
21-7195

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

CHARLIE L. HARDIN,

Plaintiff-Appellant,

—v.—

OFFICER JAMES HUNT; LINDA YORK; CRAIG KENNEDY; MICHAEL WARD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

**BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA,
NORTH CAROLINA PRISONER LEGAL SERVICES
IN SUPPORT OF PLAINTIFF-APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* state as follows:

Amici the American Civil Liberties Union, the American Civil Liberties Union of North Carolina, the American Civil Liberties Union Foundation of Virginia, and North Carolina Prisoner Legal Services are all nonprofit organizations. They have no parent corporations, and no corporation or publicly held entity owns 10% or more of any *amici*'s stock.

Dated: New York, New York
January 31, 2022

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INTEREST OF *AMICI CURIAE*¹

Amici are nonprofit organizations with extensive experience litigating and advocating for people who face constitutional deprivations while incarcerated. They are aware of the financial realities of people in prison, and the costs and expenses imposed on them. *Amici* understand, and wish to inform the Court of, the financial impact that the district court's decision would have on incarcerated litigants.

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with more than 1.7 million members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. The ACLU established the National Prison Project (NPP) in 1972 to protect and promote the civil and constitutional rights of prisoners. The NPP has decades of experience in complex prisoners' rights class action suits and since 1990 has represented prisoners in five cases before the U.S. Supreme Court. Courts across the country have repeatedly recognized the special expertise of the NPP in conditions of confinement cases.

¹ No party's counsel authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has contributed money to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4). *Amici* file this brief with the consent of all parties, pursuant to Fed. R. App. P. 29(a)(2).

The American Civil Liberties Union of North Carolina is a statewide, nonprofit, nonpartisan organization with over 30,000 members. It is a state affiliate of the national American Civil Liberties Union. Since 1965, the ACLU of North Carolina has been at the forefront of efforts to protect the constitutional and civil rights of North Carolinians, particularly those who have been historically marginalized. In doing this work, the ACLU of North Carolina frequently advocates for the rights of incarcerated people in federal court, and thus has a strong interest in the proper resolution of this controversy.

The American Civil Liberties Union Foundation of Virginia (ACLU of Virginia) is a statewide, nonprofit, nonpartisan organization with approximately 25,000 members across the Commonwealth of Virginia. The ACLU of Virginia appears frequently before the state and federal courts of the Commonwealth, both as counsel and as *amicus curiae*. The issues presented in this case are of particular importance to the ACLU of Virginia given its history of advocacy on behalf of people incarcerated in Virginia, including as to their right to advocate on their own behalf and to access courts and obtain relief from mistreatment and abuse in Virginia prisons and jails.

North Carolina Prisoner Legal Services (NCPLS) is a nonprofit law firm dedicated to ensuring access to the courts for those individuals incarcerated in

North Carolina state prisons. NCPLS attorneys advocate for safe, humane, and constitutional prison conditions.

SUMMARY OF ARGUMENT

As Justice Powell once stated, “it is fundamental that justice should be the same, in substance and availability, without regard to economic status.” Justice Lewis F. Powell Jr., *Address to the American Bar Association*, 3 (Aug. 10, 1976).² Yet for many people in America’s jails and prisons, access to courts is significantly constrained by their economic circumstances.

Under the Prison Litigation Reform Act of 1995 (“PLRA”), incarcerated people must pay courts’ full filing fees, even if they qualify for *in forma pauperis* (“IFP”) status. Prisoners who meet the financial and statutory criteria for IFP status must pay the full filing fee over time pursuant to a complex statutory formula, *see* 28 U.S.C. § 1915(b), while prisoners who have accumulated three “strikes” due to prior litigation are ineligible for IFP status and must prepay the full filing fee up front, *see id.* at § 1915(g). Whether filing fees are paid over time or at the outset, filing fees represent a heavy financial burden for most incarcerated people, who have little to no financial resources.

² https://law2.wlu.edu/deptimages/powell%20archives/PowellSpeech_LegalServicesCorporationAug10,1976.pdf; <https://lawlib.academic.wlu.edu/2016/08/04/forty-years-ago-recalling-justice-powells-speech-on-legal-aid/>.

