No. 21-56254

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

William D. Dunne, et al.,

Petitioners-Appellants,

v.

Eliseo Ricolcol,

Respondent-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Central District of California
No. CV 18-9728, Judge Michael W. Fitzgerald

REPLACEMENT REPLY BRIEF FOR PETITIONER-APPELLANT WILLIAM D. DUNNE

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Introduction and Summary of Argument

To ensure that the Bureau of Prisons' grievance program runs fairly and efficiently, federal law subjects prison officials to a range of specific, non-discretionary duties, four of which are at issue here: to provide receipts when prisoners' grievance requests are filed; to conduct grievance investigations; to respond to and sign grievance requests; and to establish procedures that allow for the informal resolution of grievances. 28 C.F.R. §§ 542.11(a)(2)-(4), 542.13(a). Dunne's petition alleges that the warden at FCI-Victorville has systematically ignored these obligations. The warden asks this Court to overlook these transgressions, seeking affirmance on three grounds.

First, the warden says that the district court lacks subject-matter jurisdiction over Dunne's Administrative Procedure Act and Declaratory Judgment Act claims. That is wrong. The district court had federal-question jurisdiction under 28 U.S.C. § 1331 because Dunne's claims arise under federal law—the APA—and he alleged violations of federal regulations.

Second, the warden contends that Dunne failed to state claims to compel him to act under APA Section 706(1) or the Mandamus Act. That's also incorrect. Each of the warden's duties under 28 C.F.R. §§ 542.11(a)(2)-(4) and 542.13(a) is discrete, plainly described, and non-discretionary. Because Dunne alleged that the warden has failed to comply with these specific duties, he can be compelled to perform them via APA Section 706(1) or

mandamus. The warden attempts to escape scrutiny under APA Section 706(1) by asserting that Dunne is not entitled to the relief he has requested. But neither the type nor breadth of the remedy is relevant at the motion-to-dismiss phase. And, in any event, the relief to which Dunne is entitled may be tailored to the extensiveness of the warden's violations, and thus is not as limited as the warden maintains.

Third, the warden asserts that Dunne forfeited his challenges to the one-at-a-time rule and the systematic rejection of Dunne's BP-9 grievances. Dunne forfeited nothing. He preserved these APA Section 706(2)(A) claims by presenting their factual foundations to the district court. With that brush cleared, the warden has conceded these claims by failing to defend them on the merits.

Argument

I. The district court had subject-matter jurisdiction over Dunne's Administrative Procedure Act and Declaratory Judgment Act claims.

A "federal court has jurisdiction pursuant to 28 U.S.C. § 1331 over challenges to federal agency action as claims arising under federal law, unless a statute expressly precludes review." *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). That is true for APA claims, *see id.*, and for federal claims seeking relief under the Declaratory Judgment Act, *Allen v. Milas*, 896 F.3d 1094, 1099 (9th Cir. 2018). Here, no statute expressly precludes review of Dunne's claims, and the warden does not argue

otherwise. Thus, "[b]y alleging violations of federal … regulations pursuant to the APA's cause of action, [Dunne's] complaint asserts a federal question and satisfies § 1331." *United Aeronautical Corp. v. U.S. Air Force*, 80 F.4th 1017, 1028 (9th Cir. 2023).

Though not clear, the warden appears to contend that the district court's failure to mention 28 U.S.C. § 1331 in its dismissal order prevents this Court from holding that the district court had federal-question jurisdiction. *See* Resp. Br. 17. That is flatly wrong. The district court's failure to appreciate that 28 U.S.C. § 1331 provided jurisdiction is no reason for this Court to ignore that error.

The warden also suggests that Dunne's mistaken assertion that the APA and Declaratory Judgment Act themselves provided subject-matter jurisdiction bars his claim. *See* Resp. Br. 17. Taking that argument on its own terms, the warden gains no ground because Dunne also invoked 28 U.S.C. § 1331 as a basis for jurisdiction in both his original petition and his response to the warden's motion to dismiss. *See* SER-39; ECF 64 at 6 (citing *Du v. Gonzales*, 2008 WL 11336158, at *3 n.14 (C.D. Cal. Feb. 19, 2008)). In any case, the statute Dunne cited is irrelevant, because the court *had* jurisdiction under 28 U.S.C. § 1331. *See Allen*, 896 F.3d at 1099; *cf.* 28 U.S.C. § 1653 (providing that defective allegations of jurisdiction may be amended by trial or appellate courts); *Snell v. Cleveland, Inc.*, 316 F.3d 822, 828 (9th Cir. 2002) (per curiam) (noting same).

