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
The Honorable J. Randal Hall

EN BANC BRIEF OF PLAINTIFF-APPELLANT JEREMY WELLS

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CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

The undersigned hereby certifies the following list of trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this appeal:

American Civil Liberties Union

Anand, Easha

Brennan Center for Justice at NYU School of Law

Brown, Clifford

Cao, Perry

Constitutional Accountability Center

Dignam, Brett

Dillon, Rosalind

Eppler, Ian D.

Epps, Brian K., U.S. Magistrate Judge

Faulks, LaTisha Gotell

Florida Justice Institute

Fluker, FNU

Gelernter, Eugene M.

Gorod, Brianne J.

Hall, Randal J., U.S. District Court Chief Judge

Human Rights Defense Center

Legal Aid Society

Marion, Abigail E.

Patterson Belknap Webb & Tyler LLP

Philbin, Warden

Quigley, William P.

Rao, Devi

Roderick & Solange MacArthur Justice Center

Sandick, Harry

Schwartz, Charlotte

Southern Center for Human Rights

Southern Poverty Law Center

Tilley, Daniel

Wedekind, Jennifer

Wells, Jeremy John

Wydra, Elizabeth B.

Young, Sean Jengwei

Pursuant to Eleventh Circuit Rule 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: June 14, 2022

Respectfully submitted,

s/ Easha Anand
Easha Anand

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is currently scheduled for the week of October 17, 2022. This Court would benefit from oral argument because it concerns an important question of statutory interpretation with high stakes that frequently recurs and because this Court's sister circuits have uniformly parted ways with this Circuit on the issues presented.

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INTRODUCTION

The "three-strikes" provision of the Prison Litigation Reform Act (PLRA) requires prisoners with three "strikes" to pay a full filing fee—often hundreds of dollars—to initiate a new case. Prisoners with three "strikes" are thus often functionally barred from court. The PLRA instructs a court to assess a prisoner one "strike" for any action that was "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. §1915(g). Pointedly absent from that list? An action that is "dismissed on the ground[]" of failure to exhaust administrative remedies. Yet this Circuit stands alone in holding that such dismissals nonetheless count as "strikes" under the PLRA.

The time has come to correct that error. Parsing a virtually identically worded provision of the PLRA, the Supreme Court noted that "[a]lthough exhaustion was a 'centerpiece' of the PLRA, failure to exhaust was notably not added." *Jones v. Bock*, 549 U.S. 199, 214 (2007) (citation omitted) (interpreting 28 U.S.C. §1915A(b)(1)). In the wake of *Jones*, at least eight of this Court's sister circuits have concluded that an action

dismissed for failure to exhaust isn't a "strike" under the "three-strikes" provision of the PLRA. *See infra*, at 18.

This Court's rule to the contrary has grave consequences for prisoners in this Circuit. When Jeremy Wells tried to file suit over prison officials' failure to heed his repeated warnings and prevent an assault that left him with a ruptured eardrum and burns on both eyes, a district court held that he had three "strikes" under the PLRA and dismissed his case. But two of the cases the district court cited were dismissed for failure to exhaust—a ground that's not included in the "three-strikes" list.

This Court should overrule its outlier precedent. And because absent that precedent, Mr. Wells has, at most, one "strike," it should reverse the district court.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court below issued a final judgment dismissing Appellant Jeremy Wells's claims on December 18, 2020. Doc.21.[1] Mr.

[1] "Doc.##" citations are to the district court docket in this case unless otherwise noted.

Wells filed a timely notice of appeal on January 14, 2021.[2] Doc.24. This Court has jurisdiction to review the district court's final order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Is a dismissal for failure to exhaust administrative remedies a "strike" for purposes of the Prison Litigation Reform Act's "three-strikes" provision?

II. If a dismissal for failure to exhaust administrative remedies can be a "strike" for purposes of the Prison Litigation Reform Act's "three-strikes" provision, did Mr. Wells have three "strikes" when he filed the instant case?

III. If Mr. Wells had three "strikes," did the district court err in dismissing his case without affording him the opportunity to pay the court's filing fee?

STATEMENT OF THE CASE

I. Statutory Background.

Generally, a party bringing or appealing a civil action must pay the applicable filing fee. 28 U.S.C. § 1914(a). Parties that are unable to pay that fee may request permission to proceed *in forma pauperis* under

[2] Although Mr. Wells's Notice of Appeal was not docketed by the district court until February 18, 2021, the Notice of Appeal was timely because it included a signed declaration by Mr. Wells certifying that he deposited the notice in the institution's mail system, postage pre-paid, on January 14, 2021. Doc.24; Fed. R. App. P. 4(c)(1).

section 1915. *See* 28 U.S.C. § 1915(a). If *in forma pauperis* status is granted, the filing fee is waived. *Id.* at § 1915(a)(1).

In 1996, Congress passed the Prison Litigation Reform Act (PLRA), which restricted the ability of incarcerated plaintiffs to proceed *in forma pauperis*. The PLRA requires every incarcerated person to pay the full filing fee for a civil suit. 28 U.S.C. § 1915(b). But prisoners granted *in forma pauperis* status based on indigency may pay that fee in installments, rather than paying the full fee up front. 28 U.S.C. § 1915(a)-(b).

The PLRA limits courts' discretion to grant *in forma pauperis* status. Known as the "three-strikes" provision, the relevant section provides:

> "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [the *in forma pauperis*] section if the prisoner has, on 3 or more prior occasions . . . brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted unless the prisoner is under imminent danger of serious physical injury."

