**RECORD NO. 11-7120**

**ORAL ARGUMENT HAS BEEN SCHEDULED FOR MARCH 19, 2013**

In The

# United States Court of Appeals

For The District of Columbia Circuit

**JOHN B. LESESNE,**

***Plaintiff - Appellant,***

**v.**

**JOHN DOE, Officer; DAVID HOLMES, Captain; HENRY R. LESANSKY, Health Service Administrator; DEPARTMENT OF CORRECTION OF THE DISTRICT OF COLUMBIA; DISTRICT OF COLUMBIA,**

***Defendants – Appellees,***

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**SEAN ERIC ANDRUSSIER,**

***Appointed Amicus Curiae for Appellant,***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

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## GLOSSARY

| | |
|---|---|
| IGP | Inmate Grievance Procedures |
| PLRA | Prison Litigation Reform Act |

## SUMMARY OF ARGUMENT

I. This Court should decide the threshold question of statutory interpretation—and hold that the PLRA does not apply—even though Lesesne did not raise this legal issue below. Defendants contend that Lesesne's "forfeiture went to an antecedent *factual* issue," but there is no factual dispute. Defendants do not dispute Lesesne's sworn declaration, made in his *in forma pauperis* application, that he was not incarcerated when he brought this action. Even ignoring Lesesne's sworn declaration, however, no factual issue arose over his filing status because Defendants submitted no evidence that Lesesne was incarcerated when he brought this action (such evidence did not exist). And it was Defendants who bore that burden of production since they were moving for summary judgment on an affirmative defense on which *they* bore the burden of proof. For these reasons, there never was a factual issue about Lesesne's filing status. Instead, this case involves a threshold issue of statutory interpretation, which is well within the Court's discretion to decide for the first time on appeal.

And, contrary to Defendants' argument, exceptional circumstances do warrant this Court's review. The issue involves a purely legal question that does not require any further factual development. Further, the issue is not complex, and the issue's proper resolution is obvious. And this important issue is novel in this Circuit and could recur unless decided by this Court. Significantly, moreover,

Defendants have not suggested that they will be prejudiced if this Court addresses the issue, which they had an opportunity to brief on appeal. Finally, it would be unjust to apply the forfeiture rule in this case. By granting Lesesne's *in forma pauperis* application and not assessing filing fees, the district court presumably accepted Lesesne's sworn declaration that he was not incarcerated when he filed this action. It would be unjust to affirm the judgment on the basis that Lesesne failed to *remind* the court of his *in forma pauperis* application, particularly when the district court relied on summary judgment evidence establishing that Lesesne had been released from the D.C. Jail nearly two years before he brought this action.

II. Lesesne preserved the issue whether the Inmate Grievance Procedure (IGP) was available to him. In opposing summary judgment, Lesesne argued that the IGP was unavailable to him both while he was hospitalized and while he was detained at the D.C. Jail until his release. Moreover, in support of his motion to amend his complaint, which he had filed to respond to Defendants' dispositive motion, Lesesne again raised the unavailability issue. Defendants opposed Lesesne's motion to amend as futile, arguing that the amended complaint was barred by the PLRA's exhaustion requirement. Lesesne replied, emphasizing that the PLRA requires exhaustion of only available administrative remedies. He raised the inability of prisoners to use the grievance system when they are "transferred or . . . otherwise absent from the institution or prison system when

they should have filed a grievance"—i.e., during the IGP's 15-day filing period. The district court then ordered Defendants to submit supplemental briefing on the availability of administrative remedies. In their response, Defendants submitted evidence showing that Lesesne had been released from the D.C. Jail before the 15-day grievance-filing period expired. And they acknowledged that the IGP was not available to him after his release. While Lesesne's *pro se* briefs were inartful, the unavailability issue was raised in the district court.

## ARGUMENT

John Lesesne commenced this case by declaring under penalty of perjury that he was not incarcerated when he brought this action. J.A. 20–21. That declaration was required to determine if the Prisoner Litigation Reform Act's (PLRA's) filing-fee requirement applied. *See* 28 U.S.C. §§ 1915(a)(2), (b)(1)–(2). That requirement, like the PLRA's exhaustion requirement, applies only when the action is brought by a prisoner. *See id.*; *In re Smith*, 114 F.3d 1247, 1251 (D.C. Cir. 1997) ("If a litigant is a prisoner on the day he files a civil action, the PLRA applies.").[1] The district court did not assess filing fees against Lesesne and instead granted his application to proceed without prepayment of fees. J.A. 20. Thus, the

[1] As *Amicus* explained in the opening brief (at pp. 22–24), the PLRA amended the *in forma pauperis* statute to impose a filing-fee requirement if the plaintiff is a "prisoner bring[ing] a civil action." 28 U.S.C. §§ 1915(a)(2), (b)(1).

court presumably accepted Lesesne's sworn declaration that he was not incarcerated when he brought this action.