Finally, the warden contends that the district court lacked subject-matter jurisdiction because Dunne has not stated an APA claim. *See* Resp. Br. 18-19. That, too, is mistaken. "[I]t is well settled" that failing to state a claim and failing to establish subject-matter jurisdiction involve two distinct inquiries. *Bell v. Hood*, 327 U.S. 678, 682 (1946). Only when a claim is "immaterial" or "wholly insubstantial and frivolous" should it be dismissed on jurisdictional grounds. *Id.* at 682-83. No one has suggested that Dunne's APA claims are immaterial or frivolous; indeed, Dunne has stated valid APA claims. *See* Opening Br. 19-45; *infra* at 4-10, 16-19.

II. Dunne states a claim to compel mandatory actions under APA Section 706(1) and the Mandamus Act.

A. Dunne's petition states a claim under APA Section 706(1) to compel mandatory agency actions unlawfully withheld and unreasonably delayed.

To state a claim under APA Section 706(1), a plaintiff must identify (1) "a *discrete* agency action" that (2) the agency "is *required to take*" but (3) has "failed to take" or has unreasonably delayed taking. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Dunne has satisfied all three requirements.

(1) Dunne's petition identifies discrete agency actions. The warden argues that Dunne has failed to identify discrete agency actions and instead impermissibly seeks to force him to comply with generic obligations and to institute wholesale programmatic change. *See* Resp. Br. 20-21. That's not so.

Dunne asks the warden to take only discrete agency actions demanded by 28 C.F.R. Part 542. Yes, Dunne is challenging many violations of these regulations. But that does not transform these individually reviewable agency failures into an "impermissible, systematic challenge[.]" *Stephen C. v. Bureau of Indian Educ.*, 2022 WL 808141, at *2 (9th Cir. Mar. 16, 2022) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990)).

Dunne's case mirrors this Court's recent decision in *Stephen C.* There, students challenged a school's failure to comply with thirteen separate Bureau of Indian Education regulations concerning, among other things, the school's obligation to provide fine-arts, consumer-economics, and physical-education instruction and career-awareness programming. *See Stephen C.*, 2022 WL 808141, at *1 (citing 25 C.F.R. §§ 36.22(a), 36.23(c)). This Court held that these failures, although numerous, still constituted discrete agency actions unreasonably withheld, and the regulations were, therefore, judicially enforceable under the APA. *Id.* at *2.

Like in *Stephen C.*, Dunne challenges the warden's failure to perform several discrete actions demanded by regulation: (1) acknowledging grievance requests by providing receipts, (2) conducting grievance investigations, (3) responding to and signing grievance requests, and (4) operating a functional informal resolution process. *See* 28 C.F.R. §§ 542.11(a)(2)-(4), 542.13(a); Opening Br. 20-21. The APA imposes no limit on the number of agency failures that can be challenged in a Section 706(1)

action so long as the failures are discrete and "particular 'agency action[s]' that cause[] … harm." *Stephen C.*, 2022 WL 808141, at *2 (citing *Lujan*, 497 U.S. at 891). It would be irrational to suggest, as does the warden, that the more often an agency violates regulations governing its conduct, the less likely an APA Section 706(1) challenge would be available to stem those violations.

Contrary to the warden's suggestion, discrete failures to act do not become unreviewable simply because the extent of the agency's illegalities means that a judgment might require substantial changes to an agency program. *See Stephen C.*, 2022 WL 808141, at *2. *Lujan* observed that an APA Section 706(1) remedy "may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole program to be revised by the agency in order to avoid the unlawful result that the court discerns." 497 U.S. at 894 (quotation marks omitted). In short, in a Section 706(1) claim, the withheld or delayed agency actions—not the potential effects of the court's remedy—must be discrete.

