA318, 322. The second *Roseboro* notice suffers from the same discovery notice deficiencies as the first.

instead containing only the same vague statements that were rejected as insufficient in *Pledger*. *See id.* at 525. And discovery was sorely needed here, since "prison[s] will be the only party with access to at least some of the evidence needed to resolve such questions" as when a prisoner mailed a document or whether "the prison authorities[] fail[ed] to forward [it] promptly." *Houston v. Lack*, 487 U.S. 266, 276 (1988); *see also Pledger*, 5 F.4th at 526 (quoting *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246–47 (4th Cir. 2002)) ("'[D]iscovery is considered especially important when the relevant facts'…are 'exclusively in the control of the opposing party.'").

Parrish's affidavit also is sufficient to raise a material issue of fact on its own. The government makes no attempt to distinguish the cases cited in Parrish's opening brief showing that courts have accepted similar prisoner affidavits as creating a material issue of fact. The government offers no cases holding that an affidavit like Parrish's would not be sufficient. *Compare* Opening Br. 31–34, *with* Govt. Br. 15–16. The government also admits it fails to maintain any contemporary records of when it receives papers for mailing, JA103, which makes it impossible to credit prison officials' mere say-so. *See Houston*, 487 U.S. at 275–76 (noting the unreliability of filing date stamps and expressing an expectation that prisons will maintain "well-developed procedures for recording the date and time at which they receive papers for mailing"). The government insinuates that Parrish's declaration

was "internally contradictory." Govt. Br. 16. But all Parrish said, in the same paragraph, was that he "placed [the complaint] in the officers hands," *i.e.*, the officer's control, by the only method available to him on lockdown—by "plac[ing] [it] in my door as the officer made rounds picking up mail." JA 106; *see Houston*, 487 U.S. at 271 ("[H]is control over the processing of his [filing] necessarily ceases as soon as he hands it over to the only public officials to whom he has access—the prison authorities.")

The Federal Rules of Civil Procedure—the law governing the filing of Parrish's FTCA complaint—contain no requirement that Parrish declare that he prepaid postage. Federal procedural rules require a prepaid postage declaration from prisoners only in the appellate and § 2255 contexts, and the details of the requirement vary between them. *Compare* Fed. R. App. P. 4(c)(1), *with* Rules Governing § 2255 Cases 3(d). There is no general rule that prisoners must provide a prepaid postage declaration with every judicial filing, and no justification for inventing such a "procedural booby trap[]…to prevent unsophisticated litigants from ever having their day in court." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). This Court and the Supreme Court have repeatedly admonished that rules of procedure should be liberally construed, such that courts should even permit filings "'technically at variance with the letter of a procedural rule' but that amount to 'the functional equivalent of what the rule requires.'" *Clark v.*

Cartledge, 829 F.3d 303, 305 (4th Cir. 2016) (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316–17 (1988); *see also, e.g.*, *Foman v. Davis*, 371 U.S. 178, 181 (1962) ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.")

Even if Federal Rule of Appellate Procedure 4(c) were to be applied to Parrish's complaint, Parrish has either satisfied it or could yet satisfy it. In a note to the clerk included as part of his complaint, Parrish explained that because he was on lockdown he could not procure enough additional postage to send his memorandum of evidence along with his FTCA complaint, necessarily implying that he had prepaid postage for the complaint itself. JA24; see Fed. R. App. P. 4(c)(1)(A). If the Court were to find this insufficient to settle the matter, it should allow Parrish to submit an additional declaration to that effect under Federal Rule of Appellate Procedure 4(c)(1)(B).

B. Parrish Did Not Need to Satisfy the Sixth-Month Deadline

Parrish also was not required to independently satisfy both prongs of § 2401(b). The government "concedes that" this Court has not "squarely address[ed]" the proper reading of 28 U.S.C. § 2401(b). Govt. Br. 20. And it cannot deny that the plain text presents two alternatives coupled with a disjunctive "or." Instead, the government urges this Court to follow the Sixth Circuit's opinion

in *Ellison v. United States*, 531 F.3d 359 (6th Cir. 2008). Govt. Br. 18. As Parrish explained in his opening brief, however, the Sixth Circuit's reasoning rests on a logical inversion of the text. *See* Opening Br. 41–43. Section 2401(b) provides two disjunctive *exceptions* to the rule barring tort claims. The Sixth Circuit read the clause as providing two disjunctive *triggers* for the rule. *Ellison*, 531 F.3d at 361–63. But that is not what the text says. And the policy concerns that the Sixth Circuit expressed about a plain text reading are remedied when § 2401(b) is read together with § 2401(a), which provides an outer six-year limitations period for all claims. *See* Opening Br. at 36–38, 43.

