NO. 24-275

# In the Supreme Court of the United States

DONTE PARRISH,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF AMICI CURIAE CENTER FOR CONSTITUTIONAL RIGHTS, HUMAN RIGHTS DEFENSE CENTER, IMPACT FUND, NATIONAL POLICE ACCOUNTABILITY PROJECT, AND PUBLIC JUSTICE IN SUPPORT OF PETITIONER


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## INTEREST OF THE AMICI CURIAE[1]

*Amici curiae* are nonprofit, public-interest organizations with decades of experience advocating for the rights of incarcerated people and equitable access to the legal system.

**THE CENTER FOR CONSTITUTIONAL RIGHTS (CCR)** is a national, not-for-profit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases on behalf of individuals impacted by arbitrary and discriminatory criminal justice policies, including policies that disproportionately impact LGBTQI communities of color and policies that violate the Eighth Amendment's prohibition against cruel and unusual punishment and cause significant harm to people in prison. CCR successfully mounted a challenge regarding the use of solitary confinement in prisons and jails in its class action *Ashker v. Brown*, No. 09-cv-05796-CW (N.D. Cal. 2009).

**THE HUMAN RIGHTS DEFENSE CENTER (HRDC)** is a non-profit organization founded in 1990 that

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[1] Pursuant to Rule 37.6 of this Court, no party or counsel representing a party has authored the brief in whole or in part, and no party or counsel representing a party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, *amici* members, or counsel for *amici*, have made a monetary contribution intended to fund the preparation or submission of this brief.

advocates nationally on behalf of those imprisoned in U.S. detention facilities. The HRDC serves as an important source of news and legal research for prisoners' rights advocates, policy makers, academics, researchers, journalists, attorneys, and others involved in criminal-justice issues. In support of this effort, HRDC publishes materials including PRISON LEGAL NEWS, a monthly publication with subscribers in all 50 states and internationally that provides a voice to prisoners, their families, and other affected by criminal justice policies.

**THE IMPACT FUND** is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in major civil rights class actions, including cases protecting access to justice and the courts on behalf of underrepresented and vulnerable communities.

**THE NATIONAL POLICE ACCOUNTABILITY PROJECT (NPAP)** has approximately 550 attorney members practicing in every region of the United States. Every year, NPAP members litigate the thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and resources for non-profit organizations and community groups working on police and correction officer accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as amicus curiae

in cases, such as this one, presenting issues of particular importance for its members and their clients. NPAP has recently filed amicus briefs at this Court in *Felix v. Barnes*, 23-1239, *Vega v. Tekoh*, No. 21-499, *Egbert v. Boule*, No. 21-147, *Thompson v. Clark*, No. 20-659, and *Reed v. Goetz*, No. 21-442.

**PUBLIC JUSTICE** is a nonprofit legal advocacy organization that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of people whose civil rights have been violated to seek redress for their injuries in the civil court system. This case is of particular interest to Public Justice because it concerns an incorrect interpretation of a procedural rule that served to bar a civil-rights plaintiff from presenting the merits of his claims.

## SUMMARY OF ARGUMENT

This case illustrates the substantial consequences that flow from a court's incorrect application of a procedural rule. Petitioner Donte Parrish spent years in administrative segregation as a result of his alleged involvement in the killing of a fellow incarcerated person—involvement he denied and of which the Bureau of Prisons ("BOP") eventually cleared him. Pet. Br. at 11. During this time, he languished in the administrative segregation units of some of the most notorious federal correctional facilities in the country, including United States Penitentiary, Hazelton ("USP Hazelton"), a West Virginia prison known as "Misery Mountain" by those incarcerated there. He was isolated

in small cells, sometimes restrained and forced to sleep in shackles. *Id.* He experienced "long days of constant illumination" in one facility, and the reverse at another, where the units were "often pitch black, like a dungeon." *See* Plaintiff's Amended Complaint, *Parrish v. United States*, No. 1:12-cv-00070 (N.D.W. Va. Dec. 18, 2017), ECF No. 39-13, at 5.[2] He also experienced other serious deprivations including being denied showers, losing access to family visitation, and experiencing difficulty accessing legal counsel and legal information. Pet. Br. at 11.