Because of the PLRA's filing fee requirements, the question here—whether a prisoner may supplement his complaint to add new, fully exhausted claims, or must instead file a new suit and thus incur the expense of a second filing fee—presents an issue of extreme importance to prisoner litigants. As Appellant has demonstrated, the district court's decision to dismiss his claim under 42 U.S.C. § 1983 for failure to exhaust, rather than permit the filing of an amended or supplemental complaint, is at odds with Federal Rule of Civil Procedure 15, the PLRA, the U.S. Supreme Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), and the decisions of other Circuits.

Amici submit this brief to underscore the real-world consequences of the district court's decision. Most people in jail and prison are impoverished prior to arrest. After arrest, they are assessed booking fees and other costs. During incarceration, expenses mount, as institutions often charge prisoners for basic living expenses. Meanwhile, prisoners are paid extraordinarily low wages for work on prison jobs.

As a result, it is extremely difficult for most prisoners to amass the funds needed to pay court filing fees. Under the district court's decision, that heavy burden is doubled because a prisoner who wishes to add new, fully exhausted claims to an existing action would be forced to bring a separate, second action—and bear the expense of a second filing fee—instead of simply supplementing or

amending his existing complaint. This economic reality should inform the Court's consideration of the issue presented by this case.

ARGUMENT

I. Prisoners Bear High Costs in Connection with Their Incarceration

Being incarcerated is expensive. Over the past several decades, “[e]very aspect of the criminal justice process has become ripe for charging a fee.” Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan Ctr. For Justice, 1 (May 21, 2015).

A variety of costs are assessed before a person even passes through the prison gates. Booking fees—flat fees imposed upon arrest, often without regard to ultimate conviction—have become commonplace. *Id.* at 3; *see also Jones v. Clark Cty.*, No. 2018-CA-001710, 2020 WL 757095, at *3 (Ky. Ct. App. Feb. 14, 2020) (upholding booking fee despite dismissal of charges). Fees for the services of a public defender are also routine: forty-three states—including every state in this Circuit—use some form of cost-recovery for work performed by public defenders. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying The Price*, NPR (May 19, 2014).³

Moreover, many states impose miscellaneous “court fees” and use them

³ <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

to subsidize various expenses, ranging from maintenance of courthouse buildings to other ends far afield from criminal prosecution. Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, Brennan Ctr. for Justice, 6 (Nov. 21, 2019).⁴ For example, “North Carolina collects 52 separate fees ... using them to fund ... the state’s judicial budget as well as jails, law enforcement, counties and schools.” *Id.* at 6. In Virginia—where state and local governments collected nearly half a billion dollars in revenue from fines and fees in 2019—a defendant who avails herself of her constitutional right to a jury trial may be charged a fee of up to \$360 per day of trial simply for exercising that right. Chris Mai, *The High Price of Using Justice Fines and Fees to Fund Government in Virginia*, Vera Institute of Justice, 2, 4 (June 2021).⁵

Once incarcerated, prisoners face additional costs. Under so-called “pay-to-stay” policies, many institutions charge for room and board. These fees may take the form of per diem charges, ranging in cost from several dollars up to \$142.42 per day. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 Loy. J. Pub. Int. L. 319, 325 (Spring 2014); *see also* Jessica Lussenhop, *The US Inmates*

⁴ https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf.

⁵ <https://www.justice4all.org/wp-content/uploads/2021/10/the-high-price-of-using-justice-fines-and-fees-virginia.pdf>.

Charged Per Night in Jail, BBC News Magazine (Nov. 9, 2015).⁶ Other institutions charge for necessities, such as meals, toilet paper, and medical care. Eisen, 15 Loy. J. Pub. Int. L. at 325-26; *see also* Brennan Ctr. for Justice, *Is Charging Inmates to Stay in Prison Smart Policy?* (Sept. 9, 2019) (50 state map detailing pay-to-stay fee laws nationwide).⁷

Separate and apart from pay-to-stay fees, incarcerated people are routinely required to cover the cost of basic items. Although jails and prisons are required to provide a constitutional minimum for daily living, *see Farmer v. Brennan*, 511 U.S. 825, 832 (1994), certain clothing, hygiene products, food items, and healthcare materials often must be purchased from a private vendor, through the prison commissary. Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 Hastings Race & Poverty L. J. 3, 17 (Winter 2020). One might assume that prisoners use the prison commissary to buy luxury or comfort items, but,

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

⁶ <https://www.bbc.com/news/magazine-34705968>.

