

21-10550

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

—◆◆◆—
JEREMY JOHN WELLS,

Plaintiff-Appellant,

—v.—

WARDEN PHILBIN, CLIFFORD BROWN, and FNU FLUKER,

Defendants-Appellees.

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

BRIEF FOR *AMICI CURIAE*
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW,
FLORIDA JUSTICE INSTITUTE, HUMAN RIGHTS DEFENSE
CENTER, LEGAL AID SOCIETY, SOUTHERN CENTER FOR
HUMAN RIGHTS, SOUTHERN POVERTY LAW CENTER,
PROFESSOR BRETT DIGNAM, AND PROFESSOR WILLIAM
P. QUIGLEY IN SUPPORT OF PLAINTIFF-APPELLANT

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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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Southern Poverty Law Center, *Amicus Curiae*

Wells v. Warden, et al.

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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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
STATEMENT OF ISSUES AND SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. The Costs of Incarceration Are High	8
II. Incarcerated People Have Scant Access to Resources While Imprisoned	13
III. Filing Fees Are Insurmountable for Most Incarcerated People	17
IV. The Three Strikes Rule Bars Meritorious Claims	19
CONCLUSION	21
CERTIFICATE OF COMPLIANCE	23
CERTIFICATE OF SERVICE	24

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Page(s)

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae are organizations and professors with extensive experience litigating, documenting, campaigning, and advocating for people or groups who face constitutional deprivations while incarcerated. If affirmed, the district court's decision in this case would significantly limit incarcerated litigants' ability to seek judicial redress for violations of their constitutional rights. *Amici* have a substantial interest in that issue. *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 district court's decision. In light of their experience, *Amici* have a unique perspective on the myriad costs associated with daily life in jails and prisons, the financial realities for people in prison, and the substantial constitutional deprivations that go unheard as a result of incarcerated people's inability to pay court fees.

The Brennan Center for Justice at NYU School of Law (the "Brennan Center") is a nonprofit, nonpartisan public policy and law institute that seeks to secure our nation's promise of "equal justice for all." The Brennan Center's Justice Program seeks to build a rational, effective, and fair criminal justice

¹ 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* seek leave to file this brief under Fed. R. App. P. 29(a)(3).

system, and advocates for reshaping public policies that undermine this vision.

The Justice Program's research explores the connection between poverty and mass incarceration and identifies solutions that can break that link while advancing racial and economic justice.

Founded in 1978, the Florida Justice Institute ("FJI") is a nonprofit, public interest law firm 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 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 Human Rights Defense Center ("HRDC") is a nonprofit charitable organization headquartered in Florida that advocates in furtherance of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC engages in state and federal court litigation on prisoner rights issues, including wrongful death, public records, class actions, and Section 1983 civil rights litigation concerning the First Amendment rights of prisoners and their correspondents. HRDC's advocacy efforts include publishing

two monthly publications, Prison Legal News, which covers national and international news and litigation concerning prisons and jails, as well as Criminal Legal News, which is focused on criminal law and procedure and policing issues, as well as publishing and distributing self-help and legal reference books for prisoners.

The Legal Aid Society is New York City's first and largest social justice law firm. It is the largest provider of criminal defense services in New York City, and large numbers of its clients are held in City jails and State prisons. Through its Prisoners' Rights Project ("PRP"), established in 1971, the Society seeks to protect the constitutional and statutory rights of incarcerated people who are incarcerated. PRP engages in litigation and advocacy on behalf of people held in jails and prisons, and has been involved in litigation concerning the interpretation of the Prison Litigation Reform Act virtually since the statute's enactment, both as counsel and as *amicus curiae*.

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.

Brett Dignam is a Clinical Professor of Law at Columbia Law School. She has designed and overseen workshops conducted by students for prisoners at the Federal Correctional Institution in Danbury, Connecticut on the Prison Litigation Reform Act. She has participated in major litigation in more than 30 federal and state cases in the area of prisoners’ rights. Dignam came to the Law School following her time at Yale Law School, where she led the Prison Legal Services, Complex Federal Litigation and Supreme Court Advocacy clinics. As an associate professor at Yale Law School, Dignam taught and supervised students in prison legal services; poverty and HIV issues; landlord and tenant issues; and immigration

clinics. She guided students through administrative hearings and state and federal trial and appellate courts on issues ranging from state habeas claims to violations of the Voting Rights Act.

