No. 21-10550-U

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEREMY WELLS,

Plaintiff-Appellant,

v.

WARDEN PHILBIN, CLIFFORD BROWN, AND FNU FLUKER,

Defendants-Appellees,

On Appeal from the United States District Court
for the Southern District of Georgia

EN BANC BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, I hereby certify that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

I also hereby certify that I am aware of no persons or entities, in addition to those listed in the party and *amicus* briefs filed in this case, that have a financial interest in the outcome of this litigation. Further, I am aware of no persons with any interest in the outcome of this litigation other than the signatory to this brief and its counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: June 14, 2022

/s/ Brianne J. Gorod
Brianne J. Gorod

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Enacted to address a perceived need to "reduce the number of meritless prisoner lawsuits," 141 Cong. Rec. 26,548 (1995) (statement of Sen. Robert Dole), the Prison Litigation Reform Act (PLRA) erected a series of obstacles prisoners must overcome when they file civil suits in federal court in an effort to redress violations of the law. As relevant here, the "three strikes" provision of the PLRA denies indigent prisoners *in forma pauperis* (IFP) status, and therefore requires full payment upfront of the $402 filing fee required to bring a civil lawsuit in federal court, when they have "on 3 or more prior occasions, while incarcerated . . . , brought an action

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief. A motion for leave to file accompanies this brief.

or appeal in a [federal] court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," unless they are in "imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Relying on this provision, the district court dismissed Wells's complaint, counting as "strikes" two suits that were ultimately dismissed on the ground that Wells failed to exhaust his administrative remedies. *See* ECF No. 21, at 1.

As Wells argues, this Court's precedent holding that dismissals for failure to exhaust administrative remedies count as PLRA "strikes" is at odds with the plain language of the statute and Supreme Court precedent. Indeed, every other circuit court to have addressed the issue has concluded that a dismissal for failure to exhaust administrative remedies does not, without more, constitute a PLRA strike. *See* Appellant's En Banc Pet. 8.

Significantly, the three strikes provision lists three, and only three, scenarios in which a dismissal counts as a strike: when a suit is "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim." *See* 28 U.S.C. § 1915(g). Failure to exhaust administrative remedies is, quite simply, not one of the identified scenarios. And this is a particularly conspicuous omission given that the PLRA elsewhere devotes significant attention to the issue of administrative exhaustion. *See* PLRA, Pub. L. No. 104-134, § 803, 110 Stat. 1321, 70-73 (1996) (codified at 42

U.S.C. § 1997e); *see also Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (describing the exhaustion provision as a "centerpiece" of the PLRA).

There is another reason for this Court to reject this Court's prior precedent: the interpretation of the statute adopted by that precedent raises serious constitutional questions. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). Notably, the PLRA's three strikes provision, even properly interpreted, bars countless meritorious claims given that prisoners face extraordinary difficulty in earning sufficient funds to pay filing fees upfront. *See* Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act's 'Three Strikes Rule,' 28 U.S.C. § 1915(G)*, 28 Cornell J.L. & Pub. Pol'y 207, 235 (2018) (explaining that "[i]t is a fiction to believe that all prisoners can" save up to pay the filing fee). For many prisoners, to deny IFP status is to deny access to the courts entirely. Expanding the scope of that provision by counting dismissals for failure to exhaust administrative remedies as strikes further limits prisoners' ability to access the courts, thereby raising serious constitutional questions that are best avoided by conforming this Court's interpretation of the three strikes provision to that of its

sister circuits. Indeed, those concerns are magnified in this Circuit, where prisoners who have incurred three strikes are barred from bringing their claims *at all*, not just from proceeding IFP. *See Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir. 2002) (per curiam).

When the Framers drafted our enduring national charter, they established the federal judiciary as an independent, co-equal branch of government. Article III of the new Constitution vested the "judicial power" in the federal courts and broadly extended that power to nine categories of cases and controversies. The Framers recognized that constitutional limitations on government would be meaningless if the American people did not have the ability to vindicate their rights in the federal courts. Article III's grant of broad judicial powers to the federal courts therefore ensured that "the Constitution should be carried into effect, that the laws should be executed, [and] justice equally done to all the community." 4 *The Debates in the Several State Conventions on the Adoption of the Constitution* 160 (Jonathan Elliot ed., 2d ed. 1836) (Davie) [hereinafter *Elliot's Debates*].

