

20-17519

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SHIKEB SADDOZAI,

Plaintiff-Appellant,

—v.—

RON DAVIS, Warden of San Quentin State Prison, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**BRIEF FOR *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES
UNION, THE AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA, THE BRENNAN CENTER FOR
JUSTICE AT NYU SCHOOL OF LAW, THE FLORIDA JUSTICE
INSTITUTE, THE HUMAN RIGHTS DEFENSE CENTER,
THE PRISON LAW OFFICE, THE SOUTHERN CENTER FOR
HUMAN RIGHTS, AND THE SOUTHERN POVERTY LAW CENTER
IN SUPPORT OF PLAINTIFF-APPELLANT**

EUGENE M. GELERNTER
ABIGAIL E. MARION
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorneys for Amici Curiae

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 Northern California, the Brennan Center for Justice at NYU School of Law, the Florida Justice Institute, the Human Rights Defense Center, the Prison Law Office, the Southern Center for Human Rights, and the Southern Poverty Law Center 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
September 3, 2021

/s/ Abigail E. Marion
Abigail E. Marion
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorney for Amici Curiae

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. The Costs of Incarceration Are High	7
II. Incarcerated People Have Scant Access to Resources While Imprisoned	12
III. Filing Fees Are A Large Obstacle for Most Incarcerated People	16
IV. The District Court’s Decision Would Exacerbate the Burden of Filing Fees	18
CONCLUSION	21
CERTIFICATE OF COMPLIANCE	22
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Bruce v. Samuels</i> , 577 U.S. 82 (2016).....	18
<i>Cano v. Taylor</i> , 739 F.3d 1214 (9th Cir. 2014)	20, 21
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994).....	10
<i>Jones v. Clark Cty.</i> , No. 2018-CA-001710, 2020 WL 757095 (Ky. Ct. App. Feb. 14, 2020)	7
<i>Maus v. Baker</i> , 729 F.3d 708 (7th Cir. 2013)	17
Statutes	
28 U.S.C. § 1914.....	16
28 U.S.C. § 1915	5, 17, 18
47 C.F.R. § 64.6030	11
Ariz. Rev. Stat. Ann. § 16-954.....	8
Fed. R. App. P. 29	1
Other Authorities	
Sandra Blanco et al., <i>Costs of Injustice: How Criminal System Fees Are Hurting Los Angeles County Families</i> (Nov. 2019), https://www.aclusocal.org/sites/default/files/aclu_social_costs_of_injustice.pdf	8

Brennan Ctr. for Justice, *Is Charging Inmates to Stay in Prison Smart Policy?* (Sept. 9, 2019),
<https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy>.....9

Terry-Ann Craigie, Ames Grawert & Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings*, Brennan Ctr. for Justice (Sept. 15, 2020),
https://www.brennancenter.org/sites/default/files/202009/EconomicImpact_Report_pdf.pdf.....15

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 (Spring 2014)9

Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan Ctr. for Justice (2015),
<https://www.brennancenter.org/sites/default/files/publications/Charging%20Inmates%20Perpetuates%20Mass%20Incarceration.pdf>.....7, 12

Executive Office of the President of the United States, *Economic Perspectives on Incarceration and the Criminal Justice System* (Apr. 23, 2016),
<https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf>14

Federal Bureau of Prisons, *Work Programs*,
https://www.bop.gov/inmates/custody_and_care/work_programs.jsp.....13

Federal Communications Commission, *FCC Lowers Interstate and International Prison Phone Rates to Help Families Stay Connected* (May 20, 2021),
<https://docs.fcc.gov/public/attachments/DOC-372625A1.pdf>11

Federal Communications Commission, *Telephone Services for Incarcerated Individuals* (Oct. 27, 2020),
<https://www.fcc.gov/consumers/guides/telephone-service-incarcerated-individuals>.....11

Marie Feyche, *FCC Approves Plan to Lower Interstate and International Jail and Prison Phone Call Rates*, Jurist (May 23, 2021), <https://www.jurist.org/news/2021/05/fcc-approves-plan-to-lower-interstate-and-international-jail-and-prison-phone-call-rates/>.....11

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 (Summer 2019)13

Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, Brookings Institution (Mar. 14, 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.....12, 13, 14

