IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AARON D. ELLIS, *Plaintiff-Appellant*, v. DANIEL I. WERFEL, et al., *Defendants-Appellees*.	Case No. 22-6401 On Appeal from the U.S. District Court for the Western District of Virginia Case No. 7:22-cv-00062
DWAYNE D. YOUNG, *Plaintiff-Appellant*, v. DANIEL I. WERFEL, et al., *Defendants-Appellees*.	Case No. 22-6402 On Appeal from the U.S. District Court for the Western District of Virginia Case No. 7:22-cv-00063
VINCENT SPINNER, *Plaintiff-Appellant*, v. DANIEL I. WERFEL, et al., *Defendants-Appellees*.	Case No. 22-6422 On Appeal from the U.S. District Court for the Western District of Virginia Case No. 7:22-cv-00064

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Defendants readily concede that the district court's severance order was fundamentally flawed, agreeing—as they must—that the statute the district court relied upon in crafting a per se rule barring joinder of prisoner-plaintiffs plainly does not apply to Plaintiffs' claims. That error of law alone warrants this Court's reversal. Defendants do not defend the district court's other—and equally indefensible—reasons for denying joinder, either. Instead, they urge affirmance on alternative grounds. But accepting Defendants' invitation would require this Court not only to ignore the liberal construction owed to *pro se* plaintiffs, but also to flout this Court's well-established rule that, in the absence of "exceptional circumstances," it will not consider alternative grounds not advanced in the district court. *Skipper v. French*, 130 F.3d 603, 610 (4th Cir. 1997). This Court should decline Defendants' invitation and reverse the district court.

ARGUMENT

I. As Defendants Concede, The District Court's Severance Order Was Premised On A Clear Error of Law.

Defendants agree that the heart of the district court's severance order was wrong. The court concluded that allowing Plaintiffs to proceed

jointly under Rule 20 "flies in the face" of the Prison Litigation Reform Act. JA33. But the statutory provision the court relied on in reaching that erroneous conclusion, 28 U.S.C. § 1915(b)(1), has no application here. By its plain language, § 1915(b)(1) applies only to plaintiffs proceeding *in forma pauperis* (IFP) and Plaintiffs here were not. *See* Op. Br. 16-17. Defendants agree. *See* Resp. Br. 14-16. That error of law alone calls for this Court's reversal. *Hagan v. Rogers*, 570 F.3d 146, 157 (3d Cir. 2009) ("[T]he [District] Court abused its discretion in denying joinder to Appellants" where it "based its decision to deny joinder on an erroneous interpretation of Rule 20.").

Moreover, even if it somehow applied to Plaintiffs in this case, § 1915(b)(1) says nothing at all about joinder, so that section does not disturb the normal operation of Rule 20. *See* Op. Br. 17-23. As the opening brief explains, all but one of this Court's sister circuits have held as much. *Hagan*, 570 F.3d at 154-56; *Talley-Bey v. Knebl*, 168 F.3d 884, 887 (6th Cir. 1999); *In re Prison Litig. Reform Act*, 105 F.3d 1131, 1137-38 (6th Cir. 1997); *Boriboune v. Berge*, 391 F.3d 852, 854 (7th Cir. 2004). And the one circuit to hold otherwise, *Hubbard v. Haley*, 262 F.3d 1194 (11th Cir. 2001), ignored the basic principle of statutory interpretation

that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise … words importing the singular include and apply to several persons," 1 U.S.C. § 1; *see also* Op. Br. at 20-22.

Defendants offer no counter argument, but instead suggest that this Court should not reach the § 1915(b)(1) issue because the Plaintiffs here were not proceeding IFP, and so that section does not apply to them. Resp. Br. 16 n.5. But this Court could equally hold that, whether or not it applies, § 1915(b)(1) does not categorically bar joinder of prisoner litigants. So doing would "give district courts in the circuit guidance on an often-muddled area of substantive law."[1] *In re Continental Inv. Corp.*, 637 F.2d 1, 8 (1st Cir. 1980).

