

21-10550

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IN THE  
**United States Court of Appeals**  
FOR THE ELEVENTH CIRCUIT

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JEREMY JOHN WELLS,

*Plaintiff-Appellant,*

—v.—

WARDEN PHILBIN, CLIFFORD BROWN, and FNU FLUKER,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA

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**BRIEF FOR *AMICI CURIAE* FLORIDA JUSTICE INSTITUTE,  
SOUTHERN CENTER FOR HUMAN RIGHTS, AND  
SOUTHERN POVERTY LAW CENTER IN SUPPORT OF  
APPELLANT ON REHEARING *EN BANC***

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**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, counsel for *Amici Curiae* certifies that a list of interested persons, trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal (none of whom are publicly listed), including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party, known to *Amici Curiae*, are as follows:

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No publicly traded company or corporation known to *Amici Curiae* has an interest in the outcome of this appeal.

Dated: New York, New York  
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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici Curiae* are organizations with extensive experience litigating and advocating for people or groups who face constitutional deprivations while incarcerated. *Amici* represent and work on behalf of incarcerated people who lack the funds necessary to pay courts' full filing fees and would be barred from litigating under the reasoning of the panel's decision. In light of their experience, *Amici* have a unique perspective on the practical consequences of the issues presented by this case, including the myriad costs associated with daily life in jails and prisons, the financial realities for people in prison, and the substantial constitutional deprivations that may go unheard as a result of incarcerated people's inability to pay court fees. For these reasons, *Amici* have a substantial interest in the issue presented by this appeal.

**The Florida Justice Institute** ("FJI") is a nonprofit, public interest law firm based in Miami, Florida that conducts civil rights litigation and advocacy in a variety of areas, including the advancement and protection of the rights of incarcerated people. FJI represents incarcerated people and their families in cases seeking to ensure adequate medical and mental healthcare, eliminate abuse and

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<sup>1</sup> No party's counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has contributed money to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4). *Amici* file this brief with the consent of all parties, and a motion for leave to file accompanies this brief.

violence, ensure robust communication, and obtain redress for other unjust practices. FJI supports the robust access to courts for incarcerated people and opposes financial impediments to that access.

**The Southern Center for Human Rights** (“SCHR”) is a nonprofit law firm dedicated to protecting and advancing the civil and human rights of people impacted by the criminal legal system. Through litigation and advocacy, SCHR has worked for over 45 years to defend people accused of crimes, ensure humane conditions of confinement in jails and prisons, and end practices that criminalize people simply for experiencing poverty. In pursuit of those aims, SCHR has brought class action lawsuits, issued investigative reports, and pressed for legislative reforms on behalf of indigent persons across the Deep South.

**The Southern Poverty Law Center** (the “SPLC”) is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. The SPLC has filed litigation to end municipalities’ overreliance on fines, fees, and money bail to generate revenue, which has led to the unconstitutional treatment of indigent defendants. Additionally, the SPLC has worked with cities across the States of Alabama, Mississippi, and Louisiana to reform policies related to fine and fee collection, conflicts of interest, the use of for-profit probation, and money bail.

**STATEMENT OF ISSUES AND SUMMARY OF ARGUMENT**

As Justice Powell once stated, “it is fundamental that justice should be the same, in substance and availability, without regard to economic status.” Justice Lewis F. Powell Jr., *Address to the American Bar Association*, 3 (Aug. 10, 1976).<sup>2</sup> Yet many people in America’s jails and prisons are routinely denied access to the courts—solely because they are poor. Subject to exceptions not relevant here, the three-strikes rule of the Prison Litigation Reform Act (“PLRA”) forecloses *in forma pauperis* status for prisoners who have had three or more prior suits dismissed as being “frivolous, malicious, or [as] fail[ing] to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(g). If a prisoner with three strikes wishes to bring suit or pursue an appeal, he must pay the filing fee, in full, at the outset of the matter. But the vast majority of incarcerated people are indigent and cannot afford this expense. As a result, the three-strikes rule operates as a *de facto* ban on even meritorious litigation by impoverished prisoners.