In their initial filing in this Court, in response to Lesesne's *pro se* appellate brief, Defendants acknowledged that courts have interpreted the PLRA as not providing an exhaustion defense unless the plaintiff is a prisoner when he files his action. *See* Appellees' Br. 16 n. 7 (filed March 12, 2012). But Defendants argued that Lesesne had forfeited this issue by not raising it below. *See id.* Subsequently, this Court appointed *Amicus* and ordered the parties to brief the statutory interpretation issue: "whether a person no longer incarcerated must exhaust administrative remedies pursuant to the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), prior to filing a complaint relating to the conditions of incarceration."

Defendants now concede that § 1997e(a) does not apply—and thus, as a matter of law, a defendant has no exhaustion defense—unless the plaintiff is a prisoner at the time he files his action. Appellees' Br. 15–16. Moreover, Defendants do not contend that Lesesne was incarcerated when he filed this action. *See id.* at 15–21. Defendants do not question the veracity of Lesesne's sworn declaration that he was not incarcerated. *See id.* at 6, 17–18. In fact, Defendants seem to acknowledge "that he was not incarcerated when he filed suit." *Id.* at 18.

Because the PLRA does not apply unless the plaintiff is a prisoner when he files his action, and because Defendants never established and do not contend that

Lesesne was a prisoner, Defendants were not entitled to summary judgment on their exhaustion defense. Nonetheless, Defendants contend that this Court should affirm the judgment—without addressing the statutory interpretation issue—because Lesesne did not raise this issue below. Defendants also contend that Lesesne has forfeited his alternative argument that the administrative process was not available to him, an argument this Court need not reach if it resolves the antecedent statutory interpretation issue in Lesesne's favor. We address Defendants' forfeiture arguments in turn.

## I. THIS COURT SHOULD DECIDE THE THRESHOLD QUESTION OF STATUTORY INTERPRETATION AND REVERSE THE SUMMARY JUDGMENT BECAUSE THE PLRA DOES NOT APPLY TO THIS ACTION.

When Defendants moved for summary judgment by invoking the PLRA, Lesesne did not raise the antecedent issue of statutory interpretation: whether the PLRA applies when the plaintiff is not incarcerated when he files his action. As *Amicus* explained in the opening brief (at p. 29), although ordinarily an issue not raised in the district court will not be heard on appeal, this Court has "a fair measure of discretion to determine what questions to consider and resolve for the first time on appeal." *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 40 (D.C. Cir. 2011) (internal quotation marks omitted); *see also Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 686 (D.C. Cir. 2010). *Amicus* explained that it would be appropriate to

exercise this discretion here because, among other reasons, the exhaustion question poses an antecedent issue of statutory interpretation. Opening *Amicus* Br. 29–32.

Defendants agree "that this Court can forgive forfeitures in particular when necessary to ensure that a statute is properly construed on an antecedent and dispositive point." Appellees' Br. 18. But they contend that Lesesne's "forfeiture went to an antecedent *factual* issue." *Id.* (emphasis in original). This is an odd contention, since Defendants do not dispute Lesesne's sworn declaration that he was not incarcerated when he filed this action. There is no factual dispute.

Even ignoring Lesesne's sworn declaration, however, no factual issue arose over his filing status because Defendants submitted no evidence on that issue. Failure to exhaust under the PLRA is an affirmative defense, *Jones v. Bock*, 549 U.S. 199, 216 (2007), and so Defendants bore the burden of pleading and proving that the PLRA's exhaustion defense applied, *see Kaemmerling v. Lappin*, 553 F.3d 669, 675 (D.C. Cir. 2008). Just as a defendant invoking this defense must plead and prove that the plaintiff "failed to exhaust administrative remedies" that were "available" to him, *see id.* (quoting 42 U.S.C. § 1997e(a)), a defendant invoking this defense must also plead and prove that the action was "brought . . . by a prisoner," *see* 42 U.S.C. § 1997e(a); *see also, e.g.*, *Holland v. Prince George's Cnty.*, No. DKC 09–2737, 2011 WL 530559, at *3 (D. Md. Feb. 8, 2011) (denying summary judgment because "Defendant present[ed] no evidence that Plaintiff was

a prisoner at the time he filed his complaint" and thus failed to demonstrate that the PLRA's exhaustion provision applied).