Jessica Lussenhop, *The US Inmates Charged Per Night in Jail*, BBC News Magazine (Nov. 9, 2015), <https://www.bbc.com/news/magazine-34705968>.....9

Karin D. Martin, Sandra Susan Smith & Wendy Still, *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, Nat. Inst. of Justice & Harvard Kennedy School, Executive Session on Community Corrections (Jan. 2017), <https://www.ojp.gov/pdffiles1/nij/249976.pdf>15

Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines*, Brennan Ctr. for Justice (Nov. 21, 2019), https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf8, 15

Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 Mich. J. Race & L. 291 (2016)12

Devon Porter, *Paying for Justice: The Human Cost of Public Defender Fees*, A.C.L.U. of S. Cal. (June 2017), <https://law.yale.edu/sites/default/files/area/center/liman/document/pdfees-report.pdf>.....8

Justice Lewis F. Powell Jr., *Address to the American Bar Association*
 (Aug. 10, 1976),
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>.....5

Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative (May 2018),
<https://www.prisonpolicy.org/reports/commissary.html>10

Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 *Hastings Race & Poverty L. J.* 3 (Winter 2020).....10

Wendy Sawyer, *How much do incarcerated people earn in each state?*, Prison Policy Initiative (Apr. 10, 2017),
<https://static.prisonpolicy.org/blog/2017/04/10/wages/>11, 13, 14

Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, Nat. Public Radio (May 19, 2014),
<https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.....15

U.S. Courts, *District Court Miscellaneous Fee Schedule*, ¶14 (Dec. 1, 2020),
<https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>16

U.S. Courts, *Court of Appeals Miscellaneous Fee Schedule*, ¶2 (Dec. 1, 2020),
<https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule>16

Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, Prison Policy Initiative (Feb. 2019),
https://www.prisonpolicy.org/phones/state_of_phone_justice.html11, 12

INTEREST OF *AMICI CURIAE*¹

Amici Curiae are nonprofit organizations with extensive experience litigating, documenting, campaigning, and advocating for people or groups who face constitutional deprivations while incarcerated.

Amici submit this brief to underscore the real-life consequences of the district court's decision for incarcerated litigants. *Amici* represent and work on behalf of incarcerated people who struggle to pay courts' filing fees. In light of their experience, *amici* are aware of the economic straits of people in prison and jails, and the myriad costs they must bear in connection with their incarceration.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 1.7 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. **The ACLU of Northern California** is a regional affiliate of the national ACLU. 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.

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).

Supreme Court. Courts across the country have repeatedly recognized the special expertise of the NPP in conditions of confinement cases.

The Brennan Center for Justice at NYU School of Law (the “Brennan Center”) is a nonprofit, nonpartisan public policy and law institute that seeks to secure our nation’s promise of “equal justice for all.” The Brennan Center’s Justice Program seeks to build a rational, effective, and fair criminal justice system, and advocates for reshaping public policies that undermine this vision. The Justice Program’s research explores the connection between poverty and mass incarceration and identifies solutions that can break that link while advancing racial and economic justice.

The Florida Justice Institute (“FJI”) is a nonprofit, public interest law firm founded in 1978 that conducts civil rights litigation and advocacy in a variety of areas, including the advancement and protection of the rights of incarcerated people. FJI represents incarcerated people and their families in cases seeking to ensure adequate medical and mental healthcare, eliminate abuse and violence, ensure robust communication, and obtain redress for other unjust practices. FJI supports the robust access to courts for incarcerated people and opposes financial impediments to that access.

The Human Rights Defense Center (“HRDC”) is a nonprofit charitable organization that advocates in furtherance of the human rights of people held in

state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC engages in state and federal court litigation on prisoners' rights issues, including wrongful death, public records, class actions, and Section 1983 civil rights litigation concerning the First Amendment rights of prisoners and their correspondents. HRDC's advocacy efforts include publishing two monthly publications, Prison Legal News, which covers national and international news and litigation concerning prisons and jails, as well as Criminal Legal News, which is focused on criminal law and procedure and policing issues, as well as publishing and distributing self-help and legal reference books for prisoners.