28 U.S.C. § 1915(g). The provision thus assesses a "strike" for every case a prisoner brings that is dismissed on one of the enumerated grounds: as frivolous, as malicious, or for failure to state a claim. *See Brown v.*

Johnson, 387 F.3d 1344, 1347-48 (11th Cir. 2004). When a prisoner has three "strikes," he cannot proceed *in forma pauperis* (with one exception—where the prisoner is "under imminent danger of serious physical injury"—not relevant to this case). *Id.*

The PLRA also requires prisoners to exhaust "such administrative remedies as are available" within the prison system before bringing suit. 42 U.S.C. § 1997e(a). Non-exhaustion is an affirmative defense; a prisoner need not plead exhaustion in his complaint, and defendants must prove that a prisoner has not exhausted available remedies. *Jones v. Bock*, 549 U.S. 199, 211-17 (2007). A prisoner must exhaust only "available" administrative remedies; a grievance system that "operates as a simple dead end," for instance, isn't "available," nor is one where prison officials thwart prisoners' attempts to file grievances. *Ross v. Blake*, 578 U.S. 632, 643-44 (2016).

II. Case Background.

While incarcerated at Augusta State Medical Prison, Jeremy Wells raised concerns regarding rampant gang activity—including extortion, narcotics sales, and frequent beatings—to prison officials. Op.2. Prison officials took no action, and gang members attacked Mr. Wells, leaving

him with severe injuries. Doc.12 at 5, 12. Rather than treating his injuries, prison officials ridiculed Mr. Wells and delayed medical treatment. Doc.12 at 12 Mr. Wells suffered a ruptured ear drum; burns on both eyes; a right-eye contusion; an inner-throat abrasion; and multiple bumps and bruises to the head, shoulders, and hands. Doc.12 at 5. Mr. Wells still cannot hear out of one ear and has impaired vision in his left eye. *Id.*

Mr. Wells filed suit *pro se*. Op.2. He moved to proceed *in forma pauperis*, requesting to pay the $402 filing fee in installments. Doc.2. He acknowledged that he had one prior "strike" under 28 U.S.C. § 1915(g), the "three-strikes" provision. Doc.12 at 8 (referring to *Wells v. Cook*, No. 1:11-cv-324-RJC, 2012 WL 1032689 (W.D.N.C. Mar. 27, 2012)).

A magistrate judge found that Mr. Wells instead had three "strikes," concluding that two other cases, *Wells v. Sterling* and *Wells v. Avery County*, were "strikes." Doc.18 at 2-3 (discussing *Wells v. Sterling*, No. 6:15-cv-1344-MBS, 2016 WL 1274036 (D.S.C. Mar. 31, 2016); Order,

Wells v. Avery Cnty. Sheriff's Office, No. 1:13-cv-55-RJC (W.D.N.C. Apr. 30, 2013), Doc.7).[3]

In *Wells v. Sterling*, Mr. Wells alleged that he was detained beyond his term of incarceration due to a calculation error. Compl., *Sterling*, No. 6:15-cv-1344-MBS (S.D. Ga. Mar. 26, 2015), Doc.1 at 4-5. A district court granted summary judgment to the defendants on the ground that Mr. Wells had failed to exhaust administrative remedies. *Sterling*, 2016 WL 1274036, at *2-3. To reach that conclusion, the district court relied on affidavits submitted by prison officials. *Id.* at *1.

[3] In addition to these actions, Mr. Wells also brought suit in *Wells v. Eagleton*, No. 6:15-703-MBS (D.S.C. Apr. 30, 2015), seeking a writ of habeas corpus. The magistrate judge correctly concluded that this was not a "strike," as the petition was for habeas relief. *See Anderson v. Singletary*, 111 F.3d 801, 805 (11th Cir. 1997) (holding that "three-strikes" provision does not apply to habeas corpus proceedings). Mr. Wells also filed three cases subsequent to the complaint in this case, but, per the terms of the statute, only cases brought on "prior occasions" can constitute "strikes." 28 U.S.C. §1915(g); *see Lopez v. U.S. Dep't of Just.*, 228 F. App'x 218, 219 (3d Cir. 2007). In any event, none of the three cases brought subsequent to this one have been dismissed on qualifying grounds. *Wells v. Philbin*, No. 1:20-cv-00134 (S.D. Ga.) (filed Sept. 22, 2020) (denial of motion to proceed jointly; each prisoner docketed in separate civil action); *Wells v. Philbin*, No. 1:20-cv-00164 (S.D. Ga.) (filed Sept. 22, 2020) (dismissed because Mr. Wells had three "strikes" and could not proceed *in forma pauperis*); *Wells v. Ward*, No. 4:21-cv-00256 (S.D. Ga.) (filed Sept. 13, 2021) (pending).

In *Wells v. Avery County*, Mr. Wells filed a §1983 complaint regarding interference with his legal mail. Compl., *Avery Cnty.*, No. 1:13-cv-55-RJC (W.D.N.C. Feb. 28, 2013), Doc.1 at 4-5. Although Mr. Wells's allegations did not discuss exhaustion, the district court required prisoners filing §1983 complaints to fill out a form that included a question regarding exhaustion. *Id.* at 2-3. In response to that question, Mr. Wells explained that he did not exhaust administrative remedies because he was not aware that his legal mail was being held until after he was transferred to another jurisdiction, at which point he could not file a grievance. *Id.* The district court dismissed Mr. Wells's complaint, concluding that he had failed to exhaust available remedies. Order, *Avery Cnty.*, No. 1:13-cv-55-RJC (W.D.N.C. Apr. 30, 2013), Doc.7 at 2-3. The district court did not say that he had failed to state a claim. *Id.*

In response to the magistrate judge's report in this case counting *Wells v. Sterling* and *Wells v. Avery County* as "strikes," Mr. Wells filed an objection, arguing that a dismissal for failure to exhaust is not a "strike." Doc.20 at 1. The district court adopted the magistrate judge's recommendation. Doc.21. The district court did not give Mr. Wells an

opportunity to pay the filing fee but instead dismissed and closed the case. Doc.22.