Even if we assume (incorrectly) that the propriety of the remedies Dunne seeks was properly before the district court at the motion-to-dismiss phase, the warden understates that court's authority to grant relief beyond the precise obligations set forth in 28 C.F.R. Part 542. We acknowledge that a court's APA Section 706(1) remedy may not "amount to programmatic oversight or 'judicial entanglement in abstract policy disagreements[.]'" *Viet.*

Veterans of Am. v. Cent. Intel. Agency, 811 F.3d 1068, 1080 (9th Cir. 2016) (citing *Norton*, 542 U.S. at 66)). But when an agency repeatedly fails to perform non-discretionary duties, a court may (1) set timelines for compliance with regulations, (2) order agencies to comply with their regulations moving forward, and (3) require agencies to present the court with plans for achieving future compliance. *See id.*; *see also Stephen C.*, 2022 WL 808141, at *2 (holding that the equitable remedy of compensatory education is appropriate relief to remedy APA Section 706(1) violations).

To sum up: The possibility that the court could grant significant relief if Dunne proves his case on remand does not mean that Dunne is levying an impermissible non-specific programmatic attack. It means only that the warden has violated a range of legally mandated discrete duties many times over.

(2) The actions Dunne identifies are legally mandated by regulation. Our opening brief explains (at 20) that Dunne has identified four non-discretionary regulatory duties. The warden counters that the actions demanded by the regulations are discretionary. *See* Resp. Br. 19-23. That's incorrect.

To begin with, the duties established in 28 C.F.R. §§ 542.11(a)(2)-(4) and 542.13(a) unambiguously compel specific actions. Both 28 C.F.R. §§ 542.11(a)(2)-(4) and 542.13(a) use the word "shall," which "imposes [four] nondiscretionary, ministerial dut[ies]" on the warden. *Rivas v. Napolitano*,

714 F.3d 1108, 1111 (9th Cir. 2013); *see Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573-74 (9th Cir. 2000) (noting the "mandatory" character of "shall"). "The word 'shall' [thus] requires [the] court to compel agency action when, as here, there is a 'specific, unequivocal command' that the agency must act[,]" but it has failed to do so. *Viet. Veterans of Am.*, 811 F.3d at 1081 (citing *Norton*, 542 U.S. at 63-64); *see* Opening Br. 21-25.

The warden overlooks the distinction between discretion in whether to perform an action and discretion in implementing a specific duty. *See* Resp. Br. 20-23. This Court has recognized that "discretion in the manner in which the duty may be carried out does not mean that [an officer] does not have a duty to perform a 'discrete action' within the meaning of § 706([1]) and [*Norton*]." *Viet. Veterans of Am.*, 811 F.3d at 1079 (citing *Norton*, 542 U.S. at 65). The warden here is subject to four non-discretionary duties set out in 28 C.F.R. §§ 542.11(a)(2)-(4) and 542.13(a): to issue receipts for requests; to investigate requests; to respond to and sign all requests or appeals; and to maintain a working informal complaint process (the so-called BP-8 process). Though the warden has limited discretion in how to implement these duties, the duties themselves are non-discretionary.

As our opening brief describes (at 9-10), of the sixty-five BP-8s Dunne filed in 2018, the warden responded to only two; thus, sixty-three of his claims went unreceipted, uninvestigated, and unresponded to. SER-50. Of Dunne's fifty-two formal BP-9 complaints, he received receipts for only

three, none of which were issued on a timely basis. SER-46. Thirty complaints received no response at all. *Id.* In sum, for forty-nine of his formal complaints, the warden failed to comply with 28 C.F.R. § 542.11(a)(2)-(4)'s specific requirements and violated his mandatory duties to receipt, investigate, and respond to complaints.

As to 28 C.F.R. § 542.13(a), the warden has violated a non-discretionary duty to establish and maintain a working BP-8 process. As this Court has observed, "discretion over *how* to investigate [claims] is different from discretion over *whether* to investigate." *Vaz v. Neal*, 33 F.4th 1131, 1136 (9th Cir. 2022) (emphasis added). The warden must establish a process that "allow[s] for the informal resolution of inmate complaints." 28 C.F.R. § 542.13(a). "Allow" means "[t]o put no obstacle in the way of[.]" *Allow*, *Black's Law Dictionary* (12th ed. 2024). By putting obstacles in the way of a functioning informal complaint system, as Dunne alleges occurred here, *see* Opening Br. 9-11, the warden has failed to "allow[] for the informal resolution of inmate complaints." 28 C.F.R. § 542.13(a). Most importantly, the warden's failure to implement the program in a way that facilitates

appeals to the BP-9, 10, and 11 levels violates his non-discretionary duty to establish a functional informal resolution process.[1]

(3) The warden has withheld or unreasonably delayed the actions Dunne identifies. Under APA Section 706(1), a plaintiff must show that an agency has unlawfully withheld or unreasonably delayed a required action. Dunne has alleged both. *See* Opening Br. 25-29. Because the warden's brief to this Court does not contest that he has unlawfully withheld or unreasonably delayed the legally mandated actions that Dunne identifies, the warden has conceded any contrary argument. *See, e.g., Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (an appellee forfeits an argument that it fails to raise in its answering brief).