II. Defendants Do Not Defend The District Court's Other Reasons For Denying Joinder.

The district court's other two reasons for severing Plaintiffs' case were equally flawed. First, instead of analyzing whether the Plaintiffs

[1] District courts in this circuit need such guidance. *Compare* JA33-34 (finding persuasive the Eleventh Circuit's reasoning in *Hubbard*, and concluding Rule 20 joinder is incompatible with the PLRA), *with Ofori v. Clarke*, No. 7:18-CV-00587, 2019 WL 4344289, at *2 (W.D. Va. Sept. 12, 2019) (finding persuasive the reasoning of the Third, Seventh, and Sixth Circuits in holding that "the PLRA does not prohibit the joining of multiple prisoners as plaintiffs under Rule 20").

met Rule 20's requirements, the court relied on general stereotypes about incarceration. JA34. Second, the district court noted that Mr. Ballance—one of the original plaintiffs, but not an appellant here—could not represent his co-plaintiffs. JA33. Defendants don't defend either of these reasons for denying joinder. Nor could they. As the opening brief explains, these baseless assumptions and general stereotypes cannot form the basis for denial of joinder under Rule 20. *See* Op. Br. 24-30.

As for the supposed difficulties of litigating while incarcerated, the district court assumed that "[a] high likelihood exists that circumstances, such as cell reassignments, lockdowns, or personal disagreements, will often prevent plaintiffs from preparing and signing joint pleadings as required in pro se litigation," and expressed concerns about "coercion." JA34. But while the district court had discretion to deny joinder under Rule 20, it first needed to provide "a reasoned analysis" regarding whether the specific facts presented by *these* Plaintiffs and their claims actually met Rule 20's requirements. *Hagan*, 570 F.3d at 157 & n.5; *see also Boriboune*, 391 F.3d at 854. Defendants do not contest that the district court failed to do so. Nor do they contest that the record in this case belies the district court's generalized concerns: These specific

prisoner-plaintiffs have repeatedly demonstrated that they are capable of litigating jointly. Op. Br. at 26-27.

As for the district court's assumption that Mr. Ballance was acting as a "lawyer" on behalf of the rest of the Plaintiffs, that assumption was also flawed. Op. Br. at 28-30. It asserted, without explanation, that "[i]t is clear from the submitted pleadings that Ballance has prepared the filings." JA33. Even if that were true—and it's not obvious on this record that it is[2]—there is no rule against one co-plaintiff preparing filings; and the pro se Plaintiffs here have complied with the one Federal Rule that does apply specific requirements to them by signing each filing. *See* Fed. R. Civ. P. 11(a); Op. Br. at 29-30.

By relying merely on generalities and assumptions about prisoners to deny joinder without applying a Rule 20 analysis based on the facts of this case, the district court abused its discretion. *See Hagan*, 570 F.3d at

[2] In Plaintiffs' motion for reconsideration, they explained that Mr. Ballance was not, in fact, acting as "knight errant." JA41-42. Instead, they explained that because "Ballance has the most legible handwriting," the group simply chose him to write "the final draft" to maintain compliance with the district court's order that all submissions in the case be legible. JA42.

157; *see also* Op. Br. 25-26. Those additional errors warrant this Court's reversal.

III. This Court Should Decline Defendants' Invitation To Affirm On Alternative Grounds.

Rather than defend even a single aspect of the district court's reasoning, Defendants advance an alternative ground for affirmance: That Plaintiffs' cases should be severed because Plaintiffs made "individualized allegations." Resp. Br. at 18. But the Defendants have pointed to no exceptional circumstance warranting this Courts reaching that alternative ground on appeal. Regardless, the argument that Plaintiffs' allegations are too individualized to warrant joinder falls flat.

A. The alternative ground was not advanced in the district court and no exceptional circumstances warrant this Court reaching it in the first instance.

While this Court may affirm judgments on any ground in the record, "this contemplates that the alternative ground shall first have been advanced in that court, whether or not considered. Where it has not been, a countervailing rule comes into play." *Skipper v. French*, 130 F.3d 603, 610 (4th Cir. 1997). Absent "exceptional circumstances," this Court does not, "for very good reasons, … decide issues on the basis of theories first raised on appeal." *Id.*; *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

Defendants nevertheless insist that this Court should affirm the district court because Plaintiffs have not met the requirements for joinder under Rule 20. Resp. Br. at 18-19 But the district court never suggested there was any doubt that Plaintiffs met those requirements. And Defendants point to no "exceptional circumstance" to justify this Court's deviation from well-established principles of judicial review. And for good reason—none exists.

