No. 21-10550

In the

United States Court of Appeals

for the Eleventh Circuit

Jeremy Wells,

Plaintiff-Appellant,

v.

Warden Philbin, Clifford Brown, and Lanadra Fluker,

Defendant-Appellees.

On Appeal from the United States District Court for the Southern District of Georgia, Augusta Division.
No. 1:20-cv-00097 — Hall, *Chief Judge*

EN BANC BRIEF OF APPELLEES

Kathleen Pacious
Deputy Attorney General
Roger Chalmers
Sr. Asst. Attorney General
Susan Teaster
Sr. Asst. Attorney General

Christopher M. Carr
Attorney General of Georgia
Stephen J. Petrany
Solicitor General
Drew F. Waldbeser
Deputy Solicitor General
Slade Mendenhall
Assistant Attorney General

Office of the Georgia
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov

Counsel for Appellees

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case, in addition to those listed in Plaintiff-Appellant's certificate of interested persons:

Carr, Christopher M., Attorney General, Counsel for Defendant-Appellees

Chalmers, Roger, Senior Assistant Attorney General, Counsel for Defendant-Appellees

Lopez-Delgado, Andres M., Counsel for Amici Curiae

Mendenhall, Slade, Assistant Attorney General, Counsel for Defendant-Appellees

Pacious, Kathleen, Deputy Attorney General, Counsel for Defendant-Appellees

Petrany, Stephen J., Solicitor General, Counsel for Defendant-Appellees

Philbin, Ted, Warden, Augusta State Medical Prison

Teaster, Susan, Senior Assistant Attorney General, Counsel for Defendant-Appellees

Waldbeser, Drew F., Deputy Solicitor General, Counsel for Defendant-Appellees

Wedekind, Jennifer, Counsel for Amici Curiae

/s/ *Stephen J. Petrany*
Stephen J. Petrany

STATEMENT REGARDING ORAL ARGUMENT

The Court has already set this case for oral argument.

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2. If a dismissal for failure to exhaust administrative remedies can be a "strike" for purpose of the Prison Litigation Reform Act's "three strikes" provision, does Mr. Wells have three strikes?

INTRODUCTION

Congress passed the Prison Litigation Reform Act to "reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Congress determined "that a 'flood of nonmeritorious claims,' even if not in any way abusive, was 'effectively preclud[ing] consideration of' suits more likely to succeed." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1726 (2020) (citation omitted). Congress thus chose "to cabin not only abusive but also simply meritless prisoner suits." *Id.* Congress did so in two primary ways: it made exhaustion of administrative remedies "mandatory," *Woodford v. Ngo*, 548 U.S. 81, 84 (2006), and it directed that "[i]n no event shall a prisoner bring a civil action" *in forma pauperis* if the inmate has had three prior actions "dismissed on the grounds that [they are] frivolous, malicious, or fail[] to state a claim." 28 U.S.C. § 1915(g).

The question here is whether dismissal for "failure to state a claim" includes dismissals on the ground that a prisoner failed to exhaust his remedies, and the answer is *yes*, in Wells' case. In *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998), the Court held that *all* dismissals for exhaustion are PLRA "strikes," but the Court need not reconsider whether that categorical rule is correct and Defendant-Appellees take no position on that here. Even on a

narrower understanding of the phrase "failure to state a claim," Wells has struck out.

In the ordinary course of litigation, a court may dismiss for failure to state a claim where it is apparent from the plaintiff's complaint and admissions, anything incorporated or central to the complaint, and any judicially noticeable material, that the claim fails. And although a plaintiff need not affirmatively *plead* PLRA exhaustion, a plaintiff's failure to exhaust will often be apparent from these materials anyway. When it is, the dismissal counts as a strike. 28 U.S.C. § 1915(g).

Appellant Jeremy Wells—a serial prison litigator who has repeatedly had his complaints dismissed—has three previous cases that fall into that category. Everyone agrees that, in one of Wells' prior suits, the court dismissed for failure to state a claim. *See Wells v. Cook*, No. 1:11-cv-00324, 2012 WL 1032689, at *1–2 (W.D.N.C. Mar. 27, 2012). In another, Wells *affirmatively admitted* in his complaint that he had not exhausted, and the district court dismissed on that basis. *See Wells v. Avery County*, No. 1:13-cv-00055-RJC, Doc. 7 at 2–4 (W.D.N.C. Apr. 30, 2013). Finally, the court in *Wells v. Sterling*, No. 6:15-cv-01344, 2016 WL 1274036, at *1 n.1 (D.S.C. Mar. 31, 2016), undisputedly dismissed *part* of Wells' complaint for failure to state a claim, and in this

context a "mixed dismissal" counts as a PLRA strike. *Pointer v. Wilkinson*, 502 F.3d 369, 374 (6th Cir. 2007). And even if mixed dismissal do not count as strikes, the South Carolina court dismissed Wells' remaining claim because undisputed, judicially noticeable facts made clear that he did not exhaust. *Id.* at *2–3. Each case thus flunked the failure-to-state-a-claim standard, and they are strikes.

Wells raises several counter-arguments, but none are persuasive. While acknowledging that a plaintiff could affirmatively allege in his own complaint that he failed to exhaust, Wells forgets that courts may examine anything incorporated in the complaint, central to the complaint, or subject to judicial notice. Wells also tries to narrow the category of dismissals that count as "failure to state a claim," but these artificial, atextual limits hold no water. For instance, Wells asserts that a PLRA strike requires a Rule 12(b)(6) motion, but the PLRA does not mention 12(b)(6); instead, it expressly states that courts can dismiss for failure to state a claim "at any time," not just at a particular stage of the proceeding. 28 U.S.C. § 1915(e)(2). Likewise, Wells argues that, to count as a strike, a court's order must use the specific words "failure to state a claim." App.Br.22. Again, not quite right: as this Court has explained (and is

apparent from the text of the PLRA), the question is what previous courts *did*, not whether they incanted particular "magic words." *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016).

Given his litigious track record and repeated failures to state a claim, Wells (and his *amici*) rely heavily on policy arguments, asserting that Congress did not want to bar "legitimate" suits via the PLRA. App.Br.20. But that plea conflicts with the PLRA's text, which is the statutory embodiment of the "boy who cried wolf." When prisoners repeatedly fail to state claims, they incur strikes, and they must pay the full filing fee for their future suits up front. *Of course* Congress knew that, sometimes, prisoners would have to pay full freight for a meritorious suit. The point of the three-strikes provision is to deter unmeritorious suits *ahead of time*. Regardless, prisoners can always file suits *in forma pauperis* where they are in physical danger, and they can always file suits by paying the filing fee up front. The only party trying to undercut the PLRA's basic function is Wells, who would undermine the "centerpiece" of the PLRA by unnecessarily cabining its reach. *Lomax*, 140 S. Ct. at 1723.