B. Dunne seeks to compel mandatory duties owed to him, so he states a claim under the Mandamus Act.

Mandamus is available to compel a federal official to perform a duty if (1) the petitioner's claim is clear and certain; (2) the duty of the officer is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available. *See Agua Caliente Tribe of Cupeño Indians*

[1] The warden also argues that Dunne seeks to enforce non-binding BOP guidelines set out in the Program Statement. *See* Resp. Br. 23. That is incorrect. Dunne cites the Program Statement only to explain how, according to BOP, 28 C.F.R. Part 542's mandatory administrative remedy program should function. *See* Opening Br. 37-38.

of Pala Rsrv. v. Sweeney, 932 F.3d 1207, 1216 (9th Cir. 2019). Dunne satisfies each requirement, and none of the warden's contrary arguments has merit.[2]

(1) Dunne's claim is clear and certain. Agency regulations are judicially enforceable duties when they are promulgated through proper procedures and prescribe substantive rules. *Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003). Here, Dunne requests that the warden be compelled to "implement the administrative remedy program mandated by 28 CFR Part 542[.]" SER-34. As explained above (at 4-10), the duties imposed by 28 C.F.R. §§ 542.11(a)(2)-(4) and 542.13(a) are clear, certain, and required. The warden says that Dunne's mandamus claim is not clear and certain for two reasons. Both fail.

The warden maintains first that the duties in 28 C.F.R. Part 542 are not judicially enforceable because they weren't promulgated via the APA's notice-and-comment procedures. *See* Resp. Br. 27-28. That's wrong. The regulations Dunne seeks to enforce, both as originally promulgated and as reissued, *were* the product of notice-and-comment rulemaking and are thus judicially enforceable. *See* 44 Fed. Reg. 62248, 62248 (Oct. 29, 1979); 61 Fed.

[2] Dunne seeks to compel the warden to carry out mandatory duties under both the APA and the Mandamus Act. SER-39-40. As our opening brief explains (at 30 n.12), a court can choose to consider the two types of claims individually, *Vaz v. Neal*, 33 F.4th 1131, 1135 (9th Cir. 2022), or consider both together "[b]ecause the relief sought is essentially the same[.]" *Agua Caliente*, 932 F.3d at 1216 (alteration in original) (quoting *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997)).

Reg. 86, 86 (Jan. 2, 1996). The warden's citation to the Federal Register regarding a rule issued without notice and comments concerned two small, technical changes to 28 C.F.R. § 542.11(a)(2) and (a)(4), having nothing to do with the provisions Dunne seeks to enforce. *See* Resp. Br. 27-28 (citing 56 Fed. Reg. 58634 (Nov. 20, 1991)).[3]

The warden next argues that Dunne cannot enforce BOP's Program Statement because it is an interpretive rule. *See* Resp. Br. 28-29. But that's irrelevant. Dunne is not trying to compel the warden to follow policies in the Program Statement. Instead, Dunne cites the Program Statement only to explain how, according to BOP, 28 C.F.R. Part 542's mandatory administrative remedy program should function. *See, e.g.*, Opening Br. 37-38 (using the Program Statement's discussion of 28 C.F.R. § 542.13(a) to highlight how the warden's one-at-a-time rule frustrates the regulation's purpose).

(2) The duties assigned to the warden are ministerial and so plainly prescribed as to be free from doubt. Contrary to the warden's assertions, *see* Resp. Br. 25-26, the requirements that the warden "shall" return receipts, conduct investigations, and respond to requests under 28 C.F.R. § 542.11(a)(2)-(4) are "clear, non-discretionary agency obligation[s] to take [] specific affirmative action[s]" and are thus ministerial duties. *Indep. Mining*

[3] These two small changes still bind BOP because they were issued under the APA's "good cause" exemption from notice-and-comment procedures. 56 Fed. Reg. 58634 (Nov. 20, 1991); *see* 5 U.S.C. § 553(b)(4)(B).