The Prison Law Office is a nonprofit public interest law firm founded in 1976 that provides representation in class action impact litigation in California and Arizona to improve incarcerated persons' conditions of confinement, and directly represents individuals in habeas corpus petitions, appeals, and parole consideration hearings. The Prison Law Office has appeared before this Court in numerous cases involving prisoners' rights, both as direct counsel and as *amicus curiae*. The Prison Law Office also promotes efficient and economical federal litigation by providing incarcerated individuals with self-help material that includes information on how to prosecute federal civil rights actions.

The Southern Center for Human Rights (“SCHR”) is a nonprofit law firm dedicated to protecting and advancing the civil and human rights of people impacted by the criminal legal system. Through litigation and advocacy, SCHR has worked for over 45 years to defend people accused of crimes, ensure humane conditions of confinement in jails and prisons, and end practices that criminalize people simply for experiencing poverty. In pursuit of those aims, SCHR has brought class action lawsuits, issued investigative reports, and pressed for legislative reforms on behalf of indigent persons across the Deep South.

The Southern Poverty Law Center (the “SPLC”) is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. The SPLC has filed litigation to end municipalities’ overreliance on fines, fees, and money bail to generate revenue, which has led to the unconstitutional treatment of indigent defendants. Additionally, the SPLC has worked with cities across Alabama, Mississippi, and Louisiana to reform policies related to fine and fee collection, conflicts of interest, the use of for-profit probation, and money bail.

SUMMARY OF ARGUMENT

As Justice Powell once stated, “it is fundamental that justice should be the same, in substance and availability, without regard to economic status.” Justice Lewis F. Powell Jr., *Address to the American Bar Association*, 3 (Aug. 10, 1976).² Yet many people in America’s jails and prisons find their access to the courts significantly constrained by their economic circumstances. Under the Prison Litigation Reform Act (“PLRA”), incarcerated people are obliged to pay courts’ full filing fees, even if they qualify for *in forma pauperis* (“IFP”) status. Prisoners who meet the financial criteria for IFP status must either pay the fee over time pursuant to a complex statutory formula, *see* 28 U.S.C. § 1915(b), or, if they have accumulated three “strikes” for prior litigation, they are denied IFP status and must prepay the full filing fee up front, *see id.* at § 1915(g). For incarcerated people—the majority of whom have little to no financial resources—these filing fees often represent a heavy or even insurmountable burden.

Because of the PLRA’s filing fee requirements, the question presented by this case is a matter of extreme importance to prisoner litigants. Under the district court’s reasoning, exhaustion is assessed as of the time the original complaint is filed, and an amended or supplemental complaint that is filed after a prisoner

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/>.

exhausts administrative remedies is ineffective for purposes of exhaustion. As a result, a prisoner who exhausts administrative remedies after commencing an action would need to bring a separate, second suit—duplicative of the first, but filed after exhaustion—in order to obtain redress for a violation of constitutional rights.

This approach would impose a heavy burden on prisoner litigants. Under the PLRA, the prisoner would be responsible for paying the filing fee for the second, duplicative suit, in addition to the filing fee for the original action. For prisoners who lack financial resources and must bear significant expenses related to their incarceration, the filing fees required for commencing a separate, second action are an additional monetary burden that they can ill-afford.

This brief addresses the burdens that the court filing fees impose on people incarcerated in jails and prisons, by considering filing fees in the context of their economic circumstances. The criminal justice system begins assessing fees immediately upon arrest: booking fees and other miscellaneous costs are often imposed without regard to whether the arrestee is ultimately found guilty. And throughout incarceration, expenses continue to mount, as institutions frequently charge for basic living expenses and require incarcerated people to cover the costs of their own confinement. People in jail and prison are often impoverished prior to arrest, and prison wages are extraordinarily low. Thus, the vast majority lack

resources to pay court filing fees.

This economic reality should inform the Court’s consideration of this issue. The added filing fees needed to commence a second, separate action raising claims that already are pending before the district court in an existing case represent an onerous—indeed, insurmountable—burden for many prisoners. This Court should avoid a construction of the PLRA that would impose greater fees on litigants with scant means to pay them.