The panel in this case viewed itself as bound by Circuit precedent holding that dismissal of a prior action for failing to exhaust administrative remedies (rather than on the merits) counts as a strike for purposes of the PLRA’s three-strikes rule. *Wells v. Warden*, No. 21-10550, 2021 WL 5706990, at \*2 (11th

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<sup>2</sup> [https://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech\\_LegalServicesCorporationAug10,1976.pdf](https://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_LegalServicesCorporationAug10,1976.pdf); <https://lawlib.academic.wlu.edu/2016/08/04/forty-years-ago-recalling-justice-powells-speech-on-legal-aid/>.

Cir. Dec. 2, 2021). The panel's decision gives the three-strikes rule a broader scope than permitted under *Jones v. Bock*, 549 U.S. 199 (2007) and therefore conflicts with *Jones* and the PLRA's text. Br. of Appellant 11-12. And as the panel observed, its decision conflicts with those of "all other circuits to have addressed the issue." *Wells*, 2021 WL 5706990, at \*2. On rehearing *en banc*, this Court should bring the law in this Circuit into alignment with *Jones* and thereby avoid imposing undue burdens on the right of indigent people to access the courts.

Economic realities underscore the harsh effect of the panel's decision. The criminal justice system begins assessing fees immediately upon arrest. Booking fees and other miscellaneous costs are often imposed without regard to whether the arrestee is ultimately found guilty. And throughout incarceration, expenses continue to mount, as institutions charge for basic living expenses and require incarcerated people to cover the costs of their own confinement. People in jail and prison are often impoverished prior to arrest, and prison wages are, if provided at all, extraordinarily low. Thus, the vast majority have no hope of saving hundreds of dollars to pay courts' initial filing fees. The three-strikes rule fully prevents these incarcerated individuals from bringing suit.

This denial of access to the courts has far-reaching consequences. Systemic abuses and disastrous conditions can proceed unchecked in the absence

of corrective litigation. And the public, too, loses an opportunity to learn what goes on behind prison walls.

Congress's claimed intent in enacting the PLRA was to curb excessive and frivolous litigation. However laudable that goal may be, in practice the three-strikes rule presents an impassable bar for many incarcerated people, leaving them wholly without recourse for serious deprivations of important constitutional rights. By giving the three-strikes rule a broader construction than is warranted by the statutory text and by Supreme Court precedent, the panel decision would unduly prevent many prisoners from being able to vindicate their constitutional rights.

This case sharply highlights these concerns. As set out in his brief, Appellant Jeremy Wells was severely beaten by other prisoners, suffering “a ruptured ear drum; burns on both eyes; a right-eye contusion; an inner-throat abrasion” and other injuries. Br. of Appellant 7. Before the beating, guards ignored Mr. Wells's repeated warnings that his safety was in jeopardy; afterwards, they mocked his injuries. *Id.* Yet when Mr. Wells brought suit, the district court summarily dismissed his claims, concluding that his prior cases had been dismissed for failure to exhaust and must be counted as “strikes.” This determination was in no way related to the merits of his claims—indeed, even the merits of Mr. Wells's *prior* suits had no bearing, since those earlier suits were barred for failure to exhaust, not for failure to state a claim. Mr. Wells cannot

afford to pay the court fees, especially in a lump sum. As a result, the district court's decision on the three-strikes issue effectively foreclosed Mr. Wells from litigating his claims.<sup>3</sup>

As set out in Appellant's brief, the panel's holding—that a dismissal for failure to exhaust counts as a “strike”—is contrary to Supreme Court precedent and at odds with decisions from every Circuit that has addressed the issue. That holding would also have dire consequences for other prisoners. Like Mr. Wells, many incarcerated people cannot afford to pay court filing fees in a lump sum; their ability to litigate meritorious constitutional claims depends on their ability to proceed *in forma pauperis*.

In this brief, we address the economic circumstances in which most prisoners find themselves, shedding light on the need for the Court to reject an unduly broad interpretation of the three-strikes provision.

## ARGUMENT

### I. The Costs of Incarceration Are High

It is expensive to be a criminal defendant. Over the past several decades, “[e]very aspect of the criminal justice process has become ripe for charging a fee.” Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan

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<sup>3</sup> Mr. Wells subsequently obtained *pro bono* counsel, which paid the filing fee on his behalf.