Reflecting the Framers' vision, "[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). Nor is it subject to debate that such access cannot be conditioned on the ability to pay a filing fee, as "the ability to pay costs in advance bears no rational relationship" to the merits of a claim. *Griffin v. Illinois*, 351 U.S.

12, 17 (1956). The Supreme Court has repeatedly held that indigent defendants' access to the courts cannot be contingent on their ability to pay various fees, including transcript fees, *see id*. at 18-19; *Mayer v. Chicago*, 404 U.S. 189, 195-97 (1971), docketing fees, *see Burns v. Ohio*, 360 U.S. 252, 257-58 (1959), and fees for their own appellate counsel, *Douglas v. California*, 372 U.S. 353, 355-56 (1963). Moreover, a prisoner's constitutional right to access the courts includes the ability to bring civil rights actions "concerning violations of fundamental constitutional rights." *Wolf v. McDonnell*, 418 U.S. 539, 579 (1974).

The PLRA's three strikes provision raises serious constitutional concerns because it effectively erects a total barrier to legal review for indigent prisoners seeking to vindicate fundamental constitutional rights. This Court's erroneous precedent only exacerbates these serious constitutional concerns. By interpreting the three strikes provision to include the failure to exhaust administrative remedies, this precedent significantly increases the number of cases in which indigent prisoners will be unable to seek review of their constitutional claims. As Wells pointed out in his petition for rehearing en banc, a review of PLRA cases from one representative month in this Circuit revealed that a case was dismissed for failure to exhaust administrative remedies at least once a week. *See* Appellant's En Banc. Pet. 11. Moreover, as a consequence of this Court's rule, prisoners accumulate three strikes at least every other month. *Id.*

That outcome is particularly alarming in light of the fact that the failure to exhaust administrative remedies has little, if anything, to do with the merits of the underlying claim. After all, the failure to exhaust administrative remedies is "often a temporary, curable, procedural flaw," *Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999), and a decision that a plaintiff has failed to exhaust reflects no judgment on the merits of their claim, *Bryant v. Rich*, 530 F.3d 1368, 1374 (11th Cir. 2008) (exhaustion is a question of "abatement" that does not "deal with the merits"); *see also* Wells En Banc Pet. 12 ("Administrative exhaustion is extraordinarily difficult, even for sophisticated prisoners."). Thus, if dismissal for the failure to exhaust were to count as a strike for PLRA purposes, prisoners could lose the ability to pursue meritorious claims based on the dismissal of prior suits that ultimately proved meritorious. This Court's precedent therefore threatens the constitutional right of access to the courts without serving the goal of the PLRA, which was to deter "*meritless* prisoner lawsuits," 141 Cong. Rec. 26,548 (1995) (statement of Sen. Robert Dole) (emphasis added). This Court should hold, as has every other circuit to consider the issue, that a dismissal based on the failure to exhaust administrative remedies does not, without more, give rise to a PLRA "strike."

ARGUMENT

I. The Framers Gave Federal Courts Broad Authority in Article III to Ensure that Individuals Would Have Recourse to Federal Courts to Vindicate Their Rights.

Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States[] shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1, cl. 1. The Constitution's establishment of the judiciary as an independent, co-equal branch of government was a direct response to the infirmities of the Articles of Confederation, which had created a single branch of the federal government—"the United States in Congress assembled," Arts. of Confed. art. II—and no independent court system. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (noting that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). As a result, the federal government could not enforce its laws, prompting Alexander Hamilton to observe that a "most palpable defect of the existing Confederation is the total want of a SANCTION to its laws." *The Federalist No. 21*, at 138 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see The Federalist No. 22*, at 150 (Alexander Hamilton) (explaining that "[l]aws are a dead letter without courts to expound and define their true meaning and operation").

