No. 21-10550

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEREMY WELLS,
Plaintiff-Appellant,

v.

WARDEN PHILBIN, CLIFFORD BROWN, AND FNU FLUKER,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia
Case No. 1:20-CV-00097
Hon. J. Randal Hall

BRIEF FOR *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF ALABAMA, THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, THE AMERICAN CIVIL LIBERTIES UNION OF GEORGIA IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c) and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal:

1. American Civil Liberties Union
2. American Civil Liberties Union of Alabama
3. American Civil Liberties Union of Florida
4. American Civil Liberties Union of Georgia
5. Anand, Easha
6. Brennan Center for Justice at NYU School of Law
7. Brown, Clifford
8. Cao, Perry
9. Dignam, Brett
10. Dillon, Rosalind
11. Epps, Brian K., U.S. Magistrate Judge
12. Faulks, LaTisha G.
13. Florida Justice Institute
14. Fluker, FNU
15. Gelernter, Eugene M.

16. Hall, Randal J., U.S. District Court Chief Judge
17. Human Rights Defense Center
18. Legal Aid Society
19. Marion, Abigail E.
20. Murguia, Ryan J.
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22. Philbin, Warden
23. Quigley, William P.
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26. Southern Center for Human Rights
27. Southern Poverty Law Center
28. Tilley, Daniel
29. Wedekind, Jennifer A.
30. Wells, Jeremy John
31. Young, Sean J.

Pursuant to 11th Cir. R. 26.1-3, the undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: February 14, 2022

/s/ Ryan Murguia
Ryan J. Murguia

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INTEREST OF *AMICI CURIAE*[1]

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 1.7 million members, dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. Consistent with that mission, the ACLU established the National Prison Project ("NPP") in 1972 to protect and promote incarcerated people's civil and constitutional rights. NPP has been involved in litigation concerning the interpretation of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), since the statute's enactment.

The **ACLU of Georgia**, the **ACLU of Alabama**, and the **ACLU of Florida** are state affiliates of the ACLU.

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the amici, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief.

INTRODUCTION

Prison grievance systems often contain a gauntlet of procedural minutiae, designed to intimidate the uninitiated, trip up the unwary, and foil all but the most sophisticated grievants from successfully navigating the labyrinth. Indeed, in the era of the Prison Litigation Reform Act (PLRA), prison grievance procedures often resemble the optical illusions of M.C. Escher, with circular stairways and unreachable doors.[2]

Incarcerated people who are unable to traverse these complicated pathways are forced to watch their civil rights claims dismissed for failure to exhaust. And current Court precedent twice penalizes plaintiffs for being unable to navigate the thicket of procedural requirements necessary to exhaust their administrative remedies—by dismissing their case *and* assessing them a PLRA "strike." Indeed, this Court's holding that a dismissal for failure to exhaust constitutes a strike goes beyond what is required under the statute, which bars plaintiffs from proceeding *in forma pauperis* in a civil action where the grievant has "on 3 or more prior occasions" brought an action that was dismissed on grounds that it was "[f]rivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." 28 U.S.C.

[2] M.C. ESCHER COLLECTION, https://mcescher.com/gallery/impossible-constructions/# (last visited Feb. 14, 2022).

§ 1915(g). This Court should join with its sister circuits who have addressed the issue and hold that strikes should not be assessed in these situations.

SUMMARY OF ARGUMENT

The PLRA's administrative exhaustion requirement requires incarcerated people to exhaust all available administrative remedies prior to bringing suit. 42 U.S.C. § 1997e(a). There is virtually no limitation on how complicated a grievance process may be, and incarcerated people must comply with every step in a grievance regime devised by the prison authorities themselves, with few exceptions, to demonstrate "proper" exhaustion. *See Woodford v. Ngo*, 548 U.S. 81, 93 (2006). But incarcerated people are often unable to successfully navigate the grievance process and are thus barred from seeking judicial redress for serious civil rights violations.

Additional barriers also hinder incarcerated people's ability to complete the grievance process. Incarcerated people have disproportionately high rates of disabilities and mental illness, and disproportionately low rates of English proficiency and literacy. Threatened or actual retaliation further prevents incarcerated people from completing the grievance process.

In many cases, the procedural barriers that prevent incarcerated people from successfully navigating the grievance process are by design. Because the responsibility for the creation and implementation of any and all grievance

requirements rests with prison administrators, those same administrators can design procedures to immunize themselves from suit.