William P. Quigley is a Professor of Law Emeritus at Loyola University New Orleans. He has litigated numerous cases for people imprisoned in Louisiana and has written on human rights and conditions of confinement for prisoners.

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).² Yet many people in America’s jails and prisons are routinely denied access to the courts—solely because they are poor. Under the three strikes provision of the Prison Litigation Reform Act (“PLRA”), codified at 28 U.S.C. § 1915(g), incarcerated people must pay courts’ full filing fees up front, if they have three “strikes” for prior dismissed suits. But the vast majority of incarcerated people are indigent, and cannot meet this expense. As a result, the three strikes rule operates as a *de facto* ban on even meritorious litigation by impoverished prisoners.

A closer look at prisoners’ harsh economic conditions clarifies the rule’s preclusive effect. 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

² 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/>.

prison wages are 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 beyond prison walls.

Congress's claimed intent in enacting the PLRA was to curb excessive and frivolous litigation. However laudable that goal may have been, the three strikes rule has proven in practice to be an impassable bar for many incarcerated people, leaving them wholly without recourse for serious deprivations of important constitutional rights. As a result, the three strikes rule should be narrowly construed, so as to prevent it from barring an ever-greater swath of litigation.

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. Appellant Br. at 6. Before the beating, guards ignored Mr. Wells's repeated warnings that his safety was in jeopardy; afterwards, they mocked his injuries. 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 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 courts’ fees, and thus the district court’s decision regarding his three strikes status effectively foreclosed Mr. Wells from litigating his claims.³

For the reasons set out in Appellant’s brief, the district court’s holding that failure to exhaust amounts to a strike is legally incorrect. In addition, the district court’s decision improperly broadens the reach of the three strikes provision, by defining a strike far too expansively. Many incarcerated people confront the precise circumstances that Mr. Wells confronted here, where their right to litigate is cut off, only because they cannot afford to pay courts’ filing fees. An inspection of their economic circumstances sheds light on the need to narrowly construe the three strikes provision here.

ARGUMENT

I. The Costs of Incarceration Are High

Being incarcerated is expensive. 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 Ctr. for

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

Justice, 1 (2015).⁴

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; *see also Jones v. Clark Cty.*, No. 2018-CA-001710, 2020 WL 757095, at *3 (Ky. Ct. App. Feb. 14, 2020) (upholding booking fee despite dismissal of charges). Fees for the services of a public defender are also routine. “Forty-three states use some form of cost-recovery for public defenders, and 27 of these charge upfront registration fees.” Devon Porter, *Paying for Justice: The Human Cost of Public Defender Fees*, A.C.L.U. of S. Cal., 2 (June 2017).⁵

Moreover, 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).⁶ For example, in Florida, fees are allocated “to the

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

⁵ <https://law.yale.edu/sites/default/files/area/center/liman/document/pdfees-report.pdf>.

⁶ https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf.

state’s general coffers.” *Id.* “North Carolina collects 52 separate fees ... using them to fund ... the state’s judicial budget as well as jails, law enforcement, counties and schools.” *Id.* And in Louisiana, fees were transferred to a judicial expense fund, which paid for “two Ford Expeditions ... and a full-time private chef” for judges. *Id.*

Once incarcerated, prisoners face additional costs. Under what are commonly termed “pay-to-stay” policies, many institutions charge for room and board. These fees may take the form of per diem charges, ranging in cost from several dollars up to \$142.42 per day. 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); *see also* Jessica Lussenhop, *The US Inmates Charged Per Night in Jail*, BBC News Magazine (Nov. 9, 2015).⁷ Other institutions charge for basic necessities, such as meals, toilet paper, and medical care. Eisen, 15 Loy. J. Pub. Int. L. at 325-26; *see also* Brennan Ctr. for Justice, *Is Charging Inmates to Stay in Prison Smart Policy?* (Sept. 9, 2019) (50 state map detailing pay-to-stay fee laws nationwide).⁸

Even in the absence of pay-to-stay fees, incarcerated people are routinely

⁷ <https://www.bbc.com/news/magazine-34705968>.

⁸ <https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy>.