Long ago, the Supreme Court explained the "basic reasons" supporting the general principle that appellate courts will not consider issues not raised below: It is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues … [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel*, 312 U.S. at 556. As the Court noted, however, there may exist "exceptional cases or particular circumstances" where, by not passing on an issue, "the obvious result would be a plain miscarriage of justice." *Id.* at 557-58; *see also Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below" unless

"proper resolution is beyond any doubt" or "injustice might otherwise result." (cleaned up)). In such exceptional circumstances, an appellate court may exercise its discretion and consider an issue not advanced or passed upon below.

This Court "exercise[s] that discretion sparingly," *In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014), regularly declining to consider alternative grounds not advanced below. In *Skipper*, for example, this Court declined to consider an alternative theory for affirmance that was not presented in the district court, explaining that "all the reasons for applying the ordinary rule as explained in *Hormel* militate in favor of applying it here." 130 F.3d at 610. It further noted that the State had failed to "advance any exceptional reason pushing the other way; indeed, it does not acknowledge the rule's existence." *Id.*; *see also Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 515 (4th Cir. 2015) ("The district court is in a better position to consider the parties' arguments in the first instance, which can be presented at length rather than being discussed in appellate briefs centered on the issues the district court did decide."); *French v. Assurance Co. of Am.*, 448 F.3d 693, 707 (4th Cir. 2006) ("Because the district court did not address the … Defendants'

three alternative arguments and each appears to involve at least one underlying factual dispute, we adhere to the general rule that a federal appellate court does not consider an issue not passed upon below."). And on the rare occasion this Court does consider an issue not advanced below, it clearly articulates an exceptional basis for doing so. *Cf.* *McDougall v. Dunn*, 468 F.2d 468, 475-76 (4th Cir. 1972) (finding "exceptional circumstance" where evidentiary error was not raised on appeal but was "manifest" from the record, "seriously prejudiced" plaintiff, "caus[ing] and sustain[ing] a disadvantage affecting the fundamental issues of liability," and, without correction, injustice would result); *CX Reinsurance Co. Ltd. v. Johnson*, 977 F.3d 306, 313 (4th Cir. 2020) (concluding that appellate consideration of the meaning of a local rule was appropriate where "the proper resolution [was] beyond any doubt" and involved a "pure question of law" (cleaned up)).

Here, no exceptional reason exists for this Court to abandon the general practice of not passing on issues never advanced or considered below. Rather, all the basic reasons for applying the ordinary rule are present: The district court severed Plaintiffs' case at early screening without questioning whether Rule 20's prerequisites for joinder were

met, so neither Plaintiffs or Defendants have had any opportunity to present evidence relevant to that issue. *Hormel*, 312 U.S. at 556. Nor have Plaintiffs had an opportunity to counter with evidence Defendants' assertion that their supposedly "individualized" allegations do not fit within Rule 20. *See id.* Further militating in favor of this Court sticking to its ordinary practice, the thorny question whether Plaintiffs satisfy the prerequisites for joinder under Rule 20 requires "extensive analysis," *see infra* Part III.B., which the district court "is better positioned to [undertake] in the first instance." *Hulsey v. Cisa*, 947 F.3d 246, 252 (4th Cir. 2020). Finally, Defendants have not advanced *any* exceptional circumstance that warrant's this Court's departure from the general rule—indeed, they do not even "acknowledge the rule's existence." *Skipper*, 130 F.3d at 610.

Because "injustice [is] more likely to be caused than avoided by deciding the issue," *Singleton*, 428 U.S. at 121, this Court should follow its ordinary practice and decline to consider the alternative ground raised by Defendants.

B. Even if this Court were to reach Defendants' alternative ground, reversal would still be warranted.

If this Court accepts Defendants' invitation to decide this appeal on a ground never reached by the district court, it should find that Plaintiffs meet Rule 20's prerequisites for joinder. Defendants disagree, urging that because Plaintiffs made "individualized allegations," they do not meet Rule 20's permissive-joinder requirements and, even if they did, those allegations would warrant the district court's discretionary severance under Rule 21. Resp. Br. at 18-19. Defendants are wrong.

Permissive joinder of plaintiffs is allowed under Rule 20 if (1) "they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences"; and (2) "any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1). In the interest of convenience and judicial economy, "joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966); *see also Saval v. BL Ltd.*, 710 F.2d 1027, 1031 (4th Cir. 1983) (per curiam) (explaining Rule 20 should be construed in light of its purpose, which "is to promote trial convenience

and expedite the final determination of disputes, thereby preventing multiple lawsuits").