This Court should affirm.

STATEMENT OF THE CASE

Wells sued several prison officials at Augusta State Medical Prison for allegedly failing to prevent an assault. The district court dismissed his suit *sua sponte*, before Defendants were served, because Wells had three strikes under the PLRA.

A. Statutory Background

Since 1892, the federal *in forma pauperis* statute has "ensure[d] that indigent litigants have meaningful access to the federal courts." *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). If a litigant is "unable to pay the costs of the lawsuit," federal courts may waive the up-front filing fee and court costs and allow the payment of those fees over time. *Id.* (citing 28 U.S.C. § 1915(a)).

But the *in forma pauperis* statute incentivizes indigent plaintiffs to file "frivolous, malicious, or repetitive lawsuits." *Id.* Inmates, in particular, "account for an outsized share of [*in forma pauperis*] filings" in federal courts. *Woodford*, 548 U.S. at 94 n.4. "Most of these cases have no merit," and "many are frivolous." *Jones v. Bock*, 549 U.S. 199, 203 (2007). Without an "economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits," some inmates will keep doing so, over and over. *Neitzke*, 490 U.S. at 324.

Eventually, the "sharp rise in prisoner litigation in the federal courts" prompted Congress to create that incentive. *Woodford*, 548 U.S. at 84. In 1996, Congress passed the PLRA, which imposed new requirements designed to "reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524.

The PLRA first makes administrative exhaustion a prerequisite to suit—"*[n]o action* shall be brought … until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). Simply put, "unexhausted claims cannot be brought in court," full stop. *Jones*, 549 U.S. at 211. This was a sea change for prison litigation. Prior to 1980, inmates did not need to exhaust administrative remedies before bringing constitutional claims. *Woodford*, 548 U.S. at 84. Then, "Congress enacted a weak exhaustion provision," which gave district courts discretion to require exhaustion, but "only if the State's prison grievance system met specified federal standards, and even then, only if, in the particular case, the court believed the requirement 'appropriate and in the interests of justice.'" *Id.* (quoting *Porter*, 534 U.S. at 523).

The PLRA "eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be 'plain, speedy, and effective' before exhaustion could be required."

Booth v. Churner, 532 U.S. 731, 739 (2001). The PLRA's "invigorated" exhaustion requirement was thus the "centerpiece" of Congress's "effort 'to reduce the quantity ... of prisoner suits.'" *Woodford*, 548 U.S. at 84 (quoting *Porter*, 534 U.S. at 524).

Congress then established the "three-strikes rule" to "help staunch [the] 'flood of nonmeritorious' prisoner litigation." *Lomax*, 140 S. Ct. at 1723. Under that rule, "in no event shall a prisoner bring a civil action or appeal a judgment … 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." 28 U.S.C. § 1915(g). If a prisoner has three strikes but files an action without paying the filing fee anyway, the court must generally deny *in forma pauperis* status and dismiss the case. *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002).

B. Procedural Background

Appellant Jeremy Wells is currently incarcerated. He alleges that, while imprisoned at Augusta State Medical Prison, he was beaten by two gang members. Doc. 1 at 6. On July 9, 2020, Wells sued Ted Philbin, the warden for Augusta State Medical Prison, and two correctional officers, for allegedly failing to prevent this assault. *Id.* at 6–7. He moved for leave to proceed *in forma*

pauperis. Doc. 2. The magistrate judge recommended that the motion be denied and the complaint dismissed because Wells had three strikes under the PLRA. Doc. 18 at 1, 4. The district court agreed that the prior dismissals all qualified as strikes under this Court's precedent and dismissed the action (all without Defendant-Appellees ever being served). Doc. 21 at 1–2.

1. The Three Strikes

Wells v. Cook. First, in 2012, Wells had a suit dismissed *sua sponte* because he "failed to state a cognizable legal claim" in his complaint. *Wells v. Cook*, No. 1:11-cv-00324-RJC, 2012 WL 1032689, at *1–2 (W.D.N.C. Mar. 27, 2012).

Wells v. Avery County Sheriff's Office. The second strike came in 2013. *See Wells v. Avery County*, No. 1:13-cv-00055-RJC, (W.D.N.C. Apr. 30, 2013). In that case, Wells used the Western District of North Carolina's form complaint for prisoner civil rights suits. *Id.*, Doc. 1. On the second page, the form complaint asks whether the inmate has exhausted administrative remedies. *Id.* at 2. Wells stated that he had not—he alleged that he had not even learned about the basis for his claim until after he had been transferred to a different prison. *Id.* at 2–3. The district court relied on Wells' admission in his complaint and *sua sponte* dismissed the case for failure to exhaust administrative remedies.

Id., Doc. 7 at 2 ("Plaintiff admits that he did not participate in any internal grievance procedures while housed at the Avery County Jail or following his transfer to a new custodian. (Doc. No. 1 at 2).").

Wells v. Sterling. The final strike came in *Wells v. Sterling*, No. 6:15-cv-01344-MBS, 2016 WL 1274036 (D.S.C. Mar. 31, 2016). In that case, Wells included two claims in his complaint.

In the first claim, he alleged that a nurse failed to change her gloves before taking blood from Wells. *Id.*, Doc. 1 at 3. Wells specifically alleged that he exhausted his administrative remedies for that claim and explained how he had done so. *Id.* at 3–4. The district court dismissed the medical gloves claim because "the alleged failure of the nurse to change her medical gloves cannot constitute a concrete injury to Plaintiff," and so "Plaintiff simply has not been subjected to cruel and unusual punishment which could form the basis of a cognizable § 1983 claim." *Id.*, Doc. 15 at 4 (internal quotation marks omitted).

