**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 OPENING BRIEF FOR PETITIONER-APPELLANT WILLIAM D. DUNNE

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## Introduction

In binding federal regulations, the federal Bureau of Prisons (BOP) established the Administrative Remedy Program to authorize prisoners to seek formal review of concerns relating to their confinement—and to require prison officials to fairly and efficiently address these grievances. Wardens at federal prisons must implement and operate this program at their facilities, and the program's effectiveness depends on the wardens fulfilling the mandatory duties assigned to them by BOP in 28 C.F.R. Part 542.

But the warden at Federal Correctional Institute Medium 1 in Victorville, California (FCI-1)—where Appellant William Dunne has been incarcerated since 2017—fails to perform these duties by neglecting to return a receipt for, investigate, or respond to prisoners' formal administrative requests. The warden has further undermined the Administrative Remedy Program by adopting an informal-resolution process that effectively prevents prisoners from seeking review of issues relating to their confinement.[1]

Dunne has repeatedly attempted to address concerns—ranging from accommodations for his skin-cancer diagnosis to an unexplained four-year extension of his mandatory release date from prison—through the Administrative Remedy Program. His attempts have repeatedly proved futile because of the warden's failure to fulfill mandatory duties. For

[1] The Federal Correctional Institution in Victorville includes two prisons, FCI-1 and FCI-2. As indicated, Dunne is in FCI-1.

example, when prison officials instituted a policy of collectively punishing all prisoners by leaving their cell lights off for two weeks, Dunne submitted a request to the warden through the Administrative Remedy Program. The warden never provided a receipt of this request and never responded to it. Without a receipt from the warden, Dunne was unable to prove he had submitted that request when he attempted to seek further review, and his appeal was rejected because of his purported failure to first submit a request with the warden. The warden's failure to provide a receipt or response, therefore, effectively barred Dunne from any further review of his request. Accordingly, Dunne's use of the Administrative Remedy Program amounted to submitting a request that was never responded to, investigated, or even acknowledged.

The unresponsiveness that this example demonstrates is characteristic of the Administrative Remedy Program at FCI-1. As further described below, the warden's failure to perform duties required by BOP regulations undermines the purpose and operation of the Administrative Remedy Program at FCI-1.

**Statement of Jurisdiction**

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 over Dunne's Administrative Procedure Act and Declaratory Judgment Act claims and under 28 U.S.C. § 1361 over his Mandamus Act claim. On September 10, 2021, the district court entered an order granting respondent's motion to dismiss, disposing of all claims. SER-4, 6. Dunne filed a timely

notice of appeal on November 8, 2021. SER-169. This Court has jurisdiction under 28 U.S.C. § 1291.

## Issues Presented

**I.** Whether the district court erred in finding that it lacked subject-matter jurisdiction over Dunne's claims under the Administrative Procedure Act, 5 U.S.C. § 702, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

**II.** Whether Dunne's petition states a claim to compel mandatory actions under Section 706(1) of the Administrative Procedure Act, 5 U.S.C. § 706(1), and the Mandamus Act, 28 U.S.C. § 1361.

**III.** Whether Dunne's petition states a claim to hold unlawful and set aside two agency actions under Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A): (1) FCI-1's "one-at-a-time" limit on informal-resolution requests, and (2) its practice of denying formal requests based on a prisoner's purported failure to prove that the prisoner sought informal resolution.

## Addendum of Regulations and Authorities

Pertinent regulatory provisions and other authorities appear in the addendum to this brief.

## Statement of the Case

William Dunne is a federal prisoner at FCI-1, where he has been incarcerated since April 2017. SER-37-38. FCI-1 ostensibly operates an Administrative Remedy Program, as required by BOP regulations. *See* 28

C.F.R. pt. 542. The FCI-1 warden is responsible for operating that system. 28 C.F.R. § 542.11(a).[2]

While at FCI-1, Dunne has attempted to use the institution's Administrative Remedy Program to address problems concerning his confinement, including an error in computing his sentence, SER-80 ("MR [mandatory release] changed from 2043 to 2047"); FER-10, medical and dietary concerns, SER-48, 62-63, 78, 93-100, and collective punishment of all prisoners for conduct that Dunne had no part in, SER-68, 78, 130. At every step, however, Dunne has encountered unresponsiveness and roadblocks. Accordingly, Dunne, along with fellow prisoner Thomas Farrugia, sued to require the warden to administer the Administrative Remedy Program at FCI-1 in compliance with federal regulations and to respond to all of his outstanding administrative-remedy requests.[3]

## I. Regulatory background

"[T]o allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement," 28 C.F.R. § 542.10(a), BOP promulgated regulations requiring the warden of each federal correctional institution to "implement[] and operate[]" an Administrative Remedy Program, 28 C.F.R.

[2] FCI-1 has had several wardens during this litigation. Eliseo Ricolcol is the current warden and is substituted under Federal Rule of Appellate Procedure 43(c)(2).

[3] Farrugia did not appeal the district court's dismissal order and is not before this Court.

§ 542.11(a). These regulations establish four levels of review and impose requirements that prisoners and prison employees must follow at each level. *See id.* §§ 542.10–542.18.

The purpose of these requirements is "to provide an inmate with the opportunity to seek formal administrative review and resolution" of grievances and give BOP employees sufficient opportunities to respond. *See, e.g.*, Control, Custody, Care, Treatment, and Instruction of Inmates, 44 Fed. Reg. 62248, 62248 (Oct. 29, 1979) (codified at 28 C.F.R. pt. 542). Because prisoners must complete each level of the remedy process sequentially, *see* 28 C.F.R. §§ 542.13(a), 542.15(b)(1)-(2), and generally must exhaust this scheme before suing in court, *see* 42 U.S.C. § 1997e(a), BOP employees' failure to follow these requirements at any level can make it impossible for prisoners to vindicate their rights and obtain relief.

We now describe how the program is supposed to work.

**1. The regulations impose requirements on prisoners at all four levels of review.** *First*, prisoners must attempt to informally resolve a grievance according to the procedures for informal resolution established by the warden. 28 C.F.R. § 542.13(a).

*Second*, if informal resolution is unsuccessful, a prisoner may begin the formal administrative process by submitting a "BP-9" form. 28 C.F.R. § 542.14(a). Prisoners may include only one "complaint or a reasonable number of closely related issues" on each BP-9; if a BP-9 includes multiple unrelated issues, the regulations require prison staff to return the form and

advise the prisoner to resubmit the grievance using "a separate form for each unrelated issue." *Id.* § 542.14(c)(2).

The deadline for a prisoner to both complete the informal-resolution process established by the warden and submit a BP-9 is twenty calendar days from the date of the incident giving rise to the grievance. 28 C.F.R. § 542.14(a). In 1996, when BOP revised the deadline to complete informal resolution and submit a BP-9, it explained that "including informal resolution under this deadline should not unduly impair [an] inmate's ability to file" the BP-9. Administrative Remedy Program, 61 Fed. Reg. 86, 87 (Jan. 2, 1996) (revising 28 C.F.R. pt. 542).

*Third*, if a prisoner is not satisfied with the warden's response to a BP-9, the prisoner may appeal that decision by filing a "BP-10" form with the appropriate BOP Regional Director. 28 C.F.R. § 542.15(a). The deadline for a prisoner to submit the BP-10 is twenty calendar days from the date the warden signed the response to the BP-9. *Id.* Every BP-10 must be accompanied by a copy of the BP-9 and the warden's response to it. *Id.* § 542.15(b)(1).

*Fourth*, if a prisoner is not satisfied with the Regional Director's response to a BP-10, the prisoner may appeal that decision by filing a "BP-11" form with BOP's General Counsel. 28 C.F.R. § 542.15(a). The BP-11 is the last level of the Administrative Remedy Program. *Id.* The deadline for submitting a BP-11 is thirty calendar days after the date the Regional Director signed the response to the BP-10. *Id.* Every BP-11 must be accompanied by copies of the

BP-9, the warden's response to the BP-9, the BP-10, and the Regional Director's response to the BP-10. *Id.* § 542.15(b)(1).

**2. The regulations impose several mandatory requirements on prison officials administering the program.** *First*, when a prisoner initiates the informal-resolution process, the regulations require that BOP "staff shall attempt to informally resolve the issue." 28 C.F.R. § 542.13(a). To facilitate that process, the warden of each institution "shall establish procedures" that "allow for … informal resolution." *Id.*

*Second*, when a prisoner submits a BP-9, BP-10, or BP-11, the warden, Regional Director, or General Counsel, respectively, must acknowledge the submission "by returning a receipt to the inmate." 28 C.F.R. § 542.11(a)(2). Prisoners must mail BP-10 and BP-11 appeals to the appropriate BOP office, *id.* § 542.15(b)(3), and if the prisoner's mail is rejected, the warden must notify the prisoner in writing of the reasons for the rejection, *id.* § 540.13.

*Third*, the warden, Regional Director, or General Counsel, respectively, must "[c]onduct an investigation into each" complaint set forth on a BP-9, BP-10, or BP-11. 28 C.F.R. § 542.11(a)(3).

*Fourth*, the same officials must "[r]espond to and sign all [BP-9s, BP-10s, and BP-11s] filed at their levels," 28 C.F.R. § 542.11(a)(4), and they must do so "in writing to all filed Requests or Appeals," *id.* § 542.18. The deadlines for each official to respond are twenty, thirty, and forty calendar days for the warden, Regional Director, and General Counsel, and the officials may take

extensions for a maximum of twenty, thirty, or twenty additional days, respectively, if they "inform the inmate of this extension in writing." *Id.*

When BOP amended the regulations to lengthen the deadlines for these officials to respond, it explained that it wanted to give prison employees sufficient time to carry out their duties and noted that "staff must prepare responses to whatever requests or appeals have been submitted from the inmate population." 61 Fed. Reg. at 86. The regulations also advise prisoners that if they do "not receive a response within the time allotted for reply, including extension," they "may consider the absence of a response to be a denial at that level." 28 C.F.R. § 542.18.

**3. BOP and FCI-Victorville provide staff with additional instructions.** A Program Statement issued by BOP in 2014 provides further instructions for implementing the federal regulations in BOP facilities nationwide. BOP Program Statement 1330.18. A "Complex Supplement" promulgated in 2015 by the wardens of all FCI-Victorville facilities, including the warden of FCI-1, *see* FER-6, lays out requirements and procedures specific to FCI-Victorville, FER-3-6. The Complex Supplement includes a one-at-a-time limit on how many Informal Resolution Forms a prisoner can file: "[o]rdinarily, only one (1) Informal Resolution Form will be issued to an inmate at one time." FER-4. BOP employees at FCI-1 following this limit who accept an Informal Resolution Form from a prisoner will refuse to provide or accept any further Informal Resolution Forms until they have answered the first one, even when that answer is delayed by days or weeks. SER-50-51.

BOP has already "advis[ed] against" a similar, but less restrictive, version of this one-at-a-time limit. 61 Fed. Reg. at 87. When BOP proposed revisions to the informal-resolution regulations, a commenter maintained that prisoners' access to the remedy program at a different institution "was limited by requiring one form to be filled out and submitted before staff would issue another to the same inmate." *Id.* BOP responded that it "does not wish to encourage … a perception" of limiting access to the Administrative Remedy Program and was therefore "advising against such [an] institutional administrative practice." *Id.*

Moreover, BOP's current Program Statement requires that informal-resolution "procedures may not operate to limit inmate access to formal filing of a Request." BOP Program Statement § 1330.18. Nevertheless, staff at FCI-1 applying its one-at-a-time limit require not only that the earlier form be already submitted, but also that it be answered before staff will issue the prisoner another Informal Resolution Form. SER-50-51.