When the Framers gathered in Philadelphia to draft the new national charter,

they recognized that "there ought always to be a constitutional method of giving efficacy to constitutional provisions." *The Federalist No. 80*, at 475 (Alexander Hamilton). They debated at length what that method ought to be and ultimately concluded that federal courts should be given the power to enforce the Constitution's guarantees and ensure the supremacy of federal law in adjudicating cases that come before them. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 705-73 (1998); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1346-55 (2001).

To ensure that the federal courts would be up to this task, the Framers provided for an expansive federal judicial power vested in an independent judiciary. *See* U.S. Const. art. III, § 1 (establishing an independent judiciary whose members "shall hold their offices during good Behavior"). The Framers considered other methods for ensuring broad compliance with federal law, including a federal "legislative power to veto any state law found to contravene the national interest," and "authorizing the federal government to use military force" to coerce compliance with federal law. Liebman & Ryan, *supra*, at 710. After rejecting these other proposals, the Convention instead substantially expanded the federal judicial power. First, the Convention approved the power of Congress to appoint lower federal courts, recognizing that "[i]nferior tribunals are essential to render the authority of

the Natl. Legislature effectual." 2 *The Records of the Federal Convention of 1787*, at 46 (Max Farrand ed., 1911). The Convention also expanded the jurisdiction of the federal courts, making explicit in the text that the "jurisdiction of the national Judiciary shall extend to the cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." *Id*. at 39. It subsequently further expanded their jurisdiction, giving them the power to hear cases arising under "this Constitution" as well as federal laws. *Id*. at 430.

In the debates about the Constitution's ratification, Federalists and Anti-Federalists alike agreed that Article III conferred broad, substantial powers on the federal courts. Indeed, the Anti-Federalists bitterly attacked the new federal judiciary, claiming that it would be "exalted above all other power in the government," Brutus XV (Mar. 20, 1788), *reprinted in the Anti-Federalists: Selected Writings and Speeches* 476 (Bruce Frohnen ed., 1999), and that the Supreme Court would have "more power than any court under heaven," 3 *Elliot's Debates* 564 (Grayson); *id.* at 523 (George Mason) (the grant of power to the federal courts was "the most extensive jurisdiction").

The Framers rejected these concerns, recognizing that constitutional limitations on government would be meaningless if individuals did not have recourse to federal courts to vindicate their rights. *See, e.g.*, 3 *Elliot's Debates* 554 (statement of John Marshall at Virginia ratifying convention) ("To what quarter will you look

for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection."). Indeed, the existence of the federal courts to vindicate constitutional rights was a powerful argument in favor of the adoption of the Bill of Rights: in March 1789, Thomas Jefferson wrote to James Madison that an "argument[] in favor of a declaration of rights" that carried "great weight with [him]" was the "legal check which it puts into the hands of the judiciary." 12 *The Papers of James Madison* 13 (William I. Hutchinson et al. eds., 1961). As Madison explained in proposing the Bill of Rights that June, "[i]f the [Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Cong. 457 (1789) (Joseph Gales ed., 1790).

In short, Article III's grant of broad judicial powers to the federal courts ensured that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 *Elliot's Debates* 160 (Davie). The American people recognized that "[t]hese ends can only be accomplished by a general, paramount judiciary." *Id*.; *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,

whenever he receives an injury.").

II. Interpreting the PLRA to Count Actions Dismissed for Failure to Exhaust Administrative Remedies As "Strikes" Raises Serious Constitutional Questions.

A. Indigent Prisoners Have the Right to Access the Courts to Assert Constitutional Claims.

As discussed above, the Constitution provides for broad access to the courts because the Framers viewed such access as essential to protecting individual liberty and ensuring compliance with the nation's laws. Reflecting the Framers' belief that a strong federal judiciary is essential to the protection of individual liberties, the Supreme Court has long ensured that indigent prisoners have full access to the courts to raise fundamental constitutional claims.