⁷ <https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy>.

are typically only available in the commissary, and only for those who can afford to pay.

Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative (May 2018).⁸ In 2016, for example, Massachusetts prisoners purchased “over 245,000 bars of soap,” not a luxury item. *Id.*

Commissaries can be a significant source of revenue for jails and prisons: for example, in 2020, Virginia’s jails alone received nearly \$22 million in revenue from prisoner commissary purchases. *Annual Jail Revenues and Expenditures Report*, Commonwealth of Virginia Compensation Board, 117 (Nov. 1, 2021).⁹

Phone calls to loved ones are another significant expense. The Federal Communications Commission (“FCC”) has capped interstate phone call rates at 12 cents per minute for prisons, 14 cents for jails with populations of 1,000 or more, and 21 cents for jails with populations of fewer than 1,000. 47 C.F.R. § 64.6030. But, for incarcerated people whose work is compensated at rates of only 14 to 63 cents per hour, even 12 cents per minute is a substantial cost. Wendy Sawyer, *How much do incarcerated people earn in each state?*, Prison Policy Initiative (Apr. 10, 2017).¹⁰

⁸ <https://www.prisonpolicy.org/reports/commissary.html>.

⁹ <https://www.scb.virginia.gov/docs/fy20jailcostreport.pdf>.

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

Moreover, “80 percent of jail and prison calls are intrastate,” and thus do not benefit from FCC regulation. Marie Feyche, *FCC Approves Plan to Lower Interstate and International Jail and Prison Phone Call Rates*, Jurist (May 23, 2021).¹¹ As a result, the cost of local calls is far greater: “Nationally, the average cost of a 15-minute [local] call from jail is \$5.74.” Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, Prison Policy Initiative (Feb. 2019).¹² And certain facilities may charge even higher rates. In Virginia, for example, the same 15-minute call may cost as much as \$14.65. *Id.* The exorbitant cost of prison phone calls can be a significant profit center for jails and prisons. In 2020, Virginia’s local jails earned nearly \$10 million in profits from prisoner phone calls. *Annual Jail Revenues and Expenditures Report*, at 117.

All told, the path from arrest through release is littered with fees and expenses, which begin accumulating before the prison doors are even closed and increase daily throughout incarceration.

II. Incarcerated People Have Scant Access to Resources

Incarcerated people are largely unable to meet these costs. An estimated 80% of America’s incarcerated people are indigent. *See Eisen, Charging Inmates*

¹¹ <https://www.jurist.org/news/2021/05/fcc-approves-plan-to-lower-interstate-and-international-jail-and-prison-phone-call-rates/>.

¹² https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

Perpetuates Mass Incarceration, at 1, 4; Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 Mich. J. Race & L. 291, 298 (2016). On average, people in prison have little to no income in the years prior to incarceration. Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, Brookings Institution, 8 (Mar. 14, 2018).¹³ “Two years prior to the year they entered prison, 56 percent of individuals have essentially no annual earnings (less than \$500), the share earning between \$500 and \$15,000 is 30 percent, and average earnings (among those who worked) was \$12,780.” *Id.* This means that the typical prisoner enters the system without a financial safety net to cover prison costs.

Further, the wages for prison work are extraordinarily low. On average, people in prison earn between 14 and 63 cents per hour. Sawyer, *How much do incarcerated people earn in each state?*. In federal institutions, work assignments pay 12 to 40 cents per hour. Federal Bureau of Prisons, *Work Programs*.¹⁴ In North Carolina, prisoner wages are capped by statute at \$3 *per day*. N.C. Gen. Stat. Ann. § 148-133(b). Even when incarcerated people risk their lives, their pay

¹³ https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

¹⁴ https://www.bop.gov/inmates/custody_and_care/work_programs.jsp.

is minimal. For example, in California, incarcerated people fight wildfires for “just \$2 per day, or \$1 an hour if fighting an active fire.” Neveen Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities*, 26 Va. J. Soc. Pol’y & L. 65, 82 (Summer 2019).

