No. 21-10550

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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**JEREMY WELLS,**

*Plaintiff-Appellant,*

v.

**WARDEN PHILBIN, CLIFFORD BROWN, and FNU FLUKER,**

*Defendants-Appellees.*

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

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# OPENING BRIEF OF APPELLANT JEREMY WELLS

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

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

Anand, Easha

Brown, Clifford

Cao, Perry,

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

Fluker, FNU

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

Philbin, Warden

Rao, Devi

Roderick & Solange MacArthur Justice Center

Wells, Jeremy John

Pursuant to Eleventh Circuit Rule 26.1-3, the undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: June 17, 2021

Respectfully submitted,

*s/ Perry Cao*

PERRY CAO

## STATEMENT REGARDING ORAL ARGUMENT

Appellant, who proceeded *pro se* below, has obtained pro bono counsel on appeal and believes that the Court would benefit from oral argument in this case for the following reasons:

*First*, this case concerns an important statutory interpretation question of first impression in this Circuit. Because most prisoners facing a three-strikes bar proceed pro se, this case also presents a rare opportunity for this Court to address that question with the benefit of counsel.

*Second*, the issue on appeal recurs frequently[1] and is critically important to the ability of indigent prisoners to properly access the courts in the Eleventh Circuit.

*Third*, the district court's holding conflicts with the decisions of all of this Court's sister circuits that have considered the issue.[2]

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[1] Numerous district courts in the Eleventh Circuit have misguidedly cited to *Rivera v. Allin*, 144 F.3d 719 (11th Cir. 1998), for the proposition that dismissals for failure to exhaust automatically count as strikes. *See, e.g.*, *Fedd v. Johnson*, No. 5:20-CV-69, 2020 WL 5922114, at *2 n.2 (S.D. Ga. Sept. 8, 2020); *Smith v. Fye*, No. 5:17-CV-406, 2018 WL 6046453, at *3 (M.D. Ga. Nov. 19, 2018); *Miller v. Hooks*, No. CV-614-90, 2015 WL 2452927, at *2 n.2 (S.D. Ga. May 14, 2015).

[2] *See Turley v. Gaetz*, 625 F.3d 1005, 1013 (7th Cir. 2010) ("A prisoner's failure to exhaust administrative remedies is statutorily distinct from his

*Fourth*, the district court's holding conflicts with the decision of the United States Supreme Court in *Jones v. Bock*, 549 U.S. 199 (2007).

If Defendants do not contest this appeal, this Court may, if necessary, wish to appoint an amicus to argue in support of the district court's order. *See, e.g.*, Order Appointing Leland Kynes of Kynes Law to Defend the District Court's Ruling on Appeal, *Jara v. Nunez*, 878 F.3d 1268 (11th Cir. 2018) (No. 16-15179). Other circuits faced with questions of first impression regarding the three strikes provision of the Prison Litigation Reform Act have appointed amici to argue in support of the district court's order or requested defendants' participation in the case.[3]

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failure to state a claim upon which relief may be granted. The dismissal of an action for failure to exhaust therefore does not incur a strike") (cleaned up); *Owens v. Isaac*, 487 F.3d 561, 563 (8th Cir. 2007) (per curiam) ("The first case was dismissed without prejudice for failure to exhaust administrative remedies; such a dismissal is not a strike under section 1915(g)"); *Snider v. Melindez*, 199 F.3d 108, 115 (2d Cir. 1999) ("we do not believe that failure to exhaust qualifies as failure to state a claim in the context of the PLRA").

[3] *See* Order Appointing Megan Lacy Owens of Jones Day to Serve as Amicus Curiae and to Brief Arguments in Opposition, *Hill v. Madison Cnty.*, 983 F.3d 904 (7th Cir. 2020) (No. 20-1307), ECF No. 26; Ruling Letter Inviting the Director and Michigan Department of Corrections to Participate in Appeal at their Discretion, *Simons v. Washington*, 996 F.3d 350 (6th Cir. 2021) (No. 20-1406), ECF No. 19.

## TABLE OF CONTENTS

## TABLE OF CITATIONS

**Page(s)**

**Cases**

**Statutes**

**Other Authorities**

## INTRODUCTION

The Prison Litigation Reform Act prohibits incarcerated plaintiffs from proceeding *in forma pauperis* if, on three prior occasions, they have had a case dismissed on the basis that it was frivolous, malicious, or fails to state a claim. Each prior occasion qualifies as a "strike." The text of the statute does not allow the assigning of strikes on any other basis. The Eleventh Circuit, however, stands alone in counting cases dismissed for failure to exhaust administrative remedies as a strike. This case presents an opportunity to bring the Eleventh Circuit in line with its sister courts and Supreme Court precedent.

Between June and August 2020, Jeremy John Wells was incarcerated at the Augusta State Medical Prison in Grovetown, Georgia. After prison officials repeatedly ignored his warnings that gang members within the prison were beating other inmates, Mr. Wells was himself the victim of a brutal attack. He brought suit against the officials for his injuries and, being indigent, sought to proceed *in forma pauperis*.

The court below denied that request and subsequently dismissed Mr. Wells' lawsuit, concluding that he had accumulated three prior "strikes." *Wells v. Philbin*, No. 1:20-cv-0097, 2020 WL 7491360 (S.D. Ga.

Dec. 18, 2020), Order, Doc 21 – Pg 1. This was error. Of the three cases deemed to be strikes, two were incorrectly assessed. *Wells v. Sterling*, No. 6:15-cv-1344-MBS, 2016 WL 1274036 (D.S.C. Mar. 31, 2016), Order, Doc 61 – Pg 3-4, was dismissed at summary judgment for failing to exhaust administrative remedies, and *Wells v. Avery Cnty. Sheriff's Office*, No. 1:13-cv-55-RJC (W.D.N.C. Apr. 30, 2013), Order, Doc 7 – Pg 3-4, was dismissed at screening for failing to exhaust. Under the text of the Prison Litigation Reform Act and in light of the Supreme Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), neither case constitutes a strike. The dismissal of Mr. Wells' suit should therefore be reversed.

## STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court below issued a final judgment dismissing Appellant Jeremy Wells' claims on December 18, 2020. *Philbin*, Order, Doc 21 – Pg 2. Mr. Wells filed a timely notice of appeal on February 18, 2021. *Philbin*, Notice of Appeal, Doc 24. This Court has jurisdiction to review the district court's final order pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

Mr. Wells filed a civil complaint for violations of his Eighth Amendment rights. The district court denied his request to proceed *in forma pauperis* and dismissed the suit at screening. It held that Mr. Wells had accumulated three strikes prior to this suit: (1) *Sterling*, Order, Doc 61 – Pg 3-4, dismissed at summary judgment for failure to exhaust administrative remedies, (2) *Avery Cnty.*, Order, Doc 7 – Pg 3-4, dismissed at screening for failure to exhaust, and (3) *Wells v. Cook*, No. 1:11-cv-324-RJC, 2012 WL 1032689, at *1 (W.D.N.C. Mar. 27, 2012), dismissed for failure to state a claim upon which relief may be granted.

This appeal raises the following two issues:

I. Whether the district court erred in assessing a strike for *Wells v. Sterling*—an action dismissed at summary judgment for failing to exhaust administrative remedies—even though it was not dismissed for being frivolous, malicious, or a failure to state a claim?

II. Whether the district court erred in assessing a strike for *Wells v. Avery County Sheriff's Office*—an action dismissed at

screening for failing to exhaust—even though it was not dismissed for being frivolous, malicious, or a failure to state a claim, and despite the Supreme Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007)?

## STATEMENT OF THE CASE

### I. The PLRA's "Three Strikes" Provision

Generally, a party bringing or appealing a civil action must pay the applicable filing fee. 28 U.S.C. § 1914(a). Parties that are unable to pay that fee may request permission to proceed *in forma pauperis* under section 1915. *See* § 1915(a). If *in forma pauperis* status is granted, the filing fee is waived. § 1915(a)(1).

In 1996, Congress passed the Prison Litigation Reform Act ("PLRA" or "the Act"), which restricted the ability of incarcerated plaintiffs to proceed *in forma pauperis*. First, the PLRA held that *in forma pauperis* status did not waive the filing fee for incarcerated plaintiffs. Instead, prisoners proceeding *in forma pauperis* still must pay the full filing fee, but are permitted to do so in installments, rather than all up front. 28 U.S.C. § 1915(b). Second, the PLRA created a new "three-strikes provision," which prohibits prisoners from bringing a civil action or appeal *in forma pauperis* if they have,

> on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it [was] frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). A case dismissed "on the grounds that it [was] frivolous, malicious, or fails to state a claim upon which relief can be granted" is often referred to as a "strike." *See Brown v. Johnson*, 387 F.3d 1344, 1349 (11th Cir. 2004).