"It is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds*, 430 U.S. at 821. This doctrine is based on the Constitution's guarantee of "equal justice for poor and rich, weak and powerful alike." *Griffin*, 351 U.S. at 16; *see Bounds*, 430 U.S. at 822 ("[I]nmate access to the courts [must be] adequate, effective, and meaningful."). Indeed, access to the courts is especially important for prisoners "[b]ecause a prisoner ordinarily is divested of the privilege to vote," meaning that "the right to file a court action might be said to be his remaining 'most fundamental political right, because preservative of all rights.'" *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

The Supreme Court has long guarded that access by removing barriers prisoners have faced in reaching the courts, such as preventing prison officials from impairing a prisoner's "right to apply to a federal court for a writ of habeas corpus," *Ex parte Hull*, 312 U.S. 546, 548-49 (1941), and barriers to the resources that make that access meaningful, including by striking down prison regulations prohibiting inmates from advising each other on the preparation of legal documents, *see Johnson v. Avery*, 393 U.S. 483, 485-88 (1969), and that restricted inmates' access to professional legal advice, *see Procunier v. Martinez*, 416 U.S. 396, 419-21 (1974), and by ensuring that inmates have "access to a reasonably adequate law library," *see Wolff*, 418 U.S. at 578-79.

The Court has also guarded against financial barriers that would prevent indigent prisoners who cannot afford the costs of litigation from accessing the courts. As the Supreme Court has explained, it is no more permissible to "discriminate on account of poverty than on account of religion, race, or color" because "the ability to pay costs in advance bears no rational relationship to" the validity of a legal claim. *Griffin*, 351 U.S. at 17-18. *Griffin* thus held that the Constitution prohibits "pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way." *Mayer*, 404 U.S. at 196-97. And the Court has recognized this principle in the habeas context as well, holding that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state

right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

In addition to criminal appeals and habeas actions, indigent prisoners also have the right to access courts to bring civil actions asserting constitutional claims. After all, the "right of access to the courts . . . assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff*, 418 U.S. at 579. For that reason, there is "no reasonable distinction between" habeas and civil rights actions, and the right of court access includes all litigation related to "basic constitutional rights." *Id.*; *see City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) ("[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights."). In short, although the Constitution does not "guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims," it does require that they are able to meaningfully access the courts "in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement," *Lewis v. Casey*, 518 U.S. 343, 355 (1996), regardless of income.

B. Interpreting the "Three Strikes" Provision Expansively to Include Dismissals for Failure to Exhaust Administrative Remedies Threatens Indigent Prisoners' Constitutional Right to Access the Courts.

The three strikes provision of the PLRA denies indigent prisoners IFP status

once they have on three "prior occasions" had an "action or appeal" dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). The PLRA was enacted to address the perception that the civil justice system was "overburdened by frivolous prisoner lawsuits." 141 Cong. Rec. 26,553 (1995) (statement of Sen. Orrin Hatch). *But cf.* Samuel B. Reilly, *Where is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act's "Three Strikes" Rule*, 70 Emory L.J. 755, 760 (2021) ("[T]he real catalyst" for the increase in filings "was the inmate population" which had "quadrupled" since 1980 as "Congress artificially increased the prison population . . . through policies, sentencing, and rhetoric"). In seeking to stem the purported tide of frivolous prisoner lawsuits, the PLRA's proponents emphasized that they did "not want to prevent inmates from raising legitimate claims," 141 Cong. Rec. 27,042 (1995) (statement of Sen. Orin Hatch), and instead hoped that the PLRA would "free up judicial resources for claims with merit," 141 Cong. Rec. 38,276 (1995) (statement of Sen. Jon Kyl).

And for good reason. Prisoners file civil lawsuits to redress serious violations that would otherwise go unchecked. In the years leading up to the passage of the PLRA, these included cases involving pervasive sexual assault of inmates, *see Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 877 F. Supp. 634, 639-43 (D.D.C. 1994), severe beatings by prison guards, *see Madrid v. Gomez*, 889

F. Supp. 1146, 1161-68 (N.D. Cal. 1995), the use of "excessive corporal punishment" against juvenile detainees, *see Santiago v. Philadelphia*, 435 F. Supp. 137, 144 (E.D. Pa. 1977), and "constitutionally deficient" medical care leading to outbreaks of tuberculosis, *see Austin v. Pa. Dep't of Corr.*, No. 90-7497, 1992 WL 277511, at *7 (E.D. Pa. Sept. 29, 1992). Indeed, in this case, Wells seeks redress for prison officials' failure to prevent a beating that left him with severe injuries "including a ruptured ear drum and burns on both eyes." Appellant's En Banc Pet. 2.