For people with negligible assets before incarceration, who earn a pittance while incarcerated, the costs discussed above are astronomical. As discussed, the FCC has capped the cost of interstate phone calls at 12 to 21 cents a minute—meaning that, under prevailing prison wages, many people in prison must work *fifteen hours* to pay for a single *fifteen-minute phone call*. And for intrastate calls, which are not regulated by the FCC and are often subject to much higher rates, prisoners often must work far longer to afford the same one-minute call. Further, a \$5 per diem “pay-to-stay” charge—well within the typical range—exceeds the daily earnings of many prisoners, who are generally paid only pennies per hour. There are other examples:

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

Sawyer, *How much do incarcerated people earn in each state?*

As a result, incarcerated people often turn to their families for support. But families of incarcerated people are often ill-positioned to provide relief.

“[T]he incarcerated population is concentrated among individuals—mostly boys—from low-income, single parent families.” Looney & Turner, *Work and Opportunity Before and After Incarceration*, at 13 (“[O]f the individuals incarcerated at around age 30 ... 82 percent are from the bottom half of families [as ranked by income].”). In addition, many families face further financial distress as a result of their loved one’s incarceration. “The probability that a family is in poverty increases by nearly 40 percent while a father is incarcerated.” Executive Office of the President of the United States, *Economic Perspectives on Incarceration and the Criminal Justice System*, 5 (Apr. 23, 2016).¹⁵ Two-thirds of families report difficulty meeting basic needs as a result of a family member’s incarceration. Saneta deVuono-Powell et al., *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, 9,14 (2015).¹⁶

Thus, most incarcerated people cannot meet the costs of daily prison life. “80 to 85 percent of inmates now leave prison” in debt. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*; see also Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings*, Brennan Ctr. for Justice, 6 (Sept. 15, 2020) (detailing severe detrimental impact of incarceration on lifetime

¹⁵ <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf>.

¹⁶ <http://whopaysreport.org/who-pays-full-report/>.

earnings).¹⁷

Debt accumulated from interaction with the criminal justice system can “trigger a cascade of debilitating consequences,” becoming “a hindrance to obtaining a driver’s license, [restricting] voting rights, and [interfering] with obtaining credit and making child support payments.” Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, Nat. Inst. of Justice & Harvard Kennedy School, Executive Session on Community Corrections, 9 (Jan. 2017).¹⁸ Perhaps most troubling, debt is a significant contributor to re-incarceration, as failure to pay fines and fees can lead to the revocation of probation or re-arrest. *Id.* at 9-10; *see also* Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, at 10 (“Often when someone is unable or unwilling to pay a fee or fine, the court issues a warrant.”).

III. For Most Incarcerated People, It Is Extremely Difficult to Amass the Funds Needed to Pay Courts’ Filing Fees

Federal litigation is costly. In federal district courts, the initial filing fee is \$402: a base fee of \$350 set by statute, with another \$52 assessed as a miscellaneous fee. 28 U.S.C. § 1914(a); U.S. Courts, *District Court Miscellaneous*

¹⁷ https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf.

¹⁸ <https://www.ojp.gov/pdffiles1/nij/249976.pdf>.

Fee Schedule, ¶14 (Dec. 1, 2020).¹⁹ A person earning 40 cents an hour in prison would have to work 1,005 hours to pay that initial fee. And a person making 14 cents an hour—at the low end of average prison wages—would have to work 2,871 hours, or nearly an *entire year* of daily 8-hour shifts, without weekends, sick days, or other interruptions.