Mr. Wells, now represented by counsel, appealed the denial of *in forma pauperis* status, arguing that the two cases dismissed for failure to exhaust were not "strikes" and that, even if they were, the district court should have allowed him to prepay the filing fee rather than dismissing his case outright. Opening Br. 41-53, 53 n.18.

The panel opinion did not dispute that the text of the PLRA omits "failure to exhaust" as a basis for a "strike"; that eight other circuits "have concluded that dismissal based on the failure to exhaust, in the absence of an enumerated ground, does not constitute a 'strike' under the PLRA"; or that *Jones v. Bock*, 549 U.S. 199 (2007), is incompatible with a rule that dismissal for failure to exhaust is a "strike." Op.3-5. But the panel believed itself bound by this Court's decisions in *Rivera v. Allin*, 144 F.3d 719 (11th Cir. 1998), which predated *Jones*, and *White v. Lemma*, 947 F.3d 1373 (11th Cir. 2020), which reaffirmed *Rivera* in a sentence without considering whether *Jones* overruled it. Op.5-6. The panel thus affirmed the district court. *Id.*

This Court granted rehearing en banc.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a case under the PLRA's "three-strikes" provision. *Mitchell v. Nobles*, 873 F.3d 869, 873 (11th Cir. 2017).

SUMMARY OF THE ARGUMENT

I. The plain text of 28 U.S.C. §1915(g) makes clear that a failure to exhaust is not a "strike." That provision lists three—and only three—grounds for assessing a "strike," a failure to exhaust not among them. Nor is a dismissal for failure to exhaust synonymous with or subsumed within one of the grounds contained in the "three-strikes" provision. A failure to exhaust isn't "frivolous" because it has nothing to do with the merits of a claim. It isn't "malicious" because it doesn't necessarily reveal bad faith. And it isn't a "failure to state a claim" unless the failure to exhaust was conceded on the face of the complaint. Were there any doubt, the Supreme Court, interpreting virtually identical language in another PLRA section, concluded that a failure to exhaust was not subsumed within one of the enumerated grounds. *Jones*, 549 U.S. at 216. And to top

it off, holding that a dismissal for failure to exhaust constitutes a "strike" would also be inequitable and inconsistent with the purpose of the PLRA.

II. Neither *Wells v. Sterling* nor *Wells v. Avery County* were "strikes." Because §1915(g) asks whether a case "was dismissed"—past tense—on one of the specified grounds, the court assessing whether a plaintiff has three "strikes" must look at the dismissal order in each prior case for an "express statement" of one of the §1915(g) grounds. *Daker v. Comm'r, Ga. Dep't. of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016). Neither *Wells v. Sterling* nor *Wells v. Avery County* contained any "express statement" that dismissal was on the basis of frivolity, maliciousness, or failure to state a claim. Even if this Court could look beyond the dismissing court's order, neither case would be a "strike." Defendants did not argue that either case was frivolous or malicious. *Wells v. Sterling* was resolved at summary judgment, based on evidence outside the four corners of the complaint, and therefore was not dismissed because Mr. Wells failed to state a claim. *See Jones*, 549 U.S. at 216. And *Wells v. Avery County* was dismissed based on Mr. Wells's answer to a question on the district court's required prisoner form complaint, not based on allegations that Mr. Wells volunteered. In identical circumstances, the

Fifth Circuit has held that such a dismissal is not for failure to state a claim. *See Coleman v. Sweetin*, 745 F.3d 756, 762-63 (5th Cir. 2014) (discussing *McDonald v. Cain*, 426 F. App'x 332 (5th Cir. 2011) (per curiam)); *Torns v. Mississippi Dep't of Corr.*, 301 F. App'x 386, 389-90 (5th Cir. 2008).

III. At the very least, the district court erred in dismissing Mr. Wells's case without allowing him an opportunity to pay his full filing fee up front. The text of § 1915(g) does not limit the ability of a prisoner who has incurred three "strikes" to "bring a civil action," full stop. It limits only the ability of a prisoner to "bring a civil action…*under this section*"—that is, under the *in forma pauperis* section. 28 U.S.C. § 1915(g). The remedy where a prisoner has incurred three "strikes" is to bar him from proceeding *in forma pauperis*—"under this section"—by requiring him to pay his filing fee up front, rather than in installments. The district court here did not give Mr. Wells an opportunity to pay his filing fee. Instead, it dismissed Mr. Wells's case altogether. But that rule reads the qualifying phrase "under this section" out of the statute.

ARGUMENT

I. A Case Dismissed For Failure To Exhaust Is Not A "Strike" For Purposes Of The PLRA's "Three-Strikes" Provision.

1. This Court has three rules when it comes to interpreting the PLRA: "(1) Read the statute; (2) read the statute; (3) read the statute!" *Daker*, 820 F.3d at 1283. The provision of the statute at issue here is excruciatingly clear. It enumerates three—and only three—grounds for assessing a "strike": dismissals as frivolous, dismissals as malicious, or dismissals for failure to state a claim. 28 U.S.C. § 1915(g). "Under the negative-implication canon, these three grounds are the *only* grounds that can render a dismissal a strike." *Daker*, 820 F.3d at 1283-84. A dismissal for failure to exhaust isn't one of those three grounds.