## II. Factual background

**A.** In 2018, Dunne submitted sixty-five Informal Resolution Forms, only two of which were answered. SER-50. Following submission of his informal requests, Dunne filed fifty-two BP-9s in 2018. SER-46. Dunne received receipts for only three of these requests, none of which were timely sent to him by BOP staff. *Id.* Though twenty-two BP-9s eventually received some form of response, thirty complaints remain unanswered and unreturned

despite expiration of the response time under the regulations, the absence of an extension-of-time notice, and expiration of the permissible extension period. *Id.*

An example helps illustrate these regulatory violations. Shortly after Dunne was transferred to FCI-1, he saw that for an unknown reason his scheduled release date was extended by four years. SER-80; FER-10. He filed a complaint seeking to learn what happened and to correct this serious error. SER-80. His complaint was never receipted or answered. *Id.*

Meanwhile, of the twenty-two BP-9s for which Dunne received a response or which reached some form of resolution, one was resolved informally, one was granted through the formal-resolution process, and four naturally resolved themselves through the passage of time (although one of these resolved complaints never received a formal response and another was rejected). SER-46. Another sixteen requests were rejected for reasons that Dunne contests (such as purported procedural errors, despite Dunne's compliance with all procedural requirements, as discussed below). *Id.*

**B.** Dunne has faced many other hurdles filing complaints and getting them answered at each level of the Administrative Remedy Process. For starters, Dunne has repeatedly been unable to submit or even obtain administrative-remedy forms. *See, e.g.*, SER-46, 48-49. Because of FCI-1's one-at-a-time limit, *see supra* at 8-9, and a variety of other excuses given by prison counselors, Dunne was prevented from filing nine Informal Resolution Forms and three BP-9s, SER-46; *see also* SER-80, 133. Meanwhile, Dunne can

obtain administrative-remedy forms from, and submit forms to, only assigned counselors who are supposed to be available for one hour, twice a week, at "open houses." SER-49. But counselors rarely adhere to this schedule and are frequently unavailable. *Id.* And even when open houses do occur, frequently too many people are in line, so the open house ends before Dunne can obtain his forms or submit his requests. *Id*.

Dunne's attempts to resolve his concerns through BP-9s have likewise often been thwarted by his inability to prove that he attempted informal resolution. In several cases, Dunne filed an Informal Resolution Form, which went without response. SER-50. He assumed the Informal Resolution Form had been denied, *see* FER-5; BOP Program Statement § 1330.18, so he then filed a BP-9, in which he stated that he had attempted informal resolution. *See, e.g.*, SER-86, 103, 112. The BP-9 was then rejected on the ground that Dunne supposedly "did not attempt informal resolution prior to submission of administrative remedy, or [he] did not provide the necessary evidence of [his] attempt at informal resolution." SER-112-13,[4] 103-04,[5] 86-87.[6] These rejections for alleged procedural errors account for several of the sixteen complaints for which Dunne received rejections, so that the merits of his

[4] BP-9 submitted May 18, 2018, stating that Dunne attempted informal resolution on May 4, 2018; rejected May 31, 2018.

[5] BP-9 submitted May 19, 2018, stating that Dunne attempted informal resolution on May 4, 2018; rejected May 31, 2018.

[6] BP-9 submitted July 13, 2018, stating that Dunne attempted informal resolution; rejected August 2, 2018.

grievances were never considered. Dunne's co-petitioner Farrugia was likewise prevented from appealing adverse decisions due to the lack of receipts. SER-66.

**C.** Dunne has faced similar impediments in using the BP-10 and BP-11 appeals processes. His appeals either go unanswered or are thwarted by delays or the inability to prove that he attempted resolution through the lower levels of the system. Dunne appealed fifteen of the sixteen BP-9 rejections he received to the regional level (BP-10). SER-53; *see also* SER-85, 88, 105. Of these, six were rejected and the rest remain unanswered. *See* SER-53. Even though the warden is required to notify prisoners when their mail is rejected or otherwise not delivered, 28 C.F.R. § 540.13, Dunne has not received any explanation for why many of his appeals have not received a response, SER-61-62.

For the six BP-10s that received rejections, Dunne appealed to the central office, where five were rejected and one remains unanswered. SER-53. Like with his BP-9s, Dunne's appeals are routinely rejected for his supposed failure to pursue resolution at the lower levels of the system (either the Informal Resolution Form, BP-9, or both), even after Dunne explains in his

request that he did in fact pursue informal resolution and that he has no other way to prove that he did so. SER-128-32,[7] 81-84,[8] 108-13.[9]

**D.** Dunne repeatedly spoke with various prison officials—including the warden—regarding the numerous obstacles he faced using FCI-1's Administrative Remedy Program, but the conversations went nowhere. SER-63-64. He then attempted to resolve his concerns through the Administrative Remedy Program itself, but this, too, was futile. Dunne attempted to address the issue of not receiving receipts through informal resolution. SER-103. His informal request was never answered. *Id.* Accordingly, he assumed denial, as BOP authorizes, *see* BOP Program Statement § 1330.18; FER-5, and submitted a BP-9, which was rejected, SER-104. The response stated (falsely) that he had not attempted informal resolution, as well as that he could not submit a request on behalf of the entire prison population. *Id.* He filed an appeal to the regional office, which was never answered. SER-61, 102. He then filed an appeal to the central office, which also was never answered. SER-61, 101.

Dunne likewise attempted to resolve other concerns regarding the Administrative Remedy Program through informal resolution, particularly

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[7] Appeals rejected at regional level on June 8, 2018, and at central office on August 17, 2018, for failure to pursue resolution at lower levels of system.

[8] Appeals rejected at regional level on June 21, 2018, and at central office on August 16, 2018, on same procedural grounds.

[9] Appeals rejected at regional level on June 27, 2018, and at central office on August 16, 2018, on same procedural grounds.

the lack of responses to his requests. SER-86. His Informal Resolution Form was never answered, so he proceeded to file a BP-9. *Id.* His request was again rejected on the ground that he purportedly had not attempted informal resolution. SER-87. He filed an appeal, SER-85; this, too, was never answered, SER-58.

### III. Procedural background

Dunne filed a pro se petition for relief with the U.S. District Court for the Central District of California, requesting an order that the warden at FCI-1 implement the Administrative Remedy Program required by 28 C.F.R. Part 542. SER-34. Dunne requested relief under the Mandamus Act, the Administrative Procedure Act (APA), and the Declaratory Judgment Act (DJA). He maintained that the district court had jurisdiction over his Mandamus Act claim under 28 U.S.C. § 1361, and over the APA and DJA claims under 28 U.S.C. § 1331. SER-36-37, 39-40. The warden filed a motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim, as well as a motion for summary judgment for failure to exhaust administrative remedies. SER-11-12.

Addressing only the motion to dismiss, the magistrate judge determined, in a report and recommendation, that the court lacked jurisdiction to consider Dunne's APA and DJA claims because neither statute itself provides a basis for jurisdiction. SER-25-26. The magistrate judge also found that Dunne did not state a claim under the Mandamus Act because Dunne

did not identify nondiscretionary acts to which he had "a clear and indisputable right" and had not alleged the lack of another adequate remedy. SER-27-31. Dunne filed objections to the magistrate judge's report and recommendation. SER-6. The district court concurred with the magistrate judge, including with respect to the purported lack of subject-matter jurisdiction over Dunne's APA and DJA claims, and granted the motion to dismiss. SER-7-8.

Dunne then filed this appeal.[10]

**Summary of Argument**

**I.** The district court erred in dismissing Dunne's APA and DJA claims for lack of subject-matter jurisdiction. That court had subject-matter jurisdiction under 28 U.S.C. § 1331 because all of his claims arise under federal law.

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[10] While this appeal was pending, in February 2024, Dunne was temporarily transferred to FMC-Butner for cancer treatment. BOP policy indicates that Dunne will return to FCI-1, his parent facility, after completion of treatment. BOP Program Statement 5100.08 ("Medical cases are normally returned to their parent facility[.]"). Dunne has been temporarily transferred in the past and has always returned to his parent facility. Therefore, because there is a "reasonable expectation" and a "demonstrated probability" that Dunne will return to FCI-1, the temporary transfer does not moot his claims. *Darring v. Kincheloe*, 783 F.2d 874, 876-77 (9th Cir. 1986); *see also Lozano v. Collier*, ___ F.4th ___, 2024 WL 1562765 at *3 n.2 (5th Cir. Apr. 11, 2024) (finding that plaintiff's claims were not moot because court was not convinced plaintiff would not be transferred back to the institution where the violations occurred); *Wrinkles v. Davis*, 311 F. Supp. 2d 735, 743 (N.D. Ind. 2004) (finding that claims were not moot because plaintiffs stated that their transfer was only temporary and they would return to the institution where the violations occurred).

**II.** The district court erred in dismissing Dunne's petition because he identified mandatory duties that can be enforced under APA Section 706(1) and the Mandamus Act.

**A.** The petition pleaded that FCI-1's warden has failed to provide receipts, conduct investigations, respond to and sign requests, and establish procedures that allow for informal resolution of complaints. These are mandatory duties established by BOP's regulations. *See* 28 C.F.R. §§ 542.11(a)(2)-(4), 542.13(a). The warden's failure to fulfill the mandatory duties in BOP's regulations constitutes unlawfully withheld or unreasonably delayed agency action that courts may compel under APA Section 706(1).

**B.** Similarly, the Mandamus Act authorizes district courts to compel federal employees and agencies to perform a duty owed to the plaintiff. Accordingly, Dunne is entitled to relief under the Mandamus Act to compel the warden to comply with the mandatory requirements of 28 C.F.R. Part 542.

**III.** Dunne's petition states a claim under APA Section 706(2)(A) that the one-at-a-time limit at FCI-1, and the institution's practice of denying BP-9s for failure to prove informal resolution, are arbitrary, capricious, and not in accordance with law.

**A.** Dunne alleges that the one-at-a-time limit, by preventing prisoners from obtaining more than one Informal Resolution Form at a time, effectively restricts access to the Administrative Remedy Program and prevents informal resolution of complaints. In establishing and enforcing

this directive, the warden's actions contradict the text and purpose of 28 C.F.R. § 542.13 by preventing prison staff from attempting to informally resolve grievances. The warden also failed to consider how this directive would function within the larger regulatory scheme, or to connect this directive with its stated objective.

**B.** Dunne also alleges that his BP-9s are routinely denied because he purportedly failed to prove that he attempted informal resolution. This practice is inconsistent with 28 C.F.R. § 542.14's text and structure, which do not require a prisoner to provide evidence of informal resolution to file a complaint, unlike the neighboring provision, 28 C.F.R. § 542.15, which does require a prisoner to attach his original request and response to a BP-10 or BP-11 appeal. Indeed, the regulations nowhere provide a means for prisoners to receive evidence of informal resolution. By denying Dunne's requests for relief because he could not prove that he attempted informal resolution, the warden took agency action at odds with the text, structure, and purpose of 28 C.F.R. § 542.14.

## Standard of Review

This Court reviews the grant of a motion to dismiss for lack of subject-matter jurisdiction or for failure to state a claim de novo. *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995). When considering a motion to dismiss for failure to state a claim, the court must "accept the factual allegations of the complaint as true and construe them in the light most favorable to the

plaintiff." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 886-87 (9th Cir. 2018) (citation omitted).

A pro se complaint such as Dunne's must be construed liberally, "however inartfully pleaded" and is "held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation omitted). Pro se complaints may not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Mangiaracina v. Penzone*, 849 F.3d 1191, 1195 (9th Cir. 2017) (citation omitted).

## Argument

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

Congress has given federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The APA does not itself contain an independent grant of jurisdiction, but when a plaintiff "allege[s] violations of federal … regulations pursuant to the APA's cause of action, [the plaintiff'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); *accord Vaz v. Neal*, 33 F.4th 1131, 1135 (9th Cir. 2022); *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). The same is true for suits under the DJA. *See Allen v. Milas*, 896 F.3d 1094, 1099 (9th Cir. 2018).

Indeed, the principal authority cited by the district court recognizes that Section 1331 provides jurisdiction for APA and DJA claims. *See Staacke v. U.S. Sec'y of Lab.*, 841 F.2d 278, 282 (9th Cir. 1988) (finding Section 1331 inapplicable only because the federal statute in question expressly withheld federal-question jurisdiction); SER-25-26. For these reasons, the district court had jurisdiction over Dunne's APA and DJA claims, and its contrary holding should be reversed.

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

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

APA Section 706(1) "requires a court to compel agency action when, as here, there is a 'specific, unequivocal command' that the agency must act." *Viet. Veterans of Am. v. Cent. Intel. Agency*, 811 F.3d 1068, 1081 (9th Cir. 2016) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004)). A plaintiff states a claim under Section 706(1) by identifying (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*, 542 U.S. at 64. Because Dunne identifies several agency actions mandated by BOP regulations that prison officials did not take or unreasonably delayed, *see, e.g.*, SER-34-35, he has stated a claim under Section 706(1).