In practice, the three strikes provision sweeps in innumerable meritorious claims. Notably, the provision acts as a total bar to bringing IFP claims in federal court even if the three prior strikes raised non-frivolous and non-malicious—albeit unsuccessful—claims. *See Neitzke v. Williams*, 490 U.S. 319, 329 (1989) ("[A] finding of a failure to state a claim does not invariably mean that the claim is without arguable merit."). "Even a new, nonfrivolous claim submitted in good faith would not be heard if [a prisoner] could not meet the filing fee and cash deposit." *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981). And while this blanket prohibition includes an exception for when "the prisoner is under imminent danger of serious physical injury," 28 U.S.C. § 1915(g), it still freezes out fundamental constitutional claims like "free speech, religious liberty, [and the] right to refuse medical treatment," *Thomas v. Holder*, 750 F.3d 899, 907 (D.C. Cir. 2014) (Tatel, J.,

concurring). The provision therefore makes the ability of prisoners to have their fundamental constitutional claims heard in court after three strikes "wholly contingent on one's ability to pay." *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996).

For these reasons, numerous federal judges have expressed "grave doubts that the PLRA's three-strikes provision may be constitutionally applied to indigent prisoners who seek access to the courts in order to bring claims involving fundamental constitutional rights." *Thomas*, 750 F.3d at 909 (Tatel, J., concurring); *see Abdul-Akbar v. McKelvie*, 239 F.3d 307, 319 (3d Cir. 2001) (en banc) (Mansmann, J., dissenting) (explaining that the "three strikes" provision "bar[s] the doors of our courts against a disfavored group—indigent prisoners who have resorted unsuccessfully to civil litigation—even with respect to meritorious litigation that may be their sole means of vindicating a fundamental right"); *Wilson v. Yaklich*, 148 F.3d 596, 606 (6th Cir. 1998) ("To the extent that any provisions of 28 U.S.C. § 1915(g) restrict the right to have arguably meritorious claims reviewed, those provisions could be deemed unconstitutional."); *Lyon v. Krol*, 127 F.3d 763, 766 (8th Cir. 1997) (Heaney, J., dissenting) ("[t]here is no question" that the three strikes provision burdens prisoners' "fundamental right of access to the courts").

It is no answer to these concerns to say that the three strikes provision "does not block a prisoner's access to the federal courts" because it "only denies the prisoner the privilege of filing before he has acquired the necessary filing fee."

Abdul-Akbar, 239 F.3d at 314. That conclusion ignores the reality that, for too many prisoners, denying IFP status is the equivalent of blocking access to the courts. Most inmates enter prison poor, *see* Adam Looney & Nicholas Turner, *Work Opportunity Before and After Incarceration*, Brookings Inst. 8 (March 2018), https://www.brookings.edu/wpcontent/uploads/2018/03/es_20180314_looneyincarceration_final.pdf ("Two years prior to the year they entered prison, 56 percent of individuals have essentially no annual earnings . . . ."), become poorer as a result of the fees and fines they accrue starting from the time of arrest, *see* Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan Ctr. for Just. 1, 3 (May 21, 2015), https://www.brennancenter.org/our-work/research-reports/charging-inmates-perpetuates-mass-incarceration (fees in the criminal justice system now include "charges for police transport, case filing, felony surcharges, electronic monitoring, drug testing, and sex offender registration"), and have no opportunity to earn any meaningful income while incarcerated, given that the pay they receive for work performed while incarcerated is often as little as twelve cents an hour, *see* Manning, *supra*, at 235. Denial of IFP status thus effectively prevents most prisoners from bringing any constitutional claims for the duration of their incarceration, regardless of the underlying merits of the claim.