Were there any doubt, the Supreme Court has interpreted an identically worded portion of the PLRA to exclude dismissals for failure to exhaust. Under 28 U.S.C. § 1915A(b)(1), a court may *sua sponte* dismiss certain complaints if, among other things, they are "frivolous, malicious, or fail[] to state a claim"—precisely the language used in the three-strikes provision, § 1915(g). In *Jones v. Bock*, the Supreme Court explained that while "exhaustion was a 'centerpiece' of the PLRA, failure

to exhaust was notably not added" to § 1915A(b)(1). 549 U.S. at 200 (citation omitted).

Congress could have drafted a statute that barred *in forma pauperis* status for a prisoner who "on 3 or more prior occasions . . . brought an action or appeal in a court of the United States that was dismissed," period. It did not, instead barring *in forma pauperis* status only for prisoners who have brought three or more suits that were "dismissed on the grounds" that they were "frivolous, malicious, or fail[ed] to state a claim." 28 U.S.C. § 1915(g). This Court cannot depart from the plain text of the statute by adding an additional ground to that list.

2. Nor is a dismissal for failure to exhaust synonymous with or subsumed within one of the grounds contained in the "three-strikes" provision, which covers only an action dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted."

A "frivolous" suit challenges an "inarguable legal conclusion" or raises a "fanciful factual allegation." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A suit dismissed for failure to exhaust hasn't done either.

Indeed, as this Court has explained, dismissals that do not address the merits cannot, by definition, be frivolous. *See Daker*, 820 F.3d at 1284 (holding that dismissals for want of prosecution and lack of jurisdiction cannot be "frivolous" because they "say[] nothing about the underlying merits of the appeal"). A dismissal for failure to exhaust doesn't address the merits and so cannot be "frivolous." *See Brooks v. Warden*, 706 F. App'x 965, 969 (11th Cir. 2017); *Howard v. Gee*, 297 F. App'x 939, 940 (11th Cir. 2008).

A "malicious" suit is one filed "[w]ithout just cause or excuse." *Daker v. Bryson*, 841 F. App'x 115, 120-21 (11th Cir. 2020) (quoting *Malicious*, BLACK'S LAW DICTIONARY (11th ed. 2019)); *see Pinson v. Grimes*, 391 F. App'x 797, 799 (11th Cir. 2010). This Court has also counted actions that abuse the judicial process through repetition or misrepresentation as "malicious." *Daker*, 841 F. App'x at 120-21; *Pinson*, 391 F. App'x at 798-99. The key is that the plaintiff acted for an illegitimate purpose at some point during the proceedings. Failing to exhaust evinces no such bad motive.

Nor is a dismissal for failure to exhaust a dismissal for "fail[ing] to state a claim." In *Jones v. Bock*, the Supreme Court held that "inmates

are not required to specially plead or demonstrate exhaustion in their complaints." 549 U.S. at 216. Instead, non-exhaustion is a defense to be raised by defendants. *Id.* A complaint that doesn't mention exhaustion or is inconclusive as to whether or not a plaintiff has exhausted can't be dismissed for failure to state a claim. *Id.* To be sure, in some—rare—cases, a prisoner-plaintiff will affirmatively concede both that administrative remedies are "available" and that he has not exhausted those available administrative remedies, such that the affirmative defense of exhaustion "appears on [the] face" of his complaint. *Id.* at 215. The Supreme Court has opined—in dicta—that such a complaint "is subject to dismissal for failure to state a claim."[4] *Id.* But other than those

[4] That dicta is arguably inconsistent with this Court's cases. In this Circuit, the "PLRA exhaustion defense is not a failure-to-state-a-claim defense because it is independent from the merits of the plaintiff's claim." *Brooks*, 706 F. App'x at 969 (citing *Bryant v. Rich*, 530 F.3d 1368, 1376 n.12 (11th Cir. 2008)); *see also Howard*, 297 F. App'x at 940 ("[A] finding of exhaustion is not an adjudication on the merits[.]"). That accords with the general rule of civil procedure that a "dismissal for failure to state a claim . . . is a 'judgment on the merits,'" *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990), whereas administrative exhaustion is a non-merits determination, *see Banks v. United States*, 796 F. App'x 615, 616 (11th Cir. 2019) (in the context of habeas corpus: "[i]f a previous § 2254 petition was dismissed as premature or for failure to exhaust, the dismissal was not on the merits"); *Freeman v. Cavazos*, 939 F.2d 1527, 1530 (11th Cir. 1991) (in the context of federal education funds: "[petitioner] was

rare cases where the district court's dismissal for failure to exhaust relies only on what's within the four corners of the complaint, a dismissal for failure to exhaust is not a "failure to state a claim."

Were there any doubt that a dismissal for failure to exhaust is not subsumed within one of the grounds listed in §1915(g), consider another provision of the PLRA, 42 U.S.C. §1997e(c)(2). That provision reads as follows: "In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies." *Id.* If "frivolous, malicious, [or] fails to state a claim upon which relief can be granted" included a failure to exhaust, the provision "would carry the highly improbable meaning that courts may dismiss for failure to exhaust administrative remedies without first requiring exhaustion of administrative remedies." *Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999).

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required to exhaust administrative remedies *before* we would address the merits of the case" (emphasis added)).

3. Unsurprisingly, every other circuit to consider the question—the Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, and D.C. circuits—have concluded that dismissals for failures to exhaust are not "strikes." *Snider*, 199 F.3d at 115; *Ball v. Famiglio*, 726 F.3d 448, 459-60 (3d Cir. 2013); *Green v. Young*, 454 F.3d 405, 408 (4th Cir. 2006); *Turley v. Gaetz*, 625 F.3d 1005, 1012-13 (7th Cir. 2010); *Owens v. Isaac*, 487 F.3d 561, 563 (8th Cir. 2007); *El-Shaddai v. Zamora*, 833 F.3d 1036, 1043-44 (9th Cir. 2016); *Strope v. Cummings*, 653 F.3d 1271, 1274 (10th Cir. 2011); *Thompson v. Drug Enf't Admin.*, 492 F.3d 428, 438 (D.C. Cir. 2007); *see also Pointer v. Wilkinson*, 502 F.3d 369, 375 (6th Cir. 2007) (noting, in dicta, that plaintiff would have a "compelling argument that a strike should not be assessed" were a case dismissed for failure to exhaust).