## II. Factual Background

In June 2020, while housed at the Augusta State Medical Prison in Grovetown, Georgia, Mr. Wells became aware of gang activity within the prison, including extortion, narcotics sales, and beatings of other inmates. *Philbin*, Complaint, Doc 12 – Pg 12. Fearing for his safety and the safety of others, Mr. Wells brought the gang activity to the attention of several officials, including Warden Philbin and Unit Manager Clifford Brown. *Id.* Those officials did nothing, and on June 14, Mr. Wells was brutally beaten and assaulted by those gang members. *Id.*

Immediately after the attack, Corrections Officer Fluker ridiculed Mr. Wells, laughing hysterically upon seeing his injuries. *Id.* Fluker's failure to take the injuries seriously led to a significant delay in medical treatment. *Id.* Mr. Wells suffered a ruptured ear drum; burns on both eyes; a right-eye contusion; an inner-throat abrasion; and multiple bumps and bruises to the head, shoulders, and hands. *Id.* at 5. Mr. Wells

still cannot hear out of one ear and has impaired vision in his left eye. *Id.* Defendants' separate and collective inaction—despite credible knowledge that Mr. Wells was in danger—led to serious and permanent injuries that continue to ail Mr. Wells to this day. *Id.* at 12.

## III. Procedural History

Mr. Wells brought suit against Warden Philbin, Unit Manager Brown, and Corrections Officer Fluker in their individual and official capacities in the United States District Court for the Southern District of Georgia. He alleged violations of the Eighth Amendment and sought injunctive, compensatory, and punitive damages. He also moved to proceed *in forma pauperis*, asking the district to allow him to pay the $402 filing fee in installments. At the time he filed the lawsuit, Mr. Wells had no funds, was not employed, and had no other means of acquiring income. *Philbin*, Mot. for Leave to Proceed In Forma Pauperis, Doc 2 – Pg 1-2.

Upon reviewing the complaint, a magistrate judge concluded that Mr. Wells had accumulated three prior strikes and thus recommended that Wells' motion to proceed *in forma pauperis* be denied. *Philbin*, Report & Recommendation, Doc 18 – Pg 1. Those strikes were: (1) *Wells v. Sterling*, No. 6:15-cv-1344-MBS, 2016 WL 1274036, at *2-3 (D.S.C. Mar.

31, 2016), dismissed at summary judgment for failure to exhaust administrative remedies, (2) *Avery Cnty.*, Order, Doc 7 – Pg 3-4, dismissed at screening for failure to exhaust, and (3) *Wells v. Cook*, No. 1:11-cv-324-RJC, 2012 WL 1032689, at *1 (W.D.N.C. Mar. 27, 2012), dismissed for failure to state a claim upon which relief may be granted. Mr. Wells does not dispute that *Cook* was properly designated a strike.[4]

In *Sterling*, Mr. Wells alleged that he was detained beyond his maximum incarceration date due to a calculation error. *Sterling*, Compl., Doc 1 – Pg 4-5. Though he presented evidence that he had exhausted his remedies in accordance with prison officials' instructions, the district court ultimately granted summary judgment to the defendants on the basis of exhaustion. *Sterling*, Order, Doc 61 – Pg 3-4.

In *Avery County*, Mr. Wells alleged that he was denied access to the courts when his legal mail was held without his knowledge, inhibiting

[4] In addition to these actions, Mr. Wells also brought suit in *Wells v. Eagleton*, No. 6:15-703-MBS (D.S.C. Apr. 30, 2015), seeking a writ of habeas corpus. The magistrate judge correctly concluded that this was not a strike, as the petition was for habeas relief. *See Anderson v. Singletary*, 111 F.3d 801, 805 (11th Cir. 1997) (concluding that the three-strikes provision of the PLRA "does not plainly apply to habeas corpus proceedings").

his ability to correspond with his attorney and causing him to receive enhanced charges. *Avery Cnty.*, Compl., Doc 1 – Pg 4. Mr. Wells was not made aware of this conduct until after he was transferred to another facility, rendering exhaustion impossible. *Id.* Nevertheless, the district court dismissed his suit at screening for failing to exhaust. *Avery Cnty.*, Order, Doc. 7 – Pg 4.

Mr. Wells objected to the magistrate judge's recommendation, arguing that those two actions were for failing to exhaust and therefore did not constitute strikes. *Philbin*, Obj. to Report & Recommendation, Doc 20 – Pg 1. The United States District Court for the Southern District of Georgia overruled the objections, adopted the report and recommendation, and entered an order dismissing the case. *Philbin*, Order, Doc 21 – Pg 2.

## IV. Standard of Review

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

## SUMMARY OF THE ARGUMENT

**I.** A dismissal for failing to exhaust administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), does not constitute a per se strike for the purpose of the *in forma pauperis* statute. **A.** Congress enumerated three, and only three, grounds for a strike: dismissals for frivolousness, maliciousness, and a failure to state a claim. The failure to exhaust administrative remedies is not included among these three. **B.** Failing to exhaust administrative remedies is separate from each of these three grounds, and therefore does not generate a strike. It is not frivolous because it does not amount to an "indisputably meritless legal theory" and does not touch on the merits at all. It is not malicious because it is not necessarily brought for the purposes of harassment or annoyance. And it is not a failure to state a claim because it does not address the merits, because such an interpretation would make no sense in the context of the PLRA, and because this view is foreclosed by the Supreme Court's decision *Jones v. Bock*. The only scenario in which a failure to exhaust qualifies as a failure to state a claim is if the plaintiff's allegations affirmatively demonstrate that he has not ex-

hausted—an incredibly rare occurrence. **C.** All of this Court's sister circuits to address the issue agree and hold that an action dismissed for a failure to exhaust, without more, does not constitute a strike under the PLRA. **D.** Furthermore, counting a case dismissed for failure to exhaust administrative remedies as a strike contravenes the interests of justice.

**II.** *Wells v. Sterling* is not a strike. **A.** It was not expressly deemed to be frivolous, malicious, or a failure to state a claim by the dismissing court. Thus, under this Court's precedent, it cannot be a considered a strike on those grounds. **B.** It was also not dismissed for failing to state a claim for the reasons explained in §I, and because it was resolved based on non-exhaustion at summary judgment (a resolution that necessarily requires going beyond the face of the complaint).

**III.** *Wells v. Avery County Sheriff's Office* is also not a strike. **A.** Like *Sterling*, it was not expressly dismissed as frivolous, malicious, or a failure to state a claim, and thus was not a strike. **B.** It was also not dismissed for failing to state a claim because the failure to exhaust was *not* apparent on the face of the complaint. And, this Court's decision in *Rivera v. Allin*, which held that failing to plead exhaustion was tantamount to failing to state a claim, has been overruled by *Jones v. Bock*.

## ARGUMENT

The text of the PLRA demonstrates that a dismissal for failing to exhaust remedies is not per se a strike. A failure to exhaust can only be a strike if it is also frivolous, malicious, or fails to state a claim. And, as *Jones v. Bock* makes clear, it can only be a failure to state a claim if the plaintiff's allegations affirmatively show that he has not exhausted.

The court below assumed that *every* case dismissed for failure to exhaust constitutes a strike, causing it to erroneously assign Mr. Wells three strikes when he only had one. Had the district court conducted a proper analysis, it would have concluded that *Wells v. Sterling* was not a strike. That case was dismissed at summary judgment for failing to exhaust remedies. It was not dismissed for being frivolous, malicious, or failing to state a claim. The same applies to *Wells v. Avery County*, dismissed at screening for failing to exhaust. It was similarly not dismissed for any "three strikes" grounds.

### I. An Action Dismissed For Failing to Exhaust Administrative Remedies Is Not Per Se A Strike Under 28 U.S.C. § 1915(g).

The PLRA provides clear directives for denying *in forma pauperis* status. The statute governing *in forma pauperis* requests for incarcerated persons lists three kinds of cases that are "strikes": Cases dismissed as

frivolous, cases dismissed as malicious, and cases dismissed for failure to state a claim. 28 U.S.C. § 1915(g). That list does not include cases dismissed for failure to exhaust. Actions that fail to exhaust are not necessarily frivolous, malicious, or failures to state a claim upon which relief may be granted. This Court's sister circuits agree. And Congress made this clear in drafting the PLRA.