And so, Defendants could not properly obtain summary judgment without producing evidence that Lesesne was incarcerated when he brought this action. Defendants suggest that it was Lesesne's burden to produce evidence on his status. But that was Defendants' burden since they were moving for summary judgment on an affirmative defense on which *they* bore the burden of proof. The moving party "bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact." *Miller v. Hersman*, 594 F.3d 8, 12 (D.C. Cir. 2010) (internal quotation marks omitted). And when the movant also bears the burden of proof on the underlying claim or defense, the movant cannot obtain summary judgment without submitting competent evidence on an essential component of its claim or defense. *See Woodruff v. Peters*, 482 F.3d 521, 525 (D.C. Cir. 2007) (reversing an agency's summary judgment because the agency bore the burden of proof on its affirmative defense, yet failed to submit evidence establishing when the plaintiff received notice of a final agency decision that commenced the limitations period).[2]

[2] *See also Gerlich v. U.S. Dep't of Justice*, 828 F. Supp. 2d 284, 303 (D.D.C. 2011) ("The satisfaction of the moving party's summary judgment burden is influenced by the party bearing the burden of proof at trial. 'If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial.'"

Simply put, to obtain summary judgment, it was Defendants' burden to submit evidence that Lesesne was incarcerated when he filed this action (though such evidence did not exist). Because Defendants failed to do so, they never shifted to Lesesne the burden of producing evidence of his filing status. *See Miller*, 594 F.3d at 12 (holding that an agency should not have been awarded summary judgment for a plaintiff's failure to exhaust administrative remedies in an employment-discrimination suit because the agency offered no evidence of when the plaintiff knew or should have known of the alleged discrimination); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 (1970) (holding that where the moving party "did not meet its initial burden" to demonstrate an absence of a genuine issue of material fact as to an essential element, the nonmoving party is "not required to come forward with suitable opposing affidavits").

Accordingly, the cases cited by Defendants on the burdens at summary judgment are distinguishable because in those cases the *nonmovants* bore the burden of proof on the underlying claims upon which the moving parties had sought summary judgment; and the moving parties demonstrated that they were entitled to judgment as a matter of law, thus shifting the burden to the nonmovants

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(alterations and emphasis in original) (citations omitted)); *Tech 7 Sys., Inc. v. Vacation Acquisition, LLC*, 594 F. Supp. 2d 76, 80 (D.D.C. 2009) ("Where summary judgment is sought based on an affirmative defense, as it is here, the defendant bears the burden of proof of establishing facts supporting the affirmative defense.").

to submit evidence to create a genuine issue of material fact and defeat summary judgment. *See Bush v. District of Columbia*, 595 F.3d 384, 386 (D.C. Cir. 2010) (holding that the moving party was entitled to summary judgment after the nonmovant-plaintiffs failed to establish a genuine issue of material fact supporting their 42 U.S.C. § 1983 claim); *Potter v. District of Columbia*, 558 F.3d 542, 551 (D.C. Cir. 2009) (holding that the District failed to raise a genuine issue of material fact that its policy was narrowly tailored to achieving a compelling government interest, an issue on which, by statute, the District bore the burden of proof).

For these reasons, Defendants are wrong to contend that Lesesne's forfeiture went to an antecedent factual issue. There never was—and there is not now—a factual issue about Lesesne's filing status. Instead, this case involves a threshold issue of statutory interpretation, one that Lesesne admittedly did not bring to the district court's attention. For the reasons explained in *Amicus*'s opening brief, an antecedent issue of statutory interpretation is well within the Court's discretion to decide for the first time on appeal.

And, contrary to Defendants' argument, exceptional circumstances do warrant this Court's review. First, this Court has been more willing to hear an issue for the first time on appeal when the issue is a purely legal question that does not require any further factual development. *See*, *e.g.*, *Prime Time*, 599 F.3d at 686 (deciding an issue not raised below because, among other factors, "[t]he issue

involves a straightforward legal question"); *Time Warner Entm't Co v. FCC*, 93 F.3d 957, 974–75 (D.C. Cir. 1996) (deciding an issue not raised below because, among other factors, "resolution of the legal issue presented here does not require the consideration of facts not already in the record"); *Milhouse v. Levi*, 548 F.2d 357, 363 (D.C. Cir. 1976) (deciding an issue not raised below because "[t]he issue is one of law, . . . which does not require further factual development"). Here, the propriety of the summary judgment turns on a pure question of law: whether the PLRA applies to an action brought by a previously incarcerated person who is not a prisoner when he files the lawsuit. This issue requires no further factual development. Had Lesesne raised this issue below, the district court's interpretation of the statute would not have been entitled to any deference on appeal.