The district court did not dispute that Plaintiffs met both requirements for joinder under Rule 20. Nor could it have, given the liberal construction the court was required to afford Plaintiffs' pro se pleadings. *Fauconier v. Clarke*, 966 F.3d 265, 276 (4th Cir. 2020).

As for the first prong, Plaintiffs' claims arise out of the same "series of transactions": The IRS's denial of stimulus checks to each Plaintiff without any "real justification." Fed. R. Civ. P. 20(a)(1)(A); *see also* JA5. It is well established that, to show a "series of transactions," "[a]bsolute identity of all events is unnecessary." *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 325 (4th Cir. 2021) (quoting *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974)). Instead, Plaintiffs need only show that there is a "logical relationship" between their claims. *Id.*

Plaintiffs' claims are logically related. Plaintiffs assert that the IRS has wrongfully withheld payments to each of them because of their status as prisoners without "real justification." JA5. Specifically, they allege that after being denied stimulus payments for no reason, they began a letter writing campaign to Defendants. JA5; JA9. Rather than respond

by providing the wrongly withheld payments, Defendants responded to the letters with various false rationales: "Your name is spelled wrong on the tax form; your social security number is wrong; your social security number shows under another name; you need to file a tax form; and your stimulus payment has been filed for on a computer by somebody else." JA9. Further, the Plaintiffs alleged those rationales were not "real," JA5, asserting that "[a]ll the plaintiffs know how to spell their name and all of them know their social security number." JA9. In short, Plaintiffs fairly alleged that each Plaintiff is eligible for stimulus payments and correctly filled out the necessary tax forms to receive those payments; yet Defendants have withheld payments from each Plaintiff with no "real justification" simply because they are incarcerated. JA9. Those claims are sufficiently logically related to satisfy Rule 20's first prerequisite for joinder.

Defendants disagree, insisting that Plaintiffs' claims cannot possibly be related because each Plaintiff was "denied distinct payments for different reasons." Resp. Br. at 19. But as was just explained, Plaintiffs alleged in their complaint that those "different reasons" were not "real." And because absolute identity of the claims is not required,

the fact that some Plaintiffs were denied all three stimulus payments, while others were denied just two, changes nothing. In *Courthouse News Service*, for example, this Court considered whether Rule 20's first prerequisite was met where two different Virginia courts, for several months, had denied reporters prompt access to newly filed civil complaints. 2 F.4th at 325. In concluding that the Clerks of both courts were properly joined, this Court did not even consider the precise number of complaints that each court had failed to make accessible to the reporters. *Id.* Instead, this Court explained that the delays all arose out of the reporters' general coverage of Virginia courts, and the delays had stemmed from each court's implementation of similar—not identical—local practices to process new complaints. *Id.*; *see also Courthouse News Serv. v. Schaeffer*, 429 F. Supp. 3d 196, 202 (E.D. Va. 2019). And in *Mosley*, the Eighth Circuit held on interlocutory appeal that the district court abused its discretion severing joined actions alleging a racially discriminatory policy. 497 F.2d at 1334. Plaintiffs met Rule 20's first requisite for joinder, the Court concluded, because they had each alleged an injury—ranging from discrimination in promotions to being fired on the basis of race—stemming from a general policy of discrimination. *Id.*

at 1331, 1333-34. By the same logic, Plaintiffs here also meet Rule 20's first requisite: They each allege an injury—the denial of two or three stimulus payments—stemming from the same series of transactions—Defendants routine denial of stimulus payments to incarcerated people.

As for the second prong, a "common question of law or fact" links Plaintiffs' claims: Whether the IRS unlawfully withheld payments merely because Plaintiffs are incarcerated. Fed. R. Civ. P. 20(a)(1)(B). Defendants do not deny that such a question would satisfy Rule 20's second requirement, but instead urge that Plaintiffs have not actually alleged that the IRS withheld payments because of their incarcerated status. Resp. Br. at 22. That argument flouts the well-established rule that Plaintiffs' pro se pleadings must be liberally construed. *Fauconier*, 966 F.3d at 276. Here, Plaintiffs alleged:

> [D]efendants have violated [Plaintiffs'] Fourteenth Amendment rights to due process and equal protection of the law. The Defendants are denying the Plaintiffs their stimulus payments without real justification after the Federal Court ordered the IRS to make payments to incarcerated inmates.