**(1) Dunne's petition identifies four categories of discrete agency actions.** For an action to have a sufficient "characteristic of discreteness" to be compelled under APA Section 706(1), it must meet the APA's definition of an agency action. *Norton*, 542 U.S. at 62–63. That definition includes an agency's "failure to" provide "relief," 5 U.S.C. § 551(13) (defining "agency action"), which, in turn, includes "the whole or a part of an agency … remedy … [or] action on the application or petition of, and beneficial to, a person," *id.* § 551(11) (defining "relief").

Dunne's petition identifies four types of mandated agency actions that meet this definition and that FCI-1 failed to take: (1) attempting to resolve informal requests submitted by prisoners, (2) returning a receipt for each BP-9 submitted by a prisoner, (3) investigating each BP-9 submitted by a prisoner, and (4) responding to all BP-9s in a signed writing by the applicable deadline. *See* SER-41-46 (quoting 28 C.F.R. §§ 542.11-542.18). Each of these are concrete "action[s] on" Dunne's applications for administrative "remed[ies]" and would "benefit" his attempts to seek "relief." *See* 5 U.S.C. § 551(11).

This Court has repeatedly confirmed that these types of relief are discrete agency actions that may be compelled under Section 706(1). Applying Section 706(1), the Court has required agencies to "reconsider the denial of" an application, *Rivas v. Napolitano*, 714 F.3d 1108, 1111 (9th Cir. 2013), "investigate a complaint," *Vaz v. Neal*, 33 F.4th 1131, 1136 (9th Cir. 2022), and notify individuals of particular information, *Viet. Veterans*, 811 F.3d at 1076.

These are the same types of discrete actions Dunne identifies here: he seeks to compel prison employees to carry out their mandatory duties to consider his requests for informal resolution, issue receipts notifying him when his formal requests have been received, investigate his complaints, and provide him with signed, written responses notifying him of the results of his formal requests within the time demanded by the regulations. *See, e.g.*, SER-34-35, 41-46.

**(2) The actions Dunne identifies are legally required by the regulations.** The word "shall" "imposes a nondiscretionary, ministerial duty" that "may be compelled under the APA," *see, e.g.*, *Rivas*, 714 F.3d at 1111, and each of the relevant regulatory provisions provides that an official "shall" take each action, 28 C.F.R. §§ 542.11(a)(2)-(4), 542.13(a), 542.18. Despite this unambiguous, mandatory language, the district court held that Dunne could not obtain relief on the grounds that (1) "prisoners [do not] have an absolute right to a response" because the regulations allow prisoners to treat a nonresponse as a denial, SER-7; *see also* SER-15 n.5, (2) prison officials have discretion over how to implement the Administrative Remedy Program, SER-7, 28–30, and (3) Dunne sought broadly "to implement a grievance system of [his] ideal design," SER-27–28. These conclusions are inconsistent with the regulations, the record, and this Court's precedent.

*First*, the district court's conclusion that the regulations do not require prison officials to respond to prisoners' requests is incorrect. Though the regulations do give Dunne the option to treat a nonresponse as a denial for

purposes of appeal, 28 C.F.R. § 542.18, that is no answer to Dunne's claim because the regulations also unambiguously mandate that prison officials provide responses. In two separate places, the regulations state that officials "shall" "[r]espond to and sign all Requests and Appeals" "in writing." 28 C.F.R. §§ 542.11(a)(4), 542.18. The regulation's use of "the imperative 'shall'" means "[a]ny contention that" providing responses "is discretionary would fly in the face of [the regulation's] text." *Bennett v. Spear*, 520 U.S. 154, 175 (1997).

The magistrate judge cited *Perez Olivo v. Gonzalez*, 384 F. Supp. 2d 536 (D.P.R. 2005), but that decision is irrelevant. SER-15 n.5. In *Perez Olivo*, the district court found that the prison's central office did not violate a prisoner's due-process rights because it had in fact responded to his BP-11. *Id.* at 542. The only discussion of a nonresponse in that case was the court's observation that if the central office had failed to respond, that would "not [have] constitute[d] a concession of the facts as stated by the inmate" in his underlying *Bivens* claim. *Id.* At no point did *Perez Olivo* consider whether prison officials had a duty to respond under the regulations. *Id.*

Dunne also alleges that, as a practical matter, the warden's failure to respond to an administrative complaint effectively makes that complaint unappealable. That is so because when Dunne appeals from an unanswered BP-9, those appeals are routinely denied "for alleged failure to file at the institutional level" because he cannot attach the (nonexistent) response to his BP-9. SER 53-54; *see also* 28 C.F.R. § 542.15(b)(1) (requiring that BP-10 and BP-

11 appeals include a copy of the original "filings *and their responses*" (emphasis added)). As a result, failure to provide responses not only violates the text of the regulations, 28 C.F.R. §§ 542.11(a)(4), 542.18, but also effectively prevents subsequent steps of the remedy program from operating as required, *see id.* § 542.15.

Moreover, the regulatory provision giving Dunne the option to treat a nonresponse as a denial has no effect on prison employees' duties to provide receipts for and investigate formal requests, or to attempt to resolve informal complaints. *See* 28 C.F.R. §§ 542.11(a)(2), 542.11(a)(3), 542.13(a). The district court did not explain how these duties are nonmandatory, nor could it have.

*Second*, that officials may have some discretion over *how* to carry out actions does not mean they have discretion over *whether* to carry them out. "[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, [even though the court] has no power to specify what the action must be." *Norton*, 542 U.S. at 65. In applying another regulation that, like 28 C.F.R. § 542.11(a)(3), requires an agency to investigate complaints, this Court explained that "discretion over how to investigate is different from discretion over whether to investigate." *Vaz*, 33 F.4th at 1136. The Court thus held that even though the agency had discretion over the scope and manner of the investigation, it lacked "discretion *whether* to investigate a complaint." *Id.* Likewise, in a case involving a regulation requiring an agency to provide notices of health risks, this Court held that

even though "the precise content of the notice" was left to the agency, "discretion in the manner in which the duty may be carried out does not mean that the [agency] does not have a duty to perform a 'discrete action' within the meaning of § 706(a)." *Viet. Veterans*, 811 F.3d at 1079.

Here, the district court was correct that prison officials have some discretion over how they attempt to resolve informal requests, the content of receipts, the scope and conduct of investigations, and the content of written responses. *See* SER-7, 28-30. That this latitude exists does not mean, however, that the officials have discretion over *whether* to attempt resolutions, issue receipts, conduct investigations, or give written and signed responses before the regulatory deadline, and "a court can compel" the prison to take each of these acts. *Norton*, 542 U.S. at 65.

*Third*, though requiring the warden to comply with his regulatory obligations would result in meaningful changes, the result would not be a grievance system of Dunne's "ideal design," as the district court maintained, SER-27-28, but rather the system demanded by federal law. This Court has considered and rejected the argument that "judicial intervention" is foreclosed whenever that "intervention might result in sweeping changes to an agency program." *Stephen C. v. Bureau of Indian Educ.*, 2022 WL 808141, at *2 (9th Cir. Mar. 16, 2022). This Court observed that "a plaintiff can challenge a final agency action even if the challenge would have the 'effect of requiring … a whole "program" to be revised by the agency'" as long as the "plaintiff 'direct[s] its attack against some particular "agency action" that causes it

harm.'" *Id.* (alteration in original) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891, 894 (1990)).

In any case, Dunne seeks less than that. He does not ask for "sweeping" systemic changes or to uproot the "whole 'program.'" *Stephen C.*, 2022 WL 808141, at *2 (citation omitted). Rather, his petition is directed at particular actions that the prison is unlawfully withholding in violation of federal regulations—namely, attempting informal resolution and issuing receipts, conducting investigations, and providing written and signed responses in the time allotted for all formal requests and appeals. He seeks only operational changes to the Administrative Remedy Program necessary to ensure that the system works as the law already requires.

**(3) The prison has not taken, or has unreasonably delayed, the actions Dunne identifies.** A plaintiff states a claim under Section 706(1) by alleging that an agency either has not taken legally required actions or that it has unreasonably delayed in taking them. Here, Dunne has alleged both.

**(a) Agency action "unlawfully withheld."** Dunne has alleged that the prison, on dozens of occasions, has not taken actions required by the regulations. Although the regulations require the warden to return a receipt for and respond in writing to all formal requests within twenty days, 28 C.F.R. §§ 542.11, 542.18, Dunne's petition alleges that at least thirty of his formal "requests remain … unreceipted [and] unanswered … despite expiration of the time for response, absence of an extension of time notice, and end of the permissible extension period," SER-46.

Although the regulations require the applicable official to "[c]onduct an investigation into *each* Request or Appeal," 28 C.F.R. § 542.11(a)(3) (emphasis added), Dunne alleges facts showing that his filings are not being investigated. For instance, on numerous occasions, his BP-9s were rejected on the ground that he had not provided proof that he attempted informal resolution, even though he identified on his BP-9 the date he submitted his Informal Resolution Form and the name of the prison employee he gave it to. *See, e.g.*, SER-85-87, 101-04, 112-13. Any investigation into these requests would involve asking the named employee if he or she received Dunne's Informal Resolution Form on the identified date, yet the warden responsible for investigating BP-9s apparently failed to take even that basic step. *Cf. Alexander v. Perrill*, 916 F.2d 1392, 1398 (9th Cir. 1990) (explaining that "prison officials who are under a duty to investigate" cannot "stand by idly").

And, although the regulations require that prison "staff shall attempt to informally resolve" requests brought by prisoners (and that "[e]ach [w]arden shall establish procedures" that "*allow for* the informal resolution of inmate complaints"), 28 C.F.R. § 542.13(a) (emphasis added), Dunne alleges that staff routinely refuse to even accept requests—the most basic prerequisite to attempting to resolve them—because of the Complex Supplement's one-at-a-time limit. *See* SER-50–51; *infra* at 35-42 (discussing one-at-a-time limit in detail).

**(b) Agency action "unreasonably delayed."** Dunne has also stated a claim that the prison has "unreasonably delayed" attempting informal resolution, providing receipts, conducting investigations, and issuing responses under Section 706(1). In assessing whether an agency's delay is unlawful, this Court uses the "*TRAC*" factors identified by the D.C. Circuit in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). *See Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 & n.7 (9th Cir. 1997). As relevant here, the first, third, and fifth *TRAC* factors demonstrate that the delays are unreasonable.[11]

The first and "'most important' [*TRAC*] factor," *Vaz*, 33 F.4th at 1138 (quoting *In re A Cmty. Voice*, 878 F.3d 779, 786 (9th Cir. 2017)), is that "the time agencies take to make decisions must be governed by a 'rule of reason,'" *Indep. Mining Co.*, 105 F.3d at 507 n.7 (quoting *TRAC*, 750 F.2d at 80). Delays

[11] The second and sixth *TRAC* factors—which ask whether Congress has provided a timetable for the agency's action and instruct that agency impropriety is not a prerequisite to a finding of unreasonable delay—do not apply here. *See Indep. Mining Co.*, 105 F.3d at 507 (quoting *TRAC*, 750 F.2d at 80). The fourth factor—"the effect of expediting delayed action on agency activities of a higher or competing priority," *id.*—requires the agency to provide a basis for concluding that the delayed action should be accorded lower priority. *Cf. In re Nat. Res. Def. Council*, 956 F.3d 1134, 1142 (9th Cir. 2020) (finding agency's delayed review of insecticide unreasonable because, even though agency prioritized review of other pesticides, it identified "*no specific danger*" from the other pesticides). The prison has not provided a basis here. And it is difficult to imagine a priority that could make reasonable the years-long delays in responding to Dunne's complaints on issues ranging from his release date to dangerous sun exposure in light of his skin-cancer diagnosis.

of multiple years generally violate this rule of reason, and "[r]epeatedly, courts in this and other circuits have concluded that 'a reasonable time for agency action is typically counted in weeks or months, not years.'" *Vaz*, 33 F.4th at 1138 (citation omitted) ("assum[ing]" a delay of four years weighed in favor of a finding of unreasonableness); *see also, e.g.*, *In re Nat. Res. Def. Council*, 956 F.3d 1134, 1139-40 (9th Cir. 2020) (delays of six, eight, and nine years were each unreasonable). Dunne's petition identifies dozens of requests that he submitted in 2018 that have yet to receive any receipt, investigation, or response—even though the regulations require wardens to respond within forty days at the latest, 28 C.F.R. § 542.18. *E.g.*, SER-46. This multi-year delay, especially in the face of a clear regulatory command, violates any rule of reason.