Ctr. for Justice, 1 (2015).<sup>4</sup>

A variety of costs are assessed before a person even passes through the prison gates. Booking fees—flat fees imposed upon arrest, often without regard to ultimate conviction—have become commonplace. *Id.* at 3. Despite the right to counsel guaranteed by *Gideon v. Wainwright*, 372 U.S. 335 (1963), it is also routine for states to charge indigent defendants fees for legal representation. Forty-three states—including every state in this Circuit—use some form of cost recovery for work performed by public defenders. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying The Price*, NPR (May 19, 2014).<sup>5</sup>

Moreover, many states impose miscellaneous “court fees” and use them to subsidize various expenses—ranging from general support for the state’s budget, to maintenance for courthouse buildings, to other ends far afield from criminal prosecution. Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines*, Brennan Ctr. for Justice, 6 (Nov. 21, 2019).<sup>6</sup> For example, in Florida, fees are allocated “to the

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<sup>4</sup> <https://www.brennancenter.org/sites/default/files/publications/Charging%20Inmates%20Perpetuates%20Mass%20Incarceration.pdf>.

<sup>5</sup> <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

<sup>6</sup> [https://www.brennancenter.org/sites/default/files/2020-07/2019\\_10\\_Fees%26Fines\\_Final.pdf](https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf).

state’s general coffers.” *Id.* Some Alabama criminal defendants pay fees that are earmarked to support the American Village museum. *Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama’s Racial Wealth Divide* (“*Under Pressure*”), Alabama Appleseed, 16 (2018).<sup>7</sup>

Incarcerated people face additional costs. Under so-called “pay-to-stay” policies, many institutions charge prisoners for room-and-board. These fees may take the form of per diem charges, which can exceed \$140 per day, or charges for necessities like meals and medical care. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 Loy. J. Pub. Int. L. 319, 325 (Spring 2014). And even in the absence of pay-to-stay fees, incarcerated people are routinely required to cover the cost of essential items. Clothing, hygiene products, food items, and healthcare materials often must be purchased from a private vendor, through the prison commissary. Stephen Raheer, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 Hastings Race & Poverty L. J. 3, 17 (Winter 2020). Prison commissaries often charge sharply inflated prices for these essentials: for instance, in 2018, Florida women’s prisons charged \$4.02 for a package of four

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<sup>7</sup> <https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf>.

tampons. Ben Conarck, *Prisons roll out more for-profit services while weighing visitation cuts*, Florida Times-Union (June 1, 2018).<sup>8</sup>

Phone calls to loved ones are another significant expense. Taking note of the “excessive rates and egregious fees on phone calls” within prison facilities, the Federal Communications Commission (“FCC”) capped interstate phone call rates at 21 cents per minute, and recently voted to lower that rate to 12 cents per minute for prisons, and 14 cents for jails with populations of 1,000 or more. 47 C.F.R. § 64.6030 (setting interim rate of 21 cents per minute); FCC, *Telephone Services for Incarcerated Individuals* (Oct. 27, 2020)<sup>9</sup>; FCC, *FCC Lowers Interstate and International Prison Phone Rates to Help Families Stay Connected* (May 20, 2021).<sup>10</sup> But, for incarcerated people whose work is compensated at rates of pennies per hour—if it is compensated at all—even 12 cents per minute is a substantial cost. Wendy Sawyer, *How much do incarcerated people earn in each state?*, Prison Policy Initiative (Apr. 10, 2017).<sup>11</sup>

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<sup>8</sup> <https://www.jacksonville.com/story/news/crime/2018/06/01/florida-prisons-roll-out-more-for-profit-services-while-weighing-visitation-cuts/12014791007/>.

<sup>9</sup> <https://www.fcc.gov/consumers/guides/telephone-service-incarcerated-individuals>.

<sup>10</sup> <https://docs.fcc.gov/public/attachments/DOC-372625A1.pdf>.

<sup>11</sup> <https://static.prisonpolicy.org/blog/2017/04/10/wages/>.

Moreover, “80 percent of jail and prison calls are intrastate,” and thus do not benefit from FCC regulation. Marie Feyche, *FCC Approves Plan to Lower Interstate and International Jail and Prison Phone Call Rates*, Jurist (May 23, 2021).<sup>12</sup> As a result, the cost of local calls is far greater: “Nationally, the average cost of a 15-minute [local] call from jail is \$5.74.” Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, Prison Policy Initiative (Feb. 2019).<sup>13</sup> And certain facilities may charge even higher rates: at some county jails in Florida, for example, the same 15-minute call may cost as much as \$8.45. *Id.*

All told, the path from arrest through release is littered with fees, which begin accumulating immediately and continue to crop up daily throughout incarceration.