Moreover, the legal question is not complex. *Cf. Prime Time*, 599 F.3d at 686 (resolving "a straightforward legal question" that was not raised in the district court). The PLRA's meaning is plain, as Defendants acknowledge. Although this Court has declined to decide complicated new legal issues that would benefit from a trial record, *see, e.g.*, *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1078 (D.C. Cir. 1984), that is not this case. In *Air Florida*, the District raised on appeal an argument based on a novel theory of the public-trust doctrine after its initial complaint was dismissed for failing to state a claim. *Id.* at 1078. Refusing

to consider the newly raised public-trust doctrine, this Court noted that the District's argument "raises a number of very difficult issues," including "the creation of federal common law" and "the delegation of trust duties to the District." *Id.* By contrast, Lesesne's appeal does not raise "complex issues which should first be developed in the District Court." *Cf. id.* at 1085. Rather, his appeal involves a straightforward legal question concerning the meaning of the PLRA.

That it is "obvious" the PLRA does not apply to this action also favors this Court's review. *See Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007) ("[W]e have authority to raise issues on our own motion when 'the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.'") (citation omitted). Here the PLRA's inapplicability is obvious because the statute's meaning is plain. Every circuit that has addressed this issue has so concluded. Opening *Amicus* Br. 21 n.4. Indeed, Defendants appear to acknowledge the statute's plain meaning. Appellees' Br. 15–16.[3]

[3] The obviousness of the PLRA's inapplicability in cases like this one has led district courts to raise the issue *sua sponte* in rejecting motions for summary judgment under § 1997e(a). *See Summers v. Warden of H.O.D.*, No. CIV.A. 11-1960-SS, 2012 WL 2088654, at *1 (E.D. La. June 8, 2012); *Bolden v. Cnty. of Sullivan*, No. 10 CIV. 3514(LLS), 2011 WL 4136821, at *1 (S.D.N.Y. Sept. 15, 2011). Regarding the foregoing cases, a review of PACER reveals that the plaintiffs never argued in opposition to summary judgment that the PLRA does not apply to a plaintiff who was released from prison before filing his action. Yet in each case the district court identified the issue and held that the exhaustion defense could not apply. In *Summers* the court relied on authority from other circuits because the Fifth Circuit had not decided the issue. 2012 WL 2088654, at *1.

That this important issue is novel in this Circuit and could recur unless decided by this Court also weigh in favor of review. *See Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C.Cir.1992) (observing that exceptional circumstances warranting review of a forfeited issue include "a novel, important, and recurring question of federal law").

Significantly, moreover, Defendants have not argued that they will be prejudiced if this Court addresses the statutory interpretation issue. *Cf. Doe*, 654 F.3d at 40 (reaching an issue raised for the first time on appeal in part because "appellants do not suggest they are prejudiced by not having had an opportunity to present their position on the merits in the district court and they have fully addressed the issue on appeal"). Both parties have now had the opportunity to fully brief the issue. *See id.*; *Prime Time*, 599 F.3d at 686 (hearing an issue raised for the first time on appeal because, among other factors, "both parties [had] fully addressed the issue on appeal"); *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 697 (D.C. Cir. 1991) ("We have stated that in exercising this discretion we will look to factors such as whether the issue in question has been fully briefed by the parties . . . .").[4] Defendants have not argued that had Lesesne

[4] Defendants' concession regarding the PLRA's proper interpretation does not thwart review. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (holding that the D.C. Circuit "acted without any impropriety" in addressing an unpreserved issue of statutory interpretation on which the parties were in agreement).

raised the legal issue below, they would have offered evidence about his filing status, i.e., that they would have shown (contrary to Lesesne's sworn declaration) that he was incarcerated.[5]

Finally, it would be unjust to apply the forfeiture rule in this case. As an *in forma pauperis* applicant, Lesesne was required by law and by the district court's form to certify to the court whether he was incarcerated when he filed this action. J.A. 20–21. Lesesne gave the court this requested information and declared, under penalty of perjury, that he was not incarcerated. *Id.* Again, that was a PLRA-related declaration because the PLRA requires a court to assess filing fees against the plaintiff in an action brought by a prisoner. *See* 28 U.S.C. §§ 1915(a)(2), (b)(1)–(2). By granting Lesesne's *in forma pauperis* application and not assessing filing fees, the court presumably accepted Lesesne's sworn declaration.

[5] Nor could Defendants plausibly claim they were unfairly surprised by this legal issue. After all, less than six months after the summary judgment order, in their initial brief in this appeal, Defendants acknowledged that courts have held that the PLRA does not apply unless the plaintiff is incarcerated when he files the action. Moreover, two years before Lesesne filed this action, the District's Office of Attorney General represented the defendants in a prisoner's suit in which the district court observed that the plaintiff "'would have been free of the strictures of the PLRA if he had filed a timely complaint after his release from prison,'" and noted that "a number of circuits have held that 'the PLRA does not apply to actions filed by former prisoners.'" *Banks v. York*, 515 F. Supp. 2d 89, 118–19 (D.D.C. 2007) (citations omitted). Further, in Lesesne's case, in response to the district court's request for supplemental briefing on exhaustion, Defendants discussed two cases, Docket Entry 28, pp. 5–6, one of which cited authority for the proposition that the exhaustion defense does not apply if the plaintiff is a "former prisoner who is not confined at the time he files his lawsuit." *Berry v. Kerik*, 366 F.3d 85, 87 (2d Cir. 2004).