The filing fee for a federal appeal is even higher, at \$500. U.S. Courts, *Court of Appeals Miscellaneous Fee Schedule*, ¶2 (Dec. 1, 2020).²⁰ Other fees incident to litigation, such as transcripts and copies of the record on appeal, may cost “thousands of dollars.” *Maus v. Baker*, 729 F.3d 708, 709-10 (7th Cir. 2013) (Posner, J., sitting as motions judge); 28 U.S.C. § 1915(c).²¹ If a particular case were appealed, and necessitated \$1,000 in transcripts and other record costs, the total cost of litigation would rise to \$1,902. At 40 cents an hour, that price would require 4,755 hours of labor; at 14 cents an hour, it would rise further still, to 13,585 hours. Even assuming that an incarcerated person worked 8-hour shifts, every day of the year, under either wage rate, the cost would take years to pay—during which time, the person would still have to bear the costs flowing from

¹⁹ <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.

²⁰ <https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule>.

²¹ Prisoners granted IFP status may request that the court require the United States to pay these expenses. *See* 28 U.S.C. § 1915(c).

initial court fees and daily prison living.

As a result, the costs of litigation are enormous when put into the context of a typical prisoner's meager resources.

IV. The District Court's Decision Would Exacerbate the Burden Imposed by Filing Fees

The PLRA mandates that all prisoners must pay courts' filing fees, even if they meet the financial criteria for IFP status.

Prisoners granted IFP status are permitted to pay filing fees over time, with monthly payments of "20 percent of the preceding month's income credited to the prisoner's account." 28 U.S.C. § 1915(b)(2). While this distributes the fees over time, prisoners who have been granted IFP status for more than one suit must pay the filing fee for each suit concurrently. *Bruce v. Samuels*, 577 U.S. 82, 90 (2016). In other words, if a prisoner files two suits, the prisoner must pay 40% of the preceding month's income towards the filing fees of the two suits, rather than paying 20% until the first suit is paid off, and then continuing to pay 20% until the next is paid as well. Thus, each suit severely reduces the amount of funds available in a prisoner's account to pay for calls to loved ones, commissary expenses, and other ongoing costs associated with incarceration.²²

²² The PLRA provides that prisoners granted IFP status will not be required to pay if there is less than \$10 in their accounts. 28 U.S.C. § 1915(b)(2). Even so, that would leave only \$10 to cover other expenses incurred in day-to-day prison living.

Separately, prisoners with three prior “strikes” are denied IFP status, and must prepay the full filing fee up front. 28 U.S.C. § 1915(g). For a single suit, this lump sum fee represents an impassable bar for many incarcerated litigants, given the financial constraints they face. For two suits, the burden is even heavier.

If affirmed, the district court’s decision would effectively double the financial burden imposed by filing fees. A prisoner granted IFP status, whose suit is then dismissed and refiled—as would be required if the district court’s decision were affirmed—would pay 40% of the preceding month’s income towards the litigation, rather than 20%. This added expense would drastically curtail their ability to pay for other prison-related costs. And a person denied IFP status pursuant to the three strikes provision would be required to pay two lump-sum filing fees to pursue their claim—a colossal amount, given the scant resources available to most prisoners.

Thus, the district court’s decision would severely constrain prisoners’ ability to seek redress for violations of their constitutional rights, regardless of the merit of their claims. Here, Appellant was subject to a retaliatory placement in administrative segregation after being assaulted by gang members. Under the district court’s ruling, Appellant would be required to refile his suit, rather than simply amend or supplement his initial complaint—meaning he would have to pay two filing fees in order to seek redress for this one egregious event. That result

impedes judicial economy, by requiring a separate suit to be filed, docketed and served. In contravention of Supreme Court precedent, it denies many prisoners the “reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement.” *Lewis v. Casey*, 518 U.S. 343, 356 (1996). And it comes at a heavy cost to prisoners who have little access to resources, and are extraordinarily ill-positioned to bear the financial burden of a second filing fee.

CONCLUSION

The judgment of the district court should be reversed.

Dated: January 31, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation, as provided in Federal Rule of Appellate Procedure 29 because, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 3598 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: January 31, 2022

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I HEREBY CERTIFY that on this 31st day of January, 2022, I electronically filed the foregoing with the Clerk of the Court through the Court's CM/ECF system. Notice of this filing will be sent by mail to all parties by operation of the Court's electronic filings system.

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