To be sure, a case dismissed for failure to exhaust may *also* be frivolous or malicious or fail to state a claim and so may nonetheless qualify as a strike. But a dismissal for failure to exhaust administrative remedies, on its own, is simply not an automatic strike.

### A. A dismissal for failure to exhaust is not listed as one of the reasons for assigning strikes.

In determining the meaning of a statute, courts should always begin with the "language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *United States v. Chinchilla*, 987 F.3d 1303, 1308 (11th Cir. 2021). When the statutory language is plain, "the sole function of the courts is to enforce it according to its terms." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 388 (2013) (Sotomayor, J., dissenting). And oftentimes, as is the case here, this is also where the in-

quiry ends. *See Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (holding that the interpretation of 1997e starts and ends by looking no further than the statute itself).

The statutory text enumerates three, and only three, scenarios that warrant strikes. This Court did not mince words in *Daker v. Commissioner*, holding that "[u]nder the negative-implication canon, these three grounds are the *only* grounds that can render a dismissal a strike." 820 F.3d 1278, 1283-84 (11th Cir. 2016) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 107-11 (2012)). A dismissal for failure to exhaust is simply not listed among the three grounds, and thus cannot serve as a basis for assigning strikes. *See id.*

Indeed, exhaustion is not mentioned *a single time* throughout the entirety of the *in forma pauperis* section of the PLRA. *See* PLRA, Pub. L. No. 104-134, § 804, 110 Stat. 1321, 73-75 (1996). Importantly, this glaring omission was not because Congress simply forgot to consider the exhaustion of administrative remedies. Quite the contrary, it discussed exhaustion multiple times in the section of the PLRA immediately preceding the *in forma pauperis* provisions. There, in section 803 of the PLRA,

Congress amended 42 U.S.C. § 1997e to require exhaustion of administrative remedies as a prerequisite to prisoner suits. PLRA, Pub. L. No. 104-134, § 803, 110 Stat. 1321, 70-73 (1996). Had Congress intended to include dismissal for non-exhaustion as grounds for a "strike," it could have easily done so. But it did not.

Omissions like this carry substantial weight in the realm of statutory interpretation. *See Johnson v. White*, 989 F.3d 913, 918 (11th Cir. 2021) (holding that—under the doctrine of *expressio unius*—in comparing two adjacent sections of a statute, the enumeration of some items implies the intentional omission of others). As the Supreme Court has made clear, "it is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another." *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) (cleaned up). The absence of language discussing dismissals for non-exhaustion, then, should not be taken lightly.

Notably, the text of the three strikes provision mirrors the text of section 1915A, another provision passed as part of the PLRA that establishes a "screening" requirement for certain prisoner-initiated suits. 28

U.S.C. § 1915A. Under this provision, a court may *sua sponte* dismiss certain complaints if, among other things, they are "frivolous, malicious, or fail[] to state a claim upon which relief may be granted"—precisely the same language used in the three strikes provision. 28 U.S.C. § 1915A(b)(1). In considering that identical language, the Supreme Court has noted the conspicuous absence of exhaustion language. In *Jones v. Bock*, the Court considered whether exhaustion was a pleading requirement to be demonstrated by the plaintiff, or an affirmative defense to be raised by the defendants. 549 U.S. 199, 204 (2007). In answering this question, the Court observed that while "exhaustion was a 'centerpiece' of the PLRA, failure to exhaust was notably not added" to the screening provision. *Id.* at 214-16 (internal citation omitted) ("[T]hat the PLRA focused on exhaustion rather than other defenses simply highlights the failure of Congress to include exhaustion in terms among the enumerated grounds justifying dismissal upon early screening."). As such, there was "no reason to suppose that the normal pleading rules have to be altered to facilitate judicial screening of complaints specifically for failure to exhaust." *Id.* at 214.

In other words, if exhaustion isn't listed as a reason to *sua sponte* dismiss the suit, courts cannot behave otherwise. Because the *sua sponte* dismissal provision mirrors the language of the three-strikes provision, the Supreme Court's explanation applies with equal force to the three-strikes provision: Exhaustion isn't listed as a basis for a strike, so courts cannot treat it as one. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998) (characterizing as "established canon" that similar language within a statute "must be accorded a consistent meaning"); *Douglas v. Yates*, 535 F.3d 1316, 1320-21 (11th Cir. 2008) (similar). The lack of exhaustion language among the grounds for a strike settles the issue.

In sum, the three strikes provision is clear. It enumerates only three separate grounds for a "strike." As this Court has put it, "We are not at liberty to add statutory language where it does not exist." *Domante v. Dish Networks, L.L.C*, 974 F.3d 1342, 1346 (11th Cir. 2020); *see also Harris*, 216 F.3d at 976 (in discussing a different section of the PLRA: "the role of the judicial branch is to apply statutory language, not to re-write it"). "[O]nly the words on the page constitute the law," and judges are not free to "remodel, update, or detract" from them without trampling

on the legislative process and separation of powers. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). Any decision by courts of this circuit that treats a dismissal for failure to exhaust as an automatic strike simply does not comport with the governing statute.

### B. A dismissal for failure to exhaust is not equivalent to a dismissal for frivolousness, maliciousness, or failure to state a claim.

Because a dismissal for failure to exhaust is not listed as a separate basis for a strike, the only way for non-exhaustion to result in a strike is if the dismissed action is frivolous, malicious, or a failure to state a claim. These are, after all, the only section 1915(g) grounds for assessing strikes. *See* 28 U.S.C. § 1915(g). However, an action dismissed for a failure to exhaust, without more, does not fall into any of these three categories.

#### 1. By definition, a dismissal for failure to exhaust is not a dismissal on any of the enumerated section 1915(g) grounds.

"Frivolous," "malicious," and "failure to state a claim" are all legal terms of art. As the Supreme Court has instructed, it is a "cardinal rule of statutory construction that, when Congress employs a term of art, it

presumably knows and adopts the cluster of ideas" that are attached to it. *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (cleaned up).

**Frivolous.** A frivolous claim, put simply, is a pointless one. *Frivolous*, BLACK'S LAW DICTIONARY 668 (6th ed. 1990) ("[o]f little weight or importance"); *frivolous*, BALLENTINE'S LAW DICTIONARY 503 (3d ed. 1969) ("[s]o clearly and palpably bad and insufficient as to require no argument to show the character as indicative of bad faith upon a bare inspection"); *see also United States v. Shaygan*, 652 F.3d 1297, 1312 (11th Cir. 2011) (frivolous actions are "often brought to embarrass or annoy the defendant"). The Supreme Court has defined frivolous claims as those that challenge an "inarguable legal conclusion" or raise a "fanciful factual allegation." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). More often than not, such claims present "an indisputably meritless legal theory." *Id.* at 327. The frivolousness label is thus reserved for the most futile and groundless actions that a prisoner can bring.

A claim that has not been exhausted is not inherently frivolous because the issue of exhaustion does not involve the merits of a plaintiff's legal theory. As this Court explained in *Daker*, dismissals that do not address the merits are, by definition, not frivolous. *See* 820 F.3d at 1284

(holding that dismissals for want of prosecution and lack of jurisdiction cannot be "frivolous" because they "say[] nothing about the underlying merits of the appeal"). Non-exhaustion only proves that a plaintiff has yet to complete the lengthy—and oftentimes complex—administrative grievance process. Other times, it is evidence that the plaintiff was prevented from doing so. This settles nothing about the plaintiff's underlying claim. *See Abreu v. Alutiiq-Mele, LLC*, No. 11-20888-CIV, 2012 WL 4369734, at *13-14 (S.D. Fla. Aug. 3, 2012) (holding that the failure to comply with a statutory exhaustion scheme did not render the plaintiff's claims frivolous). Therefore, a dismissal for failure to exhaust, without more, is not a frivolous action.

**Malicious.** A failure to exhaust is also not malicious. A malicious claim must evince malice or exhibit willful misconduct on the part of the plaintiff. *Malicious*, BALLENTINE'S LAW DICTIONARY 768 ("[w]icked and perverse"); *malicious*, RADIN'S LAW DICTIONARY 198 (2d ed. 1970) ("done without any reason that would justify a normally conscientious man in so acting"); *malicious act*, BLACK'S LAW DICTIONARY 958 ("done without legal justification or excuse"). Malicious actions are those filed for an improper purpose. *See Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013)

(finding as malicious a claim "filed with the intention or desire to harm another"); *Crisafi v. Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981) (per curiam) (finding as malicious a complaint filed for purposes of vengeance and not to redress a legal wrong). In this circuit, actions that abuse the judicial process through repetition,[5] misrepresentation,[6] and noncompliance with court orders also qualify as malicious.[7] The key is a lack of good faith by the complainant. A failure to exhaust administrative remedies is none of these.