The government asserts that its reading would "align[] [this Court] with every other circuit to have considered this issue." Govt. Br. 19. But the national caselaw is irreconcilable. One line of cases holds that "or" should be read to mean "and." *See Willis v. United States*, 719 F.2d 608, 612 (2d. Cir. 1983) ("[T]he committees had the 'or' language of the bills before them and thought it meant 'and.' It is settled that 'or' may be read to mean 'and' when the context so indicates."). *Ellison* squarely rejects that reasoning, noting that reading "or" as "and" would actually foreclose the government's interpretation and produce an absurd result. *See Ellison*, 531 F.3d at 363 ("Had Congress used 'and' in writing this statute (or had we adopted 'and' in construing it), that would mean that a claim would be barred only if the plaintiff filed the action late in the agency *and* filed the

action late in court."). Instead, *Ellison* chooses to misread the text in a different, but equally indefensible, way. The government urges the importance of adhering to a uniform interpretation but cannot divine one for this Court to adopt.

The government seeks refuge in legislative history to circumvent the plain text. Govt. Br. 20. But this Court has long recognized that "the authoritative statement is the statutory text, not the legislative history." *United States v. Hasson*, 26 F.4th 610, 624 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). And the legislative history the government points to suggests reading the "or" in § 2401(b) as an "and"—the exact approach the government rejects by embracing *Ellison*. *Compare* Govt. Br. 18, *with* Govt. Br. 20.

This Court has already considered and rejected an argument much like the one the government offers here. The appellee in *In re Sunterra Corp*. argued for "read[ing] the disjunctive 'or' as the conjunctive 'and,'" because reading the text according to "the plain meaning of the Statute" would create internal inconsistencies, undermine general policy, and conflict with legislative history. 361 F.3d 257, 265 (4th Cir. 2004). The district court held that giving "or" its plain meaning would be "quite unreasonable" and conflict with "the drafters' intentions," while reading it conjunctively would be "far more harmonious with" the statute's policy. *Id.* at 268–69 (emphasis omitted). But this Court recognized that merely "showing that the statute's literal application is unreasonable in light of

[the statute's] policy" is insufficient to deviate from "the plain meaning." *Id.* And while a committee report suggested that Congress intended a conjunctive requirement, "legislative history suggesting an interpretation contrary to a statute's plain meaning is not necessarily sufficient to override the Plain Meaning Rule." *Id.* at 270.

Finally, the government argues that this Court should simply defer to its reading because the FTCA involves a waiver of sovereign immunity. Govt. Br. 20–21. That is not how the sovereign immunity canon of construction works. That canon requires Congress to "unequivocally express[]" its desire to waive immunity. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). But when waiver is clear—as in the FTCA—the government does not receive interpretive deference in construing the remainder of the Act. Not a single case the government cites to suggests otherwise.[4] In contrast, when this Court and the Supreme Court have

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[4] *See F.A.A. v. Cooper*, 566 U.S. 284, 299 (2012) (declining to authorize a category of damages against the government not specified in the Privacy Act); *United States v. Williams*, 514 U.S. 527, 531–36 (1995) (finding that the "broad language" of the statute counseled against the government's constrained interpretation of the waiver); *BP Am. Prod. Co.*, 549 U.S. at 96 (adopting favorable interpretation for the government as plaintiff, not defendant); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34, 37 (1992) (reasoning that language in the bankruptcy code that plausibly could be read to retain sovereign immunity should not be construed to waive it, while contrasting this with "narrow[] constru[ction,]…consistent with Congress' clear intent," of the waiver of sovereign immunity in the "the 'sweeping language' of the Federal Tort Claims Act"); *Clarke v. INS*, 904 F.2d 172, 175–77 (3d Cir. 1990 (declining to allow suit against the government for attorney's fees

interpreted the FTCA, they have repeatedly and expressly rejected application of "the general rule that waivers of sovereign immunity should be strictly construed" because it "run[s] the risk of defeating the central purpose of the statute." *Sanders v. United States*, 937 F.3d 316, 327 (4th Cir. 2019) (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491–92 (2006)). Indeed, in interpreting the very provision at issue here, § 2401(b), the Supreme Court rebuffed any role for the canon that waivers of sovereign immunity are strictly construed. *See Kwai Fun Wong*, 575 U.S. 402, 419–20 (2015). And even the government acknowledges that its *ad hoc* interpretive approach would only apply "to the extent that Congress's use of the word 'or' in § 2401(b) could be construed to be ambiguous." Govt. Br. 20. There is no ambiguity in the meaning of "or," and the government identifies none.