It would be unjust to affirm the judgment on the basis that Lesesne failed to *remind* the district court of this. Yet that is essentially what Defendants contend by arguing that Lesesne should be faulted for failing to bring to the court's attention his sworn declaration. *See* Appellees' Br. 17–18. Defendants invoke the colorful language that "'judges are not like pigs, hunting for truffles buried in briefs or the record.'" *Id.* at 18 (quoting *Potter*, 558 F.3d at 553 (Williams, J., concurring)) (citation omitted) (internal quotation marks omitted). Yet in *Potter*, the record was voluminous, consisting of an array of filings, including expert reports and scholarly articles, submitted over time in a case that had been pending for years. *See Potter*, 558 F.3d at 549–51. That is not the case here. When Defendants moved for summary judgment, the record contained only *two documents* filed by Lesesne: (1) his fifteen-page complaint, and (2) his accompanying two-page *in forma pauperis* application in which he was required to declare whether he was incarcerated. *See* J.A. 2–3 (docket).

Moreover, "[w]hile a judge isn't a pig hunting for truffles in the parties' papers, neither is he a potted plant." *Potter*, 558 F.3d at 553 (Williams, J., concurring). It is well established that a plaintiff applying to proceed *in forma pauperis* must declare whether he is incarcerated, and must submit a certified trust-account statement if he is incarcerated. *See* 28 U.S.C. §§ 1915(a)(1), (b)(1)–(2). In a *pro se* action like this one, the *in forma pauperis* application is the place one

would expect to learn the plaintiff's status as a prisoner *vel non* at the time the action is filed. Here, moreover, the very affidavit on which the district court relied in granting summary judgment established that Lesesne had been released from the D.C. Jail nearly two years before he brought this action. J.A. 101.

Furthermore, for a separate reason, Defendants were on notice that Lesesne was not a prisoner when he filed this action. Defendants' certificates of service for their summary judgment filings certified that they served Lesesne at the address from which he addressed his complaint, *see, e.g.*, J.A. 24, which was a private street address. *Cf. Cofield v. Bowser*, 247 F. App'x 413, 414 (4th Cir. 2007) (per curiam) (concluding that the plaintiff had been released from prison before he filed his complaint, and thus the PLRA's exhaustion defense did not apply to his action, because the plaintiff's "mailing address, as listed on the envelope and in his complaint, provided a private street address"). Defendants should have known that this was not the address of a correctional facility. One should assume that Defendants, which include the District of Columbia, know where correctional facilities are located within the District.[6]

[6] Presumably the Office of the Attorney General, which represents the Defendants, could have determined that Lesesne was not incarcerated when he filed this action. In fact, in support of their summary judgment motion, Defendants ultimately submitted an affidavit and prison record that tracked to the minute when Lesesne moved in and out of, and was released from, the D.C. Jail. J.A. 101–02, 107.

In the final analysis, the forfeiture rule exists in large part to ensure that "litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *see also Air Florida*, 750 F.2d at 1084. These policies would not be undermined by reviewing whether the PLRA properly applies here, particularly given the unique circumstances of this case. Therefore, it would be an appropriate exercise of this Court's discretion to address the statutory interpretation issue that the Court directed the parties to brief. If this Court agrees that the PLRA applies only when the plaintiff is a prisoner when he files his complaint, Defendants do not have an exhaustion defense, and the Court need not address the alternative issue raised in part II of *Amicus*'s opening brief concerning the availability of administrative remedies.

## II. LESESNE PRESERVED THE ISSUE WHETHER THE INMATE GRIEVANCE PROCEDURE WAS AVAILABLE TO HIM.

As *Amicus*'s opening brief argued, summary judgment was improper because Defendants failed to carry their burden of proving as a matter of law that the Inmate Grievance Procedure (IGP) was "available" to Lesesne. Opening *Amicus* Br. 32–41. As *Amicus* explained: (1) for the deliberate-indifference incident while Lesesne was being treated at Prince George's County Hospital in Maryland, the IGP was unavailable to him because he was hospitalized throughout the period when we was required to file a grievance; and (2) for the deliberate-

indifference incidents while Lesesne was a detainee at the D.C. Jail, the IGP became unavailable to him upon his release, well before the IGP required him to file a grievance. *Id.*

Defendants do not address the merits of these arguments. Instead Defendants contend that Lesesne failed to raise the matter in the district court, and therefore forfeited these arguments. Appellees' Br. 19–20. But as shown below, the unavailability issue was raised in the district court, and thus the forfeiture rule does not apply. While Lesesne's briefing was inartful, he is a *pro se* litigant, not a lawyer; and because he is *pro se*, his filings should be liberally construed. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999).