Unless there is additional evidence that the plaintiff has brought a suit maliciously, failing to exhaust—on its own—evinces no such motive.

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[5] *Daker v. Bryson*, 841 F. App'x 115, 120-21 (11th Cir. 2020) (suit was malicious where it was entirely duplicative of an earlier case).

[6] *Pinson v. Grimes*, 391 F. App'x 797, 798-99 (11th Cir. 2010) (suit was malicious where plaintiff failed to list all related court cases under penalty of perjury); *Henderson v. Morales*, No. 312-092, 2012 WL 5473057, at *2 (S.D. Ga. Oct. 10, 2012) (suit was malicious where plaintiff provided false information about prior filing history); *but see Hines v. Thomas*, 604 F. App'x 796, 800-01 (11th Cir. 2015) (reversing dismissal based on maliciousness where plaintiff did not disclose entire litigation history, but said that he could not remember all prior suits and exhibited no record of willful misconduct).

[7] *Arango v. Butler*, No. 14-61707-CIV, 2014 WL 4639411, at *2 (S.D. Fla. Sept. 16, 2014) ("Dismissals for failure to comply with court orders fall under the category of 'abuse of the judicial process'").

At its core, a malicious claim primarily seeks to harass or annoy. When a plaintiff has no such intent and instead tries to bring a claim in good faith, the claim is not malicious. *See Hines v. Thomas*, 604 F. App'x 796, 800-01 (11th Cir. 2015) (reversing lower court's dismissal for maliciousness because plaintiff did not display a "'clear record' of willful misconduct"). Of course, a claim that fails to exhaust may be malicious for reasons unrelated to exhaustion—for instance, if the plaintiff also committed perjury. *See Schmidt v. Navarro*, 576 F. App'x 897, 899 (11th Cir. 2014) (affirming the dismissal of a suit as malicious after the plaintiff committed perjury). But failing to exhaust, without more, is not per se malicious.

**Failure to State a Claim.** A failure to state a claim is when the pleadings do not provide a plausible basis to infer "that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). An action fails to state a claim upon which relief may be granted when "the allegations, taken as true, show that the plaintiff is not entitled to relief." *Jones*, 549 U.S. at 215. A dismissal for failing to exhaust administrative remedies is not necessarily a failure to state a claim for several reasons.

First, the Supreme Court's decision in *Jones v. Bock* holds as much. The Court held that "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Id.* at 216. In other words, incarcerated plaintiffs do not have to show, as part of their affirmative case, that they have exhausted their administrative remedies. Instead, non-exhaustion is a defense to be raised by defendants. *Id.*; *Whatley v. Smith*, 898 F.3d 1072, 1082 (11th Cir. 2018). *Jones* makes clear that the only way for a failure to exhaust to become a failure to state a claim is if the inmate's allegations affirmatively establish that he did not exhaust. *See Bingham v. Thomas*, 654 F.3d 1171, 1175 (11th Cir. 2011) ("A complaint may be dismissed if an affirmative defense, such as failure to exhaust, appears on the face of the complaint") (citing *Jones*, 549 U.S. at 215). In *Bingham*, this Court explained that a case can only be dismissed at the pleading stage if it was "clear from the face of the complaint" that the plaintiff did not exhaust his remedies. *Id.* at 1176. Such dismissals will be rare, as very few complaints will affirmatively allege that the

plaintiff failed to exhaust.[8] And where the allegations do not clear this high hurdle, dismissal for failure to state a claim is improper.

Second, this Court has explained that a "dismissal for failure to state a claim . . . is a 'judgment on the merits.'" *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990) (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981)). By comparison, this Court has also stated that "PLRA exhaustion defense is not a failure-to-state-a-claim defense because it is independent from the merits of the plaintiff's claim." *Brooks*

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[8] Several circuits have recognized that non-exhaustion will only be facially apparent in the rarest of circumstances or when the defense is "unmistakable." *See Custis v. Davis*, 851 F.3d 358, 362 (4th Cir. 2017) ("Custis's complaint did not present the *rare, exceptional instance* where administrative exhaustion was apparent on the complaint's face") (emphasis added); *Boyce v. Ill. Dep't of Corr.*, 661 F. App'x 441, 443 (7th Cir. 2016) (citing *Walker v. Thompson*, 288 F.3d 1005, 1009-10 (7th Cir. 2002)); *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014) ("In a few cases, a prisoner's failure to exhaust may be clear from the face of the complaint. However, such cases will be *rare* because a plaintiff is not required to say anything about exhaustion in his complaint") (emphasis added); *United States v. Del Toro-Alejandre*, 489 F.3d 721, 723 (5th Cir. 2007) ("the usual PLRA practice would permit a district court to dismiss sua sponte a prisoner's complaint for failure to exhaust *in the rare instance* where the prisoner's failure to exhaust appeared on the face of his complaint") (emphasis added); *Freeman v. Watkins*, 479 F.3d 1257, 1260 (10th Cir. 2007) ("we caution that *only in rare cases* will a district court be able to conclude from the face of the complaint that a prisoner has not exhausted his administrative remedies.") (cleaned up; emphasis added).

*v. Warden*, 706 F. App'x 965, 969 (11th Cir. 2017) (citing *Bryant v. Rich*, 530 F.3d 1368, 1376 n.12 (11th Cir. 2008)); *see also Howard v. Gee*, 297 F. App'x 939, 940 (11th Cir. 2008) ("a finding of exhaustion is not an adjudication on the merits").[9] Whether a plaintiff has gone through the administrative grievance process at their facility says nothing about the merits of their claims. If a prisoner has indisputably suffered a constitutional violation—and thus has a clearly meritorious claim—he could still be barred from suing on the basis of non-exhaustion.

As such, a dismissal for failure to exhaust administrative remedies—without more—is not the same as a dismissal for frivolousness, maliciousness, or the failure to state a claim.

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[9] This Court has treated administrative exhaustion as a non-merits determination in other contexts as well. *See Banks v. United States*, 796 F. App'x 615, 616 (11th Cir. 2019) (in the context of habeas corpus: "If a previous § 2254 petition was dismissed as premature or for failure to exhaust, the dismissal was not on the merits"); *Freeman v. Cavazos*, 939 F.2d 1527, 1530 (11th Cir. 1991) (in the context of federal education funds: "Dekalb was required to exhaust administrative remedies *before* we would address the merits of the case") (emphasis added).

2. Another section of the PLRA makes clear that dismissing a suit for failure to exhaust is different from dismissing a suit for being frivolous, malicious, or failing to state a claim.

That the failure to exhaust does not fit into any of the legal definitions of frivolousness, maliciousness, or failure to state a claim is convincing proof that it is separate. But further support can be found in one of the PLRA's *sua sponte* dismissal provisions, 42 U.S.C. § 1997e(c). That provision reads:

> (c) Dismissal.—
>
> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions . . . by a prisoner . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of remedies.

PLRA § 803(d), 110 Stat. 1321, 71 (1996).

Like 28 U.S.C. § 1915A(b), discussed *supra*, at §I.A, 42 U.S.C. § 1997e(c) allows a district court, on its own motion, to dismiss a case for various reasons, including that "the action is frivolous, malicious, [or]

fails to state a claim upon which relief can be granted"—the same language as the three-strikes provision. 42 U.S.C. § 1997e(c)(1). Because both provisions use the same language, they must be construed to have the same meaning. *United States v. DBB, Inc.*, 180 F.3d 1277, 1285 (11th Cir. 1999) (citing *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986)).

The language of 42 U.S.C. § 1997e(c) makes clear that a case dismissed for nonexhaustion is not necessarily a case dismissed for frivolousness, maliciousness, or failure to state a claim. The phrase "without first requiring" implies that whether a claim is "frivolous, malicious, [or] fails to state a claim" is independent of whether it "exhaust[s] remedies." Otherwise, Congress would have lumped them all together. If a case dismissed for failure to exhaust is necessarily a case dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim," the above provision would require the dismissal of a claim for failing to exhaust remedies without first requiring the exhaustion of remedies. This makes no sense.