This Court's treatment of incarcerated persons' inability to exhaust complicated grievance systems as PLRA "strikes" twice penalizes plaintiffs who are attempting to seek redress for serious constitutional violations.

ARGUMENT

I. PRISON GRIEVANCE PROCEDURES ARE LITTERED WITH LANDMINES THAT PREVENT EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Under the PLRA, prisoners must exhaust administrative remedies before filing suit in federal court. 42 U.S.C. § 1997e(a). But complex grievance procedures, combined with short deadlines, present myriad potential stumbling blocks for incarcerated people that may prevent them from ever reaching the courthouse doors.

Grievance systems typically require incarcerated people to *perfectly* complete multiple stages, which may include an informal resolution attempt, formal grievance, and one or two appeals.[3] At each stage they must meet often impossibly tight deadlines, which are frequently less than two weeks and can be as short as two to five days.[4] And any misstep during the grievance process can forever foreclose

[3] *See* Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 492-94 (2012).
[4] Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J.

plaintiffs from pursuing their civil rights claims in federal court.[5] Incarcerated people may lose their claims for including multiple issues on a single grievance.[6] Or for failing to name the individuals[7] or policy[8] implicated by the grievance with sufficient specificity. Even minor technical errors can prove fatal. For example, filing an "administrative" appeal rather than a "disciplinary" appeal[9] or submitting a proper grievance to the wrong official[10] can lead to dismissal for failure to exhaust. So can mailing multiple grievances in a single envelope rather than separately mailing each one;[11] failing to submit a complaint where the requisite form for doing so is unavailable;[12] submitting handwritten copies instead of photocopies even when the

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CONST. L. 139, 148 (2008), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2261&context=articles.

[5] *See* Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 575-76 (2014).

[6] *See, e.g.*, *Simpson v. Greenwood*, No. 06-C-612-C, 2007 WL 5445538, at *2-5 (W.D. Wis. Apr. 6, 2007).

[7] *See, e.g.*, *Williams v. Hollibaugh*, No. 3:04-cv-2155, 2006 WL 59334, at *5-6 (M.D. Pa. Jan. 10, 2006); *Whitener v. Buss*, 268 F. App'x 477, 478-79 (7th Cir. 2008) (unpublished); *Haynes v. Ivens*, No. 08-cv-13091-DT, 2010 WL 420028, *5-6 (E.D. Mich., Jan. 27, 2010).

[8] *See, e.g.*, *Giamboi v. Prison Health Servs.*, No. 3:11-CV-00159, 2014 WL 12495641, at *10 (M.D. Pa. Sept. 11, 2014), report and recommendation adopted 2015 WL 12159307 (M.D. Pa. Jan. 13, 2015).

[9] *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001).

[10] *See*, *e.g., Keys v. Craig*, 160 F. App'x 125, 126 (3d Cir. 2005).

[11] *Freeland v. Ballard*, No. 2:14-cv-29445, 2017 WL 337997, at *6-7 (S.D. W.Va. Jan. 23, 2017).

[12] *See Mackey v. Kemp*, No. CV 309-039, 2009 WL 2900036, at *3 (S.D. Ga., July 27, 2009).

photocopier is broken;[13] submitting carbon copies instead of originals;[14] submitting an appeal to the "Inmate Appeals Branch" instead of to the "appeals coordinator";[15] or writing below a form's line that instructed "do not write below this line."[16]

Classifying cases dismissed for failure to exhaust administrative remedies as PLRA "strikes," creates additional barriers for plaintiffs seeking redress from federal courts for serious constitutional violations. Prisoners who proceed in good faith but are unable to successfully navigate the grievance system can quickly rack up strikes and find themselves ineligible to proceed *in forma pauperis*.

In this case, the lower court adopted the Report and Recommendation of the Magistrate Judge and held that Mr. Wells' two previous cases dismissed for failure to exhaust administrative remedies count as PLRA strikes. *Wells v. Philbin*, No. 1:20-cv-00097-JRH-BKE, 2020 WL 7491360, at *1 (S.D. Ga. Dec. 18, 2020) (quoting *White v. Lemma*, 947 F.3d 1373, 1379 (11th Cir. 2020)). The district court's opinion, affirmed by this Court, stands in stark contrast with every other circuit to have addressed the issue. *Wells v. Warden*, No. 21-10550, 2021 WL 5706990, at *2-3 (11th Cir. Dec. 2, 2021). Considering the real-world consequences of this outlier