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 Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 Hastings Race & Poverty L. J. 3, 17 (Winter 2020). Members of the public may assume that the prison commissary functions as a source of luxury or comfort items, but,

Consider: If your only bathing option is a shared shower area, aren't shower sandals a necessity? Is using more than one roll of toilet paper a week really a luxury (especially during periods of intestinal distress)? Or what if you have a chronic medical condition that requires ongoing use of over-the-counter remedies (*e.g.*, antacid tablets, vitamins, hemorrhoid ointment, antihistamine, or eye drops)? All of these items are typically only available in the commissary, and only for those who can afford to pay.

Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative (May 2018).⁹ In 2016, for example, Massachusetts prisoners purchased “over 245,000 bars of soap,” not a luxury item. *Id.*

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. §

⁹ <https://www.prisonpolicy.org/reports/commissary.html>.

64.6030 (setting interim rate of 21 cents per minute); FCC, *Telephone Services for Incarcerated Individuals* (Oct. 27, 2020)¹⁰; FCC, *FCC Lowers Interstate and International Prison Phone Rates to Help Families Stay Connected* (May 20, 2021).¹¹ But, for incarcerated people whose work is compensated at rates of only 14 to 63 cents per hour, 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).¹²

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).¹³ 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).¹⁴ And certain facilities may charge even

¹⁰ <https://www.fcc.gov/consumers/guides/telephone-service-incarcerated-individuals>.

¹¹ <https://docs.fcc.gov/public/attachments/DOC-372625A1.pdf>.

¹² <https://static.prisonpolicy.org/blog/2017/04/10/wages/>.

¹³ <https://www.jurist.org/news/2021/05/fcc-approves-plan-to-lower-interstate-and-international-jail-and-prison-phone-call-rates/>.

¹⁴ https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

higher rates: In Arkansas, for example, the same 15-minute call may cost as much as \$24.82. *Id.*

All told, the path from arrest through release is littered with fees, which begin accumulating before the doors are even closed, 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* Lauren-Brook Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan Ctr. for Justice 1, 4 (May 21, 2015)¹⁵; Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, 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).¹⁶ “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

¹⁵ <https://www.brennancenter.org/our-work/research-reports/charging-inmates-perpetuates-mass-incarceration>.

¹⁶ https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

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, prison wages are extraordinarily low. On average, people in prison earn between 14 and 63 *cents* per hour. Sawyer, *How much do incarcerated people earn*. In federal institutions, work assignments pay 12 to 40 cents per hour. Federal Bureau of Prisons, *Work Programs*.¹⁷ The scant availability of decent wages is illustrated by the fact that, if offered the opportunity, incarcerated people will accept large risks for marginally increased pay. For example, in California, incarcerated people fight wildfires for “just \$2 per day, or \$1 an hour if fighting an active fire.” Neveen Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities*, 26 *Va. J. Soc. Pol’y & L.* 65, 82 (Summer 2019).

For people with negligible assets before incarceration, who earn a pittance 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-

¹⁷ https://www.bop.gov/inmates/custody_and_care/work_programs.jsp.

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. There are other examples:

In Colorado ... it costs an incarcerated woman two weeks' wages to buy a box of tampons; maybe more if there's a shortage. Saving up for a \$10 phone card would take almost two weeks for an incarcerated person working in a Pennsylvania prison.

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).¹⁸

¹⁸ <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf>.

Thus most incarcerated people cannot meet the costs of daily 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)¹⁹; *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).²⁰

Debt accumulated from interaction with the criminal justice system can “trigger a cascade of debilitating consequences,” 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*, Nat. Inst. of Justice & Harvard Kennedy School, Executive Session on Community Corrections, 9 (Jan. 2017).²¹ Perhaps most troubling, 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. *Id.* at 9-10; *see also* Menendez, Crowley, Eisen & Atchison,

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

²⁰ https://www.brennancenter.org/sites/default/files/202009/EconomicImpactReport_pdf.pdf.

²¹ <https://www.ojp.gov/pdffiles1/nij/249976.pdf>.

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.”).

For most prisoners, the costs of incarceration present an ongoing, Sisyphean challenge, where charges for their basic needs far exceed their ability to pay. And, upon release, arrears accrued in prison often significantly constrain their ability to successfully reenter society.