The third *TRAC* factor indicates that delays "are less tolerable when human health and welfare are at stake." *Indep. Mining Co.*, 105 F.3d at 507 n.7 (quoting *TRAC*, 750 F.2d at 80). This Court has thus held that delays in agency action are unreasonable when they allow health risks to persist. *See, e.g.*, *In re Nat. Res. Def. Council*, 956 F.3d at 1141-42 (fact that regulation would limit exposure to insecticides favored finding that delay was unreasonable); *In re A Cmty. Voice*, 878 F.3d at 787 (fact that regulation would reduce lead levels favored finding that delay was unreasonable). As in those cases, FCI-1's delays in responding to many of Dunne's requests—such as those about inadequate nutrition, SER-48, a lack of hygiene supplies, SER-78, and dangerous UV exposure, which exacerbates Dunne's skin cancer (by making

him workout under the desert sun when indoor recreational equipment is broken), SER-62-63—posed health risks. The third factor therefore weighs in Dunne's favor.

Under the fifth *TRAC* factor, "the court should also take into account the nature and extent of the interests prejudiced by the delay." *Indep. Mining Co.*, 105 F.3d at 507 n.7 (quoting *TRAC*, 750 F.2d at 80). Dunne's petition alleges that the prison's delays have prevented him from seeking relief when his sentence was wrongly extended by four years, SER-80; FER-10, which implicates fundamental liberty interests. *See United States v. Anderson*, 201 F.3d 1145, 1152 (9th Cir. 2000) ("[A] longer sentence undoubtedly affects substantial rights."); *United States v. Jackson*, 77 F. App'x 436, 437 (9th Cir. 2003) ("An error resulting in a longer sentence 'affect[s] both the fairness and integrity of our judicial system.'" (alteration in original) (quoting *United States v. Portillo-Mendoza*, 273 F.3d 1224, 1228 (9th Cir. 2001))). And because Dunne alleges that the prison's delays in receipting and responding to his requests prevent him from appealing and seeking relief from higher levels of the administrative-remedy system, his petition is unlike cases where delays were reasonable because a plaintiff could "provide[] no evidence that the [agency's] delay prevented him from seeking … relief." *Vaz*, 33 F.4th at 1138.

### B. Dunne's petition seeks to compel mandatory duties owed to him, so it states a claim under the Mandamus Act.

The Mandamus Act grants the district court "jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Mandamus relief is available to compel a federal official to perform a duty if (1) the plaintiff'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 of Pala Rsrv. v. Sweeney*, 932 F.3d 1207, 1216 (9th Cir. 2019). As we now show, Dunne's petition meets each of these conditions.[12]

**(1) Dunne's claim is clear and certain.** Dunne requests that the warden be compelled to "implement the administrative remedy program mandated by 28 CFR Part 542." SER-34. As indicated, mandamus may be invoked to compel a federal official to perform a duty owed to the plaintiff. 28 U.S.C. § 1361. An agency regulation establishes judicially enforceable duties when it is promulgated through the proper procedures and prescribes substantive rules. *Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003).

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[12] Dunne seeks to compel the warden to carry out mandatory duties under both the APA and the Mandamus Act. SER-40-41. A court can choose to consider the 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)); *accord Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986).

As explained above (at 21-25), the Administrative Remedy Program, which allows "an inmate to seek formal review of an issue relating to any aspect of his/her own confinement," 28 C.F.R. § 542.10, establishes substantive rules for prison officials to operate this program. Dunne's petition alleges that the warden is not fulfilling the duties assigned to him by the regulations, specifically, 28 C.F.R. §§ 542.11(a)(2)-(4), 542.13(a), and it therefore states a clear and certain claim for mandamus relief to compel the warden to "implement the administrative remedy program mandated by 28 CFR Part 542." SER-34.

**(2) The duties assigned to the warden are ministerial and so plainly prescribed as to be free from doubt.** A ministerial duty is "a clear, non-discretionary agency obligation to take a specific affirmative action." *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 508 (9th Cir. 1997). When an agency "shall" take a certain action, that action is mandatory and therefore nondiscretionary. *See Rivas v. Napolitano*, 714 F.3d 1108, 1111 (9th Cir. 2013). Though mandamus "cannot be used to compel or control a duty in the discharge of which by law [the official] is given discretion," if a "duty [is] discretionary within limits … [the official] cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them." *Work v. U.S. ex rel. Rives*, 267 U.S. 175, 177 (1925).

In operating and implementing the Administrative Remedy Program, the warden "shall" provide receipts for requests, investigate each request, respond to and sign all requests, and establish procedures to allow for

informal resolution of complaints. 28 C.F.R. §§ 542.11(a)(2)-(4), 542.13(a). As explained earlier (at 21), the regulations' use of "shall" indicates that these duties are nondiscretionary and requires the warden to take specific actions.

Though the warden has discretion in designing the procedures by which receipts will be generated and returned to prisoners, the warden must issue receipts to prisoners for their requests. 28 C.F.R. § 542.11(a)(2). Yet Dunne has received only three receipts for the fifty-two formal administrative requests he submitted. SER-46.

Though the warden has discretion in determining how to conduct investigations, the warden must investigate "each Request." 28 C.F.R. § 542.11(a)(3). Dunne has thirty requests that remain "unrejected, unreceipted, unanswered, or unreturned," *see* SER-46, and there is no indication they have been investigated. Moreover, as discussed above (at 26), Dunne's requests that have been rejected for purported failure to pursue informal resolution or to prove those attempts—even though his BP-9s provide the name of the counselor to whom he gave the Informal Resolutions Forms, SER-86-87, often with the dates on which he attempted informal resolution, SER-103-04, 112-13—have also not been investigated. The Complex Supplement provides that copies of completed Informal Resolution Forms are retained by prison officials, FER-5, so BOP staff could easily confirm that Dunne attempted informal resolution by submitting Informal Resolution Forms if they conducted even the most basic investigation.

Though the warden has discretion in implementing a process by which requests will be responded to, the warden must respond to and sign "all Requests." 28 C.F.R. § 542.11(a)(4). Again, thirty of Dunne's requests remain "unrejected, unreceipted, unanswered, or unreturned." SER-46.

Though the warden has discretion in designing the procedures for informal resolution, the warden must implement procedures that "allow for the informal resolution of inmate complaints." 28 C.F.R. § 542.13(a). And as discussed (at 26 and 35-42), the one-at-a-time limit transgresses the bounds of the warden's discretion because it doesn't allow prisoners to informally resolve their requests. In practice, prison staff use this directive to violate their duty to "attempt to informally resolve" grievances by simply refusing to distribute or accept Informal Resolution Forms when a prisoner has a pending informal request. 28 C.F.R. § 542.13(a); *see* SER-46, 80, 133; *see also* SER-66 (same for petitioner Farrugia). Further, given the infrequency with which counselors hold "open house[s]" where prisoners can obtain the Informal Resolution Forms, this limit often prevents prisoners from timely submitting formal requests. SER-49. By the time prisoners can obtain the proper form for informal resolution—and wait for a response or for the allotted response time to elapse—their BP-9s may be outside the twenty-day deadline imposed by 28 C.F.R. § 542.14(a). SER-51.

Accordingly, the duties imposed by 28 C.F.R. §§ 542.11(a)(2)-(4), 542.13(a) are nondiscretionary, and the warden has failed to take the actions required to fulfill them.

**(3) No other adequate remedy is available to Dunne.** As discussed above, Dunne has been unable to use the Administrative Remedy Program to pursue a remedy. An administrative procedure is unavailable when it "operates as a simple dead end" and is "so opaque that it becomes, practically speaking, incapable of use." *Ross v. Blake*, 578 U.S. 632, 643-44 (2016); *see also Fordley v. Lizarraga*, 18 F.4th 344, 353 (9th Cir. 2021) (finding prison grievance process effectively unavailable when prison officials fail to properly log and substantively respond to requests in a timely manner).

Dunne has demonstrated that the warden's failures to acknowledge, investigate, and respond to requests render the Administrative Remedy Program at FCI-1 unavailable. Therefore, the only remedy available to Dunne is via the Mandamus Act or the APA. *See supra* note 12.

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

Dunne alleges that the warden at FCI-1 took agency action by adopting and enforcing the one-at-a-time limit, as established in the institution's Complex Supplement. *See* SER-50-51; FER-4-5; *see also* 5 U.S.C. § 551(13) (defining agency action). That limit prevents prisoners from acquiring or filing multiple Informal Resolution Forms; rather, prisoners must wait until a pending Informal Resolution Form is resolved to then obtain a new Informal Resolution Form, at which point the process begins anew. *See* FER-4; SER-50-51. Dunne also alleges that the warden took agency action by

rejecting his BP-9s when he could not prove that he attempted informal resolution through the informal-resolution process. *See* SER-86-87, 103-04, 112-13.

Dunne requested below that both actions be set aside under APA Section 706(2)(A) as arbitrary, capricious, and not in accordance with law. *See* SER-74; 5 U.S.C. § 706(2)(A). The one-at-a-time limit is reviewable under Section 706(2)(A). *See* 5 U.S.C. § 551(13) (defining "agency action" that is subject to judicial review); *see also Gill v. U.S. Dep't of Just.*, 913 F.3d 1179, 1186-87 (9th Cir. 2019) (reviewing whether a directive announcing a new policy was arbitrary and capricious). The rejection of BP-9s for failing to attach proof of exhaustion of the informal-resolution process is also reviewable agency action as a denial of requested relief. *See* 5 U.S.C. § 551(13); *see also supra* 20-21. As we now show, the district court erred in dismissing those claims.

### A. The prison's one-at-a-time limit is arbitrary, capricious, and not in accordance with law.

**1. The one-at-a-time limit is not in accordance with law because it violates Section 542.13 of BOP's own regulations.** Courts may review whether an agency's action violates federal statutes or the agency's own regulations. *Kohli v. Gonzales*, 473 F.3d 1061, 1066 (9th Cir. 2007); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979). Under the APA, "if an agency action fails to comply with its regulations, that action may be set aside as arbitrary and capricious" or not in accordance with law. *Erie Boulevard Hydropower, LP v. Fed. Energy Regul. Comm'n*, 878 F.3d 258, 269

(D.C. Cir. 2017); *see also Am. Stewards of Liberty v. Dep't of the Interior*, 370 F. Supp. 3d 711, 728 (W.D. Tex. 2019) (recognizing that an agency's failure to comply with its own regulations can be set aside as either arbitrary and capricious or not in accordance with law); *Ghafoori v. Napolitano*, 713 F. Supp. 2d 871, 878 (N.D. Cal. 2010).

This inquiry demands regulatory interpretation. *See, e.g.*, *Brown*, 441 U.S. at 296-318 (performing regulatory and statutory construction to determine whether agency conduct was not in accordance with law). When interpreting a regulation, courts "examin[e] [the regulation's] text, structure, history, and purpose." *Goffney v. Becerra*, 995 F.3d 737, 742 (9th Cir. 2021) (citation omitted).

By promulgating and enforcing the one-at-a-time limit, the FCI-1 warden did not act in accordance with BOP's own regulations, which require prisoners to "first present an issue of concern informally to staff" and provide that prison "staff *shall attempt* to informally resolve the issue." 28 C.F.R. § 542.13 (emphasis added). As discussed above (at 21), this duty is mandatory. *See Rivas v. Napolitano*, 714 F.3d 1108, 1111 (9th Cir. 2013).

The one-at-a-time limit violates this mandatory regulatory requirement by preventing staff from even *attempting* to informally resolve complaints whenever the prisoner has previously submitted another complaint that has not yet been resolved. *See* SER-46. By instructing staff to provide only one Informal Resolution Form at a time, the Complex Supplement requires staff to prevent prisoners from obtaining Informal Resolution Forms in the first

place and to reject completed complaints when prisoners attempt to submit the relevant forms. *See* SER-46-47, 80, 133; *see also* SER-65-66 (same for petitioner Farrugia). Although these instructions allow prison staff to attempt to informally resolve a prisoner's first complaint, staff are then rejecting—and, therefore, not attempting to resolve informally—any subsequent complaints that arise while the first complaint is pending, which is not permitted by the regulation. The one-at-a-time limit, as written and enforced, does not conform with Section 542.13's requirement that "staff shall attempt to informally resolve … issue[s]." It is therefore not in accordance with law under the APA.