Moreover, 42 U.S.C. § 1997e(c) requires district courts to dismiss actions that "seek[] monetary relief from a defendant who is immune

from such relief," and it lists that requirement separately from the requirement to dismiss actions that are "frivolous, malicious, [or] fail to state a claim upon which relief can be granted." In other words, Congress did not believe that "frivolous, malicious, or fails to state a claim upon which relief may be granted" was a catchall for any possible bar to suit. If it were, Congress would not have listed immunity dismissals as separate from dismissals for those first three bases. If Congress also wanted the language of the *sua sponte* provision to encompass a failure to exhaust, it would similarly have said so.

Finally, the Supreme Court has acknowledged that dismissals for nonexhaustion are uniquely complicated relative to dismissals for *sua sponte* grounds. Exhaustion is generally a complex inquiry that requires significant factual development, is not always clear-cut, and—in certain situations—can be entirely excused. In *Ross v. Blake*, for example, the Court listed at least three circumstances in which a prisoner is not required to exhaust: (1) when the procedure operates as a simple dead end, (2) when the process is so opaque that no reasonable prisoner could navigate it, and (3) when prison officials thwart inmates' attempts to

properly exhaust. 136 S. Ct. 1850, 1859-60 (2016).[10] This fact-intensive inquiry does not lend itself to a simple, *sua sponte* screening mechanism. That's why Congress chose to omit nonexhaustion from the *sua sponte* screening provision.

If nonexhaustion is not a basis for *sua sponte* screening, then it cannot be a basis for a strike, either, since the two provisions use the same language.

3. *Rivera v. Allin* is not to the contrary.

Though the text of the statute and the Supreme Court's case law are clear that a case dismissed for failure to exhaust is not a strike, this

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[10] As many circuits have recognized, it is relatively common for exhaustion to be excused under one of these grounds. *See Lanaghan v. Koch*, 902 F.3d 683, 689-90 (7th Cir. 2018) (exhaustion excused where inmate with incapacitating muscle disease was prevented from drafting a grievance); *Tuckel v. Grover*, 660 F.3d 1249, 1255-56 (10th Cir. 2011) (exhaustion excused where inmate, having been beaten by other inmates following a prior grievance, did not exhaust remedies before filing civil suit); *Pyles v. Nwaobasi*, 829 F.3d 860, 866 (7th Cir. 2016) (exhaustion excused where inmate submitted grievance form to the law library and the library took no action prior to the filing deadline); *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002) (exhaustion excused where prison official failed to respond to a grievance within the prescribed time limit); *Dole v. Chandler*, 438 F.3d 804, 807 (7th Cir. 2006) (exhaustion excused where prisoner's only method of filing his grievance was to place it in his "chuckhole," after which point it was misplaced).

Court and district courts throughout this circuit routinely assume that any case dismissed for failure to exhaust—at any stage of the proceedings—counts as a strike.[11] The trouble stems from this Court's opinion in *Rivera v. Allin*, which held that a complaint that "lacked any allegations of exhaustion of remedies" was "tantamount to one that fails to state a claim upon which relief may be granted" and therefore constituted a strike. 144 F.3d 719, 731 (11th Cir. 1998). This Court should clarify that *Rivera* was never so broad and that, in any event, *Rivera* has been overruled by *Jones v. Bock*.

First, *Rivera* dealt only with cases dismissed at the complaint stage. In that case, this Court reviewed the district court's assessment of strikes for two of Rivera's prior suits. Both suits were dismissed at the pleadings stage. *See* Order at 10, *Rivera v. Arocho*, No. 3:96-cv-00275 (M.D. Fla.

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[11] *See, e.g.*, *White v. Lemma*, 947 F.3d 1373, 1379 (11th Cir. 2020) (". . . a third [case] was dismissed for failure to exhaust administrative remedies, which counts as a strike under our precedent.") (citing *Rivera v. Allin*, 144 F.3d 719, 728-31 (11th Cir. 1998)); *Crook v. Horton*, No. 14:19cv611-MW-MAF, 2020 WL 3052518, at *2 n.2 (N.D. Fla. May 6, 2020) (same); *Wright v. Mims*, No. 1:13-cv-845-TWT, 2013 WL 4013163, at *2 n.4 (N.D. Ga. Aug. 5, 2013) (same); *Marlin v. Haynes*, No. 212-059, 2012 WL 1664160, at *1 n.1 (S.D. Ga. Apr. 16, 2012) (same); *Russell v. Burnette*, No. 308-096, 2008 WL 5262688, at *2 (S.D. Ga. Dec. 17, 2008) (same).

Apr. 25, 1996), ECF No. 6; Order at 2, *Rivera v. Parker*, No. 3:96-cv-00325 (M.D. Fla. May 2, 1996), ECF No. 4. Therefore, *Rivera* says nothing about nonexhaustion dismissals at summary judgment, trial, or other phases of a proceeding.

Second, *Rivera* has been clearly overruled. In *Jones v. Bock*, the Supreme Court confirmed that incarcerated plaintiffs are "not required to specially plead or demonstrate exhaustion in their complaints." *Jones*, 549 U.S. at 216. As such, courts are prohibited from dismissing lawsuits on this basis. Even a suit that is completely silent as to exhaustion cannot be dismissed on this basis alone. By holding that exhaustion is an affirmative defense to be pled by defendants, *Jones* undermined the entire premise of the *Rivera* rule. *Id.* The *Rivera* rule is predicated on the idea that failing to *allege* exhaustion is "tantamount to" failing to state a claim and therefore constitutes a strike. *See Rivera*, 144 F.3d at 731. But *Jones* makes clear that this isn't true—a court can't dismiss a petition simply because it fails to allege exhaustion, so a failure to allege exhaustion cannot be "tantamount to" a failure to state a claim. *Jones*, 549 U.S. at 216.

And because that was the *sole* basis for *Rivera*'s conclusion that a dismissal on exhaustion grounds counts as a strike, the conclusion can no longer stand.

This comes as no surprise, as numerous panels within this circuit have already recognized that the premise of *Rivera*'s strike rule—that a failure to allege exhaustion is equivalent to a failure to state a claim—has been abrogated. *See Anderson v. Donald*, 261 F. App'x 254, 255-56 (11th Cir. 2008) (acknowledging that the *Rivera* pleading rule has been abrogated by *Jones*); *Hernandez v. Fla. Dep't of Corr.*, 281 F. App'x 862, 867 (11th Cir. 2008) (explaining in a parenthetical that *Jones* "overrul[ed]" *Rivera*). Holdings by prior panels are no longer binding if they have been "overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008); *In re Provenzano*, 215 F.3d 1233, 1235 (11th Cir. 2000) ("We would, of course, not only be authorized but also required to depart from [our prior decision] if an intervening Supreme Court decision actually overruled or conflict with it").[12]

[12] Three-judge panels of this Court have overruled prior precedent even where an intervening Supreme Court case is not directly on point. *See*

Other circuits, too, have recognized that in light of *Jones v. Bock*, a dismissal for failing to plead exhaustion cannot be a strike. For example, in evaluating whether courts could dismiss a case *sua sponte*—under a provision of the PLRA that, like the three-strikes provision, is limited to cases that are "frivolous, malicious, or fail[] to state a claim upon which relief may be granted"—the Sixth Circuit had held, before *Jones*, that "a plaintiff who fails to allege exhaustion of administrative remedies through particularized averments does not state a claim on which relief may be granted, and his complaint must be dismissed sua sponte." *See Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002) (cleaned up). After *Jones*,

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*Babb v. Sec'y, Dep't of Veterans Affairs*, 992 F.3d 1193, 1196 (11th Cir. 2021) (holding that a Supreme Court decision interpreting one portion of a statute overruled circuit precedent interpreting a different, but similar statute). And they have done so even many years after the Supreme Court decision. *See Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 862 (11th Cir. 2020) (recognizing—in 2020—that a prior panel decision conflicted with a 2006 Supreme Court case and thus could not stand).