## **II. Incarcerated People Have Scant Access to Resources While Imprisoned**

Incarcerated people are largely unable to meet these swelling costs. An estimated 80% of America’s incarcerated people are indigent. *See Eisen, Charging Inmates Perpetuates Mass Incarceration*, at 1, 4; Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance*,

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<sup>12</sup> <https://www.jurist.org/news/2021/05/fcc-approves-plan-to-lower-interstate-and-international-jail-and-prison-phone-call-rates/>.

<sup>13</sup> [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice.html](https://www.prisonpolicy.org/phones/state_of_phone_justice.html).

*and Social Welfare Policy in an Age of Carceral Expansion*, 21 Mich. J. Race & L. 291, 298 (2016). On average, people in prison have little to no income in the years prior to incarceration. Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, Brookings Institution, 8 (Mar. 14, 2018).<sup>14</sup> “Two years prior to the year they entered prison, 56 percent of individuals have essentially no annual earnings (less than \$500), the share earning between \$500 and \$15,000 is 30 percent, and average earnings (among those who worked) was \$12,780.” *Id.* This means that the typical person enters the system without a financial safety net to cover prison costs.

Further, many prisoners in the states of this Circuit have no opportunity to earn money while incarcerated. In Georgia, prisoners are not compensated for their work at all, and in Alabama and Florida, most prisoners who perform work related to essential institutional services such as food service and laundry are not paid. Wendy Sawyer, *How Much Do Incarcerated People Earn In Each State?*, Prison Policy Initiative (Apr. 10, 2017).<sup>15</sup> For the few Alabama and Florida prisoners who work in state-owned prison industries and are compensated for their

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<sup>14</sup> [https://www.brookings.edu/wp-content/uploads/2018/03/es\\_20180314\\_looneyincarceration\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf).

<sup>15</sup> <https://static.prisonpolicy.org/blog/2017/04/10/wages/>.

labor, wages are a pittance: Alabama prisoners are paid between 25 and 75 cents per hour, and Florida prisoners are paid between 20 and 55 cents per hour. *Id.*

For people with negligible assets before incarceration, who earn pennies while incarcerated, the costs of incarceration discussed above are astronomical. As discussed, the FCC has capped the cost of interstate phone calls at 12 to 14 cents a minute—meaning that, under prevailing prison wages, many people in prison must work *one hour* to pay for a single *one-minute phone call*. And for intrastate calls, which are not regulated by the FCC and are often subject to much higher rates, prisoners often must work far longer to afford the same one-minute call. Further, a \$5 per diem fee—well within the typical range—exceeds the daily earnings of many prisoners, who are generally paid only a fraction of a dollar an hour. Other essential in-prison expenses are equally burdensome. For instance, an incarcerated woman in Florida earning 32 cents per hour—at the high end of wages for Florida prisoners, since many are not compensated for their labor at all—who wished to purchase four tampons from the prison commissary would have to work over twelve hours to make that purchase. Sawyer, *How much do incarcerated people earn in each state?*

As a result, incarcerated people often must turn to their families for support—but their families are ill-positioned to provide relief. “[T]he incarcerated population is concentrated among individuals—mostly boys—from low-income,

single parent families.” Looney & Turner, *Work and Opportunity Before and After Incarceration*, at 13 (“[O]f the individuals incarcerated at around age 30 . . . 82 percent are from the bottom half of families [as ranked by income].”). In addition, many families face further financial distress as a result of their loved one’s incarceration. “The probability that a family is in poverty increases by nearly 40 percent while a father is incarcerated.” Executive Office of the President of the United States, *Economic Perspectives on Incarceration and the Criminal Justice System*, 5 (Apr. 23, 2016).<sup>16</sup>

Thus, most incarcerated people cannot meet the daily costs of prison life. “80 to 85 percent of inmates now leave prison” in debt. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, Nat. Public Radio (May 19, 2014)<sup>17</sup>; see also Terry-Ann Craigie, Ames Grawert & Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings*, Brennan Ctr. for Justice, 6 (Sept. 15, 2020) (detailing severe detrimental impact of incarceration on lifetime earnings).<sup>18</sup>

After release from prison, the debt accumulated from interaction with the criminal justice system can “trigger a cascade of debilitating consequences,”

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<sup>16</sup> <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf>.