When Defendants moved for summary judgment on their exhaustion defense, they argued that Lesesne had failed to complete the grievance process by submitting a grievance appeal to the Director of the Department of Corrections ("Department"), i.e., that he had failed to complete the final step in the process. Docket Entry 9, at 24. Lesesne responded to the motion with an opposition brief, in which he squarely contested whether an administrative remedy was available to him. Docket Entry 13, at 3, 13. His brief contained a section with this heading:

> X. Summary judgment cannot be granted on plaintiff['s] constitutional (Claims I-IX) due to [the] fact administrative remedy was unavailable.

*Id.* at 13 (underlining in original). In that section he argued,

> In response to defendant administrative procedure for inmate grievances, these forms were not readily available to plaintiff being medically treated out of jurisdiction nor during his detention at correctional facility due to his being transitioned, removed for court during business hours on a daily basis until his release.

*Id.*

Lesesne's reference to "these forms" indicates he was referencing the "administrative procedure" (i.e., the IGP). His use of "nor" drew a distinction between the IGP's availability when he was hospitalized ("medically treated out of jurisdiction") and the IGP's availability after he became a detainee at the D.C. Jail. The latter portion of Lesesne's argument suggested that, upon becoming a detainee at the D.C. Jail, the IGP was unavailable to him when he was physically gone from the jail. With respect to the first part of this argument—referring to the administrative procedure's unavailability while he was "being medically treated out of jurisdiction"—Lesesne was contending that the IGP was not available to him while he was in the hospital.[7] Earlier in that same brief, under a heading about the PLRA not being jurisdictional, Lesesne argued that, given his "grave condition during his stay in the intensive care, sedation, jurisdiction of his hospice [sic], administrative remedy was non-existent." Docket Entry 13, at 3.

[7] With his opposition to summary judgment, Lesesne submitted evidence (medical records) showing his period of hospitalization. J.A. 48–62.

In that opposition brief, Lesesne also argued that with "a defense of non-exhaustion . . . courts ought first to consider any argument that administrative remedies were not available, which makes sense because a finding that no remedies were available ends the inquiry as to exhaustion." *Id.* For that proposition he cited *Abney v. McGinnis*, 380 F.3d 663 (2d Cir. 2004), a PLRA case addressing the availability of administrative remedies for an inmate who failed to file a timely appeal within the grievance procedure's four-day deadline. *Id.* at 668–69. The court held that administrative remedies were not available to the inmate because he could not reasonably have been expected to appeal within the four-day deadline. *Id.*[8]

Moreover, Lesesne again raised the unavailability issue in a brief in support of his motion to amend his complaint, Docket Entry 25, at 3, a motion he had filed to respond to Defendants' dispositive motion, J.A. 63. Defendants opposed Lesesne's motion to amend as futile, arguing, among other things, that the amended complaint was "barred by the PLRA's exhaustion requirement." Docket Entry 23, at 2. Lesesne replied to that exhaustion argument, emphasizing that the

[8] In *Abney*, the inmate had received favorable responses to his grievances, but after the four-day appeal deadline passed, the inmate learned that the favorable decisions were not being implemented. 380 F.3d at 669. The district court nonetheless held that the inmate failed to exhaust administrative remedies. *Id.* at 666. The Second Circuit reversed. The Second Circuit concluded that the IGP did not give the inmate "adequate time" to appeal because by the time he was in a position to appeal, the IGP's four-day appeal deadline had expired. *Id.* at 668–69.

PLRA's text requires exhaustion of only such "administrative remedies as are available." Docket Entry 25, at 3. Lesesne further argued that the matter of "exhaustion has been rendered moot by its unavailability," and he emphasized that "*prisoners may also be unable to use a grievance system because they have been transferred or were otherwise absent from the institution or prison system when they should have filed a grievance.*" *Id.* (emphasis in original). For support, Lesesne cited *Barnard v. District of Columbia*, 223 F. Supp. 2d 211 (D.D.C. 2002). He argued that *Barnard* stood for the proposition that "a prisoner who was first hospitalized, then involved in hearings, then transferred during the 15 days he had to file a grievance, may not have been able to use the grievance system." Docket Entry 25, at 3–4.