JA5. The most favorable construction of those allegations, and the one the district court was required to make, is that Defendants employed a wrongful practice of withholding stimulus payments to prisoners without

justification because of their incarcerated status.[3] At the very least, Plaintiffs should have been given an opportunity to amend their complaint to make the appropriateness of joinder more apparent. *See Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc) ("We have interpreted Rule 15(a) to provide that leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile." (cleaned up)).

Defendants' arguments under Rule 21 fare no better. Resp. Br. at 20. That rule provides: "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." Fed. R. Civ. P. 21. By its terms, Rule 21, applies to situations in which parties are "misjoined." *Id*. As was just explained, the Plaintiffs here met the prerequisites for joinder under Rule 20, so they

[3] Despite Defendants' argument to the contrary, Resp. Br. at 21, Plaintiffs' allegations are nearly identical to the "common questions of law and fact" that were "easily" sufficient to certify a class for claims arising from the IRS withholding stimulus payments to prisoners. *Scholl v. Mnuchin*, 489 F. Supp. 3d 1008, 1044 (N.D. Cal. 2020); *see also Scholl v. Mnuchin*, 494 F. Supp. 3d 661 (N.D. Cal. 2020) (alleging IRS denied funds to prisoners solely because they were incarcerated).

were not "misjoined" at all. *See Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521 (5th Cir. 2010) (per curiam) ("Since Rule 21 does not provide any standards by which district courts can determine if parties are misjoined, courts have looked to Rule 20 for guidance."); *see also DirecTV, Inc., v. Leto*, 467 F.3d 842, 844 (3d Cir. 2006) (explaining that misjoinder occurs where the test for permissive joinder under Rule 20 is not satisfied). And even assuming the district court had concluded that Plaintiffs' claims *were* misjoined, the rule says only that the parties "may" be severed, not that they must be. The district court's reasons for severing Plaintiffs' claims here—which were totally speculative and not supported by the complaint—do not pass muster (a point Defendants do not contest). *See supra* Part II. At most, then, this Court should remand for the district court to appropriately exercise its discretion regarding joinder and severance.[4] *See Applewhite v. Reichold Chemicals, Inc.*, 67

[4] Defendants' citation to *Brooks v. Mnuchin*, No. 7:21-CV-223, 2021 WL 1722900 (W.D. Va. Apr. 30, 2021), to support its argument that severance is proper under Rule 21 changes nothing. Resp. Br. at 20. In severing the claims in that case, the district court *first* considered whether the prisoner-plaintiffs were misjoined under Rule 20 and *then* chose to exercise its discretion under Rule 21 to sever. *Id.* at *2. And that made sense, as the prisoner-plaintiffs had already demonstrated significant difficulty litigating jointly—plaintiffs filed a motion to appoint counsel that not one of the plaintiffs signed, in addition to a motion for leave to

F.3d 571, 574 (5th Cir. 1995) (reversing and remanding where district court severed claims without "an examination of the individual case" for the "district court to consider whether the plaintiffs are properly joined and whether they should be allowed to continue in one action.").

What's left is Defendants' argument that, even if Plaintiffs meet the Rule 20 prerequisites for joinder, severance was still proper. That is because, Defendants insist, district courts have "wide discretion" to "measur[e] a complaint's allegations against the rule's requirements." Resp. Br. at 17, 23 (citing *Saval*, 710 F.2d at 1031, 1032). True enough. But the problem here is that the district court never actually measured the complaint's allegations against Rule 20's requirements, and so it never actually exercised that discretion. It was therefore error for the district court to deny joinder.

CONCLUSION

For these reasons, this Court should reverse the judgment of the district court and remand for further proceedings.

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proceed IFP, which was also not signed by all plaintiffs. *Id.* at *1-2. In other words, the *Brooks* court gave valid reasons for exercising its discretion to sever, whereas the court here did not.

Date: June 23, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7(B) because this brief contains 4,665 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: June 23, 2023

/s/ Rosalind E. Dillon
Rosalind E. Dillon

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2023, I electronically filed the foregoing *Reply Brief of Plaintiffs-Appellants* with the Clerk of the Court for the United States Court of Appeals for the Fourth 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 23, 2023

/s/ Rosalind E. Dillon
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