[13] *Mack v. Klopotoski*, 540 F. App'x 108, 112-13 (3d Cir. 2013).
[14] *Fischer v. Smith*, No. 10-C-870, 2011 WL 3876944, *2 (E.D. Wis. Aug. 31, 2011).
[15] *Chatman v. Johnson*, No. CV S-06-0578 MCE EFB P, 2007 WL 2023544, at *6 (E.D. Cal. July 11, 2007), *report and recommendation adopted*, No. CV S-06-0578 MCE EFB P, 2007 WL 2796575 (E.D. Cal. Sept. 25, 2007).
[16] *Bracero v. Sec'y, Fla. Dep't of Corr.*, 748 F. App'x 200, 203 (11th Cir. 2018) (per curiam) (unpublished), *cert. denied*, 139 S. Ct. 1631 (2019).

approach, one that effectively limits well-intentioned incarcerated persons' access to the courts for failure to exhaust administrative remedies, this Court *en banc* should align its approach with its sister circuits and hold a dismissal based solely on the failure to exhaust does not constitute a strike under the PLRA.

II. MANY INCARCERATED PEOPLE FACE ADDITIONAL BARRIERS THAT HINDER THEIR ABILITY TO EXHAUST ADMINISTRATIVE REMEDIES.

A. Common Characteristics Of Incarcerated People Make Completing Complex Grievance Procedures Particularly Onerous.

The complexities of prison grievance procedures may stump even the most proficient jailhouse lawyers. And many incarcerated people face additional barriers that further frustrate their chances of successful administrative exhaustion. Incarcerated people have disproportionately low rates of educational attainment,[17] English proficiency,[18] and literacy.[19] Any or all of these characteristics may make it

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[17] *See*, *e.g.*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL PRISONER STATISTICS COLLECTED UNDER THE FIRST STEP ACT, 2021, at Table 1 (Nov. 2021), https://bjs.ojp.gov/library/publications/federal-prisoner-statistics-collected-under-first-step-act-2021 (finding that in 2020, 28.3% of federal prisoners did not have a high school diploma, general equivalency degree, or other equivalent certificate).

[18] *Id.* (finding that in 2020, 11.4% of federal prisoners reported English as a second language).

[19] BOBBY D. RAMPEY, *ET AL.*, U.S. DEP'T OF EDU., HIGHLIGHTS FROM THE U.S. PIAAC SURVEY OF INCARCERATED ADULTS: THEIR SKILLS, WORK EXPERIENCE, EDUCATION, AND TRAINING, at Table 1.2 (Nov. 2016), https://nces.ed.gov/pubs2016/2016040.pdf (finding 29% of state and federal

harder for incarcerated people to successfully file and pursue a meritorious claim through the prison grievance system. Meanwhile, the prevalence of disability and mental illness among incarcerated people is disproportionately high. According to the Bureau of Justice Statistics, a staggering 38% of prisoners reported having a disability—a rate roughly two and a half times greater than adults in the general U.S. population.[20] Significantly, the most commonly reported disability was "cognitive disability."[21] Similarly, 41% of all state and federal prisoners have a history of mental health problems,[22] compared to about 21% of the general population.[23] And about 13% of state and federal prisoners reported experiencing serious psychological distress during the last month.[24]

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prisoners fell into the two lowest levels of a six-level literacy scale, compared to 19% of the general population).

[20] LAURA M. MARUSCHAK, *ET AL.*, BUREAU OF JUSTICE STATISTICS, DISABILITIES REPORTED BY PRISONERS, at 1-2 (Mar. 2021), https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf.

[21] *Id.* at 1-2.

[22] LAURA M. MARUSCHAK, *ET AL.*, BUREAU OF JUSTICE STATISTICS, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS, at 1 (June 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/imhprpspi16st.pdf

[23] National Institute of Mental Health, *Mental Illness*, Fig. 1, https://www.nimh.nih.gov/health/statistics/mental-illness#part_2539 (last visited Feb. 14, 2022).

[24] MARUSCHAK, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS, *supra* note 23, at 5 (Table 1). *See also* Margo Schlanger, *Prisoners with Disabilities*, *in* 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295, 295 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/14_Criminal_Justice_Reform_Vol_4_Prisoners-with-Disabilities.pdf (over half of convicted prisoners

Prisoners with serious mental illness or intellectual disabilities are at a particular disadvantage when attempting to fulfill the rigorous requirements of grievance procedures. These prisoners may be unable to fully comprehend and comply with the numerous and varied intricacies of the grievance procedure, such as strict timelines, proper formatting, content requirements, or one of many other potentially "bewildering features." *See Ross*, 578 U.S. at 646.