*Barnard*, like this case, involved a summary judgment motion by the District arguing that the plaintiff failed to file a grievance before bringing his 42 U.S.C. § 1983 action about prison conditions. 223 F. Supp. 2d at 212–13. But because the plaintiff was hospitalized and ultimately transferred to a maximum security facility during the IGP's 15-day grievance-filing period, the court was concerned that "he may have been unable to seek informal resolution of his complaint or to file a formal grievance within fifteen days of the [incident]." *Id.* at 214. The incident occurred at the Lorton Correctional Complex, which had closed before the plaintiff brought his action. *Id.* at 213. The district court directed the District's

counsel to advise the court, among other things, "whether administrative remedies are now available to a former inmate at the Lorton Correctional Complex," "what if any impact the non-existence of administrative remedies would have on plaintiff's ability to pursue this lawsuit," and "any standards to be applied by administrators in ruling on a request for an extension of time [beyond the 15-day period] for filing a grievance based on 'extraordinary circumstances.'" *Id.*[9]

By invoking *Barnard*, Lesesne put at issue the IGP's unavailability while he was hospitalized and after he was released from the D.C. Jail. Again, Lesesne used *Barnard* to argue against the IGP's availability for a prisoner who is "hospitalized" or "transferred" out of the jail "during the 15-days he had to file a grievance." Docket Entry 25, at 3–4. He emphasized the inability of plaintiffs to use the grievance system when they are "transferred or . . . otherwise absent from the institution or prison system when they should have filed a grievance," Docket Entry 25, at 3 (emphasis removed)—i.e., during the IGP's 15-day filing period.

The same day that Lesesne filed the foregoing brief, the district court issued the order asking Defendants to submit supplemental briefing on their exhaustion defense, and the court specifically asked Defendants to address "whether the practical inability of an individual to follow the procedures necessary to seek

[9] As *Amicus*'s opening brief notes, *Barnard* involved an earlier version of the IGP, which provided for an extension of the 15-day filing period, 223 F. Supp. 2d at 213, but the version of the IGP applicable to Lesesne does not provide for an extension of the 15-day period. Opening *Amicus* Br. at 36 n.8.

otherwise available administrative remedies renders such remedies unavailable for the purposes of exhaustion." J.A. 97. A month later, Defendants responded with a supplemental brief, and they also submitted new evidence. J.A. 99–107; Docket Entry 28. Their evidence confirmed that Lesesne had been released from the D.C. Jail before his 15-day grievance-filing period expired. J.A. 101. And for the first time, Defendants acknowledged (contrary to their initial summary-judgment argument) that Lesesne was not "required to exhaust all of the steps of the inmate grievance procedure" as "[t]his would not be fair because the steps beyond the first step *were not 'available' to plaintiff because [he] was released before he would have the opportunity to further pursue a grievance*." Docket Entry 28, at 4 (emphasis added). But even though Lesesne was released from the jail before the 15-day filing period expired, Defendants argued that Lesesne should have filed a grievance while he was at the jail. *Id.* at 4–5.

On that argument, Lesesne did not cite *Bradley v. Washington*, 441 F. Supp. 2d 97 (D.D.C. 2006), a case in which the District's Office of Attorney General unsuccessfully litigated the same issue. (As *Amicus* explained in the opening brief, in *Bradley* the court interpreted the same version of the IGP at issue in this case. Opening *Amicus* Br. 38. The court held that the exhaustion defense failed because the plaintiff was transferred out of the D.C. Jail before his 15-day grievance-filing period expired, thus rendering the administrative process unavailable to him. 441

F. Supp. 2d at 102–03.) But Lesesne may invoke relevant legal authority on appeal even though he did not cite it below. *See United States v. Rapone*, 131 F.3d 188, 196–97 (D.C. Cir. 1997). In *Rapone*, a defendant charged with contempt had failed to argue in the district court that he had a statutory right to a jury trial for his contempt proceeding; instead he had argued only that he had a constitutional right to a jury trial. *Id.* In his appeal, however, the defendant for the first time invoked "an obscure statutory provision," contending the statute gave him a right to a jury trial. *Id.* at 195. The government argued that the defendant forfeited his right to rely on the statute because he "never brought the statute to the attention of the district court." *Id.* at 196. But this Court ruled for the defendant, observing that the defendant was "not attempting to raise the issue of a jury trial for the first time on appeal," but rather was offering "new legal authority" for the issue he had repeatedly raised in the district court, the issue "that he was entitled to have his case tried before a jury." *Id.*