Although this Court has reiterated the *Rivera* holding about three strikes since *Jones*, opinions that merely restate a prior panel holding do not *sub silentio* hold that the prior ruling survived an uncited Supreme Court decision. *Gahagan v. USCIS*, 911 F.3d 298, 302 (5th Cir. 2018); *see also Monroe Cnty. v. U.S. Dep't of Labor*, 690 F.2d 1359, 1363 (11th Cir. 1982) (recognizing that, where the rule of orderliness would require disregarding a Supreme Court decision, the rule of orderliness must give way).

the Sixth Circuit recognized that cases dismissed "for failure to satisfy this court's now-abrogated requirement that prisoners specifically plead exhaustion . . . were not dismissals on the grounds that [they] were frivolous, malicious, or failed to state a claim upon which relief may be granted." *See Feathers v. McFaul*, 274 F. App'x 467, 469 (6th Cir. 2008). In other words, the court came to the exact realization explained above. *See also Strope v. Cummings*, 653 F.3d 1271, 1274 (10th Cir. 2011) (explaining that, post-*Jones*, dismissals for failing to plead exhaustion are not strikes). Without the pleading requirement as a foundation, a dismissal for failing to exhaust can no longer be tantamount to a failure to state a claim.

Decisions within this circuit that post-date *Jones* continue to rely on *Rivera* without actually considering the effect of *Jones*, emphasizing the need for this Court to address the decision. *See, e.g.*, *White v. Lemma*, 947 F.3d 1373, 1379 (11th Cir. 2020). This Court should now take the opportunity, in a case where the issue is cleanly raised, to bring its precedent in line with its sister circuits and the Supreme Court and hold that *Rivera* is no longer good law.

### C. The other circuits agree that a dismissal for failure to exhaust is not a strike.

This Court's sister circuits agree that a failure to exhaust, without more, does not constitute a strike under the PLRA. The Second, Third, Fourth, Seventh, Eighth, Tenth, and D.C. circuits all have the correct view.[13]

In *Snider v. Melindez*, the Second Circuit explained, "we do not believe that failure to exhaust qualifies as failure to state a claim in the context of the PLRA." 199 F.3d 108, 115 (2d Cir. 1999). In explaining that decision in a later case, the Second Circuit expounded that exhaustion concerns the "prematurity" of a suit, and that dismissals for prematurity simply do not warrant strikes. *Tafari v. Hues*, 473 F.3d 440, 443 (2d Cir. 2007) (prematurity is a "temporary, curable, procedural flaw" and "we do not think that Section 1915(g) was meant to impose a strike upon a prisoner who suffers a dismissal because of the prematurity of his suit") (quoting *Snider*, 199 F.3d at 112).

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[13] Though it has only addressed the question in dicta, the Sixth Circuit has said that where a complaint is dismissed in its entirety for failing to exhaust, the plaintiff would have a "compelling argument that a strike should not be assessed." *Pointer v. Wilkinson*, 502 F.3d 369, 375 (6th Cir. 2007).

In *Ball v. Famiglio*, the Third Circuit held that dismissals for failure to exhaust do not constitutes strikes "unless a court explicitly and correctly concludes that the complaint reveals the exhaustion defense on its face and the court then dismisses the unexhausted complaint for failure to state a claim." 726 F.3d 448, 459-60 (3d Cir. 2013), *partially abrogated on other grounds by Coleman v. Tollefson*, 575 U.S. 532 (2015). As such, a strike can only be assigned to a non-exhausted claim when the complaint's allegations actually concede the failure to exhaust. Otherwise, a strike does not accumulate.

In *Green v. Young*, the Fourth Circuit wrote that "when the PLRA is considered as a whole, we have no difficulty concluding that a routine dismissal for failure to exhaust administrative remedies does not amount to a strike." 454 F.3d 405, 408 (4th Cir. 2006). The court continued by saying:

> Because a dismissal for failure to exhaust is not listed in § 1915(g), it would be improper for us to read it into the statute. Congress created the exhaustion requirement in the section of the PLRA immediately preceding the three-strikes provision, but Congress nonetheless declined to include a dismissal on exhaustion grounds as one of the types of dismissals that should be treated as a strike. Accordingly, we must honor Congress's deliberate omission . . .

*Id.* at 409.

In *Turley v. Gaetz*, the Seventh Circuit held that "a prisoner's failure to exhaust administrative remedies is statutorily distinct from his failure to state a claim upon which relief may be granted." 625 F.3d 1005, 1012-13 (7th Cir. 2010). The court then held that "[t]he dismissal of an action for failure to exhaust therefore does not incur a strike." *Id.*

In *Owens v. Isaac*, the Eighth Circuit determined that when a case is dismissed without prejudice for failing to exhaust administrative remedies, "such a dismissal is not a strike under section 1915(g)." 487 F.3d 561, 563 (8th Cir. 2007) (per curiam).

In *Strope v. Cummings*, the Tenth Circuit explained that an incarcerated plaintiff's failure to "plead and prove exhaustion" was not a failure to state a claim, and therefore not a strike under the PLRA. 653 F.3d at 1274.

And in *Thompson v. DEA*, the D.C. Circuit concluded that where exhaustion is raised as an affirmative defense—that is, in the vast majority of cases where non-exhaustion is not apparent from the face of the complaint—"the dismissal will not count as a strike." 492 F.3d 428, 438 (D.C. Cir. 2007).

### D. Counting a dismissal for nonexhaustion as a strike is inequitable and contrary to the purpose of the statute.

In addition to clear directives from the statute, Supreme Court, and sister circuits, the practice of counting nonexhaustion dismissals as strikes is flawed as a matter of policy.

The fundamental right of incarcerated persons to access the courts "may not be denied or obstructed." *Johnson v. Avery*, 393 U.S. 483, 485 (1969). And ensuring that indigent individuals have the ability to vindicate their rights in our judicial system is a core part of our constitutional tradition. *See Lewis v. Casey*, 518 U.S. 343, 354 (1996); *Vanderberg v. Donaldson*, 259 F.3d 1321, 1323 (11th Cir. 2001). Courts must therefore exercise substantial care when barring plaintiffs from proceeding *in forma pauperis*, given that it could end up permanently shutting the courthouse doors to incarcerated plaintiffs. The costs of incarceration are astoundingly high, with basic necessities like soap and phone calls costing significant amounts of money—money that is difficult, or impossible, to earn. Those who cannot file suit *in forma pauperis* basically cannot file suit at all. And without access to *in forma pauperis* status, they may not have any way to defend their constitutional rights.

Furthermore, assigning strikes on the basis of nonexhaustion alone makes little sense. Because exhaustion is curable, an incarcerated plaintiff could have a case dismissed for nonexhaustion, refile the same case after exhausting, *win* the entire suit, and still walk away with a strike. *See Tafari*, 473 at 443 (explaining that the three-strikes provision "was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws"); *Snider*, 199 F.3d at 112 ( "We do not think that Section 1915(g) was meant to impose a strike upon a prisoner who suffers a dismissal because of the prematurity of his suit but then exhausts his administrative remedies and successfully reinstitutes it."). This would be a truly bizarre—and grossly unfair—result.

Finally, counting failures to exhaust as strikes would be contrary to the intent of Congress in drafting the PLRA. The legislative history of the PLRA demonstrates that its primary objective was to penalize those who repeatedly bring baseless or bad faith claims. *See Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002) ("The purpose of the PLRA is to curtail *abusive* prisoner litigation") (emphasis added). Congress did not, however, want prisoners who raised "legitimate" claims to be barred from

court. *See* 141 CONG. REC. S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Orrin Hatch) ("I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised"); 142 CONG. REC. S2297 (daily ed. Mar. 19, 1996) (statement of Sen. Paul Simon) (". . . in many instances there are legitimate claims that deserve to be addressed. History is replete with examples of egregious violations of prisoners' rights. . . . In seeking to curtail frivolous lawsuits, we cannot deprive individuals of their basic civil rights.").

Assigning strikes for non-exhaustion clashes with that goal. Exhaustion has no bearing on the actual merit of the plaintiff's claims. It does not ask or answer whether a particular suit is baseless or brought in bad faith. When a case is dismissed on the grounds that it is frivolous, malicious, or a failure to state a claim, Congress deems the case to be a strike for initiating a bad faith suit. When a case is instead dismissed for failing to exhaust, there is no inquiry into the "abusiveness" or "legitimacy"—to borrow Congress's own words—of the case. Perpetually shutting the courthouse doors to pro se plaintiffs who commit correctable errors like failing to exhaust simply does not further Congress' goal.

* * * * *

The text, structure, and history of the PLRA make clear that a dismissal for failing to exhaust is not a per se strike under § 1915(g). Such a dismissal can only be a strike when the claim also happens to be frivolous, malicious, or a failure to state a claim. With respect to the first two categories, dismissals for non-exhaustion are not by definition dismissals for frivolousness or maliciousness. With respect to the third, the only way for a failure to exhaust to be a failure to state a claim is if non-exhaustion is apparent on the face of the complaint. Only the rarest of cases will qualify. In all other situations, a strike does not accrue.