In his second claim, Wells alleged that the warden violated his due process rights by improperly calculating his sentence. *Sterling*, 2016 WL 1274036, at *1. But the district court held that Wells had not exhausted his administrative remedies for this claim. *Id.* at *3. Wells' own documents, along with a few judicially

noticeable documents, confirmed that Wells was aware of this claim on January 7, 2015, *id.* (citing Doc. 1-2 at 6), that prison rules required him to file a grievance within eight days, and that Wells filed nothing until sometime in February, *id.* at *1 & n.3 (citing, *inter alia*, *Wells v. Eagleton*, No. 6:15-cv-00703, Doc. 1-4). That was well outside the eight-day deadline. The court therefore granted summary judgment for the defendants because Wells failed to exhaust his administrative remedies.[1]

2. Appellate Proceedings

Wells appealed the dismissal in this case. On appeal, he argued that *Wells v. Sterling* and *Wells v. Avery County* were not strikes. Because Defendant-Appellees were never served, there was no responsive briefing. The panel nevertheless affirmed his

[1] These dismissals have not deterred Wells from filing other suits. After the dismissal in this case, Wells filed *Wells v. Philbin*, No. 1:20-cv-00134 (S.D. Ga. Sept. 22, 2020), which was dismissed without prejudice because five inmates tried to litigate jointly. The court directed the clerk to docket the complaint in five separate lawsuits. *Id.*, Doc. 8. The new case, *Wells v. Philbin*, No. 1:20-cv-00164 (S.D. Ga. Sept. 22, 2020) was dismissed because Wells had three prior strikes. *Id.*, Doc. 8. Last September, Wells filed *Wells v. Ward*, No. 4:21-cv-00256 (S.D. Ga. Sept. 13, 2021). That case, too, was dismissed because Wells had three prior strikes. *Id.*, Doc. 9 at 5.

dismissal. Under Eleventh Circuit precedent, each of Wells' dismissals qualified as strikes. *See Rivera*, 144 F.3d at 731 (holding that dismissal for lack of exhaustion is categorically a PLRA strike).

Wells then petitioned for *en banc* review. This Court granted that petition and asked the Georgia Attorney General's office whether it would appear to defend the district court's judgment. After consultation with Defendant-Appellees, the Attorney General agreed to defend the judgment below.

C. Standard of Review

This Court reviews a "district court's determination of qualifying strikes under the three-strikes provision de novo." *White v. Lemma*, 947 F.3d 1373, 1379 (11th Cir. 2020).

SUMMARY OF ARGUMENT

I. On three occasions, Wells has had a suit dismissed because it failed to state a claim. That means he has three PLRA strikes. Two of his previous dismissals were based on failure to exhaust, and to be sure, failure to exhaust is an affirmative defense, not a pleading requirement. *Jones*, 549 U.S. at 215. But the PLRA strike analysis need not turn on the *reason* the complaint fails to

state a claim, only the *fact* that it does not. The district court properly dismissed Wells' complaint.

A. A litigant fails to state a claim when his complaint reveals that an affirmative defense bars the claim. *Id.* Courts analyzing whether to dismiss for failure to state a claim may consider not just the allegations in the complaint, but attached or incorporated documents, the plaintiff's admissions, and judicially noticeable documents. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007).

This rule covers many, if not most, dismissals for failure to exhaust administrative remedies. Courts routinely take judicial notice of government records. That includes court filings, prison grievance policies, administrative rulings, and sometimes even prison grievance records. This analysis will typically permit a court to determine if an inmate has exhausted, and dismissals on that basis count as strikes.

B. The PLRA does not require courts to use "magic words" to identify a dismissal as a strike. *Daker*, 820 F.3d at 1284. As long as it is clear the court conducted a failure-to-state-a-claim analysis, the dismissal is a strike. So it does not matter if the dismissing court literally stated that it dismissed for failure to state a claim. The crucial question is whether the court *applied*

"failure-to-state-a-claim" standards in dismissing, not how the defendants or the court labeled the analysis. Courts must "figure out what the dismissing court actually did," and labels, though sometimes helpful, are not dispositive. *Id.*

C. For the same reason, whether a previous dismissal is a PLRA strike does not turn on the procedural mechanism the court uses to dismiss. The PLRA affirms that a court may dismiss for failure to state a claim "at any time." 28 U.S.C. § 1915(e)(2). The key point for the strike analysis is whether the action was "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim." *Id.* § 1915(g). Courts can and do dismiss for failure to state a claim before service, in response to a motion for judgment on the pleadings, and even at summary judgment.

II. These principles confirm Wells has three strikes. Everyone agrees that *Wells v. Cook* was dismissed for failure to state a claim. *Wells v. Avery County* and *Wells v. Sterling* are strikes, too.

A. In *Wells v. Avery County*, Wells admitted in his complaint that he had not filed a grievance. His complaint thus plainly established that he had not stated a claim. Wells now argues that the dismissal is not a strike because the court did not use the words "failure to state a claim." But that is exactly the kind of "magic words" analysis this Court rejected in *Daker*. The *Avery*

County court dismissed *sua sponte* before the defendants had been served. The court could not and did not consider anything *but* Wells' complaint, as its order makes clear. *See Avery County*, No. 1:13-cv-00055, Doc. 7 at 2 (W.D.N.C. Apr. 30, 2013) (citing Wells' admission for the point that he had not exhausted).

Nor does it matter that Wells used a form complaint which prompted him to explain whether he had exhausted his administrative remedies. A few Fifth Circuit cases have suggested that, because exhaustion is not a pleading requirement, courts should not ask about it in form complaints. Even assuming those cases are correctly decided (and they are not), they are irrelevant. The PLRA strike analysis does not permit inmates to relitigate whether past cases *should* have been dismissed. The only question is whether they *were* dismissed on a qualifying basis. *Wells v. Avery County* plainly was.

B. In *Wells v. Sterling*, the court dismissed one of Wells' claims, *sua sponte*, for failure to state a claim. The other was dismissed later, for failure to exhaust administrative remedies. This case counts as a strike for two, alternative reasons.

First, *Wells v. Sterling* is a strike because one of Wells' claims was indisputably dismissed for failure to state a claim. And when a court dismisses some claims for failure to state a claim and

others for failure to exhaust, the "mixed dismissal" is a strike. In that situation, the "action" was "dismissed on the grounds" that it failed to state a claim. Here, "on the grounds" simply means "because." Congress frequently uses "on the grounds" when it intends to create a necessary but not exclusive requirement. When the ground is meant to be exclusive, Congress says "*only* on the grounds." So nothing in the text requires that the action be dismissed *solely* on an enumerated ground. If it were otherwise, inmates could (and would) immunize their actions from the PLRA strike analysis by appending unexhausted claims. That makes no sense of the statute at all.

Second, *Sterling* is also a strike because the district court's conclusion that Wells had not exhausted his administrative remedies for his *second* claim flowed from a failure-to-state-a-claim analysis. It does not matter that this dismissal came at summary judgment. The court relied solely on judicially noticeable documents and plaintiff admissions that established: Wells knew of his grievance by at least January 7, 2015; the prison grievance policy required him to initiate a grievance by at least January 15, 2015; and Wells did not submit a grievance of any kind until several weeks later. Though the court *labeled* this a summary

judgment decision, what it actually *did* was dismiss for failure to state a claim.