This illegality is underscored by the purpose and history of the regulation—as articulated in BOP's Program Statement and Section 542.13's regulatory history. First, Program Statement 1330.18 details how Section 542.13 should function:

> The warden is responsible for ensuring that effective informal resolution procedures are in place and that good faith attempts at informal resolution are made in an orderly and timely manner by both inmates and staff. These procedures may not operate to limit inmate access to formal filing of a Request.

BOP Program Statement 1330.18.

The one-at-a-time limit is inconsistent with these purposes. First, the directive is not "effective," given that Dunne received only two responses to his sixty-five Informal Resolution Forms in 2018. SER-50.

Second, the directive prevents staff from making "good faith attempts at informal resolution" by stopping staff from even attempting to informally resolve any new complaints if another complaint is outstanding. BOP Program Statement 1330.18. Indeed, because prisoners must complete informal resolution and file BP-9s all within "20 calendar days following the date on which the basis for the Request occurred," 28 C.F.R. § 542.14, the directive makes it impossible for staff to ever attempt informal resolution of complaints that are filed outside the twenty-day period because a prior complaint is still pending. *See, e.g.*, SER-46, 51.

Third, and most importantly, by preventing complaints from being filed (perhaps permanently, if they become untimely), the one-at-a-time limit impermissibly "operate[s] to limit inmate access to formal filing of a Request." BOP Program Statement 1330.18. In each of these respects, the one-at-a-time limit is contrary to Part 542's stated purpose, as expressed in the Program Statement, which lends additional support to the conclusion that the policy and its enforcement are not in accordance with law.

Likewise, BOP has itself indicated that a one-at-a-time limit is inconsistent with the purposes of Part 542. During the notice-and-comment period for the 1996 revisions to the regulation, a commenter complained to BOP about a similar (but less-restrictive) policy whereby a prison required prisoners to fill out and submit one form before staff would issue another form to the same prisoner. *See* Administrative Remedy Program, 61 Fed. Reg. 86, 87 (Jan. 2, 1996). To avoid even the perception that this policy would limit

prisoner access to the formal administrative-remedy process, BOP responded by saying it would issue internal instructions to staff advising against this type of institutional practice. *See id.* FCI-1's one-at-a-time limit is applied in an even more restrictive manner because it requires that a complaint be *completed*—rather than only submitted—before staff will issue a new form. *See* SER-51. Therefore, it plainly contravenes the regulation's purpose.

**2. The one-at-a-time limit is arbitrary and capricious because it is not reasonably related to its stated purpose, and it interacts with BOP regulations to place prisoners in a procedural catch-22.** An agency's conduct may be set aside as arbitrary and capricious when the agency does not articulate a rational connection between the facts found and the choices made, "fail[s] to consider an important aspect of the problem," or "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Earth Island Inst. v. Muldoon*, 82 F.4th 624, 633 (9th Cir. 2023) (citation omitted); *see also Blue Mountains Biodiversity Project v. Jeffries*, 72 F.4th 991, 997 (9th Cir. 2023) (explaining that courts "assess the lawfulness of agency action based on the reasons offered by the agency"); *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 541 (N.D. Cal. 2020) (holding that an agency failed to consider an important aspect of a problem "[b]y failing to consider the combined impact of [a set of] rules"). Simply put, "[a]gency action must be reasonable and reasonably explained." *Lotus*

*Vaping Tech., LLC v. U.S. Food & Drug Admin.*, 73 F.4th 657, 668 (9th Cir. 2023) (citation omitted).

The Complex Supplement states that the one-at-a-time limit's purpose is to "ensure that each issue is thoroughly investigated and to allow sufficient time for staff to attempt informal resolution of the complaint." FER-4. But, as Dunne alleges, the policy has the opposite effect because it prevents timely complaints from being filed, perhaps irrevocably due to the twenty-day deadline. *See* SER-46, 51, 80, 133; *see also* 28 C.F.R. § 542.14. Meanwhile, virtually none of Dunne's Informal Resolution Forms have been responded to at all. *See* SER-50 (alleging that only two of sixty-five Informal Resolution Forms received answers). This failure to live up to legal requirements, in turn, caused many of Dunne's appeals to be rejected because he could not prove that he attempted to use the informal-resolution process. *See* SER-108-13. The one-at-a-time limit, then, undermines the entire grievance system, turning the Complex Supplement's stated objective on its head. *Cf. Ross v. Blake*, 578 U.S. 632, 643 (2016) (noting that "an administrative procedure is unavailable when … it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates").

The one-at-a-time limit is thus arbitrary and capricious on two related grounds. First, FCI-1 claims the limit is intended "to ensure that each issue is thoroughly investigated and to allow sufficient time for staff to attempt informal resolution of the complaint." FER-4. This explanation is, however, neither reasonable nor reasonably explained. Given that the vast majority of

Dunne's Informal Resolution Forms have gone uninvestigated and unanswered, *see* SER-50-51, there is no reason to think that the limit has anything to do with its stated purpose. The explanation FCI-1 has offered for the one-at-at-time limit is thus "implausible." *See Earth Island*, 82 F.4th at 633.

Second, FCI-1 failed to consider an important aspect of the problem in enacting the limit: how the limit interacts with Section 542.14's requirements that prisoners complete informal resolution and file BP-9s within "20 calendar days following the date on which the basis for the Request occurred," 28 C.F.R. § 542.14(a), and "use a separate form for … unrelated issue[s]," *id.* § 542.14(c)(2). FCI-1 also failed to consider how the rule interacted with the institution's other practices, such as its rule that prisoners must obtain Informal Resolution Forms and BP-9s from counselors who are infrequently available during open houses. SER-49.

Recall that prisoners have a twenty-day deadline to pursue both informal and formal (BP-9) resolution and that all issues must be addressed on separate complaint forms. 28 C.F.R. §§ 542.14(a), (c)(2). By delaying prisoners' ability to file Informal Resolution Forms, the one-at-a-time limit may well bar complaints altogether by causing prisoners to miss the twenty-day window whenever a new problem arises while a first Informal Resolution Form is outstanding. Indeed, the regulations explicitly contemplate that multiple unrelated issues may arise at the same time, and that a prisoner might attempt to resolve them all on the same form. 28 C.F.R. § 542.14(c). The regulations do not require the issues to be presented and

resolved one at a time, but rather only that "the inmate shall be advised to use a separate form for each unrelated issue." 28 C.F.R. § 542.14(c).

Even if a prisoner does receive a new Informal Resolution Form within the twenty-day window (because the first complaint is resolved within that time), that might well occur close to the deadline, so the prisoner still may be unable to complete the informal-resolution process and submit a BP-9 within the allotted timeframe. *See* SER-138 (describing that the informal-resolution process could take over a week). The one-at-a-time limit thus places prisoners in a procedural catch-22, which is directly contrary to BOP's assurance that the informal resolution process "should not unduly impair [an] inmate's ability to file" the BP-9. 61 Fed. Reg. at 87.

For each of these reasons, Dunne states a claim that the one-at-a-time limit should be set aside as arbitrary, capricious, and not in accordance with law.

### B. The rejection of Dunne's BP-9s because he cannot prove that he attempted informal resolution is arbitrary, capricious, and not in accordance with law.

As discussed above at 34-35, agency action violates Section 706(2)(A) when it does not comply with its own regulations. *See Erie Boulevard Hydropower, LP, v. Fed. Energy Regul. Comm'n*, 878 F.3d 258, 269 (D.C. Cir. 2017). FCI-1's rejection of Dunne's BP-9s because he did not prove he pursued informal resolution is arbitrary, capricious, and not in accordance with law.

In Section 542.15, BOP expressly provided that when a prisoner appeals a decision to the BP-10 or BP-11 level, the prisoner must attach "one complete copy or duplicate original of the [BP-9] and response." 28 C.F.R. § 542.15(b)(1). Conversely, BOP does not require any form of proof or attachment, such as an Informal Resolution Form and response, when filing a BP-9. *Id.* § 542.14. Rather, Section 542.14 requires that prisoners attach only "identifying information" when filing BP-9s. *Id.*

In line with the *expressio unius* canon, BOP's decision to expressly include a proof requirement in Section 542.15, but not in Section 542.14, indicates that BOP deliberately intended not to require proof of an earlier informal request when a prisoner files a BP-9. *See Bartenwerfer v. Buckley*, 598 U.S. 69, 78 (2023). FCI-1's practice of rejecting Dunne's BP-9s for his purported inability to prove that he attempted informal resolution adds to Section 542.14 "something which is not there." *Cal. Cosmetology Coal. v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997) (citation omitted). This violation of the express terms of Section 542.14 is not in accordance with law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 318-19 (1979).

This conclusion makes practical sense too, when considering the structure of the regulations. As Dunne repeatedly emphasized to prison staff, prisoners simply have no way to prove that they pursued informal resolution. *See, e.g.*, SER-110. That is because prison staff do not have a duty, during informal resolution, to provide prisoners with receipts or even responses, meaning there is no guarantee that a paper trail will be created.

That is part of what makes the process "informal." But once a prisoner files a BP-9, the warden has a mandatory duty to provide the prisoner with a receipt and a response. 28 C.F.R. § 542.11. Only then can a prisoner, on appeal, be expected to prove that he pursued lower-level resolution because he will have paperwork to do so.

Once this regulatory structure is understood, it is evident that denying a prisoner's BP-9 because he could not prove that he had pursued informal resolution is arbitrary, capricious, and not in accordance with law. By denying relief based on a prisoner's failure to provide documentation that prisoners have no right to receive, FCI-1 is effectively barring prisoner access to the formal Administrative Remedy Program. But barring prisoners from the process is expressly prohibited by the regulation itself and its associated Program Statement. Recall that "[t]he purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his[] own confinement." 28 C.F.R. § 542.10. The Program Statement then adds that the informal-resolution process "may not operate to limit inmate access to formal filing of a Request." BOP Program Statement 1330.18. From these statements, BOP's intent is manifest: prisoners may not be continuously stymied from pursuing formal resolution of grievances, particularly for procedural reasons.

Because FCI-1's habitual practice of rejecting Dunne's BP-9s for his alleged failure to pursue informal resolution—despite his inability to prove otherwise—is inconsistent with the text, structure, and purpose of the

authorizing regulations, this practice is arbitrary, capricious, and not in accordance with law.[13]

## 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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April 19, 2024

[13] Dunne's APA and mandamus claims serve as predicates for the declaratory relief he seeks. *See* SER-72. If Dunne prevails, declaratory relief would concern how the warden at FCI-1 has failed to implement the Administrative Remedy Program mandated by 28 C.F.R. Part 542 and thus "would clarify or settle the legal relations in issue." *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1057 (9th Cir. 2008) (citation omitted). Dunne's requested declaratory relief is therefore neither overbroad nor irrelevant, contrary to the district court's conclusion. *See* SER-31.

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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# Addendum

## Addendum Table of Contents

## FEDERAL REGULATIONS

### 28 C.F.R. § 540.13 – Notification of Rejections

When correspondence is rejected, the Warden shall notify the sender in writing of the rejection and the reasons for the rejection. The Warden shall also give notice that the sender may appeal the rejection. The Warden shall also notify an inmate of the rejection of any letter addressed to that inmate, along with the reasons for the rejection and shall notify the inmate of the right to appeal the rejection. The Warden shall refer an appeal to an official other than the one who originally disapproved the correspondence. The Warden shall return rejected correspondence to the sender unless the correspondence includes plans for or discussion of commission of a crime or evidence of a crime, in which case there is no need to return the correspondence or give notice of the rejection, and the correspondence should be referred to appropriate law enforcement authorities. Also, contraband need not be returned to the sender.

### 28 C.F.R. § 542.10 – Purpose and Scope

(a) Purpose. The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement. An inmate may not submit a Request or Appeal on behalf of another inmate.

(b) Scope. This Program applies to all inmates in institutions operated by the Bureau of Prisons, to inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons responsibility, and to former inmates for issues that arose during their confinement. This Program does not apply to inmates confined in other non-federal facilities.