III. Filing Fees Are Insurmountable for Most Incarcerated People

Perhaps unsurprisingly then, most incarcerated people find court filing fees impossible to pay all at once. To be clear, the PLRA mandates that all prisoners must pay courts’ filing fees: Prisoners granted *in forma pauperis* status are permitted to pay the fee over time. 28 U.S.C. § 1915(b). But the three strikes rule imposes an even greater burden, by denying *in forma pauperis* status and requiring that prisoners pay the full filing fee up front. 28 U.S.C. § 1915(g). This lump sum cost is simply unachievable for most incarcerated people.

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).²² An incarcerated person earning 40 cents an hour would have to work

²² <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.

1,005 hours to pay that initial fee. And an incarcerated person making 14 cents an hour—at the low end of average prison wages—would have to work 2,871 hours, or nearly an *entire year* of daily 8-hour shifts, without weekends, sick days, or other interruptions.

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).²³ 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. At 40 cents an hour, that price would require 4,755 hours of labor; at 14 cents an hour, it would rise further still, to 13,585 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.

Put simply, for most incarcerated people, filing fees are beyond their means. Once an incarcerated person is found to have accumulated three strikes,

²³ <https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule>.

and the PLRA mandates that they pay the full filing fee up front, litigation becomes entirely unreachable—solely because of poverty.

IV. The Three Strikes Rule Bars Meritorious Claims

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

To take one recent example, over the last year and a half, COVID-19 has run rampant through America’s jails and prisons. Eddie Burkhalter *et al.*, *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. Times (Apr. 10, 2021).²⁴ In some institutions, “four in five inmates were infected”; in others, nearly all. *Id.* As of April 2021, “one in three inmates in state prisons are known to have had the virus,” while “[i]n federal facilities, at least 39 percent of prisoners are known to have been infected.” *Id.* At least 2,700 incarcerated people have died. *Id.*

But as prisoners brought litigation contesting these dire conditions, scores of suits were barred solely because of the PLRA’s three strikes provision. *See, e.g., Munn v. Singleton*, No. 4:20-CV-04078, 2020 WL 7212576, at *1-2 (W.D. Ark. Dec. 7, 2020) (collecting cases; barring suit alleging that “guards distribute medication in an unsanitary manner; that no masks are passed out; that no bleach is passed out; that screening is not taking place”); *Johnson v. Wilcher*, No. CV 420-

²⁴ <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html>.

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”); *Jones v. Douglas Cty. Jail*, No. 20-3091, 2020 WL 1492703, at *1 (D. Kan. Mar. 27, 2020) (dismissing suit alleging staff “are refusing to give masks to inmates to prevent exposure to Covid-19” and certain prisoners were known to have been exposed to the virus).

Even apart from the global health crisis, a consequence of the three strikes rule is that beatings, rapes and other dangerous living conditions may go unchecked. *See, e.g., Goldman v. Elum*, No. 2:19-cv-10390, 2019 WL 6828313, at *1 (E.D. Mich. Dec. 13, 2019) (dismissing claims of rapes by guards); *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); *Robinson-Bey v. Calloway*, No. 17-CV-2198, 2017 WL 6813678, at *1 (C.D. Ill. Oct. 13, 2017) (dismissing suit alleging denial of “desperately needed” medical treatment for

“degenerative joint disease (osteoarthritis) that causes ... severe pain in [plaintiff’s] lower back and legs”); *Dillon v. Blake*, No. 14-CV-2416, 2014 WL 4966086, at *2 (E.D.N.Y. Oct. 3, 2014) (dismissing allegations that guards at Riker’s Island jail “threatened to sexually assault or forcibly rape Plaintiff”).

Importantly, the effect of a meritorious suit extends beyond bringing relief to an individual person: Litigation also provides 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 district court errantly concluded 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 district court’s decision is at odds with the statutory text and the U.S. Supreme Court’s decision in *Jones v. Bock*, 549 U.S. 199 (2007). It also improperly broadens the scope of the three strikes rule, sweeping far too many claims into the three strikes rule’s preclusive regime.

The judgment of the district court should be reversed.

Dated: New York, New York
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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 4468 words.

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I HEREBY CERTIFY that on this 25th day of June, 2021, 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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