III. Finally, this Court has correctly held that when a prisoner has three strikes but did not pay the pay the filing fee at the time of filing, the court should dismiss the complaint. *Dupree*, 284 F.3d at 1236. Wells argues inmates should be given a chance to pay the filing fee *after* the court finds they have three strikes. But § 1915(g) prohibits three-strike inmates from even *bringing* an action without prepaying the fee. Besides, if an inmate could have paid the filing fee at the outset, he should have. And if he could not, then granting the inmate a second chance to do so is pointless.

ARGUMENT

I. Where a court dismisses for lack of exhaustion based on the ordinary failure-to-state-a-claim standard, the dismissal is a PLRA strike.

Where the complaint, incorporated documents, plaintiff concessions, and judicially noticeable material show a failure to exhaust, a dismissal on that basis is a dismissal for "failure to state a claim" (as it would be with any other affirmative defense). Moreover, contrary to Wells' assertions, the court doing the dismissing need not address the issue at any particular stage of

the litigation nor incant any magic words for the dismissal to count as a strike. Any other rule would gut the "centerpiece" of the PLRA and do little to stop the "'flood of nonmeritorious' prisoner litigation." *Lomax*, 140 S. Ct. at 1723 (quoting *Jones*, 549 U.S. at 203).

A. Courts dismiss for "failure to state a claim" based on allegations, admissions, incorporated documents, and judicially noticeable materials.

"A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief." *Jones*, 549 U.S. at 215. That means that "when an affirmative defense" appears on the "face" of a complaint, it is "subject to dismissal." *Id.* (quoting *Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001)). This is the uniform rule across every circuit. *See, e.g.*, *Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 320 (5th Cir. 2022); *Washington v. Los Angeles Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 (9th Cir. 2016); *Blackstone Realty LLC v. F.D.I.C.*, 244 F.3d 193, 197 (1st Cir. 2001); *Soo Line R. Co.*, 125 F.3d 481, 483 (7th Cir. 1997); *Sanders v. Dep't of Army*, 981 F.2d 990, 991 (8th Cir. 1992). So when a plaintiff affirmatively provides material sufficient to dismiss his own complaint, that is a failure to state a claim, whether the reason for dismissal is

exhaustion, statute of limitations, or something else entirely. *See, e.g.*, *Cosgrove v. Cappachella*, 325 F. App'x 52, 54 (3d Cir. 2009) (dismissing for failure to exhaust); *Okpala v. Drew*, 248 F. App'x 72, 73 (11th Cir. 2007) (same).

Critically, courts may consider not only "all factual allegations in the complaint," but also "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs*, 551 U.S. at 322. A fact can be judicially noticed if it is not "subject to reasonable dispute" because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. Courts may also consider "concessions in plaintiff's response to the dismissal motion." *Martinez-Rivera v. Puerto Rico*, 812 F.3d 69, 74 (1st Cir. 2016) (citation omitted); *see also Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1117 (9th Cir. 2018) (same); *Baylay v. Etihad Airways P.J.S.C.*, 881 F.3d 1032, 1040 (7th Cir. 2018) (same); *McCorkle v. Bank of Am. Corp.*, 688 F.3d 164, 171 (4th Cir. 2012) (crediting a plaintiff's concession on failure-to-state-a-claim review).

This means that in many (or most) cases in which prisoners fail to exhaust, there will be sufficient facts in the complaint, plaintiffs' admissions, and judicially noticeable materials to

dismiss for failure to state a claim, even though the prisoner need not affirmatively *plead* exhaustion. For instance, government records are usually appropriate for judicial notice because they are not subject to reasonable dispute. *See Massachusetts v. Westcott*, 431 U.S. 322, 323 & n.2 (1977). That includes court documents from different judicial proceedings. *See, e.g.*, *Lozman v. City of Riviera Beach*, 713 F.3d 1066, 1075 n.9 (11th Cir. 2013). And courts can also take judicial notice of government agency reports and records. *Long v. Slaton*, 508 F.3d 576, 578 n.3 (11th Cir. 2007); *see also Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012); *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). Unsurprisingly, courts routinely take notice of prison records and procedures in the PLRA context, as well. *See Martin v. Duffy*, 858 F.3d 239, 253 n.4 (4th Cir. 2017) (taking judicial notice of South Carolina Department of Corrections detention procedures); *Germain v. Shearin*, 653 F. App'x 231, 233 & n.2 (4th Cir. 2016) (taking judicial notice of a prison "Administrative Remedy Policy"); *Day v. Chaplin*, 354 F. App'x 472, 474 (2d Cir. 2009) (similar).

Even before the passage of the PLRA, lower courts universally dismissed for failure to state a claim when the failure to exhaust was apparent from the complaint. For instance, this

Court held that administrative exhaustion is a condition predicate to bringing suit under the Freedom of Information Act, and because the plaintiff's complaint made that he had not exhausted, dismissal was warranted. *See Taylor v. Appleton*, 30 F.3d 1365, 1367–69 & n.3 (11th Cir. 1994). Courts around the country agreed, across numerous areas of law. *See, e.g.*, *Croney v. Ball*, 936 F.2d 577 (9th Cir. 1991) (under Title VII, "failure to exhaust administrative remedies supports a dismissal for failure to state a claim upon which relief can be granted"); *Harris v. Sivley*, 951 F.2d 360, 1991 WL 268943, at *2 (9th Cir. 1991) (*Bivens* action); *Hedley v. United States*, 594 F.2d 1043, 1043 (5th Cir. 1979) (FOIA claim); *Guice-Mills v. Brown*, 882 F. Supp. 1427, 1429 (S.D.N.Y. 1995) (Title VII); *Warner & Swasey Co.*, 475 F. Supp. 1071, 1075 (E.D. Pa. 1979) (ERISA). Because "Congress is assumed to act with the knowledge of existing law and interpretations when it passes new legislation," it is clear that Congress expected lack of exhaustion to be a regular basis for failure-to-state-a-claim dismissals. *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997).

B. A court's dismissal for failure to state a claim does not depend on particular labels in its order.

The PLRA directs courts to determine what *happened*, not how particular court *labeled* its decisions. 28 U.S.C. § 1915(g). "[T]he task of counting strikes [thus] involves more than sophomoric arithmetic." *Rivera*, 144 F.3d at 726. This "determination … is not formalistic or mechanical." *Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1178 (10th Cir. 2011). No "magic words" are required. *Daker*, 820 F.3d at 1284.