(c) Statutorily-mandated procedures. There are statutorily-mandated procedures in place for tort claims (28 CFR part 543, subpart C), Inmate Accident Compensation claims (28 CFR part 301), and Freedom of

Information Act or Privacy Act requests (28 CFR part 513, subpart D). If an inmate raises an issue in a request or appeal that cannot be resolved through the Administrative Remedy Program, the Bureau will refer the inmate to the appropriate statutorily-mandated procedures.

**28 C.F.R. § 542.11 – Responsibility**

(a) The Community Corrections Manager (CCM), Warden, Regional Director, and General Counsel are responsible for the implementation and operation of the Administrative Remedy Program at the Community Corrections Center (CCC), institution, regional and Central Office levels, respectively, and shall:

(1) Establish procedures for receiving, recording, reviewing, investigating, and responding to Administrative Remedy Requests (Requests) or Appeals (Appeals) submitted by an inmate;

(2) Acknowledge receipt of a Request or Appeal by returning a receipt to the inmate;

(3) Conduct an investigation into each Request or Appeal;

(4) Respond to and sign all Requests or Appeals filed at their levels. At the regional level, signatory authority may be delegated to the Deputy Regional Director. At the Central Office level, signatory authority may be delegated to the National Inmate Appeals Administrator. Signatory authority extends to staff designated as acting in the capacities specified in this § 542.11, but may not be further delegated without the written approval of the General Counsel.

(b) Inmates have the responsibility to use this Program in good faith and in an honest and straightforward manner.

**28 C.F.R. § 542.12 – [Reserved]**

**28 C.F.R. § 542.13 – Informal Resolution**

(a) Informal resolution. Except as provided in § 542.13(b), an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy. Each Warden shall establish procedures to allow for the informal resolution of inmate complaints.

(b) Exceptions. Inmates in CCCs are not required to attempt informal resolution. An informal resolution attempt is not required prior to submission to the Regional or Central Office as provided for in § 542.14(d) of this part. An informal resolution attempt may be waived in individual cases at the Warden or institution Administrative Remedy Coordinator's discretion when the inmate demonstrates an acceptable reason for bypassing informal resolution.

**28 C.F.R. § 542.14 – Initial Filing**

(a) Submission. The deadline for completion of informal resolution and submission of a formal written Administrative Remedy Request, on the appropriate form (BP–9), is 20 calendar days following the date on which the basis for the Request occurred.

(b) Extension. Where the inmate demonstrates a valid reason for delay, an extension in filing time may be allowed. In general, valid reason for delay means a situation which prevented the inmate from submitting the request within the established time frame. Valid reasons for delay include the following: an extended period in-transit during which the inmate was separated from documents needed to prepare the Request or Appeal; an extended period of time during which the inmate was physically incapable of preparing a Request or Appeal; an unusually long period taken for informal resolution attempts; indication by an inmate, verified by staff, that a response to the inmate's request for copies of dispositions requested under § 542.19 of this part was delayed.

(c) Form.

(1) The inmate shall obtain the appropriate form from CCC staff or institution staff (ordinarily, the correctional counselor).

(2) The inmate shall place a single complaint or a reasonable number of closely related issues on the form. If the inmate includes on a single form multiple unrelated issues, the submission shall be rejected and returned without response, and the inmate shall be advised to use a separate form for each unrelated issue. For DHO and UDC appeals, each separate incident report number must be appealed on a separate form.

(3) The inmate shall complete the form with all requested identifying information and shall state the complaint in the space provided on the form. If more space is needed, the inmate may use up to one letter-size (8 ½ ″ by 11″) continuation page. The inmate must provide an additional copy of any continuation page. The inmate must submit one copy of supporting exhibits. Exhibits will not be returned with the response. Because copies of exhibits must be filed for any appeal (see § 542.15(b)(3)), the inmate is encouraged to retain a copy of all exhibits for his or her personal records.

(4) The inmate shall date and sign the Request and submit it to the institution staff member designated to receive such Requests (ordinarily a correctional counselor). CCC inmates may mail their Requests to the CCM.

(d) Exceptions to initial filing at institution—

(1) Sensitive issues. If the inmate reasonably believes the issue is sensitive and the inmate's safety or well-being would be placed in danger if the Request became known at the institution, the inmate may submit the Request directly to the appropriate Regional Director. The inmate shall clearly mark “Sensitive” upon the Request and explain, in writing, the reason for not submitting the Request at the institution. If the Regional Administrative Remedy Coordinator agrees that the

Request is sensitive, the Request shall be accepted. Otherwise, the Request will not be accepted, and the inmate shall be advised in writing of that determination, without a return of the Request. The inmate may pursue the matter by submitting an Administrative Remedy Request locally to the Warden. The Warden shall allow a reasonable extension of time for such a resubmission.

(2) DHO appeals. DHO appeals shall be submitted initially to the Regional Director for the region where the inmate is currently located.

(3) Control Unit appeals. Appeals related to Executive Panel Reviews of Control Unit placement shall be submitted directly to the General Counsel.

(4) Controlled housing status appeals. Appeals related to the Regional Director's review of controlled housing status placement may be filed directly with the General Counsel.

(5) Other requests for formal review of decisions not originating from the Warden. Other than the exceptions listed above, formal administrative remedy requests regarding initial decisions that did not originate with the Warden, or his/her staff, may be initially filed with the Bureau office which made the original decision, and appealed directly to the General Counsel.

**28 C.F.R. § 542.15 – Appeals**

(a) Submission. An inmate who is not satisfied with the Warden's response may submit an Appeal on the appropriate form (BP–10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the response. An inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form (BP–11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response. When the inmate demonstrates a valid reason for delay, these time limits may be extended. Valid reasons for delay include those

situations described in § 542.14(b) of this part. Appeal to the General Counsel is the final administrative appeal.

(b) Form.

(1) Appeals to the Regional Director shall be submitted on the form designed for regional Appeals (BP–10) and accompanied by one complete copy or duplicate original of the institution Request and response. Appeals to the General Counsel shall be submitted on the form designed for Central Office Appeals (BP–11) and accompanied by one complete copy or duplicate original of the institution and regional filings and their responses. Appeals shall state specifically the reason for appeal.

(2) An inmate may not raise in an Appeal issues not raised in the lower level filings. An inmate may not combine Appeals of separate lower level responses (different case numbers) into a single Appeal.

(3) An inmate shall complete the appropriate form with all requested identifying information and shall state the reasons for the Appeal in the space provided on the form. If more space is needed, the inmate may use up to one letter-size (8 ½ ″ x 11″) continuation page. The inmate shall provide two additional copies of any continuation page and exhibits with the regional Appeal, and three additional copies with an Appeal to the Central Office (the inmate is also to provide copies of exhibits used at the prior level(s) of appeal). The inmate shall date and sign the Appeal and mail it to the appropriate Regional Director, if a Regional Appeal, or to the National Inmate Appeals Administrator, Office of General Counsel, if a Central Office Appeal (see 28 CFR part 503 for information on locating Bureau addresses).

**28 C.F.R. § 542.16 – Assistance**

(a) An inmate may obtain assistance from another inmate or from institution staff in preparing a Request or an Appeal. An inmate may also obtain

assistance from outside sources, such as family members or attorneys. However, no person may submit a Request or Appeal on the inmate's behalf, and obtaining assistance will not be considered a valid reason for exceeding a time limit for submission unless the delay was caused by staff.

(b) Wardens shall ensure that assistance is available for inmates who are illiterate, disabled, or who are not functionally literate in English. Such assistance includes provision of reasonable accommodation in order for an inmate with a disability to prepare and process a Request or an Appeal.

**28 C.F.R. § 542.17 – Resubmission**

(a) Rejections. The Coordinator at any level (CCM, institution, region, Central Office) may reject and return to the inmate without response a Request or an Appeal that is written by an inmate in a manner that is obscene or abusive, or does not meet any other requirement of this part.

(b) Notice. When a submission is rejected, the inmate shall be provided a written notice, signed by the Administrative Remedy Coordinator, explaining the reason for rejection. If the defect on which the rejection is based is correctable, the notice shall inform the inmate of a reasonable time extension within which to correct the defect and resubmit the Request or Appeal.

(c) Appeal of rejections. When a Request or Appeal is rejected and the inmate is not given an opportunity to correct the defect and resubmit, the inmate may appeal the rejection, including a rejection on the basis of an exception as described in § 542.14(d), to the next appeal level. The Coordinator at that level may affirm the rejection, may direct that the submission be accepted at the lower level (either upon the inmate's resubmission or direct return to that lower level), or may accept the submission for filing. The inmate shall be informed of the decision by delivery of either a receipt or rejection notice.

**28 C.F.R. § 542.18 – Response Time**

If accepted, a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received. Once filed, response shall be made by the Warden or CCM within 20 calendar days; by the Regional Director within 30 calendar days; and by the General Counsel within 40 calendar days. If the Request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond not later than the third calendar day after filing. If the time period for response to a Request or Appeal is insufficient to make an appropriate decision, the time for response may be extended once by 20 days at the institution level, 30 days at the regional level, or 20 days at the Central Office level. Staff shall inform the inmate of this extension in writing. Staff shall respond in writing to all filed Requests or Appeals. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.

**28 C.F.R. § 542.19 – Access to Indexes and Responses**

Inmates and members of the public may request access to Administrative Remedy indexes and responses, for which inmate names and Register Numbers have been removed, as indicated below. Each institution shall make available its index, and the indexes of its regional office and the Central Office. Each regional office shall make available its index, the indexes of all institutions in its region, and the index of the Central Office. The Central Office shall make available its index and the indexes of all institutions and regional offices. Responses may be requested from the location where they are maintained and must be identified by Remedy ID number as indicated on an index. Copies of indexes or responses may be inspected during regular office hours at the locations indicated above, or may be purchased in accordance with the regular fees established for copies furnished under the Freedom of Information Act (FOIA).

**BOP Program Statement 1330.18 (Excerpted)**

**Administrative Remedy Program**

1. PURPOSE AND SCOPE §542.10

a. Purpose. The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement. An inmate may not submit a Request or Appeal on behalf of another inmate.

*Inmates seeking a formal review of issues relating to sexual abuse should use the regulations promulgated by the Department of Justice under the Prison Rape Elimination Act, 42 U.S.C. § 15606, et seq. These procedures are provided in Section 16 of this Program Statement.*

b. Scope. This Program applies to all inmates in institutions operated by the Bureau of Prisons, to inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons responsibility, and to former inmates for issues that arose during their confinement. This Program does not apply to inmates confined in other non-federal facilities.

*The president of a recognized inmate organization may submit a request on behalf of that organization regarding an issue that specifically affects that organization.*

c. Statutorily-mandated Procedures. There are statutorily-mandated procedures in place for Tort claims (28 CFR 543, subpart C), Inmate Accident Compensation claims (28 CFR 301), and Freedom of Information Act or Privacy Act requests (28 CFR 513, subpart D). If an inmate raises an issue in a request or appeal that cannot be resolved through the Administrative Remedy Program, the Bureau will refer the inmate to the appropriate statutorily-mandated procedures.