Co., 105 F.3d at 508; *see also supra* at 7-8 (discussing the regulatory meaning of "shall"). Even if the warden has some discretion over how to take these three actions, he does not have discretion to not take the actions at all, as Dunne alleges occurs regularly. *See supra* at 8-9.

For the same reason, the warden is subject to mandamus to compel him to establish a properly functioning informal resolution process under 28 C.F.R. § 542.13(a). As the magistrate judge observed, mandamus is available when "a public official has violated … regulatory standards delimiting the scope or manner in which official discretion can be exercised." SER-26 n.12 (citing *AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 697 (9th Cir. 1999)). Here, as discussed earlier (at 8-9), although the warden ostensibly created an informal resolution process, that process is so dysfunctional that it does not "allow for the informal resolution of inmate complaints." 28 C.F.R. § 542.13(a).

For example, in 2018, Dunne filed sixty-five BP-8s, only two of which received a response. SER-50. Meanwhile, the one-at-a-time rule combined with the lack of open houses—where BP-8s are distributed—enables prison staff to violate their duty to "attempt to informally resolve" grievances by simply refusing to distribute or accept BP-8s when a prisoner has another informal request pending. 28 C.F.R. § 542.13(a); *see* SER-46, 80, 133; *see also* SER-66 (allegation of petitioner Farrugia). Accordingly, the warden has failed to obey the non-discretionary requirements of 28 C.F.R. § 542.13(a)

and may be compelled to establish procedures that actually "allow" for informal complaint resolution.

The warden also asserts that Dunne cannot maintain a mandamus action because his petition requests forms of relief that are not explicitly required by the regulations—for example, Dunne's request for a 48-hour turnaround for logging BP-9 requests and for daily staff availability. *See* Resp. Br. 26. But the question before the district court at the motion-to-dismiss phase was not the propriety of a particular form of relief—which typically would be considered at the end of the case—but rather whether Dunne had stated a claim. In any case, Dunne acknowledged below that despite his desire to create a "better, more effective" administrative remedy program, he would be "fine" if the court mandated "the administrative remedy program to which Part 542 accords [him] a right." ECF 26 at 14-15. At the end of the day, a district court's final judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). Thus, even though Dunne—a pro se litigant—did not confine his requested relief to Part 542's exact specifications, dismissal of his mandamus claim on that ground was improper, SER-27-28.

(3) No other adequate remedy is available to Dunne. Our opening brief explains (at 34) that Dunne is entitled to mandamus relief because he lacks any other adequate remedy. The warden contends that Dunne has two effective alternative remedies: the administrative remedy program itself and

a complaint process outlined on a USA.gov website. *See* Resp. Br. 29-31 (citing *File a complaint about a state or federal prison*, https://www.usa.gov/complaint-about-prison (last updated Aug. 15, 2024)). Both are illusory.

The administrative remedy program—the unlawful implementation of which is challenged in this case—is not a viable remedy. *See* Resp. Br. 29-30. The whole point of this litigation is that Dunne has been trying to use the administrative remedy program for years, and it has been grossly ineffective. To give one example: Sixty-three of Dunne's sixty-five BP-8 complaints have not been investigated or responded to. SER-50. Even worse, these unanswered, unreceipted, and uninvestigated complaints include multiple complaints about the administrative remedy process itself, underscoring the futility of the warden's suggested remedy. *See* Opening Br. 13-14.

The warden's second suggestion—that Dunne pursue relief through a complaint process listed on a government website—is hard to take seriously. *See* Resp. Br. 31. For starters, as a prisoner, Dunne lacks internet access.[4] Besides, this complaint process is intended for use by free members of the

[4] *See Stay in Touch*, https://www.bop.gov/inmates/communications.jsp (last visited Oct. 3, 2024).

public, not prisoners, as a perusal of the website's navigation menu shows.[5] Finally, unlike mandamus, this complaint scheme does not provide for judicial review.[6]

III. Dunne states a claim under APA Section 706(2)(A) to set aside agency actions that are arbitrary, capricious, or not in accordance with law.

Dunne challenges two of the warden's policies under APA Section 706(2)(A) as agency actions that are arbitrary, capricious, or not in accordance with law: (1) the one-at-a-time limit on BP-8 informal resolution, and (2) the rejection of BP-9s for failing to attach proof of exhaustion of the informal (BP-8) resolution process. *See* Opening Br. 34-45. The warden argues only that Dunne has forfeited these arguments by (purportedly) not raising them in the district court. *See* Resp. Br. 31-34. The warden does not contest the substance of Dunne's Section 706(2)(A) claims, thus abandoning

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[5] *See File a complaint about a state or federal prison*, https://www.usa.gov/complaint-about-prison (last updated Aug. 15, 2024) (showing the "[f]ile a complaint" page listed adjacent to instructions on how to "[l]ook up prisoners and prison records" and "[v]isit or send money to a prisoner").