## II. *Wells v. Sterling* Is Not A Strike.

As the previous section explains, only actions that are frivolous, malicious, or fail to state a claim can count as strikes under section 1915(g). Merely failing to exhaust, on its own, does not put a case into one of those three categories. Because *Wells v. Sterling* was not "dismissed on the ground that it [wa]s frivolous, malicious, or fail[ed] to state a claim," *see* 28 U.S.C. §1915(g), the district court erred in counting it as a strike.

In *Sterling*, Mr. Wells alleged that he was detained beyond his maximum sentence due to a calculation error. *Sterling*, Compl., Doc 1 – Pg 4-

5. The defendants argued that they were entitled to summary judgment because Mr. Wells had failed to exhaust his administrative remedies prior to bringing suit. *Sterling*, Defs.' Mem. in Supp. of Summ. J., Doc 35-1 – Pg 6. Though Mr. Wells explained that he attempted to exhaust in accordance with instructions given to him, the district court ultimately overruled his objections and granted the defendants' motion for summary judgment for failure to exhaust. *Sterling*, Order, Doc 61 – Pg 4.

### A. *Wells v. Sterling* was not dismissed for being frivolous, malicious, or failing to state a claim.

In *Daker v. Commissioner*, this Court made clear that a prior action is not dismissed for being frivolous, malicious, or failing to state a claim unless the dismissing court expressly says so. 820 F.3d at 1284; *see also Byrd v. Shannon*, 715 F.3d 117, 126 (3d Cir. 2013) ("[A] strike under § 1915(g) will accrue only if the entire action or appeal is (1) dismissed explicitly because it is 'frivolous,' 'malicious,' or 'fails to state a claim' or (2) dismissed pursuant to a statutory provision or rule that is limited solely to dismissals for such reasons."); *Blakely v. Wards*, 738 F.3d 607, 614 (4th Cir. 2013) (similar); *Paul v. Marberry*, 658 F.3d 702, 706 (7th Cir. 2011) (similar). *Daker* held that a court cannot assume that an action

was dismissed as frivolous or malicious or for failure to state a claim "unless the dismissing court made some express statement to that effect." 820 F.3d at 1284. The panel explained that, pursuant to the language of the statute, "the Act instructs us to consult the *prior* order that dismissed the action or appeal and to identify the *reasons* that the court gave for dismissing it." *Id.*

Neither the magistrate judge nor the district court said that Mr. Wells' case in *Sterling* was being dismissed as frivolous or malicious or for failing to state a claim. *Sterling*, Order, Doc 61; *Sterling*, Report & Recommendation, Doc 57. The dismissal was not expressly predicated on any of those grounds. Therefore, *Sterling* cannot be a strike. *See Daker v. Comm'r*, 820 F.3d at 1284 ("We cannot conclude that an action or appeal 'was dismissed on the grounds that it is frivolous' based on our *present-day* determination that the action or appeal was frivolous or based on our conclusion that the dismissing court *could have* dismissed it as frivolous.").

### B. *Wells v. Sterling* was not dismissed for failing to state a claim.

The court below mistakenly believed that *Sterling* was dismissed for failing to state a claim, even though the dismissing court did not say

so. Even apart from *Daker*'s clear directive regarding the labeling of dismissals, *Sterling* was not a failure to state a claim.

First, as explained in detail *supra* §I, a failure to exhaust is not per se a failure to state a claim. To the extent that the district court in this case thought those two were interchangeable, that determination was erroneous. *See Philbin*, Order, Doc 21 – Pg 1 (only referencing the failure to exhaust as the grounds for a strike).

Second, the case was resolved on a Rule 56 motion for summary judgment, not a Rule 12 motion to dismiss for failure to state a claim. *Sterling*, Defs.' Mot. for Summ. J., Doc 35 – Pg 1. Therefore, it could not have been dismissed for failing to state a claim.[14] *Jones v. Bock* makes clear that a case dismissed for failure to exhaust is only a dismissal for a failure to state a claim if the failure to exhaust is apparent on the face of the complaint. Because *Sterling* was decided at summary judgment, the failure to exhaust could not have been apparent on the face of the complaint. Indeed, both the magistrate judge and district court considered

[14] Some courts have recognized that a grant of summary judgment, no matter the reason for the grant, cannot constitute a strike. *See Thompson*, 492 F.3d at 438 ("if the court dismisses the complaint on . . . a motion for summary judgment, the dismissal will not count as a strike.").

substantial evidence outside of the pleadings to reach their decisions. *See Sterling*, Report & Recommendation, Doc 57 (considering several affidavits and evidence from another one of Mr. Wells' lawsuits). As such, the failure to exhaust was not a failure to state a claim, and the dismissal was not a strike.

The court below cited to *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008), for the proposition that a summary judgment dismissal predicated on a failure to exhaust "is the equivalent of a motion to dismiss."[15] *Philbin*, Order, Doc 21 – Pg 2. But the district court badly misreads *Bryant*. As a starting point, of all the grounds for dismissal under a Rule 12 motion, only a dismissal under 12(b)(6) can constitute a strike. This is because 12(b)(6) specifically denotes a "failure to state a claim upon which relief can be granted," an enumerated ground for a strike. Fed. R. Civ. P.

[15] The court below also cited *White v. Lemma*, 947 F.3d 1373 (11th Cir. 2020) for the blanket assertion that a case dismissed for failing to exhaust is a strike. But *White* only dealt with a case dismissed at the screening stage for failing to exhaust remedies, not with a case dismissed at summary judgment for failing to exhaust remedies, and therefore has no bearing on whether *Sterling* is a strike. *See White*, 947 F.3d at 1379 (discussing Order 13, *White v. United States*, No. 3:16-CV-00968, (S.D. Ill. Nov. 22, 2016), ECF 15).

12(b)(6); 28 U.S.C. § 1915(g). But while *Bryant* suggests treating exhaustion-based summary judgment motions as motions to dismiss, it does not analogize to 12(b)(6). Instead, it analogizes to 12(b)(2), (3) and (5)—none of which are grounds for strikes under section 1915(g). *See Bryant*, 530 F.3d at 1376 (comparing exhaustion summary judgment motions to dismiss to those for "lack of personal jurisdiction, improper venue, and ineffective service of process" because none of these grounds are an "adjudication on the merits").

And, were there any doubt, *Bryant* expressly rejects the very idea that a failure to exhaust should be considered a failure to state a claim. The *Bryant* Court wrote, "[i]t bears noting that where, as in this case, exhaustion is not adjudicated as part of the merits, it is unlike a defense under Rule 12(b)(6) for failure to state a claim, which is generally decided on the merits." *Id.* at 1376 n.12 (citing *NAACP v. Hunt*, 891 F.2d at 1560).

In short, *Bryant* does not say what the district court thinks. A motion for summary judgment under Rule 56, by definition distinct from a Rule 12 motion, does not give rise to a strike. And because summary judgment evaluates evidence beyond the pleadings, the failure to exhaust in *Sterling* could not have been apparent on the face of the complaint—the

only circumstance in which *Jones v. Bock* allows a failure to exhaust to be characterized as a failure to state a claim. *Sterling* was not a strike.

## III. *Wells v. Avery County* Is Also Not A Strike[16]

The district court also determined that *Wells v. Avery County Sheriff's Office*, which was dismissed at screening for failure to exhaust administrative remedies, was a strike. *Philbin*, Report & Recommendation, Doc 18 – Pg 3 (discussing *Avery Cnty.*, No. 1:13-cv-55-RJC (W.D.N.C. Apr. 30, 2013)). This, too, was error.