This Court's outlier rule stems from *Rivera v. Allin*, 144 F.3d 719 (11th Cir. 1998). *Rivera* held that a complaint that "lacked any allegations of exhaustion of remedies" was "tantamount to one that fails to state a claim upon which relief may be granted," so a dismissal based on failure to exhaust constituted a "strike." 144 F.3d at 731. But the Supreme Court in *Jones v. Bock* subsequently held to the contrary:

"[I]nmates are *not* required to specially plead or demonstrate exhaustion in their complaints." 549 U.S. at 216 (emphasis added). A complaint that "lack[s] any allegations of exhaustion of remedies" shouldn't be dismissed at all, let alone dismissed as "tantamount to" a failure to state a claim. *See Rivera*, 144 F.3d at 731. As panels of this Court have recognized,[5] the premise on which *Rivera* relied was thus abrogated by *Jones*.[6]

4. This Court's atextual rule has profoundly inequitable consequences. "Strike" calculations are high stakes. Poverty prior to incarceration, nominal or nonexistent wages while behind bars, and prison fees for everything from phone calls to soap combine to mean that, for most prisoners, requiring prepayment of $400 or more to file a complaint likely means foregoing suit altogether. *See* Amicus Br. filed July 20, 2021, at 11, 17-18. And prisoners barred from courts have virtually no recourse for violations of their civil rights. *See McCarthy v.*

[5] *See, e.g.*, *Anderson v. Donald*, 261 F. App'x 254, 255-56 (11th Cir. 2008); *Hernandez v. Fla. Dep't of Corr.*, 281 F. App'x 862, 867 (11th Cir. 2008).

[6] This Court reiterated the rule from *Rivera* in *White v. Lemma*, 947 F.3d 1373 (11th Cir. 2020). But that case did not consider whether *Jones* had overruled *Rivera* and did not address the text of the statute. *Id.* at 1379.

Madigan, 503 U.S. 140, 153 (1992) (access to courts is a prisoner's "remaining most 'fundamental political right'").

Assessing a "strike" for a procedural defect—one that can, in many cases, be remedied—leads to odd and inequitable results. Administrative exhaustion is extraordinarily difficult, particularly for prisoners, who generally have no legal training. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1649-54 (2003). A case may be dismissed for failure to exhaust on the most trivial of technicalities. *See, e.g.*, *Bracero v. Sec'y, Fla. Dep't of Corr.*, 748 F. App'x 200, 203 (11th Cir. 2018) (dismissing for failure to exhaust where prisoner wrote a few lines of grievance below line labeled, "Do not write below this line"). And a case dismissed based on a failure to exhaust may be refiled upon the completion of the exhaustion process, leading to the truly bizarre result that a prisoner might refile a suit, win the entire case, and still walk away with a "strike." *See Snider*, 199 F.3d at 112.

Finally, counting failures to exhaust as "strikes" would be contrary to the intent of Congress in drafting the PLRA. Congress did not want prisoners who raised "legitimate" claims to be barred from court. *See* 141 Cong. Rec. S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Orrin

Hatch) ("I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."); 142 Cong. Rec. S2297 (daily ed. Mar. 19, 1996) (statement of Sen. Paul Simon) ("[I]n many instances there are legitimate claims that deserve to be addressed. History is replete with examples of egregious violations of prisoners' rights. . . . In seeking to curtail frivolous lawsuits, we cannot deprive individuals of their basic civil rights."). Exhaustion has no bearing on the actual merit of a plaintiff's claims. Assessing a "strike" on the basis of a technical error or because a prisoner filed prematurely is thus at odds with § 1915(g), which "was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws." *Tafari v. Hues*, 473 F.3d 440, 443 (2d Cir. 2007).

II. Neither *Wells v. Sterling* Nor *Wells v. Avery County* Are "Strikes" For Purposes Of The PLRA's "Three-Strikes" Provision.

The PLRA's "three-strikes" provision asks whether three prior actions were dismissed on one of three qualifying grounds. 28 U.S.C. §1915(g). Because the statute speaks in the past tense, this Court has held that assessing whether a prior case constitutes a "strike" requires

looking for an "express statement" in the dismissal order or opinion that the case is being dismissed on one of the three grounds. *Daker*, 820 F.3d at 1284. Neither the dismissal order in *Wells v. Sterling* nor the dismissal order in *Wells v. Avery County* have such an "express statement." And even if this Court could do its own, independent analysis of why those cases were or could have been dismissed, the result would be the same: There's simply no basis to conclude that either *Wells v. Sterling* or *Wells v. Avery County* is a "strike."

1. a. The text of the "three-strikes" provision directs a court to consider whether "on 3 or more prior occasions," the plaintiff brought an action "that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. §1915(g). Based on that language, this Court has held that a dismissal order must "ma[ke] some express statement" that the case is dismissed as frivolous in order for the dismissal to count as a "strike." *Daker*, 820 F.3d at 1284. As this Court explained, "By using the phrase 'was dismissed' in the past tense and the phrase 'on the grounds that,' the Act instructs us to consult the *prior* order that dismissed the action or appeal and to identify the *reasons* that the court gave for dismissing it." *Id*. This

Court "cannot conclude that an action or appeal 'was dismissed'" on one of the specified grounds "based on our *present-day* determination that the action or appeal was frivolous or based on our conclusion that the dismissing court *could have* dismissed it as frivolous." *Id.*

The same two key phrases—"was dismissed," in the past tense, and the phrase "on the grounds that"—modify the other potential "strike" bases (dismissal on the grounds that a suit is malicious or fails to state a claim). 28 U.S.C. §1915(g). Thus, the same test applies: A prior case is only a "strike" if the dismissing court included some "express statement" that its dismissal was based on maliciousness or failure to state a claim. *See Daker*, 820 F.3d at 1284.