<sup>17</sup> <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

<sup>18</sup> [https://www.brennancenter.org/sites/default/files/202009/EconomicImpactReport\\_pdf.pdf](https://www.brennancenter.org/sites/default/files/202009/EconomicImpactReport_pdf.pdf).

becoming “a hindrance to obtaining a driver’s license, [restricting] voting rights, and [interfering] with obtaining credit and making child support payments.” Karin D. Martin, Sandra Susan Smith & Wendy Still, *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create* (“*Shackled to Debt*”), Nat. Inst. of Justice & Harvard Kennedy School, Executive Session on Community Corrections, 9 (Jan. 2017).<sup>19</sup> In Alabama, nearly 83 percent of criminal defendants reported giving up essentials such as rent, food, and medical bills in order to satisfy court debt stemming from fines and fees. *Under Pressure* at 4. Debt is a significant contributor to re-incarceration, as failure to pay fines and fees can lead to the revocation of probation or re-arrest. *Shackled to Debt* at 9-10; *see also* Menendez, Crowley, Eisen & Atchison, *The Steep Costs of Criminal Justice Fees and Fines*, at 10 (“Often when someone is unable or unwilling to pay a fee or fine, the court issues a warrant.”). Perhaps most troubling, criminal justice debt can induce a vicious cycle of re-offending, as many criminal defendants—including those whose only prior offenses were traffic violations—report committing additional crimes, such as selling drugs or passing bad checks, in a desperate effort to earn the money needed to satisfy prior fines and fees. *Under Pressure* at 4.

For most prisoners, the costs of incarceration present an ongoing,

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<sup>19</sup> <https://www.ojp.gov/pdffiles1/nij/249976.pdf>.

Sisyphian challenge, where charges for their basic needs far exceed their ability to pay. The punishment continues after the defendant has paid his debt to society; arrears accrued in prison constrain the ability to successfully reenter society.

### **III. Filing Fees Are Insurmountable for Most Incarcerated People**

Perhaps unsurprisingly then, most incarcerated people find it impossible to pay court filing fees all at once, in a lump sum. To be clear, the PLRA mandates that all prisoners must pay the full amount of courts' filing fees, despite the overwhelming burden of this requirement under the economic realities of prison life. Even prisoners granted *in forma pauperis* status must pay filing fees, albeit in installments over time. 28 U.S.C. § 1915(b). But the three-strikes rule is impossibly burdensome because it denies *in forma pauperis* status and requires prisoners to pay the full filing fee up front. 28 U.S.C. § 1915(g). Paying this lump sum cost is simply unachievable for most incarcerated people and bars meritorious suits at the courthouse door.

In federal district courts, the initial filing fee is \$402: a base fee of \$350 set by statute, with another \$52 assessed as a miscellaneous fee. 28 U.S.C. § 1914(a); U.S. Courts, *District Court Miscellaneous Fee Schedule*, ¶14 (Dec. 1, 2020).<sup>20</sup> To pay these fees, a prisoner earning 20 cents an hour would have to

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<sup>20</sup> <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.

work more than 2,000 hours, or *several months* of daily 8-hour shifts, without weekends or other interruptions. And a prisoner who works without pay—as is the case for many prisoners in this Circuit—has no income to pay a filing fee.

The filing fee for a federal appeal is even higher, at \$500. U.S. Courts, *Court of Appeals Miscellaneous Fee Schedule*, ¶2 (Dec. 1, 2020).<sup>21</sup> Other fees incident to litigation, such as transcripts and copies of the record on appeal, may cost “thousands of dollars.” *Maus v. Baker*, 729 F.3d 708, 709-10 (7th Cir. 2013) (Posner, J., sitting as motions judge); 28 U.S.C. § 1915(c). If a particular case were appealed, and necessitated \$1,000 in transcripts and other record costs, the total amount of litigation would rise to \$1,902. For a prisoner earning 40 cents an hour, paying those costs would require 4,755 hours of labor; at 20 cents an hour, it would rise further still, to 9,510 hours. This is simply unattainable: Even assuming that an incarcerated person worked 8-hour shifts, every day of the year, under either wage rate, the cost would take years to pay—during which time, the person would still have to bear the costs flowing from initial court fees and daily prison living.