Wells nevertheless asks this Court to adopt just such a "magic words" requirement. In Wells' view, to count as a strike, the court must make "some 'express statement' that it is dismissing the action on a qualifying ground." App.Br.25. But what matters is what the previous courts "*actually did*," not what labels they used. *Daker*, 820 F.3d at 1284 (emphasis added); *see also Hafed*, 635 F.3d at 1178 (The court "must consider … whether the dismissal fits within the language of § 1915(g)."); *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (courts must undertake a "careful evaluation of the order dismissing an action, and other relevant information" to determine whether the action is a strike); *Rivera*, 144 F.3d at 726 ("Courts must search records of the prisoner's prior federal cases to determine whether … the reason for the

dismissals were frivolousness, maliciousness or failure to state a claim.").

The PLRA's text refutes Wells on this point. Section 1915(g) asks whether a previous action "was dismissed" on the specified grounds, not what a previous court specifically said about the dismissal. Nothing in the text requires the dismissing court to have said or identified anything specific. So if the court dismissed the case for failure to exhaust, while examining only plaintiff admissions and judicially noticeable materials, the dismissal counts as a strike, because the court *did*, in fact, dismiss for failure to state a claim.

It is true, as Wells argues, App.Br.23, that this Court has held that "the dismissing court must give some signal in its order that the action or appeal was frivolous" for it to count as a strike on that ground. *Daker*, 820 F.3d at 1284. That makes sense—the PLRA does not permit courts to make a "*present-day* determination" that an appeal was frivolous based on the "conclusion that the dismissing court *could have* dismissed it as frivolous." *Id.* The case was either dismissed because it was frivolous or it was not (just as a case is either dismissed for failure to state a claim or not). But "the dismissing court does not need to invoke any magic words or even use the word 'frivolous.'" *Id.* As

long as it is clear that the case *was* dismissed for frivolity, maliciousness, or failure to state a claim, the dismissal counts as a strike.

Moreover, *Daker* concerned only frivolity, which, unlike a failure to state a claim, is nearly impossible to determine unless the dismissing court identified the action as frivolous. *Id.* Frivolous cases *always* fail on some substantive ground. So there is generally no way to know that a court viewed a case as both meritless and frivolous unless it gave a strong affirmative indication of frivolity. Yet *Daker* does not suggest that a court must even use the word "frivolous." It is all the more apparent that in the failure-to-state-a-claim context—where it is almost always easy to determine whether a court dismissed for failure to state a claim—that a court need not use any specific words to that effect.

Wells' argument smacks of the discredited notion that courts must label their dismissals as PLRA strikes. But the PLRA requires district courts to "*independently* evaluate prisoners' prior dismissals to determine whether there are three strikes." *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1152 (D.C. Cir. 2017) (emphasis added). "If Congress wanted district courts to contemporaneously label dismissals as strikes or wanted those

labels to bind later district courts, Congress could have said so in the PLRA." *Id.* Instead, Congress directed courts to ask what the previous courts "actually did." *Daker*, 820 F.3d at 1284.

C. Whether a dismissal is a strike does not depend on the particular procedural device used.

For the same reason, "failure to state a claim" under the three-strikes provision does not depend on a particular procedural device. When it comes to PLRA strikes, "the style of the dismissal or the procedural posture is immaterial." *El-Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016). "[T]he fact that an action was dismissed [on an enumerated ground], and not the case's procedural posture at dismissal," is what the strike analysis turns on. *Blakely v. Wards*, 738 F.3d 607, 610 (4th Cir. 2013) (*en banc*).

The text of the PLRA is dispositive in this point: Congress could have limited strikes to dismissals under Rule 12(b)(6), but it specifically chose the broader term "failure to state a claim." *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 705 (1995) (when Congress chooses a "broad word," it should be given a broad interpretation). And rather than limit dismissals to a certain procedural device or posture, Congress declared that courts may dismiss for failure to state a claim "at any time." 28 U.S.C. § 1915(e)(2). PLRA strikes can accrue when the court

dismisses *sua sponte* before any defendant has appeared, *see Okpala*, 248 F. App'x at 73, when the court grants a motion for judgment on the pleadings, *see Tolbert v. Stevenson*, 635 F.3d 646, 655 n.9 (4th Cir. 2011), on appeal, *Thompson v. Drug Enf't Admin.*, 492 F.3d 428, 436 (D.C. Cir. 2007), and even at trial, *see* Fed. R. Civ. P. 12(h)(2)(C) ("Failure to state a claim upon which relief can be granted … may be raised … at trial."). Wells' suggestions otherwise are utterly atextual.

The touchstone is "whether the dismissal 'rang the PLRA bells of frivolous, malicious, or failure to state a claim'" *not* whether the dismissal happens to follow a Rule 12(b)(6) motion. *El-Shaddai*, 833 F.3d at 1042. If the court "appl[ies] Rule 12(b)(6) standards," the dismissal counts as a strike, no matter when in the litigation the dismissal occurs. *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997). Again, courts must "figure out what the dismissing court actually did." *Daker*, 820 F.3d at 1284.

And although Wells asserts otherwise, App.Br.26–27, strikes can, in fact, accrue "at summary judgment." *Blakely*, 738 F.3d at 610; *see also, e.g.*, *Escalera v. Samaritan Vill.*, 938 F.3d 380, 383 (2d Cir. 2019); *El-Shaddai*, 833 F.3d at 1044 n.4. Congress used the term "dismiss" in § 1915(g), but that does not "curtail courts' authority to dispose of frivolous, malicious, or failed claims at

summary judgment." *Blakely*, 738 F.3d at 612. Again, § 1915(e)(2) authorizes courts to "dismiss the case at any time," which confirms that the relevant dismissals may occur in "any procedural posture, including summary judgment." *Id.*

After all, "[d]ismiss" means "to terminate (an action or claim) without further hearing, esp. before the trial of the issues involved." *Dismiss*, Black's Law Dictionary (7th ed. 1999). That is exactly what summary judgment does. It is no surprise, then, that "courts—including the Supreme Court …—routinely call summary judgments terminating actions dismissals." *Blakely*, 607 F.3d at 611 (collecting cases). Congress's use of a broad term should not be limited where both dictionaries and courts agree that the term is, in fact, broad.

Even if strikes at the summary judgment stage might be "rare" because courts do not "typically" engage in a failure-to-state-a-claim analysis at that point, they will still qualify as strikes so long as the reviewing court can determine, "after careful evaluation of the order," that the dismissal *was* for failure to state a claim. *El-Shaddai*, 833 F.3d at 1044 n.4 (citation omitted). Like every other type of order, when "evaluating a dismissal at summary judgment, … an inquiry into the basis of the district court's dismissal is required to determine whether the dismissing

court deemed the action frivolous, malicious, or failing to state a claim." *Escalera*, 938 F.3d at 383.