This Court's sister circuits are in accord: For a dismissal to count as a "strike," the dismissing court must expressly note one of the qualifying grounds. *See Ball*, 726 F.3d at 459-60; *Blakely v. Wards*, 738 F.3d 607, 614 (4th Cir. 2013); *Turley*, 625 F.3d at 1013; *Thompson*, 492 F.3d at 438. As the D.C. Circuit put the point, "a driving purpose of the PLRA is to preserve the resources of both the courts and the defendants in prisoner litigation"; a "bright-line rule that avoids the need to relitigate past cases" best serves that purpose, and a rule requiring an

express statement of a qualifying ground is such a rule. *Thompson*, 492 F.3d at 438.

b. In the case of a dismissal based on failure to exhaust, the rule requiring an "express statement" before deciding a dismissal was based on failure to state a claim (and thus constitutes a "strike") should apply with special force. Recall that, per the Supreme Court's decision in *Jones*, a dismissal for failure to exhaust is a dismissal for failure to state a claim only where the plaintiff's allegations themselves demonstrate both that administrative remedies are "available" in the prison and that he has not exhausted those available remedies. 549 U.S. at 215. In the mine-run of cases, a plaintiff won't so plead himself out of court and so a dismissal for failure to exhaust won't be a dismissal for failure to state a claim.

Where a dismissing court *does* encounter that rare case, however, under this Court's rule in *Daker* and per the text of the statute, the dismissing court must so signal by including an "express statement" to that effect. 820 F.3d at 1283. As the Third Circuit put the point, "[D]ismissal based on a prisoner's failure to exhaust administrative remedies does not constitute a PLRA strike, unless a court explicitly and correctly concludes that the complaint reveals the exhaustion defense on

its face and the court then dismisses the unexhausted complaint for failure to state a claim." *Ball*, 726 F.3d at 459-60; *see also Thompson*, 492 F.3d at 438 (prior case may constitute a "strike" only if it "dismisses an unexhausted complaint on a Rule 12(b)(6) motion or if it dismisses the complaint sua sponte and expressly declares that the complaint fails to state a claim"); *Turley*, 625 F.3d at 1013 (same).

c. The question then is whether either of the two dismissal orders Mr. Wells contends are not "strikes" made some "express statement" that it was dismissing the action on a qualifying ground. *See Daker*, 820 F.3d at 1284. The answer is no. *Sterling*, 2016 WL 1274036, at *3; Order, *Avery Cnty.*, No. 1:13-cv-55-RJC (W.D.N.C. Apr. 30, 2013), Doc.7 at 2-4. And neither "explicitly"—let alone "correctly"—concluded that the exhaustion defense was evident on the face of Mr. Wells's complaint. *Id.*; *see Ball*, 726 F.3d at 459-60.

Under this Circuit's rule, that should end the matter: Neither *Wells v. Sterling* nor *Wells v. Avery County* are "strikes" because the order of dismissal did not "express[ly] state[]" that the dismissal rested on one of the specified grounds.

2. Even if this Court could—contrary to *Daker* and the practice of its sister circuits—assign "strikes" based on a "*present-day* determination," 820 F.3d at 1284, that the action was dismissed on one of the specified grounds, neither *Wells v. Sterling* nor *Wells v. Avery County* can constitute a "strike."

a. Start with *Wells v. Sterling*. The district court in that case "sa[id] nothing about the underlying merits" of Mr. Wells's case; there's thus no indication that the dismissal was for frivolity. *Sterling*, 2016 WL 1274036, at *3. Not even defendants in that case argued that the case was brought for the purpose of harassment or annoyance, so it can't be a dismissal based on maliciousness either. Motion for Summary Judgment, *Sterling*, No. 6:15-cv-01344 (D.S.C. July 30, 2015), Doc.35 at 3-6. And it certainly wasn't the case that "the allegations in [Mr. Wells's] complaint suffice[d] to establish" a lack of exhaustion. *See Jones*, 549 U.S. at 215. Instead, the district court found a lack of exhaustion based on affidavits submitted by defendants at summary judgment, not based on the allegations in Mr. Wells's complaint. *Sterling*, 2016 WL 1274036, at *3.[7]

[7] The district court claimed that a grant of summary judgment based on exhaustion is equivalent to a dismissal based on failure to state a claim, citing to *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008). Doc.21 at 2. But

Besides, no lawyer would call a grant of summary judgment a "dismissal for failure to state a claim."

The district court erroneously counted *Wells v. Sterling* as a "strike." But for that error, Mr. Wells would have had no more than two prior "strikes." *See supra*, at 6-7. That error alone requires reversal.

b. *Wells v. Avery County* wasn't a "strike" either. Again, the district court said nothing about the merits of the action or about harassment or annoyance, meaning that it couldn't have been a dismissal for frivolity or maliciousness. Order, *Avery Cnty.*, No. 1:13-cv-55-RJC (W.D.N.C. Apr. 30, 2013), Doc.7 at 2-4.