In *Avery County*, Mr. Wells alleged a violation of his right to access the courts when he was denied a request for his attorney's address, his legal mail addressed to his attorney was withheld, and his legal mail was never given to him. *Avery Cnty.*, Compl., Doc 1 – Pg 4. As a result of being

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[16] A decision that *Sterling* is not a strike would mean that Mr. Wells has only two strikes, that the district court must thus be reversed, and that Mr. Wells should be allowed to proceed *in forma pauperis*. But regardless of this Court's decision on whether *Sterling* was a strike, this Court should still address *Avery County* in order to clarify how many strikes Mr. Wells has at this time. Such clarification will "inevitably influence" Mr. Wells' future litigation decisions and thus "present[s] a sufficiently concrete harm . . . to consider the merits of his contentions." *Belanus v. Clark*, 796 F.3d 1021, 1028 (9th Cir. 2015). This Court has previously exercised its discretion to do so. For instance, in *Daker v. Commissioner*, this Court vacated six separate strikes even though it only needed to vacate four to allow the suit to proceed. 820 F.3d at 1286.

unable to adequately communicate with his attorney, he received enhanced felony charges. *Id.* On the form that the district court requires prisoners to submit with their complaint, in response to the question, "Did you present the facts of each claim relating to your complaint to the Inmate Grievance Commission or any other available administrative remedy procedure?" Mr. Wells responded "No." *Id.* at 2. Under subsection "C" of that question, Mr. Wells explained that he was prevented from pursuing any grievance process because he was only made aware of the defendants' conduct after he was transferred to another facility. *Id.* at 2-3. As such, he never had an opportunity to file a grievance because the defendants had been withholding his legal mail without his knowledge. *Id.* Nevertheless, the district court concluded that Mr. Wells failed to exhaust his remedies and *sua sponte* dismissed the action. *Avery Cnty.*, Order, Doc 7 – Pg 2.

### A. *Wells v. Avery County* was not dismissed for being frivolous, malicious, or failing to state a claim.

As in *Sterling*, the disposition of the district court in *Avery County* made no mention of frivolousness, maliciousness, or the failure to state a claim. *Avery Cnty.*, Order, Doc 7 – Pg 4. Instead, it simply said that Mr. Wells did not exhaust his remedies and that "it is, therefore, ordered that

. . . Plaintiff's complaint . . . is dismissed without prejudice." *Id.* Under the clear direction of *Daker*, the lack of an "express statement to [the] effect" of a section 1915(g) dismissal is dispositive. 820 F.3d at 1284. Therefore, *Avery County* was not a strike.

### B. *Wells v. Avery County* was not dismissed for failing to state a claim.

Like with *Sterling*, the court below erroneously believed that because *Avery County* was dismissed for failing to exhaust, it failed to state a claim and thus counted as a strike. As established above, *supra* §I.B.1, failing to exhaust is not failing to state a claim unless nonexhaustion is apparent on the face of the complaint. *See Bingham*, 654 F.3d at 1176 (a prisoner's suit cannot be dismissed for failure to state a claim on exhaustion grounds unless it is "clear from the face of the complaint" that he did not exhaust his remedies). That was not the case in *Avery County*.

In order for non-exhaustion to appear on the face of a complaint, the plaintiff's allegations themselves must demonstrate that he has not exhausted his remedies. *See supra* note 8. Indeed, post-*Jones*, plaintiffs are not required to say *anything* about exhaustion in their complaints. *See Carbe v. Lappin*, 492 F.3d 325, 327-28 (5th Cir. 2007) (vacating dis-

trict court's dismissal for failure to exhaust where the plaintiff's allegations were "silent as to exhaustion"); *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc) ("[A] plaintiff is not required to say anything about exhaustion in his complaint."). At no point in Mr. Wells' complaint did he allege facts affirmatively establishing that he failed to exhaust. *Avery Cnty.*, Compl., Doc 1. Therefore, any failure to exhaust was not apparent on the face of the pleadings.

The district court where Mr. Wells filed his claim, like many courts around the country, asks inmate plaintiffs to answer form questions about whether or not they have exhausted administrative remedies. Using these questions to resolve the issue of exhaustion contravenes the Supreme Court's directive in *Jones*, because they essentially require the inmate to demonstrate exhaustion as part of their suit. Such questions are, in essence, poorly disguised pleading requirements. *See Coleman v. Sweetin*, 745 F.3d 756, 763 (5th Cir. 2014) (per curiam) ("District courts may not circumvent [the *Jones* rule] by . . . requiring prisoners to affirmatively plead exhaustion through local rules."); *Torns v. Miss. Dep't of Corr.*, 301 F. App'x 386, 389 (5th Cir. 2008) (per curiam) (holding that the

district court erred in relying on a form complaint question to resolve the issue of exhaustion).

Courts cannot "by local rule sidestep *Jones* by requiring prisoners to affirmatively plead exhaustion." *Carbe*, 492 F.3d at 327; *see also Torns*, 301 F. App'x at 389 ("[T]he district court erred by using Question 7 of the prisoner's form complaint to prompt [the plaintiff] for information about his exhaustion of administrative remedies and by relying on the elicited information."). When plaintiffs have no burden whatsoever to plead exhaustion, courts contradict *Jones* by requiring them to do exactly that, and then proceeding to dismiss their cases on that basis. *See Custis v. Davis*, 851 F.3d 358, 361 (4th Cir. 2017) (vacating the district court after it instructed an incarcerated plaintiff to "submit documentation" demonstrating exhaustion before allowing his suit to proceed); *Wilcox v. Brown*, 877 F.3d 161, 167 (4th Cir. 2017) (similar).

Mr. Wells did not affirmatively allege that he failed to exhaust in *Avery County*. To the contrary, he alleged facts demonstrating that exhaustion was impossible in his position. *Avery Cnty.*, Compl., Doc 1 – Pg 2. The only basis for the *Avery County* dismissal, then, was the district

court's form question about the exhaustion of remedies.[17] Therefore, the court below committed error in counting it as a strike. *See Myles v. Edwards*, 813 F. App'x 130, 131 (4th Cir. 2020) (per curiam) (even though plaintiff acknowledged in his complaint that he did not exhaust, dismissal was improper because he alleged that he attempted to exhaust). Any failure to exhaust was not apparent on the face of the complaint—meaning that the failure to exhaust could not have been a failure to state a claim. Therefore, *Avery County* was not a strike.

The district court's sole basis for concluding otherwise was this Court's opinion in *Rivera v. Allin* and its subsequent reiteration of that rule in *White v. Lemma*. *See White*, 947 F.3d at 1379 (citing *Rivera*, 144 F.3d at 728-31). As explained *supra*, §I.B.3, those cases are no longer good law after *Jones v. Bock*. Because Mr. Wells' allegations in *Avery County* did not demonstrate the failure to exhaust on their face, the complaint

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[17] District courts in this circuit continue to erroneously dismiss actions on this basis. *See, e.g.*, *McMillan v. Weaver*, No. CV-611-133, 2012 WL 3704853, at *2 (S.D. Ga. July 31, 2012) (finding non-exhaustion apparent on the face of the complaint based on plaintiff's answer to a form question) *report and recommendation adopted*, 2012 WL 3704836 (Aug. 27, 2012); *Brown v. Brewton*, No. CV-611-090, 2012 WL 5287957, at *2 (S.D. Ga. Sept. 24, 2012) *report and recommendation adopted*, 2012 WL 5287955 (Oct. 24, 2012) (same).

thus did not fail to state a claim, and the action thus did not qualify as a strike.

## CONCLUSION

For the foregoing reasons, the district court's determination that Mr. Wells had three prior strikes must be vacated. Mr. Wells has, at most, one strike for the purposes of 28 U.S.C. § 1915(g).[18]

[18] At the very least, the district court should have allowed Mr. Wells to pay the filing fee after his request to proceed *in forma pauperis* was denied. This Court is one of only two circuits that dismiss a plaintiff's suit when *in forma pauperis* status is denied, rather than giving a plaintiff the opportunity to pay. *See Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002). Most other circuits hold the opposite. *See James v. Anderson*, 770 F. App'x 724, 724 (5th Cir. 2019) (per curiam); *Ball*, 726 F.3d at 471; *Dubuc v. Johnson*, 314 F.3d 1205, 1207 (10th Cir. 2003); *In re Alea*, 286 F.3d 378, 382 (6th Cir. 2002); *Smith v. District of Columbia*, 182 F.3d 25, 29-30 (D.C. Cir. 1999); *Rodriguez v. Cook*, 169 F.3d 1176, 1182 (9th Cir. 1999). This Court's contrary position is not rooted in the PLRA and contravenes the federal judiciary's tradition of leniency for pro se litigants. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (explaining that pro se complaints are held to a "less stringent" standard). Mr. Wells recognizes that this argument is foreclosed by binding Eleventh Circuit precedent, but preserves it for future review.

Dated: June 17, 2021

Respectfully submitted,

*s/ Perry Cao*

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## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,443 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook typeface.

Dated: June 17, 2021

Respectfully submitted,

*s/ Perry Cao*

PERRY CAO

## CERTIFICATE OF SERVICE

I hereby certify that on June 17, I electronically filed the foregoing *Opening Brief of Appellant* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 17, 2021

Respectfully submitted,

*s/ Perry Cao*

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