ARGUMENT

I. The Costs of Incarceration Are High

Being incarcerated is expensive. Over the past several decades, “[e]very aspect of the criminal justice process has become ripe for charging a fee.” Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, Brennan Center, 1 (2015).³

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

³ <https://www.brennancenter.org/sites/default/files/publications/Charging%20Inmates%20Perpetuates%20Mass%20Incarceration.pdf>.

public defender are also routine: “Forty-three states use some form of cost-recovery for public defenders, and 27 of these charge upfront registration fees.”

Devon Porter, *Paying for Justice: The Human Cost of Public Defender Fees*, A.C.L.U. of S. Cal., 2 (June 2017).⁴ A 2019 report found that L.A. County charged hundreds to thousands of dollars for use of a public defender. Sandra Blanco et al., *Costs of Injustice: How Criminal System Fees Are Hurting Los Angeles County Families*, Let’s Get Free L.A. (Nov. 2019).⁵

Moreover, states impose miscellaneous “court fees” and use them to subsidize various expenses—ranging from general support for the state’s budget, to maintenance of courthouse buildings, to other ends far afield from criminal prosecution. Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines*, Brennan Center, 6 (Nov. 21, 2019).⁶ For example, Arizona imposes a surcharge on “on all civil and criminal fines and penalties” for its clean elections fund. Ariz. Rev. Stat. Ann. § 16-954(a). In Florida, fees are allocated “to the state’s general coffers.” Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, at 6. “North

⁴ <https://law.yale.edu/sites/default/files/area/center/liman/document/pdfees-report.pdf>.

⁵ https://www.aclusocal.org/sites/default/files/aclu_social_costs_of_injustice.pdf.

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

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

Once incarcerated, prisoners face additional costs. Under what are commonly termed “pay-to-stay” policies, many institutions charge inmates for their own room and board. These fees may take the form of per diem charges, ranging in cost from several dollars up to \$142.42 per day. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 Loy. J. Pub. Int. L. 319, 325 (Spring 2014); *see also* Jessica Lussenhop, *The US Inmates Charged Per Night in Jail*, BBC News Magazine (Nov. 9, 2015).⁷ Other institutions charge for necessities, such as meals, toilet paper, and medical care. Eisen, 15 Loy. J. Pub. Int. L. at 325-26; *see also* Brennan Center, *Is Charging Inmates to Stay in Prison Smart Policy?* (Sept. 9, 2019) (50 state map detailing pay-to-stay fee laws nationwide).⁸

Even in the absence of pay-to-stay fees, incarcerated people are routinely required to cover the cost of basic items. While jails and prisons must provide a

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

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

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).

Members of the public may assume, mistakenly, that the prison commissary functions as a source of luxury or comfort items, but,

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

Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative (May 2018).⁹ In 2016, for example, Massachusetts prisoners purchased “over 245,000 bars of soap,” not a luxury item. *Id.* And in Washington state, a typical prisoner spent \$513 on commissary items annually, with \$394 expended on food, and \$91 on hygiene and health items. *Id.* at Table 2.

Phone calls to loved ones are another significant expense. Taking note of the “excessive rates and egregious fees on phone calls” within prison facilities, the

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

Federal Communications Commission (“FCC”) capped interstate phone call rates at 21 cents per minute, and recently voted to lower that rate to 12 cents per minute for prisons, and 14 cents for jails with populations of 1,000 or more. 47 C.F.R. § 64.6030 (setting interim rate of 21 cents per minute); FCC, *Telephone Services for Incarcerated Individuals* (Oct. 27, 2020)¹⁰; FCC, *FCC Lowers Interstate and International Prison Phone Rates to Help Families Stay Connected* (May 20, 2021).¹¹ But, for incarcerated people whose work is compensated at rates of only 14 to 63 cents per hour, even 12 cents per minute is a substantial cost. Wendy Sawyer, *How much do incarcerated people earn in each state?*, Prison Policy Initiative (Apr. 10, 2017).¹²

Moreover, “80 percent of jail and prison calls are intrastate,” and thus do not benefit from FCC regulation. Marie Feyche, *FCC Approves Plan to Lower Interstate and International Jail and Prison Phone Call Rates*, Jurist (May 23, 2021).¹³ As a result, the cost of local calls is far greater: “Nationally, the average cost of a 15-minute [local] call from jail is \$5.74.” Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*,

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

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

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

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

Prison Policy Initiative (Feb. 2019).¹⁴ And certain facilities may charge even higher rates: for example, in 2018, in California, the same 15-minute call may cost as much as \$17.80. *Id.*

All told, the path from arrest through release is littered with fees, which begin accumulating before the doors are even closed, and continue to crop up daily throughout incarceration.