Section 2401(b) means exactly what it says. Plaintiffs must either present their claims to the appropriate agency within two years or file their claim in district court within six months of agency denial to avoid having those claims become "forever barred." None of the government's arguments support deviating from the plain meaning of Congress's chosen words.

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from deportation proceedings because reading "an adjudication under section 554" of the APA to include similar proceedings under another act when "Congress remained silent" on the matter "strikes us as strained and untenable").

C. The Government's Attempts to Minimize the '283 Filing Fail

Even if this Court agrees with none of Parrish's timeliness arguments, the government "concedes that…[Parrish's] claims in this case would still be timely to the extent that they are encompassed by the Claim '283 administrative filing." Govt. Br. 21. This Court would then need to resolve whether *any* portion of Parrish's amended complaint can fairly be said to stem from allegations in the '283 filing, given the liberal construction appropriate for a *pro se* plaintiff. *See, e.g.*, *Sanford v. Clarke*, 52 F.4th 582, 587 (4th Cir. 2022).

The government argues that Parrish did not use "the term 'negligence'" in his '283 filing, nor "allege[] any duty, breach, or standard" of care for "a reasonable correctional officer." Govt Br. 24–25. The government is wrong in both form and substance. Pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Stanton v. Elliot*, 25 F.4th 227, 237–38 (2022) (quoting *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014)). There is no need to "put [the] claim under a special heading" of negligence or to "use magic words to make out a claim." *Id.* And even if Parrish were required to plead the elements of negligence, both his '283 administrative filing and his complaint do so. Parrish identifies a standard of care he claims was violated: the BOP's regulations on administrative remedies and due process. *See* JA92–94; JA33. He pointed to numerous injuries suffered as a result

of the BOP's conduct. *See* JA94. The BOP's denial letter indicated that it investigated the claim as one of negligence. *See* JA70. And Parrish's amended complaint couches the same facts underlying his administrative filing as an express claim of negligence. *See* JA33.

These same facts also support Parrish's malicious prosecution claim. The Government acknowledges that Parrish seems to have come closer to satisfying its desire that he code plead with that claim—his '283 filing asserts a "misuse of legal process"—but asserts that Parrish's malicious prosecution claim is better considered as an abuse of process claim. Govt. Br. at 25. That alone would be a basis to reverse the district court's dismissal. But this court need not mix and match facts from the complaint to legal claims. If this Court determines that any portion of the factual allegations in the Complaint were presented to the BOP, then agency presentment would be satisfied, even if the legal theory of liability later shifts. *See* Opening Br. at 46 (collecting cases).

Finally, the government conflates two distinct portions of Parrish's complaint to justify dismissal. Parrish alleged two claims that he labeled an "abuse of process," but those claims stem from distinct factual circumstances and were separately presented in the '283 and '710 administrative filings. Opening Br. 48–49. What the government terms a "fleeting reference" to the '283-based allegations, Govt. Br. 26–27, were properly pled allegations of Parrish's complaint

that he is entitled to litigate. *See* JA85–86 (directing that Parrish's Memorandum of Evidence be docketed as part of the Amended Complaint). And while the government tries to conjure a contradiction between Parrish's acknowledgement that his *pro se* complaint did not always finely distinguish between these two separate claims and Parrish's assertion that his complaint nonetheless raised both theories of relief, Govt. Br. 26–27, that conflict is illusory. Parrish's complaint stems from a multitude of grievances that were presented to the BOP in two separate administrative filings. Parrish's complaint pled all of the facts supporting those claims. It did not erect clear barriers separating each theory of relief. And attempting to parse Parrish's claims in such a manner would have made no sense at the time of filing, when both the '710 and '283 claims were believed to be before the court.

The government may dispute these allegations on the merits, but that is not grounds to dismiss at this stage of the litigation.

CONCLUSION

For the reasons set forth above, this Court should vacate the district court's orders dismissing Parrish's complaint and remand the case to proceed to discovery.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief has been prepared in a proportionally spaced typeface using Microsoft Word, 14 point Times New Roman.
2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, the foregoing brief contains 6,030 words.
3. I understand that a material misrepresentation can result in the Court striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief with the word or line printout.

/s/ J. Scott Ballenger
J. Scott Ballenger