Simply put, if a court dismisses because the plaintiff fails to state a claim—whether after a Rule 12(b)(6) motion, a Rule 12(c) motion, or a summary judgment motion—the dismissal is a strike. Although a dismissal for failure to exhaust administrative remedies should usually "be raised in a motion to dismiss," it is also "treated as such if raised in a motion for summary judgment." *Bryant v. Rich*, 530 F.3d 1368, 1375 (11th Cir. 2008). The PLRA puts no limit on *when* this dismissal can occur or what procedural device must be used. Despite Wells' admonition to "read the statute!" App.Br.13, he locates nothing in the statute that would limit it the way he requests.

* * *

When a court dismisses a complaint on the basis of exhaustion, and it has examined only the plaintiffs' own admissions, materials incorporated into the complaint, and judicially noticeable documents, that is a "failure to state a claim" and a strike under the PLRA. Wells' proposed restrictions on this

basic rule—requiring magic words, a specific 12(b)(6) motion, etc.—are not required by the PLRA.[2]

II. Under the ordinary failure-to-state-a-claim standard, Wells has three strikes.

Under the rule laid out above, Wells has struck out. Everyone agrees that Wells has at least one strike. App.Br.6. The disagreement is over Wells' other two dismissals, *Wells v. Avery County* and *Wells v. Sterling*. But in *Avery County*, Wells specifically alleged he had failed to exhaust. And *Sterling* is a strike for two reasons. The court dismissed one claim at the outset and another at summary judgment based on Wells' admissions and judicially noticeable facts. Both dismissals were for failure to

[2] Wells and his *amici* ultimately rely heavily on policy arguments to justify their (exceedingly narrow) view of what constitutes a PLRA strike. Even assuming such arguments were relevant, the policy of the PLRA is clear, and it is Wells who tries to undercut it. He argues, for instance, that Congress did not intend to bar "legitimate" claims from court, but Congress made clear its intention to do exactly that in the text of the statute itself. App.Br.20. The three-strikes provision, in particular, bars *all in forma pauperis suits* (except in cases of physical danger), not just nonmeritorious suits. Congress's theory was that a "'flood of nonmeritorious claims,' even if not in any way abusive, was 'effectively preclud[ing] consideration of' suits more likely to succeed." *Lomax*, 140 S. Ct. at 1726 (citation omitted). Congress aimed to cut down on vexatious litigation—repeated failures to exhaust fit squarely within that concern.

state a claim, but even if the latter was not, this sort of "mixed dismissal" counts as a strike.

A. *Wells v. Avery County* is a strike because Wells admitted his failure to exhaust in his complaint.

The *Wells v. Avery County* court dismissed Wells' complaint for failure to state a claim based on lack of exhaustion. Wells specifically alleged that he had not exhausted his grievance because he was unaware of the basis for his claim until after he had been transferred to a different prison. *Avery County*, No. 1:13-cv-00055, Doc. 1 at 2–3. The district court relied on Wells' admission in his complaint and *sua sponte* dismissed the case for failure to exhaust administrative remedies. *See id.*, Doc. 7 at 2 ("Plaintiff admits that he did not participate in any internal grievance procedures while housed at the Avery County Jail or following his transfer to a new custodian. (Doc. No. 1 at 2)."). The district court thus plainly dismissed *Wells v. Avery* because the affirmative defense of exhaustion was obvious from the face of the complaint.

Wells contests this strike on two theories, but neither holds water. *First*, Wells asserts that the *Avery County* court did not make an "express statement" that it dismissed for failure to state a claim. App.Br.22. But the court explained that it dismissed for

Wells' failure to exhaust, and the only basis for its ruling was Wells' own *admission* that he had not exhausted, on the face of his complaint. *Avery County*, No. 1:13-cv-00055, Doc. 7 at 2. So the court could not have based this ruling on anything *but* failure to state a claim. Wells' argument on this score boils down to the idea that the *Avery County* court did not specifically use the words "failure to state a claim," but as already explained, there is no such requirement. *Daker*, 820 F.3d at 1284.

Second, Wells argues that the dismissal is not a strike because he supposedly alleged a lack of exhaustion only in response to a question on the district court's form complaint. In Wells' view, the form complaint should not have prompted Wells to discuss whether he had exhausted his claims. App.Br.28–30. Wells cites a few Fifth Circuit cases that suggest that district courts should not require inmates to allege administrative exhaustion in form complaints. *See, e.g.*, *Coleman v. Sweetin*, 745 F.3d 756, 763 n.5 (5th Cir. 2014).

Wells' argument is irrelevant, as it seeks to relitigate a past judgment, not determine whether there was a strike. The PLRA strikes analysis is not an "occasion for relitigating final judgments" in past cases. *Thompson*, 492 F.3d at 438. "[E]ven though a court may believe that a previous court erred by

dismissing an unexhausted complaint … , all that matters for the purpose of counting strikes is what the earlier court actually did, not what it ought to have done." *Id.* at 438–39. At most, the district court's *sua sponte* dismissal in *Wells v. Avery County* was improper under Fifth Circuit precedent. But that makes no difference as to whether it is a strike.

Even if it mattered, the Fifth Circuit's rule is wrong. Inmates are always free to leave portions of a form complaint blank. *See Lax v. Corizon Med. Staff*, 766 F. App'x 626, 628 (10th Cir. 2019). But exhaustion is mandatory, so prompting inmates to exhaust their remedies (thus saving them and everyone else the waste of litigating an unexhausted claim) is a good idea. If nothing else, "a question relating to grievance procedures is appropriate because it may alert the inmate to this extra judicial method of resolving his complaint and because the inmate may have used the grievance procedure, and the administrative record, if available, may be helpful to the federal court." The Federal Judicial Center, *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts* 56 (1980), https://www.ojp.gov/pdffiles1/Digitization/66018NCJRS.pdf.

Because Wells affirmatively admitted he did not exhaust his administrative remedies, and the district court dismissed the action on that basis, *Wells v. Avery County* is a PLRA strike.

B. *Wells v. Sterling* is a strike because the court dismissed one claim for failure to allege a constitutional injury and the other based on judicially noticeable facts.

Wells v. Sterling counts as a strike for two independent reasons. First, one of Wells' claims was indisputably dismissed for failure to state a claim, and "mixed" dismissals count as strikes. *Pointer*, 502 F.3d at 375. Second, the district court dismissed Wells' other claim for failure to exhaust administrative remedies based only on plaintiff admissions and judicially noticeable facts. Either reason makes *Sterling* a strike.