B. Retaliation Also Prevents People From Exhausting Administrative Remedies.

Actual or threatened retaliation far too often acts as a further barrier to accessing and completing the grievance procedure.[25] In response to filing grievances, incarcerated people have been beaten,[26] urinated on,[27] moved to housing units where they are assaulted by other incarcerated people,[28] and told that they would be transferred so far away as to never be able to see their family until their

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report symptoms of mental illness, chiefly mania and depression, and 15% report symptoms such as delusions or hallucinations).

[25] *Woodford*, 548 U.S. at 117-19 (Stevens, J., dissenting) (observing that prisoners with meritorious claims might choose not to file grievances out of fear of retaliation); *see also* James E. Robertson, *"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J.L. REFORM 611, 644 (2009) ("[R]etaliation against [incarcerated people who file grievances] acquires a functional quality, to wit, the prospect of deterring the target from filing suit and deterring other inmates from filing grievances.").

[26] *See, e.g.*, *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 793-94 (9th Cir. 2018); *Tuckel v. Grover*, 660 F.3d 1249, 1251 (10th Cir. 2011).

[27] *See Johnson v. Lozano*, No. 2:19-cv-1128 MCE DB P, 2021 WL 38179, at *3 (E.D. Cal. Jan. 5, 2021).

[28] *See, e.g.*, *Rinaldi v. United States*, 904 F.3d 257, 262 (3d Cir. 2018).

release from prison, among other retaliatory acts.[29] This Court has recognized that "at least some threats disrupt the operation and frustrate the purposes of the administrative remedies process enough that the PLRA's exhaustion requirement does not allow them." *Turner*, 541 F.3d at 1085.

III. PRISON ADMINISTRATORS CAN USE COMPLEX GRIEVANCE SYSTEMS TO IMMUNIZE THEMSELVES FROM SUIT.

Congress enacted § 1997e(a) "to reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524-25. To that end, prior to involving the federal courts, "Congress afforded corrections officials time and opportunity to address complaints internally . . . ." *Id.* at 525. However, prison administrators have taken what was intended to serve as a shield to protect them from frivolous lawsuits, and converted it into a sword. By imposing needlessly complex requirements that make it impossible for incarcerated people to successfully complete the grievance process, prison administrators have foreclosed incarcerated people from vindicating their rights in federal court. With any minimum requirements for grievance systems swept away by the PLRA, it is truly a case of the fox guarding the henhouse. *See Ross*, 578 U.S. at 641 ("[D]iffer[ing] markedly from its predecessor," the PLRA removed the conditions that administrative remedies be "plain, speedy, and

[29] *See, e.g.*, *Turner v. Burnside*, 541 F.3d 1077, 1081 (11th Cir. 2008).

effective" and that they satisfy minimum standards.") (quoting *Nussle*, 534 U.S. at 524).

Indeed, since the PLRA's enactment in 1996, several state corrections agencies' grievance procedures "have been updated in ways that cannot be understood as anything but attempts at blocking lawsuits."[30] Some of these tactics include reducing the amount of time within which prisoners must file their initial grievance and any subsequent appeals, and extending the time limits within which prison administrators are required to respond to those grievances.[31] These changes allow officials to effectively run out the clock on grievances until incarcerated people are left without formal recourse. Because "[i]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion[,] *Jones*, 549 U.S. at 218, prison administrators' ability to needlessly complicate grievance procedures is limited only by their own creativity.

CONCLUSION

The mandatory exhaustion requirements of the PLRA, combined with intentionally convoluted grievance procedures, result in untold numbers of

[30] Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 473 (2012).

[31] *Id.* at 506-10 (discussing changes in Arkansas Department of Corrections' grievances procedures, including reducing the time to appeal grievance decisions from ten to five working days and introducing time extensions for administrators to decide grievances).

incarcerated people being unable to vindicate their constitutional rights in court, no matter the merit of the case. The Court *en banc* should join the sister circuits who have addressed the issue and hold that dismissals for failures to exhaust are not strikes.

Dated: February 14, 2022

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION

/s/ Ryan Murguia
Ryan J. Murguia

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 2,574 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface with 14-point Times New Roman font.

Dated: February 14, 2022

/s/ Ryan Murguia
Ryan J. Murguia

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

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Date: February 14, 2022

AMERICAN CIVIL LIBERTIES UNION

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