II. Incarcerated People Have Scant Access to Resources While Imprisoned

Incarcerated people are largely unable to meet these swelling costs. An estimated 80% of America's incarcerated people are indigent. *See Eisen, Charging Inmates Perpetuates Mass Incarceration*, 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, prisoners have little or 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).¹⁵ “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

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

¹⁵ https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

30 percent, and average earnings (among those who worked) was \$12,780.” *Id.*

This means that the typical person enters the system without a financial safety net to cover prison costs.

Further, prison wages are extraordinarily low. On average, people in prison earn between 14 and 63 *cents* per hour. Sawyer, *How much do incarcerated people earn*. In federal institutions, work assignments pay 12 to 40 cents per hour. Federal Bureau of Prisons, *Work Programs*.¹⁶ Even when incarcerated people risk their lives, their pay 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 of incarceration discussed above are astronomical. As noted, the FCC has capped the cost of interstate phone calls at 12 to 14 cents a minute—meaning that, under prevailing prison wages, many people in prison must work *one hour* to pay for a single *one-minute phone call*. And for intrastate calls, which are not regulated by the FCC and are often subject to much higher rates, prisoners often must work far longer to afford the same one-minute

¹⁶ https://www.bop.gov/inmates/custody_and_care/work_programs.jsp.

call. Further, a \$5 per diem fee—well within the typical range—exceeds the daily earnings of many prisoners, who are generally paid only a fraction of a dollar an hour. There are other examples:

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

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

As a result, incarcerated people often must turn to their families for support—but their families are ill-positioned to provide relief. “[T]he incarcerated population is concentrated among individuals—mostly boys—from low-income, single parent families.” Looney & Turner, *Work and Opportunity Before and After Incarceration*, at 13 (“[O]f the individuals incarcerated at around age 30 ... 82 percent are from the bottom half of families [as ranked by income].”). In addition, many families face further financial distress as a result of their loved one’s incarceration. “The probability that a family is in poverty increases by nearly 40 percent while a father is incarcerated.” Executive Office of the President of the United States, *Economic Perspectives on Incarceration and the Criminal Justice System*, 5 (Apr. 23, 2016).¹⁷

Thus, most incarcerated people cannot meet the costs of daily prison life.

¹⁷ <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf>.

“80 to 85 percent of inmates now leave prison” in debt. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, Nat. Public Radio (May 19, 2014)¹⁸; *see also* Terry-Ann Craigie, Ames Grawert & Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings*, Brennan Center, 6 (Sept. 15, 2020) (detailing severe detrimental impact of incarceration on lifetime earnings).¹⁹

Debt accumulated from interaction with the criminal justice system can “trigger a cascade of debilitating consequences,” becoming “a hindrance to obtaining a driver’s license, [restricting] voting rights, and [interfering] with obtaining credit and making child support payments.” Karin D. Martin, Sandra Susan Smith & Wendy Still, *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, Nat. Inst. of Justice & Harvard Kennedy School, Executive Session on Community Corrections, 9 (Jan. 2017).²⁰ 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

¹⁸ <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

¹⁹ https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf.

²⁰ <https://www.ojp.gov/pdffiles1/nij/249976.pdf>.

unwilling to pay a fee or fine, the court issues a warrant.”).

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

III. Filing Fees Are A Large Obstacle for Most Incarcerated People

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 Fee Schedule*, ¶14 (Dec. 1, 2020).²¹ 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).²² Other fees incident to litigation, such as transcripts and copies of the record on appeal, may

²¹ <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.

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

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).²³ 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 initial court fees and daily prison living.

Accordingly, the filing fees for bringing suit are enormous when viewed in the context of a typical prisoner’s meager resources. Nonetheless, 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 across time, prisoners granted IFP status must pay for each suit simultaneously. *Bruce v. Samuels*, 577 U.S. 82, 90 (2016). In other words, if a prisoner files two

²³ Prisoners granted IFP status may request that the court require the United States to pay these expenses. *See* 28 U.S.C. § 1915(c).