Indeed, concerns about the constitutionality of the three strikes provision are particularly strong in this Circuit given this Court's precedent barring prisoners who

have incurred three strikes from bringing their claims *at all*, not just from proceeding IFP. *See Dupree* 284 F.3d at 1236. As Wells notes, the three strikes provision only prevents prisoners from bringing a lawsuit "under this section," that is, under the IFP provision. 28 U.S.C. § 1915(g); *see* Appellant's En Banc Pet. 13-14. But this Court's decision in *Dupree* reads those words out of the statute, holding that an indigent prisoner's failure to pay the filing fee upfront forever dooms their claim. *Dupree*, 284 F.3d at 1236. Thus, in any other circuit, Wells would have at least had the chance to "beg[] or borrow[] sufficient funds" to refile his case, but *Dupree* prevents him from accessing the courts *at all*. Appellant's En Banc. Pet. 17. This is an especially harsh rule given that many prisoners only learn they have incurred three strikes after being denied IFP status on that basis. *See Greyer v. Ill. Dep't of Corr.*, 933 F.3d 871, 875 (7th Cir. 2019) (noting that prisoners "often do not have ready access to their litigation documents and may not remember all of the details of their cases").

This Court need not address the constitutionality of the three strikes provision in this case. But against that backdrop, it is significant that this Court's precedent adopts an interpretation of the PLRA that no other court has adopted—one that expands the scope of that provision to impose an even more stringent barrier on prisoners' ability to vindicate their fundamental rights in court. Numerous indigent prisoners are being denied access to the courts based on their failure to exhaust

administrative remedies in prior cases. As Wells pointed out in his petition for rehearing en banc, a review of PLRA cases from one representative month in this Circuit revealed that a case was dismissed for failure to exhaust administrative remedies at least once a week. *See* Appellant's En Banc. Pet. 11. Moreover, as a consequence of this Court's rule, prisoners accumulate three strikes at least every other month. *Id.*

This outcome is particularly disturbing in light of the fact that exhaustion has little to do with the underlying merits of the claim. All it tells us is that a prisoner has not successfully navigated the often-labyrinthine prison grievance procedures. In many such schemes, "[d]eadlines may be very short, or the number of administrative appeals required may be very large." Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. Pa. Const. J. 139, 147 (2008). Nor are these systems always well designed, as prisoners find that the "requisite form may be repeatedly unavailable, or the grievance system may seem not to cover the complaint the prisoner seeks to make." *Id.* And prisoners "often fear retaliation," *id.*, given that the same officials who may be the subject of their complaints are in charge of the very grievance procedures they are required to exhaust. Even absent retaliation, prison officials "routinely refuse to engage prisoners' grievances" on the basis of "minor technical errors, such as using the incorrect form, sending the right

documentation to the wrong official, or failing to file separate forms for each issue." *Id.* at 148.

Making matters worse, not only does a failure to exhaust have no bearing on the merits of the underlying claim, but this error is also "often a temporary, curable, procedural flaw." *Snider*, 199 F.3d at 112. Upon a finding that a prisoner has failed to completely exhaust their administrative remedies, the prisoner can "cure the defect simply by exhausting [their claims] and then reinstituting" the suit. *Id*.

Significantly, the PLRA was "designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural . . . flaws." *Tafari v. Hues*, 473 F.3d 440, 443 (2d Cir. 2007). By counting cases that were dismissed for failure to exhaust as PLRA strikes, prisoners may have meritorious claims go unheard on the basis of dismissals of suits that ultimately proved meritorious. This Court's precedent therefore threatens the constitutional right of access to the courts without serving the goals of the PLRA.

These serious constitutional concerns should inform the statutory interpretation of the PLRA's three strikes provision. As the Supreme Court has long recognized, "[n]o court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830). This Court's precedent reading the three strikes provision expansively to include

dismissals for failure to exhaust administrative remedies raises serious constitutional concerns. These concerns present an additional reason why this Court should overrule that precedent.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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Dated: June 14, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 4,975 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that 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 14-point Times New Roman font.

Executed this 14th day of June, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on June 14, 2022.

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Executed this 14th day of June, 2022.

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