Nor was the case dismissed because "the allegations in [Mr. Wells's] complaint suffice[d] to establish" a lack of exhaustion, the only way a dismissal for lack of exhaustion could constitute a "failure to state a claim." *See Jones*, 549 U.S. at 215. Indeed, Mr. Wells's allegations said

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Bryant says the opposite: It characterizes failure to exhaust as "*unlike* a defense under Rule 12(b)(6) for failure to state a claim" because the former is "not adjudicated as part of the merits" whereas the latter is. 530 F.3d at 1376 n.12 (emphasis added). *Bryant* instead analogized a summary judgment motion based on exhaustion to motions to dismiss under Federal Rules of Civil Procedure 12(b)(2), (3), and (5), not to a motion to dismiss under 12(b)(6), the provision regarding failure to state a claim. *Id.* at 1376.

nothing at all about exhaustion. Compl., *Avery Cnty.*, No. 1:13-cv-55-RJC (W.D.N.C. Feb. 28, 2013), Doc.1 at 4-5.

Instead, the district court based its dismissal for failure to exhaust on Mr. Wells's answer to a question on the form on which the Western District of North Carolina requires prisoners to submit §1983 complaints. Question III on the form asks a prisoner, "Did you present the facts of each claim relating to your complaint to the Inmate Grievance Commission or any other available administrative remedy procedure?" *Id.* at 2. Mr. Wells marked "no" in response to that question, explaining that he did not have an opportunity to file his grievance because he was not aware of the basis for his claim until he was transferred to another jurisdiction. *Id.* at 2-3. The district court found that Mr. Wells had failed to exhaust based entirely on Mr. Wells's answer to Question III. *Id.*

Faced with identical cases—where a district court dismisses a complaint for failure to exhaust based on a prisoner's answers to a question on a district court form—the Fifth Circuit has consistently held that such a dismissal is not a dismissal for a failure to state a claim. *See Coleman v. Sweetin*, 745 F.3d 756, 762-63 (5th Cir. 2014) (discussing *McDonald v. Cain*, 426 F. App'x 332 (5th Cir. 2011) (per curiam)); *Torns*

v. Mississippi Dep't of Corr., 301 F. App'x 386, 389-90 (5th Cir. 2008).[8] This Court should follow suit.

To do otherwise would be to allow a district court to "by local rule sidestep *Jones* by requiring prisoners to affirmatively plead exhaustion." *Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007). After all, the Supreme Court has explained that a prisoner is *not* required to plead or demonstrate exhaustion in his complaint. *Jones*, 549 U.S. at 213-14. Instead, exhaustion is an affirmative defense that must be raised and proven by defendants. *Id.* The rare prisoner-plaintiff who nonetheless chooses to concede in his complaint that he has not exhausted available remedies may have his case dismissed for failure to state a claim. *Id.* at 215.

But when a district court *requires* a prisoner to answer questions about exhaustion when he submits his complaint, the district court essentially makes exhaustion a pleading requirement. *See Carbe*, 492

[8] Two other circuits have concluded that a plaintiff does not fail to state a claim in similar circumstances. *See Lax v. Corizon Med. Staff*, 766 F. App'x 626, 628 (10th Cir. 2019) (plaintiff did not fail to state a claim by skipping question on complaint form regarding exhaustion); *Snider*, 199 F.3d at 113-14 (district court cannot sua sponte dismiss a complaint for failure to state a claim based on answer to question on complaint form regarding exhaustion).

F.3d at 328. And if the district court then dismisses on the basis of the answer to that question, it has not dismissed the action because the prisoner "fail[ed] to state a claim," because the prisoner should not have been required to answer that question in order to submit his complaint in the first place. *Torns*, 301 F. App'x at 389 (answer to district court form question does not make case "one of those rare instances where the prisoner's failure to exhaust administrative remedies is clear on the face of" the complaint).

Wells v. Avery County was not dismissed on the ground that it was frivolous or malicious or because Mr. Wells failed to state a claim. The district court thus erred in counting it as a "strike."

III. At Minimum, The District Court Should Have Afforded Mr. Wells An Opportunity To Pay His Full Filing Fee Before Dismissing His Case Under §1915(g).

Even if the district court were correct in finding that Mr. Wells had incurred three "strikes," it still erred in dismissing his case without allowing him an opportunity to pay his full filing fee up front. The text of § 1915(g) does not limit the ability of a prisoner who has incurred three "strikes" to "bring a civil action," full stop. It limits only the ability of a prisoner to "bring a civil action . . . *under this section*"—that is, under the

in forma pauperis section. 28 U.S.C. § 1915(g). The remedy where a prisoner has incurred three "strikes" is to bar him from proceeding "under this section" by requiring him to pay his filing fee up front, rather than in installments. The district court here did not give Mr. Wells an opportunity to pay his filing fee. Instead, it dismissed Mr. Wells's case altogether. But that rule reads the qualifying phrase "under this section" out of the statute.

Were there any doubt that § 1915(g) does not require that a "three-strikes" prisoner's case be dismissed without giving the plaintiff an opportunity to pay the filing fee, the rest of § 1915 confirms as much. A separate provision of § 1915 mandates that a court "shall dismiss the case at any time" where "the court determines that the allegation of poverty is untrue." 28 U.S.C. § 1915(e)(2)(A). That Congress expressly mandated dismissal only in one kind of case where a prisoner is not entitled to *in forma pauperis* status (because his allegations of poverty are untrue) is strong evidence that Congress did *not* intend to require dismissal in another kind of case where a prisoner is not entitled to *in forma pauperis* status (because he has incurred three "strikes"). Antonin Scalia & Bryan A. Garner, *Reading Law* 107-11 (2012).