Defendants say that Lesesne's latter argument about the 15-day period (in his brief at Docket Entry 25) was not raised "at the appropriate time." Appellees' Br. 19–20. That brief was in support of his motion to amend his complaint, which he had filed to supplement his materials in an effort to fend off Defendants' dispositive motion. *Cf. Anyanwutaku v. Moore*, 151 F.3d 1053, 1058–59 (D.C. Cir. 1998) (reading all of the *pro se* plaintiff's filings together to conclude that the

district court abused its discretion by denying a motion for reconsideration of its dismissal of one of plaintiff's claims). The subject brief contained Lesesne's reply to Defendants' renewed exhaustion argument: Defendants argued that his proposed amended complaint was futile because he had failed to exhaust administrative remedies. *See* Docket Entry 23, at 2. When Lesesne filed the subject brief, Defendants' summary judgment motion was still pending and was the central matter before the court. J.A. 22–24. Indeed, later on the day that Lesesne filed the brief, the court issued its order asking Defendants for supplemental briefing on their exhaustion defense, including on whether administrative remedies were available to Lesesne. Defendants filed their supplemental brief a month later, so they had an opportunity to respond to Lesesne's argument. And, indeed, it appears that Defendants did respond, because they acknowledged for the first time that Lesesne could not have been expected to file a grievance upon his release from the D.C. Jail. Docket Entry 28, at 4.

Moreover, Defendants' argument that Lesesne's filing came too late is ironic because *after* his filing—and in response to an order calling for supplemental briefing, not supplemental evidence—Defendants submitted the affidavit they used to obtain summary judgment. *See* J.A. 99–102.

In conclusion, based on this record, *Amicus* submits that Lesesne did adequately preserve the unavailability issue. While Lesesne's unavailability

arguments on appeal (conveyed through *Amicus*) may be more precise than when Lesesne advanced them below as a *pro se* litigant, that does not prevent consideration of the arguments on appeal. *Cf. Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). Defendants had adequate notice of this issue. Indeed, Defendants responded and joined issue by acknowledging below that the IGP became unavailable upon Lesesne's release from the D.C. Jail, but they argued that it did not matter. Defendants never specifically countered Lesesne's separate argument that the IGP was unavailable to him while he was hospitalized in grave condition in a facility outside the Department's jurisdiction. Even now, Defendants do not explain how Lesesne could have timely filed a grievance at the hospital when, putting aside his grave condition, the hospital presumably had no grievance box.

For these reasons, the unavailability issue was adequately preserved for appellate review.[10]

[10] *Amicus* has presented arguments supporting only Lesesne's federal constitutional claims, which the district court disposed of on summary judgment based on lack of exhaustion. *Amicus* has not presented arguments in support of Lesesne's state law claims, which were dismissed under Fed. R. Civ. P. 12(b)(6). In a footnote at the end of their argument on the federal claims, Defendants argue that the Court should dismiss on the merits Lesesne's Fourth Amendment claim (not his deliberate-indifference claims) as well as his claim against Henry Lesansky.

## CONCLUSION

The district court's summary judgment should be reversed.

Respectfully submitted,

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Appellees' Br. 21 n.6. The merits of Lesesne's federal claims can be handled by the district court on remand. But *Amicus* does take issue with Appellees' assertion—made without citing authority—that any claim against Lesansky should be dismissed because he "is not referenced in the notice of appeal." *Id.* at 22 n.6. The Federal Rules of Appellate Procedure require that a notice of appeal identify the appellants taking the appeal, not the appellees. Fed. R. App. P. 3(c)(1)(A); *Appeal of D.C. Nurses' Ass'n*, 854 F.2d 1448, 1450 (D.C. Cir. 1988) (per curiam) ("While Rule 3(c) requires that appellants be identified it does not require that appellees be identified . . . ."). Here, only one order has been appealed, and that dispositive order applies equally to all Defendants who entered an appearance, each of whom is represented by the Office of the Attorney General. *See Int'l Union, United Auto. Aerospace & Agr. Implement Workers of Am. v. United Screw & Bolt Corp.*, 941 F.2d 466, 471 (6th Cir. 1991) ("It is the order or judgment from which the appellant appeals and not the specific mention of the appellees that provides the court and any opposing parties the necessary notice."). The omission of some defendants' names from a notice of appeal is harmless when the omitted defendants are public employees represented by the same counsel as the named appellees. *Chathas v. Smith*, 848 F.2d 93, 94 (7th Cir. 1988). If need be, a letter from the appellant to opposing counsel could clarify that Lesansky is a party to this appeal, *see id.*, though that seems unnecessary, since the entry-of-appearance form that opposing counsel filed in this Court listed Lesansky as one of the "Appellees."

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND VOLUME LIMITATIONS**

Pursuant to Fed. R. Ap. P. 32(A)(7)(C) and D.C. Circuit Rule 32(a)(3)(C):

I certify that this brief complies with the volume limitation in Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 6,892 words.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), as varied by D. C. Circuit Rule 32(a)(1), because it has been prepared in a proportionally spaced, typeface, 14-point Times New Roman, using Microsoft Word.

/s/ Sean E. Andrussier
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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 2nd day of January, 2013, I caused this Reply Brief of *Amicus Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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