*2. PROGRAM OBJECTIVES. The expected results of this program are:*

■ *A procedure will be available by which inmates will be able to have any issue related to their incarceration formally reviewed by high-level Bureau officials.*

■ *Each request, including appeals, will be responded to within the time frames allowed.*

■ *A record of Inmate Administrative Remedy Requests and Appeals will be maintained.*

■ *Bureau policies will be more correctly interpreted and applied by staff.*

*3. DIRECTIVES AFFECTED*

*a. Directive Rescinded*

*P1330.17 Administrative Remedy Program (8/20/2012)*

*b. Directives Referenced*

*P1320.06 Federal Tort Claims Act (8/1/03)*

*P4500.08 Trust Fund/Deposit Fund Manual (5/4/12)*

*P5212.07 Control Unit Programs (2/20/01)*

*P5214.04 HIV Positive Inmates Who Pose Danger to Other, Procedures for Handling of (2/4/98)*

*P5264.08 Inmate Telephone Regulations (1/24/08)*

*P5270.09 Inmate Discipline Program (7/8/11)*

*P5324.11 Sexually Abusive Behavior Prevention and Intervention Program (12/31/13)*

*P5890.13 SENTRY - National On-Line Automated Information System (12/14/99)*

*28 CFR 301 Inmate Accident Compensation 28 CFR 16.10 Fees (for records requested pursuant to the Freedom of Information Act (FOIA)) c. Rules cited in this Program Statement are contained in*

*28 CFR 542.10 through 542.19; and 28 CFR Part 115 – Prison Rape Elimination Act National Standards*

*c. Rules cited in this Program Statement are contained in 28 CFR 542.10 through 542.19; and 28 CFR Part 115 – Prison Rape Elimination Act National Standards*

*4. STANDARDS REFERENCED*

■ *American Correctional Association 3rd Edition Standards for Adult Correctional Institutions: 3-4236 and 3-4271*

■ *American Correctional Association 3rd Edition Standards for Adult Local Detention Facilities: 3-ALDF-3C-22, and 3-ALDF-3E-11 5.*

5. RESPONSIBILITY §542.11

a. The Community Corrections Manager (CCM), Warden, Regional Director, and General Counsel are responsible for the implementation and operation of the Administrative Remedy Program at the Community Corrections Center (CCC), institution, regional and Central Office levels, respectively, and shall:

(1) Establish procedures for receiving, recording, reviewing, investigating and responding to Administrative Remedy Requests (Requests) or Appeals (Appeals) submitted by an inmate;

*See Section 13 for further information on remedy processing, including use of SENTRY.*

(2) Acknowledge receipt of a Request or Appeal by returning a receipt to the inmate;

*The receipt is generated via SENTRY.*

(3) Conduct an investigation into each Request or Appeal;

(4) Respond to and sign all Requests or Appeals filed at their levels. At the regional level, signatory authority may be delegated to the Deputy Regional Director. At the Central Office level, signatory authority may be delegated to the National Inmate Appeals Administrator. Signatory authority extends to staff designated as acting in the capacities specified in this §542.11, but may not be further delegated without the written approval of the General Counsel.

*§ 542.11 refers to Section 5 of this Program Statement.*

*For purposes of this Program Statement, the term "institution" includes Community Corrections Centers (CCCs); the term "Warden" includes Camp Superintendents and Community Corrections Managers (CCMs) for Requests filed by CCC inmates; and the term "inmate" includes a former inmate who is entitled to use this program.*

*(5) The Warden shall appoint one staff member, ordinarily above the department head level, as the Administrative Remedy Coordinator (Coordinator) and one person to serve as Administrative Remedy Clerk (Clerk). The Regional Director and the National Inmate Appeals Administrator, Office of General Counsel, shall be advised of these appointees and any subsequent changes.*

*To coordinate the regional office program, each Regional Director shall also appoint an Administrative Remedy Coordinator of at least the Regional Administrator level, ordinarily the Regional Counsel, and an Administrative Remedy Clerk. The National Inmate Appeals Administrator, Office of General Counsel, shall be advised of these appointees and any subsequent changes.*

*(6) The Administrative Remedy Coordinator shall monitor the program's operation at the Coordinator's location and shall ensure that appropriate staff (e,g., Clerk, unit staff) have the knowledge needed to operate the procedure. The Coordinator is*

*responsible for signing any rejection notices and ensuring the accuracy of SENTRY entries; e.g., abstracts, subject codes, status codes, and dates. The Coordinator also shall serve as the primary point of contact for the Warden or Regional Director in discussions of Administrative Remedies appealed to higher levels.*

*(7) The Administrative Remedy Clerk shall be responsible for all clerical processing of Administrative Remedies, for accurately maintaining the SENTRY index, and for generating SENTRY inmate notices.*

*(8) The Unit Manager is responsible for ensuring that inmate notices (receipts, extension notices, and receipt disregard notices from institutions, regions and the Central Office) are printed and delivered daily for inmates in their units and for deleting those notices from SENTRY promptly after delivery to the inmate. CCMs are responsible for this function for inmates under their supervision.*

b. Inmates have the responsibility to use this Program in good faith and in an honest and straightforward manner.

*6. RESERVED*

7. INFORMAL RESOLUTION §542.13

a. Informal Resolution. Except as provided in §542.13(b), an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy. Each warden shall establish procedures to allow for the informal resolution of inmate complaints.

*The Warden is responsible for ensuring that effective informal resolution procedures are in place and that good faith attempts at informal resolution are made in an orderly and timely manner by both inmates and staff. These procedures may not operate to limit inmate access to formal filing of a Request.*

b. Exceptions. Inmates in CCCs are not required to attempt informal resolution. An informal resolution attempt is not required prior to

submission to the regional or Central Office as provided for in §542.14(d) of this part. An informal resolution attempt may be waived in individual cases at the Warden or institution Administrative Remedy Coordinator's discretion when the inmate demonstrates an acceptable reason for bypassing informal resolution.

*For example, the Warden may waive informal resolution for Unit Discipline Committee (UDC) appeals, or when informal resolution is deemed inappropriate due to the issue's sensitivity.*

*Although not mandatory, inmates may attempt informal resolution of DHO decisions. See the Program Statement Inmate Discipline Program.*

8. INITIAL FILING §542.14

a. Submission. The deadline for completion of informal resolution and submission of a formal written Administrative Remedy Request, on the appropriate form (BP-9), is 20 calendar days following the date on which the basis for the Request occurred.

*In accord with the settlement in Washington v. Reno, and for such period of time as this settlement remains in effect, the deadline for completing informal resolution and submitting a formal written Administrative Remedy Request, on the appropriate form (BP-9) (BP-229), for a disputed telephone charge, credit, or telephone service problem for which the inmate requests reimbursement to his/her telephone account, is 120 days from the date of the disputed telephone charge, credit, or telephone service problem.*

*Administrative Remedy Requests concerning telephone issues that do not involve billing disputes or requests for refunds for telephone service problems (such as Administrative Remedy Requests concerning telephone privileges, telephone lists, or telephone access) are governed by the 20-day filing deadline.*

b. Extension. Where the inmate demonstrates a valid reason for delay, an extension in filing time may be allowed. In general, valid reason for delay

means a situation which prevented the inmate from submitting the request within the established time frame. Valid reasons for delay include the following: an extended period in-transit during which the inmate was separated from documents needed to prepare the Request or Appeal; an extended period of time during which the inmate was physically incapable of preparing a Request or Appeal; an unusually long period taken for informal resolution attempts; indication by an inmate, verified by staff, that a response to the inmate's request for copies of dispositions requested under §542.19 of this part was delayed.

*Ordinarily, the inmate should submit written verification from staff for any claimed reason for delay.*

*If an inmate requests an Administrative Remedy form but has not attempted informal resolution, staff should counsel the inmate that informal resolution is ordinarily required. If the inmate nevertheless refuses to present a request informally, staff should provide the form for a formal Request. Upon receipt of the inmate's submission, the Coordinator shall accept the Request if, in the Coordinator's discretion, informal resolution was bypassed for valid reasons, or may reject it if there are no valid reasons for bypassing informal resolution.*

c. Form

(1) The inmate shall obtain the appropriate form from CCC staff or institution staff (ordinarily, the correctional counselor).

*The following forms are appropriate:*

■ *Request for Administrative Remedy, Form BP-9 (BP-229), is appropriate for filing at the institution.*

■ *Regional Administrative Remedy Appeal, Form BP-10 (BP-230), is appropriate for submitting an appeal to the regional office.*

■ *Central Office Administrative Remedy Appeal, Form BP-11 (BP-231), is appropriate for submitting an appeal to the Central Office.*

(2) The inmate shall place a single complaint or a reasonable number of closely related issues on the form. If the inmate includes on a single form multiple unrelated issues, the submission shall be rejected and returned without response, and the inmate shall be advised to use a separate form for each unrelated issue. For DHO and UDC appeals, each separate incident report number must be appealed on a separate form.

*Placing a single issue or closely related issues on a single form facilitates indexing, and promotes efficient, timely and comprehensive attention to the issues raised.*

(3) The inmate shall complete the form with all requested identifying information and shall state the complaint in the space provided on the form. If more space is needed, the inmate may use up to one letter-size (8 1/2" by 11") continuation page.

The inmate must provide an additional copy of any continuation page. The inmate must submit one copy of supporting exhibits. Exhibits will not be returned with the response. Because copies of exhibits must be filed for any appeal (see § 542.15 (b) (3)), the inmate is encouraged to retain a copy of all exhibits for his or her personal records.

(4) The inmate shall date and sign the Request and submit it to the institution staff member designated to receive such Requests (ordinarily a correctional counselor). CCC inmates may mail their Requests to the CCM.

d. Exceptions to Initial Filing at Institution

(1) Sensitive Issues. If the inmate reasonably believes the issue is sensitive and the inmate's safety or well-being would be placed in danger if the Request became known at the institution, the inmate may submit the Request directly to the appropriate Regional Director. The inmate shall clearly mark "Sensitive" upon the Request and explain, in writing, the

reason for not submitting the Request at the institution. If the Regional Administrative Remedy Coordinator agrees that the Request is sensitive, the Request shall be accepted. Otherwise, the Request will not be accepted, and the inmate shall be advised in writing of that determination, without a return of the Request. The inmate may pursue the matter by submitting an Administrative Remedy Request locally to the Warden. The Warden shall allow a reasonable extension of time for such a resubmission.

(2) DHO Appeals. DHO appeals shall be submitted initially to the Regional Director for the region where the inmate is currently located.

*See the Program Statement Inmate Discipline Program.*

(3) Control Unit Appeals. Appeals related to Executive Panel Reviews of Control Unit placement shall be submitted directly to the General Counsel.

*See the Program Statement Control Unit Programs.*

(4) Controlled Housing Status Appeals. Appeals related to the Regional Director's review of controlled housing status placement may be filed directly with the General Counsel.

*See the Program Statement Procedures for Handling HIV Positive Inmates Who Pose Danger to Other.*

9. APPEALS §542.15

a. Submission. An inmate who is not satisfied with the Warden's response may submit an Appeal on the appropriate form (BP-10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the response. An inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form (BP-11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response. When the inmate demonstrates a valid reason for delay, these time limits may be extended. Valid reasons for delay include those

situations described in §542.14(b) of this part. Appeal to the General Counsel is the final administrative appeal.

*These deadlines specify the date of the Appeal's receipt in the regional office or the Central Office. The deadlines have been made deliberately long to allow sufficient mail time. Inmates should mail their Appeals promptly after receiving a response to ensure timely receipt. Ordinarily, the inmate must submit written verification from institution staff for any reason for delay that cannot be verified through SENTRY.*

*In many cases, courts require a proper Appeal to the General Counsel before an inmate may pursue the complaint in court.*

b. Form

(1) Appeals to the Regional Director shall be submitted on the form designed for regional Appeals (BP-10) and accompanied by one complete copy or duplicate original of the institution Request and response. Appeals to the General Counsel shall be submitted on the form designed for Central Office Appeals (BP-11) and accompanied by one complete copy or duplicate original of the institution and regional filings and their responses. Appeals shall state specifically the reason for appeal.

(2) An inmate may not raise in an Appeal issues not raised in the lower level filings. An inmate may not combine Appeals of separate lower level responses (different case numbers) into a single Appeal.

(3) An inmate shall complete the appropriate form with all requested identifying information and shall state the reasons for the Appeal in the space provided on the form. If more space is needed, the inmate may use up to one letter-size (8 1/2" x 11") continuation page. The inmate shall provide two additional copies of any continuation page and exhibits with the regional Appeal, and three additional copies with an Appeal to the Central Office (the inmate is also to provide copies of exhibits used at the prior level(s) of appeal). The inmate shall date and sign the Appeal and mail it to the appropriate Regional Director, if a Regional Appeal, or to the National

Inmate Appeals Administrator, Office of General Counsel, if a Central Office Appeal (see 28 CFR part 503 for addresses of the Central Office and Regional Offices).

*c. Processing. The appropriate regional office to process the Appeal is the regional office for the institution where the inmate is confined at the time of mailing the Appeal, regardless of the institution that responded to the institution filing.*

10. ASSISTANCE §542.16

a. An inmate may obtain assistance from another inmate or from institution staff in preparing a Request or an Appeal. An inmate may also obtain assistance from outside sources, such as family members or attorneys. However, no person may submit a Request or Appeal on the inmate's behalf, and obtaining assistance will not be considered a valid reason for exceeding a time limit for submission unless the delay was caused by staff.

b. Wardens shall ensure that assistance is available for inmates who are illiterate, disabled, or who are not functionally literate in English. Such assistance includes provision of reasonable accommodation in order for an inmate with a disability to prepare and process a Request or an Appeal.