[6] The district court erred in suggesting that Dunne could have filed a *Bivens* action as an alternative to mandamus, *see* SER-30-31, as the warden acknowledges, *see* Resp. Br. 30 n.7. Dunne is not seeking damages—the only form of relief available in a *Bivens* action—*see Solida v. McKelvey*, 820 F.3d 1090, 1094 (9th Cir. 2016)—so, for that reason alone, *Bivens* could not provide an adequate alternative remedy to his mandamus claim for declaratory and injunctive relief.

any arguments on the merits. *See, e.g., Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009).

Dunne did not forfeit his Section 706(2)(A) claims. The warden implies that Dunne needed to cite APA Section 706(2)(A) to preserve his claims under it. *See* Resp. Br. 32-33. If that's the warden's argument, it is mistaken. "Federal pleading rules call for a short and plain statement of the claim showing that the pleader is entitled to relief[.]" *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam) (quotation marks and citation omitted). "[T]hey do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Id.* Thus, that Dunne—a pro se litigant—did not expressly invoke APA Section 706(2)(A) does not bar his claims. *See id.* (holding plaintiff did not need to invoke 42 U.S.C. § 1983 to state a claim under it).

The real question is whether Dunne pleaded a set of facts that could give rise to an APA Section 706(2)(A) claim. *See Johnson*, 574 U.S. at 12. Under the Federal Rules, the plaintiff need not set out a legal theory, but only facts that, if true, would give rise to a claim for relief. *See id.* (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1215 (3d ed. 2004). Although Dunne did not use the magic words "arbitrary," "capricious," or "not in accordance with law," as we now show, he presented the substance of an APA Section 706(2)(A) challenge in the district court.

"[A]n agency action qualifies as arbitrary or capricious if it is not reasonable and reasonably explained." *Ohio v. EPA*, 144 S. Ct. 2040, 2053 (2024) (quotation marks omitted). Dunne's district-court filings repeatedly challenge the one-at-a-time policy as unreasonable in light of Part 542's regulatory commands. Dunne's petition stated that the one-at-a-time rule "constitut[ed] an improper limitation on the filing of a [BP-9]" and thus was "inconsistent with 28 CFR Part 542." SER-74. In opposing the warden's motion to dismiss, Dunne highlighted that "[l]imiting prisoners to one [BP-8] … which is not receipted [and] exceedingly unlikely to be timely answered" contradicts 28 C.F.R. § 542.13(a)'s requirements. ECF 64 at 9.

And in objecting to the magistrate judge's Report and Recommendation, Dunne directly attacked the warden's justification for the one-at-a-time rule—administrative efficiency—as unreasonable, underscoring that infraction reports against prisoners are "written at about three times the rate of grievances against staff or [prison] policy[.]" ECF 82 at 8. Yet, he explained, these complaints "have no trouble being thoroughly investigated and heard without any limitations." *Id.* (quotation marks omitted). It is clear, then, that Dunne put the court and the warden on notice that he was challenging the one-at-a-time rule as an unreasonable—and thus an arbitrary and capricious—agency action.

Similarly, Dunne repeatedly challenged the reasonableness of the warden's Catch-22-like policy of rejecting BP-9s for not attaching proof of

exhaustion of the (dysfunctional) informal BP-8 process. In his petition, Dunne emphasized that prisoners simply have no way to prove that they pursued informal resolution. *See, e.g.*, SER-110. That's because prison staff do not provide prisoners with receipts or even responses to BP-8s, meaning a paper trail of exhaustion is not created as it should be. As Dunne pointedly put it: "If a BP-8 is not answered, it is not returned to the prisoner, so he cannot attach it to the [BP-9], and [so an unanswered BP-8] is not the 'necessary evidence' of attempted informal resolution." SER-57-58. For this reason as well, Dunne put the court and the warden on notice that he was challenging agency action that was arbitrary, capricious, or not in accordance with law.

Conclusion

This Court should reverse the district court's dismissal and remand for further proceedings on each of Dunne's claims.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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