1. Wells' complaint was indisputably dismissed, in part, for failure to state a claim.

Sterling is a strike because the entire complaint was dismissed and at least one of the grounds was failure to state a claim. The district court *sua sponte* dismissed one of Wells' claims early in the case, on the grounds that the allegations failed to make out a claim for cruel and unusual punishment. *Sterling*, No. 6:15-cv-01344, Doc. 15 at 4. It later dismissed Wells' remaining claim for lack of exhaustion. Whether or not the latter

dismissal was for "failure to state a claim," the court's overall dismissal is a strike.

Under the plain text of the PLRA, if an "action" is dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim," it is a strike. § 1915(g). The phrase "on the grounds" in this context just means "because," and there is nothing about the phrase that limits its scope. *On the grounds that*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/on%20the%20grounds%20that (defining as "for the reason that" or "because"). Where an action is both (1) dismissed, and (2) dismissed *because* it failed to state a claim, that is a strike, whether the failure to state a claim was a necessary or sufficient cause for dismissal. § 1915(g).

To be sure, "the statute refers to dismissals of '*actions*,' as opposed to '*claims*,'" so "a partial dismissal based on one of the grounds enumerated in § 1915(g) is generally not a proper basis for assessing a strike." *Thomas v. Parker*, 672 F.3d 1182, 1183 (10th Cir. 2012); *see also, e.g.*, *Escalera*, 938 F.3d at 382 (similar); *Powells v. Minnehaha Cnty. Sheriff Dep't*, 198 F.3d 711, 713 (8th Cir. 1999) (similar). That is because the *action* has not been dismissed, and the statute speaks of *actions*.

When the entire action *is* dismissed, however, a strike is appropriate, even if failure to state a claim is only part of the reason and other claims are dismissed for other reasons (lack of jurisdiction, improper venue, lack of exhaustion, etc.). The end result is that the action was both "dismissed" and dismissed "on the grounds that" (i.e., *because*) it failed to state a claim. 28 U.S.C. § 1915(g). Those are the two textual requirements under § 1915(g). The statute simply does not say that the action must have been dismissed *only* "on the grounds that it … fails to state a claim." And courts "may not narrow [§ 1915(g)]'s reach by inserting words Congress chose to omit." *Lomax*, 140 S. Ct. at 1725 (declining to read § 1915(g)'s use of the term "dismissed" as equivalent to "dismissed with prejudice").

Indeed, Congress has used the phrase "on the grounds" many times to mean a necessary but not exclusive statutory requirement. To cite just a few examples, Congress has declared that the Attorney General shall report to Congress when he declines to enforce a law "on the grounds that such provision is unconstitutional." 28 U.S.C. § 530D(a)(1)(A)(i). But surely no one takes that to mean that the Attorney General need not submit a report to Congress if he declines to enforce a law *both* because it is unconstitutional *and* because he believes it should be a low

priority as a policy matter. Likewise, "[t]he Secretary [of State] shall report … to … Congress" when "a consular post denies a visa on the grounds of terrorist activities or foreign policy," and again, no one would understand this to exclude instances where a visa denial was based on *both* suspicions of terrorism *and* mistakes in the application. 22 U.S.C. § 2723(a)(1).

When Congress does want to create an exclusive statutory requirement, it knows how to use the phrase "*only* on the grounds," which it has done numerous times. *See, e.g.*, 8 U.S.C. § 1182(n)(5)(D)(iii) ("[A] court may review only the actions of the Attorney General under clause (ii) and may set aside such actions *only* on the grounds described in …." (emphasis added)); 49 U.S.C. § 10709(g)(2)(A) ("A complaint may be filed under this subsection … by a port *only* on the grounds that such port …." (emphasis added)). "[T]hat Congress consciously chose" to add such qualifiers elsewhere in its statutes "suggests that Congress knows how to" limit the phrase "when it wants to do so." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 63 n.4 (1987). Yet it did not do so here.

Any other rule would also make little sense of the statute. "[B]y adding unexhausted claims to a complaint that otherwise does not state a claim upon which relief may be granted, a

prisoner could repeatedly escape imposition of a strike and thus evade the bar imposed by the three-strikes rule." *Pointer*, 502 F.3d at 374; *see also Thomas*, 672 F.3d at 1184 (same). That would be a bizarre reading indeed, and courts should not adopt interpretations that "no sensible person" would have expected. *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (citation omitted).

Although a few circuits have broken from the Sixth and the Tenth and taken the opposite view—that "mixed dismissals" are not strikes—they did so in cursory fashion and with little analysis of the text. Most rely on the idea that § 1915(g) refers to "actions" and not "claims," *see Thompson*, 492 F.3d at 432, but that language means only that a strike does not accrue when merely *some* claims have been dismissed and others have continued. *See also Brown v. Megg*, 857 F.3d 287, 290 (5th Cir. 2017) (relying on same language); *Tolbert*, 635 F.3d at 651 (same); *Turley v. Gaetz*, 625 F.3d 1005, 1009 (7th Cir. 2010) (same); *Andrews v. Cervantes*, 493 F.3d 1047, 1054 (9th Cir. 2007) (same). Here, Wells' entire action *was* dismissed. Other cases take "on the grounds" to mean that every claim must be dismissed on an enumerated basis. *See, e.g.*, *Talley v. Wetzel*, 15 F.4th 275, 280 (3d Cir. 2021). But they never explain why. If one claim is dismissed for failure to state a

claim and another for failure to exhaust, the *entire action* was dismissed because (among other reasons) it did not state a claim. This Court should follow the Sixth and Tenth Circuits, rather than these little-reasoned opinions.

2. The *Sterling* court dismissed Wells' complaint based solely on plaintiffs' admissions and judicially noticeable facts.

Even if this Court decides that mixed dismissals do not count as strikes, *Wells v. Sterling* is a strike anyway. In *Sterling*, the court dismissed Wells' second claim as unexhausted based on his own admissions, attachments, and judicially noticeable facts. That is a dismissal for "fail[ure] to state a claim," § 1915(g), and it is a strike. To be sure, the defendants in *Sterling* filed a motion for summary judgment rather than a motion to dismiss. But as explained above, dismissal for failure to state a claim need not arise from a Rule 12(b)(6) motion. Even if it ordinarily *should* take place at the Rule 12(b) stage, it *can* take place even at summary judgment—indeed, "at any time." 28 U.S.C. § 1915(e)(2). The relevant question is not *when* the court acts but *how* it does so. *See supra* I.C.