Despite the plain text of the statute, district courts in this Circuit routinely dismiss cases rather than allowing a prisoner-plaintiff an opportunity to pay the filing fee thanks to this Court's decision in *Dupree v. Palmer*, 284 F.3d 1234 (11th Cir. 2002). *Dupree* held that district courts should dismiss a case brought by a prisoner-plaintiff with three "strikes," rather than providing the prisoner-plaintiff with an opportunity to arrange payment. *Id.* at 1235. *Dupree* based its holding on bread crumbs in prior Eleventh Circuit opinions and unpublished opinions in other circuits—one (dealing with the constitutionality of the PLRA) had summarized the *in forma pauperis* provisions by saying "the prisoner must pay the full filing fee at the time he initiates suit"; another had, without comment, affirmed a district court order dismissing a case without an opportunity to pay the filing fee; and so on. *Id.* at 1235-36. None of those cases squarely addressed whether a district court must dismiss a case without allowing a "three-strikes" prisoner to pay the filing fee. And *Dupree* did not even acknowledge the phrase "under this section" in the statute, let alone attempt to square its conclusion with that text. *Id.* It should be overruled.

In accordance with the text of § 1915(g), other circuits do not read § 1915(g) to require dismissal of a case brought by a "three-strikes" prisoner. Instead, other circuits allow such a prisoner the opportunity to pay the filing fee. A case may subsequently be dismissed for failure to pay the filing fee, of course. But that dismissal is for a failure to prosecute or to comply with a local rule, not pursuant to § 1915(g). As a result, other circuits' standard denials of *in forma pauperis* status allow prisoners a window in which to pay the filing fee before dismissal is authorized.[9]

At the very least, the sanction of dismissing a case without affording a "three-strikes" prisoner the opportunity to pay the filing fee should be reserved for prisoners who attempt to mislead the court. The

[9] *See, e.g.*, *James v. Anderson*, 770 F. App'x 724, 724 (5th Cir. 2019) (per curiam) ("Should he wish to reinstate his appeal, [the plaintiff] has 30 days from the date of this opinion to pay the full appellate filing fee to the clerk of the district court."); *Ball*, 726 F.3d at 471 ("Unless she pays the docketing fee within 14 days of the judgment rendered herewith, these appeals will be dismissed pursuant to Third Circuit L.A.R. 107.1(a)."); *Dubuc v. Johnson*, 314 F.3d 1205, 1207 (10th Cir. 2003) ("Plaintiff's failure to pay the filing fee as directed will result in the dismissal of his appeal for failure to prosecute."); *In re Alea*, 286 F.3d 378, 382 (6th Cir. 2002) ("In summary, we conclude the district court properly applied the three-strikes provision in this action by assessing the full filing fee against the petitioner and giving him 30 days in which to pay that fee before dismissing the action."); *Smith v. District of Columbia*, 182 F.3d 25, 29-30 (D.C. Cir. 1999) ("Unless he pays the required fees, [plaintiff's] appeal will be dismissed.").

Seventh Circuit takes that approach, allowing district courts to dismiss a case brought by a prisoner with three "strikes" without the opportunity to pay the filing fee up front where the prisoner attempts to "bamboozle the court" by knowingly hiding information. *See Sloan v. Lesza*, 181 F.3d 857, 859 (7th Cir. 1999). There has been no finding in this case that Mr. Wells tried to commit fraud; he disclosed the one case that was clearly a "strike" and argued that his two other cases were not "strikes." *Supra*, 6-8. Even the Seventh Circuit, then—the only other circuit where district courts dismiss a case without allowing a three-strikes prisoner to pay the filing fee—would allow him the opportunity to pay his full filing fee before dismissing the case. *See Greyer v. Ill. Dep't of Corr.*, 933 F.3d 871, 875 (7th Cir. 2019) ("Even prisoners with no incentive to lie often do not have ready access to their litigation documents…."); *Isby v. Brown*, 856 F.3d 508, 519-21 (7th Cir. 2017) (exercising discretion to reach merits of case rather than dismissing case).

Of course, many—perhaps most—prisoners will not be able to pay their filing fee up front even if given the opportunity. But this Court's rule doesn't even give prisoners that chance. Instead, a prisoner denied *in forma pauperis* status whose case is dismissed and who then begs or

borrows sufficient funds to refile her case may well be stuck paying *two* filing fees—one for the suit that was dismissed under this Circuit's rule because she had attempted to proceed *in forma pauperis*, and a second for the refiled suit—when she could have paid just one.[10] The text of the PLRA does not require such a sanction.

* * *

The Prison Litigation Reform Act lists three—and only three—kinds of dismissals that amount to a "strike." A dismissal for failure to exhaust is not among them. Because the dismissing courts in *Wells v. Sterling* and *Wells v. Avery County* didn't list a qualifying ground among their reasons for dismissing Mr. Wells's case, Mr. Wells has, at most, one "strike." And at the very least, even if Mr. Wells had three "strikes," he should have been given the opportunity to pay the filing fee before his case was dismissed.

The district court's decision should be reversed and this Circuit's outlier precedents overruled.

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[10] *See Alea*, 286 F.3d at 381-82; *Williams v. Roberts*, 116 F.3d 1126, 1127-28 (5th Cir.1997); *Muhammad v. Storr*, No. 4:97-cv-00383, 2014 WL 1613937, *1 (N.D. Fla. Apr. 22, 2014).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision dismissing Mr. Wells's case.

Dated: June 14, 2022

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Fed. R. App. P. 32(g)(1) and 11th Cir. R. 28-1(m), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and because this brief contains 7,614 words, excluding the parts of the brief exempted by 11th Cir. R. 35-1.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(7) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolhouse typeface.

Dated: June 14, 2022

s/ Easha Anand
Easha Anand

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2022, I electronically filed the foregoing *En Banc Brief* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 14, 2022

s/ Easha Anand
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