To put it mildly, paying filing fees—even in installments—is extremely onerous for most incarcerated people. And for incarcerated persons who are

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<sup>21</sup> <https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule>.

deemed to have three strikes, the PLRA's requirement that they pay filing fees in full, up front, makes it completely impossible for them to pursue litigation for violations of constitutional rights—solely because of poverty.

#### **IV. The Three-Strikes Rule Bars Meritorious Claims**

As a result of this regime, grave constitutional deprivations will go unheard when incarcerated litigants are too poor to sue.

One dire consequence of the three-strikes rule is that beatings, sexual misconduct, and other dangerous living conditions may go unchecked. *See, e.g., Wright v. Gunter*, No. 3:22-cv-2888, 2022 WL 1271732, at \*1 (N.D. Fla. Mar. 7, 2022), *report and recommendation adopted*, 2022 WL 1262551 (N.D. Fla. Apr. 28, 2022) (dismissing claims alleging excessive force by guards and improper medical care for resulting injuries); *Chestnut v. Leavins*, No. 3:21-cv-827, 2021 WL 3134392, at \*1-2 (N.D. Fla. July 2, 2021), *report and recommendation adopted*, 2021 WL 3132724 (N.D. Fla. July 24, 2021) (dismissing suit alleging that guards severely beat plaintiff, breaking multiple bones, and threatened him with sexual assault); *Johnson v. Pace*, No. 17-0504, 2018 WL 719048, at \*1 (S.D. Ala. Jan. 11, 2018), *report and recommendation adopted*, 2018 WL 716609 (S.D. Ala. Feb. 5, 2018) (dismissing suit where guards denied cleaning supplies when faulty sewage system resulted in feces and urine dripping into cell; delivered food in such a manner that waste water dripped into the food; and twice beat plaintiff after

complaints); *Pickett v. Bentley*, No. 2:15-cv-693, 2015 WL 13824743, at \*1 (M.D. Ala. Sept. 24, 2015), *report and recommendation adopted*, 2015 WL 13824748 (M.D. Ala. Oct. 9, 2015) (dismissing suit in which the plaintiff alleged that he contracted tuberculosis as a result of placement in an overcrowded and unsanitary housing unit). Similarly, when prisoners brought suit to challenge unhealthy living conditions during the COVID-19 pandemic, the three-strikes rule meant that their claims went unheard. *See, e.g., Johnson v. Wilcher*, No. CV 420-089, 2020 WL 2064935, at \*2 (S.D. Ga. Apr. 28, 2020), *report and recommendation adopted*, 2020 WL 5807970 (S.D. Ga. Sept. 29, 2020) (dismissing suit alleging “[heightened] risk of contracting the virus [due to] proximity to other inmates that have tested positive for the disease and the failure of the Sheriff to provide masks, gloves, disinfecting products”).

The three-strikes rule not only impacts the plaintiff seeking redress or the other prisoners who stand to benefit from that plaintiff’s lawsuit. Litigation also creates a public record. By denying incarcerated people the opportunity to present their claims, the three-strikes rule also denies the public the opportunity to learn about conditions in America’s jails and prisons, and thus impedes efforts at reform.

## CONCLUSION

Because of prisoners’ dire economic circumstances, the three-strikes rule often operates to foreclose even meritorious claims. Here, the panel erred by

concluding that Mr. Wells’s prior dismissals for failure to exhaust should be counted as “strikes,” effectively barring him from suit since he could not afford to pay the filing fee. As discussed in Appellant’s brief, the panel decision is at odds with the statutory text, the U.S. Supreme Court’s decision in *Jones v. Bock*, 549 U.S. 199 (2007), and the decisions of every other Circuit that has confronted the issue. By unduly broadening the scope of the three-strikes rule, the panel decision sweeps far too many claims into the three-strikes rule’s exclusionary regime and operates as an effective denial of access to the courts. The judgment of the district court should be reversed.

Dated: New York, New York  
June 14, 2022

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation, as provided in Federal Rule of Appellate Procedure 29 because, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 4025 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14th day of June, 2022, I electronically filed the foregoing with the Clerk of the Court through the Court's CM/ECF system. Notice of this filing will be sent by mail to all parties by operation of the Court's electronic filings system.

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