In *Sterling*, the district court dismissed Wells' action after determining that he had failed to exhaust his administrative

remedies. Under the prison's grievance policy—a public record which is available online, *see* SCDC, *Inmate Grievance System* (May 12, 2014), https://www.doc.sc.gov/policy/GA-01-12.htm.pdf—prisoners were allowed eight days after an incident to file an informal grievance (or five days for a formal grievance). That policy was judicially noticeable, *see Martin*, 858 F.3d at 253 n.4; *Germain*, 653 F. App'x at 234 & n.2, and indeed, must have been judicially noticed, because the parties did not submit it to the court.[3]

The only remaining question was whether Wells had filed a grievance on time, and again, his own admissions and judicially noticeable documents established he had not. The court knew that Wells was aware of his grievance by no later than January 7, 2015, because Wells attached to his complaint a "Motion for Sentence Clarification" that revealed as much. *Sterling*, No. 6:15-cv-01344, 2016 WL 1274036, at *3 (citing Doc. 1-2 at 6, the attachment to Wells' complaint). And the court also knew that

[3] In their motion for summary judgment, the defendants quoted the *2006* version of the SCDC inmate policy. *See Sterling*, No. 6:15-cv-01344, Doc. 35-1 at 5 n.2. That older version gave inmates slightly different deadlines to exhaust. The district court, however, quoted and cited the 2014 version and applied the updated (and correct) deadlines. *See Sterling*, No. 6:15-cv-01344, 2016 WL 1274036, at *2–3.

Wells had not filed a grievance before January 30, 2015, because the magistrate judge had taken judicial notice of correspondence between Wells and one of the defendants (attached to Wells' petition for habeas corpus in a separate judicial action); Wells asked for help in obtaining credit for time served (January 30); and the response directed him to file a grievance (February 5). *Id.* at *1 & n.3 (citing *Wells v. Eagleton*, No. 6:15-cv-00703, Doc. 1-4.). In fact, in his own brief, Wells admitted that he filed a grievance only after receiving the February 5 letter from the prison official directing him to do so. *Sterling*, No. 6:15-cv-01344, Doc. 41 at 1. So not only was it apparent from judicially noticeable documents that Wells had not filed a grievance on time, Wells himself conceded as much.

To be sure, the court rendered this decision at summary judgment, but its analysis was limited to plaintiffs' admissions and judicially noticed documents. The district court actually *rejected* part of the magistrate's report and recommendation that relied on extraneous materials. *See Sterling*, No. 6:15-cv-01344, 2016 WL 1274036, at *2. It was, thus, a failure-to-state-a-claim analysis: Wells' failure to exhaust was apparent from his allegations, admissions, incorporated documents, and judicially

noticeable facts. The court's analysis "rang the PLRA bells of … failure to state a claim." *Blakely*, 738 F.3d at 615. It is a strike.

* * *

The district court dismissed Wells' complaint on the basis that actions dismissed for lack of exhaustion are always PLRA strikes. But the Court need not decide that broader question in this case, where under even a less expansive view of "failure to state a claim," Wells has still struck out.

III. The district court properly dismissed Wells' complaint rather than give him a second chance to pay the fee.

Wells also raises an argument about whether dismissal is the appropriate remedy under the PLRA. App.Br.30. The Court conspicuously declined to include this question in its briefing order, even though Wells asked the Court to address the question in his petition for rehearing *en banc*. But, to the extent the *en banc* Court decides to address the issue, courts must *dismiss* claims when prisoners have three strikes.

This Court correctly interpreted § 1915(g) in *Dupree v. Palmer*, 284 F.3d at 1236. Section 1915(g) says that "*[i]n no event* shall a prisoner *bring* a civil action" under the *in forma pauperis* section if he has three strikes. (emphasis added)). That means that the *bringing* of the action "itself violates" § 1915(g). *Sloan v.*

Lesza, 181 F.3d 857, 858 (7th Cir. 1999). So "after three [strikes], a prisoner must pay the full filing fee at the time he *initiates* suit." *Dupree*, 284 F.3d at 1236. If he does not, the district court has "no authority" to continue the suit in those circumstances. *Id.* (citing *Shabazz v. Campbell*, 12 F. App'x 329, 330 (6th Cir. 2001)).

Despite the statute's clear language, Wells argues that courts must give a prisoner with three strikes a second chance to pay the full filing fee before the suit is dismissed. Wells insists that because § 1915(g) prohibits plaintiffs only from proceeding "under this section," the inmate should be able to convert the already filed action into a normal suit. But if a prisoner does not prepay the entire filing fee, he or she is *already* proceeding "under the [*in forma pauperis*] section." 28 U.S.C. § 1915(g); *see also id.* § 1915(a)(2) (listing requirements for a "prisoner seeking to bring a civil action … without prepayment of fees"). Again, § 1915(g) prohibits three-strike prisoners from filing *in forma pauperis* actions to begin with. *Sloan*, 181 F.3d at 858. None of Wells' cases, *see* App.Br.33 n.9, grapple with this plain statutory direction.

Wells' rule makes no sense for another reason. An inmate can proceed *in forma pauperis* only if they submit an affidavit that they are "unable to pay" the filing fee. § 1915(a)(1)–(2). If that is true, then giving a three-strike inmate the chance to pay the filing

fee will be futile. And if the inmate *does* have the means to prepay the full filing fee, then the inmate misrepresented their financial situation (and the court can then dismiss on *that* basis, *see* § 1915(e)(2)(A)). Either way, the *Dupree* rule is correct. If a three-strikes inmate can pay the filing fee, they should do so or "face[] the fate that any non-IFP prisoner faces when the prisoner fails to pay the filing fee up front: dismissal without prejudice." *Lemma*, 947 F.3d at 1377.

CONCLUSION

For the reasons set out above, this Court should affirm the judgment of the district court.

Respectfully submitted,

Kathleen Pacious
Deputy Attorney General
Roger Chalmers
Sr. Asst. Attorney General
Susan Teaster
Sr. Asst. Attorney General

/s/ *Stephen J. Petrany*
Christopher M. Carr
Attorney General of Georgia
Stephen J. Petrany
Solicitor General
Drew F. Waldbeser
Deputy Solicitor General
Slade Mendenhall
Assistant Attorney General
Office of the Georgia
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov
Counsel for Appellees

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9,113 words as counted by the word-processing system used to prepare the document.

/s/ *Stephen J. Petrany*
Stephen J. Petrany

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2022, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

/s/ *Stephen J. Petrany*
Stephen J. Petrany