*For example, Wardens must ensure that staff (ordinarily unit staff) provide assistance in the preparation or submission of an Administrative Remedy or an Appeal upon being contacted by such inmates that they are experiencing a problem.*

11. RESUBMISSION §542.17

a. Rejections. The Coordinator at any level (CCM, institution, region, Central Office) may reject and return to the inmate without response a Request or an Appeal that is written by an inmate in a manner that is obscene or abusive, or does not meet any other requirement of this part.

b. Notice. When a submission is rejected, the inmate shall be provided a written notice, signed by the Administrative Remedy Coordinator,

explaining the reason for rejection. If the defect on which the rejection is based is correctable, the notice shall inform the inmate of a reasonable time extension within which to correct the defect and resubmit the Request or Appeal.

*(1) Sensitive Submissions. Submissions for inmate claims which are too sensitive to be made known at the institution are not to be returned to the inmate. Only a rejection notice will be provided to the inmate. However, other rejected submissions ordinarily will be returned to the inmate with the rejection notice.*

*(2) Defects. Defects such as failure to sign a submission, failure to submit the required copies of a Request, Appeal, or attachments, or failure to enclose the required single copy of lower level submissions are examples of correctable defects.*

*Ordinarily, five calendar days from the date of the notice to the inmate is reasonable for resubmission at the institution level; at least 10 calendar days at the CCM or regional offices; and 15 calendar days at the Central Office.*

*(3) Criteria for Rejection. When deciding whether to reject a submission, Coordinators, especially at the institution level, should be flexible, keeping in mind that major purposes of this Program are to solve problems and be responsive to issues inmates raise. Thus, for example, consideration should be given to accepting a Request or Appeal that raises a sensitive or problematic issue, such as medical treatment, sentence computation, or staff misconduct, even though that submission may be somewhat untimely.*

c. Appeal of Rejections. When a Request or Appeal is rejected and the inmate is not given an opportunity to correct the defect and resubmit, the inmate may appeal the rejection, including a rejection on the basis of an exception as described in §542.14 (d), to the next appeal level. The Coordinator at that level may affirm the rejection, may direct that the submission be accepted at the lower level (either upon the inmate's resubmission or direct return to that lower level), or may accept the submission for filing. The inmate shall be informed of the decision by delivery of either a receipt or rejection notice.

12. RESPONSE TIME §542.18

If accepted, a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received. Once filed, response shall be made by the Warden or CCM within 20 calendar days; by the Regional Director within 30 calendar days; and by the General Counsel within 40 calendar days. If the Request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond not later than the third calendar day after filing. If the time period for response to a Request or Appeal is insufficient to make an appropriate decision, the time for response may be extended once by 20 days at the institution level, 30 days at the regional level, or 20 days at the Central Office level. Staff shall inform the inmate of this extension in writing. Staff shall respond in writing to all filed Requests or Appeals. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.

*The date a Request or an Appeal is received in the Administrative Remedy index is entered into SENTRY as the "Date Rcv", and should be the date it is first received and date-stamped in the Administrative Remedy Clerk's office. Notice of extension ordinarily is made via SENTRY notice.*

*13. REMEDY PROCESSING*

*a. Receipt. Upon receiving a Request or Appeal, the Administrative Remedy Clerk shall stamp the form with the date received, log it into the SENTRY index as received on that date, and write the "Remedy ID" as assigned by SENTRY on the form. Once a submission is entered into the system, any subsequent submissions or appeals of that case shall be entered into SENTRY using the same Case Number. The "Case Number" is the purely numerical part of the "Remedy ID" which precedes the hyphen and "Submission ID."*

*All submissions received by the Clerk, whether accepted or rejected, shall be entered into SENTRY in accordance with the SENTRY Administrative Remedy Technical Reference Manual.*

*Sensitive issues, when the inmate claims that his or her safety or well-being would be placed in danger if it became known at the institution that the inmate was pursuing the issue, should be withheld from logging in until answered and/or should be logged into SENTRY with sufficient vagueness as to subject code and abstract to accommodate the inmate's concerns.*

*A Request should be submitted and logged in at the institution where the inmate is housed at the time the inmate gives the Request to the counselor or other appropriate staff member. If the event(s) occurred at a previous institution, staff at that previous institution shall provide, promptly upon request, any investigation or other assistance needed by the institution answering the Request. If an inmate is transferred after giving the Request to a staff member, but before that Request is logged in or answered, the institution where the Request was first given to a staff member remains responsible for logging and responding to that Request.*

*b. Investigation and Response Preparation. The Clerk or Coordinator shall assign each filed Request or Appeal for investigation and response preparation. Matters in which specific staff involvement is alleged may not be investigated by either staff alleged to be involved or by staff under their supervision. Allegations of physical abuse by staff shall be referred to the Office of Internal Affairs (OIA) in accordance with procedures established for such referrals. Where appropriate; e.g., when OIA or another agency is assuming primary responsibility for investigating the allegations, the response to the Request or Appeal may be an interim response and need not be delayed pending the outcome of the other investigation.*

*Requests or Appeals shall be investigated thoroughly, and all relevant information developed in the investigation shall ordinarily be supported by written documents or notes of the investigator's findings. Notes should be sufficiently detailed to show the name, title, and location of the information provided, the date the information was provided, and a full description of the information provided. Such documents and notes shall be retained with the case file copy. When deemed necessary in the investigator's discretion, the investigator may request a written statement from another staff member regarding matters raised in the Request or Appeal. Requested staff shall provide such statements promptly. For a disciplinary Appeal, a complete*

*copy of the appealed disciplinary actions record shall be maintained with the Appeal file copy.*

*c. Responses. Responses ordinarily shall be on the form designed for that purpose, and shall state the decision reached and the reasons for the decision. The first sentence or two of a response shall be a brief abstract of the inmate's Request or Appeal, from which the SENTRY abstract should be drawn. This abstract should be complete, but as brief as possible. The remainder of the response should answer completely the Request or Appeal, be accurate and factual, and contain no extraneous information. The response should be written to be released to any inmate and the general public under the Freedom of Information Act (FOIA) and the Privacy Act. Inmate names shall not be used in responses, and staff and other names may not be used unless absolutely essential.*

*Program Statements, Operations Memoranda, regulations, and statutes shall be referred to in responses whenever applicable, including section numbers on which the response relies.*

*d. Response Time Limits. Responses shall be made as required in Section 12 of this Program Statement.*

*e. Index Completion. When a response is completed, the Clerk shall update SENTRY in accordance with the SENTRY Administrative Remedy Manual and the instructions in Attachment A. Particular attention should be paid to updating the status date, code, and reason, and to making any changes to the subject code and abstract indicated by the Coordinator or by the response drafter. The abstract shall be taken from the response's first paragraph. Abbreviations may be liberally used, as long as they are easily understood, to allow as complete a description of the issue in the 50 characters allotted. For consistency, the Administrative Remedy Coordinator shall approve the closing entry, including the subject codes, status code and reason, and abstract, before the closing entry is made by the Clerk.*

*f. Response Distribution. For an institution response, one copy of the complete Request and response shall be maintained in the Warden's Administrative Remedy File together with all supporting material. Three copies shall be returned to the*

*inmate. An inmate who subsequently appeals to the regional or Central Office shall submit one copy with each appeal.*

*One copy of a Regional Appeal and response shall be retained at the regional office. One copy shall be sent to the Warden at the original filing location. The remaining two copies shall be returned to the inmate; one to submit in case of subsequent appeal to the Central Office, and one to retain.*

*One copy of a Central Office Appeal and response will be returned to the inmate. One copy will be retained in the Central Office Administrative Remedy File, one copy will be forwarded to the regional office where the Regional Appeal was answered, and one to the Warden's Administrative Remedy File at the original filing location.*

*g. File Maintenance. The Warden's Administrative Remedy File and Administrative Remedy Files at the Regional Offices and Central Office shall be maintained in a manner that assures case files are readily accessible to respond to inquiries from Federal Bureau of Prisons staff, inmates, and the public. Institutions shall file Regional and Central Office response copies with the inmate's institution submission copy. Regional offices shall file copies of Central Office responses with the inmate's Regional Appeal file. Each location shall maintain copies of supporting material and investigation notes with the case file.*

*When a Regional or Central Office Appeal was not preceded by a lower level filing, the institution and regional copies shall be filed at the institution and region having responsibility for the inmate at the time of response.*

*To provide information and feedback, Wardens and Regional Directors are encouraged to route response file copies from subsequent appeal levels to the Coordinator and the appropriate department head or person who investigated and drafted the response at their respective levels.*

14. ACCESS TO INDEXES AND RESPONSES §542.19

Inmates and members of the public may request access to Administrative Remedy indexes and responses, for which inmate names and Register Numbers have been removed, as indicated below. Each institution shall make available its index, and the indexes of its regional office and the Central Office. Each regional office shall make available its index, the indexes of all institutions in its region, and the index of the Central Office. The Central Office shall make available its index and the indexes of all institutions and regional offices. Responses may be requested from the location where they are maintained and must be identified by Remedy ID number as indicated on an index. Copies of indexes or responses may be inspected during regular office hours at the locations indicated above, or may be purchased in accordance with the regular fees established for copies furnished under the Freedom of Information Act (FOIA).

*At present, fees are detailed in 28 CFR § 16.10, which specifies a charge of $.10 per page duplicated and no charge for the first 100 pages. Staff shall forward funds received for purchase of index and response copies to the FOIA/Privacy Act Section, Office of General Counsel, Central Office.*

*Any location may produce its index or that of another location by making the appropriate entries on a SENTRY retrieval transaction, and specifying the "SAN" (sanitized) output format.*

*15. RECORDS MAINTENANCE AND DISPOSAL*

*a. Disposal Authority. The authority for Administrative Remedy records disposal is the "job number" NC1-129-83-07 provided by the National Archives.*

*b. Administrative Remedy Indexes. SENTRY Administrative Remedy indexes shall be maintained in computer-accessible form for 20 years, then destroyed. Pre-SENTRY indexes shall be maintained at the site of creation for 20 years, then destroyed.*

*c. Administrative Remedy Case Files. Administrative Remedy Case Files shall be destroyed three full years after the year in which the cases were completed (i.e.,*

*response completed). For cases submitted since implementation of the SENTRY module (July 1990), at the end of each calendar year (beginning at end of 1993), run SENTRY index retrieval transactions to identify the lowest case number for cases answered (status = cl* and status date in the appropriate range) during the calendar year ended three years previously. Cases below that number must be destroyed. Thus, cases answered in 1990 would be destroyed at the end of 1993; cases answered in 1991 would be destroyed at the end of 1994, etc.*

*To identify the lowest case number for cases answered during a given year, it may be necessary to check indexes with "Date Received" in the year in question as well as those with "Date Received" in the previous year.*

*Cases maintained under the pre-SENTRY numbering and filing system should be destroyed according to the following schedule:*

*YEAR OF CASE # DESTROY AT END OF*

*16. ADMINISTRATIVE REMEDY PROCEDURES UNDER THE PRISON RAPE ELIMINATION ACT (PREA)*

*Title 42 U.S.C. §15607 (a) required the Attorney General to publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape. Title 42 USC § 15607(b) states that the national standards shall apply immediately to the Federal Bureau of Prisons upon adoption of the final rule. The final rule is published in Title 28 C.F.R. Part 115. This section only addresses administrative remedy procedures in relation to issues of sexual abuse, and shall not constitute the sole response of the agency to allegations of sexual abuse. Appropriate steps to address the safety and security of inmates shall be made in accordance with the other provisions of the PREA regulations, and the Program Statement Sexually Abusive Behavior Prevention and Intervention Program.*

**BOP Program Statement 5100.08 (Excerpted)**

**Inmate Security Designation and Custody Classification**

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**Chapter 7 – Inmate Transfer**

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**6. Medical and Psychiatric Transfers (Codes 331-336 and 338, 339)**

e. Completion of Treatment - All requests for redesignation to the parent facility upon completion of Medical/Surgical or Psychiatric treatment, or to another medical facility for continuation of treatment, will be initiated by the facility currently housing the inmate via GroupWise on the Discharge Transfer Summary form. This form serves as the designation, transportation, and security worksheet from which the redesignation is made.

Medical cases are normally returned to their parent facility unless the DSCC approves a change in the parent facility based on clinical justification provided prior to redesignation by the Medical Designator.