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.²⁴

Separately, prisoners with three "strikes" for prior litigation are denied IFP status, and must prepay the full filing fee up front. 28 U.S.C. § 1915(g). This lump sum fee represents an insurmountable bar for many incarcerated litigants, who are often unable to overcome the many fees described above, and thus have little hope of cobbling together hundreds of dollars to pay filing fees all at once.

Thus, courts' filing fees often impose an immense burden on incarcerated litigants, who have scant means to pay for litigation in addition to other myriad expenses flowing from their interaction with the criminal justice system.

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

Under the district court's reasoning, exhaustion is assessed as of the time of the filing of the original complaint—so that a later amended or supplemental

²⁴ The statute 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.

pleading is irrelevant for exhaustion purposes. The district court relied on this reasoning in dismissing Mr. Saddozai's suit without prejudice for failure to exhaust before filing his original complaint, forcing him to file a second, separate suit in order to pursue his constitutional claims.

Requiring impecunious prisoners such as Mr. Saddozai to pay a second filing fee—in order to litigate constitutional claims that *already* are pending before the same district court in an existing case—serves no practical purpose. Moreover, by forcing prisoners to file a separate, second suit after exhaustion in order to pursue constitutional claims—rather than simply amend or supplement the original complaint as permitted by Rule 15—the district court's decision effectively doubles the burden of filing fees. A prisoner granted IFP status, who has to file a second suit in order to pursue the same constitutional claims presented in the initial action, would be forced to pay 40% of the preceding month's income towards the litigation, rather than 20%. This added expense would drastically curtail a prisoner's ability to pay for other prison-related costs of daily living. 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 constitutional claims—a colossal amount, given the scant resources available to most prisoners.

Further, the added burden imposed by the district court's decision would apply regardless of the merit of the claim at issue. Here, Mr. Saddozai's claim—

which must be presumed factually correct at this juncture—is that his constitutional rights were violated when he was shot by a corrections officer, while he was being attacked by other prisoners. Forcing Mr. Saddozai to file a second, separate suit in order to pursue his claims, as the district court’s ruling does, means that he must pay twice the filing fees in order to seek redress for this egregious violation of his constitutional rights. Given the meager resources available to most prisoners, other litigants with similarly meritorious claims may also find themselves unable to meet the cost of a second filing fee. Thus, the district court’s rule would curtail, or even eliminate, prisoners’ ability to litigate meritorious claims.

The district court’s imposition of a second filing requirement also disserves “the main purpose of the PLRA, which was to address the overwhelming number of suits brought by prisoners.” *Cano v. Taylor*, 739 F.3d 1214, 1219 (9th Cir. 2014) (citing 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995)). By demanding that a separate suit be initiated, the district court’s rule would in fact *increase* the amount of litigation imposed on federal courts, undermining judicial economy and amplifying the tax on judicial resources created by prisoner litigation. Quite simply, as this Court has previously observed, “forcing the plaintiff to file a separate suit ... would not further the policy goals of the PLRA.” *Id.* at 1220–21.

CONCLUSION

The district court's rule comes at a heavy cost to prisoners, who have scant financial resources and are extraordinarily ill-positioned to bear the financial burden of a second filing fee.

The Court should reverse the judgment of the district court, and reaffirm that exhaustion is measured as of the date of filing an amended or supplemental complaint, thus eliminating the need for prisoner litigants to incur the additional filing fees that would result from having to file a separate, second suit after exhausting administrative remedies.

Dated: New York, New York
September 3, 2021

/s/ Eugene M. Gelernter
Eugene M. Gelernter
Abigail E. Marion
PATTERSON BELKNAP WEBB &
TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation, as provided in Federal Rules of Appellate Procedure 29 and 32 because, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 4,473 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: New York, New York
September 3, 2021

/s/ Abigail E. Marion _____
Abigail E. Marion
PATTERSON BELKNAP WEBB &
TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2021, I electronically filed the foregoing with the Clerk of the Court through the Court's CM/ECF system. Notice of this filing will be sent by mail to all parties by operation of the Court's electronic filings system.

/s/ Abigail E. Marion
Abigail E. Marion
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

Counsel for Amici Curiae