Whether the government should be liable for the harm Mr. Parrish suffered is not the question presented to the Court in this appeal. This is because, for years on end, Mr. Parrish has faced a host of obstacles that have prevented any court from considering the merits of his underlying case, including the latest: whether his failure to file a second, duplicative notice of appeal after the appeal period was reopened under Federal Rule of Appellate Procedure 4(a)(6) should result in dismissal of his appeal. The Fourth Circuit incorrectly held that it did, contrary to the weight of existing legal authority and the parties' agreement that there was no need to file a second notice.

Here, *amici* describe the many procedural and practical obstacles that plaintiffs like Mr. Parrish face, including those imposed by the Prison Litigation Reform Act (PLRA), to explain why this Court's reversal of the Fourth Circuit's wrongfully punitive interpretation of Fed. R. App. P. 4(a)(6) will not open

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[2] This Brief uses "ECF No." to refer to the electronic case filings in *Parrish v. United States*, No. 1:17-cv-00070, U.S. District Court for the Northern District of West Virginia.

the proverbial floodgates and increase the number of prison conditions-related cases brought before federal courts. *Amici* then direct the Court to Mr. Parrish's attempts to navigate the legal system on his own to illustrate the real-world impact these obstacles have. Against that backdrop, *amici* urge this Court to confirm the commonsense reading of Fed. R. App. P. 4(a)(6) that every Circuit except the Fourth has adopted. Adoption of the majority view will ultimately help preserve critical access to appellate review and ensure that the federal courts serve their important function in vindicating the civil rights of incarcerated people.

## ARGUMENT

As *amici* explain, *pro se* incarcerated plaintiffs already face a number of obstacles that prevent them from litigating meritorious claims. Permitting Mr. Parrish's notice of appeal to relate forward to the date the district court granted his motion to reopen the notice of appeal period does not undermine the PLRA's "inten[tion] to deal with what was perceived as a disruptive tide of prisoner litigation." *Woodford v. Ngo*, 548 U.S. 81, 97 (2006). By law and by practice, *pro se* incarcerated plaintiffs already face a number of onerous requirements they must overcome to litigate claims. The long procedural history of Mr. Parrish's own case indicates as much. This Court should reverse the Fourth Circuit's holding and conclude that a plaintiff who files a notice of appeal after the ordinary appeal period expires does not need to file a second, duplicative notice after the appeal period is reopened.

## I. *PRO SE* INCARCERATED PLAINTIFFS ALREADY FACE A LITANY OF OBSTACLES THAT DELAY—AND EVEN PREVENT—ACCESS TO THE LEGAL SYSTEM.

Validating Mr. Parrish's premature notice of appeal does not risk a "flood of nonmeritorious claims." *Lomax v. Ortiz-Marquez*, 140 S.Ct. 1721, 1727 (2020) (quoting *Jones v. Bock*, 549 U.S. 199, 203 (2007)). Although incarcerated people have a constitutional right of access to the courts, *Lewis v. Casey*, 518 U.S. 343, 350 (1996) (citing *Bounds v. Smith*, 430 U.S. 817, 821, 828 (1977)), that right is already seriously curtailed by numerous legal and practical obstacles that often prevent incarcerated people from litigating the merits of their case, or filing a lawsuit at all.

First, like Mr. Parrish, incarcerated plaintiffs often must pursue litigation *pro se* because of the considerable difficulty obtaining representation. Then, when litigating, the PLRA and other legal rules impose unique and onerous procedural requirements on incarcerated plaintiffs—burdens that fall heaviest on those proceeding *pro se*. Finally—and as particularly relevant to this issue—beyond legal rules, practical and logistical obstacles often heighten the difficulty. Incarcerated *pro se* plaintiffs must often depend on written mail that may be delayed or intercepted by prison[3] staff, may have inconsistent or no access to legal information, and in general face obstruction by prison officials who may have a direct (and opposing) stake in the case. These obstacles collectively prevent incarcerated people from presenting their cases, from developing

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[3] This Brief uses "prison" to refer to carceral facilities subject to the PLRA, which includes any "jail, prison, or other correctional facility[.]" 42 U.S.C. § 1997e(a).

legal theories and factual records, and ultimately from even getting serious, core constitutional claims—for things like excessive force, sexual assault, denial of medical care, or retaliation—ever heard on the merits at all.

### A. Obstacles to Obtaining Legal Representation.

Legal representation matters because it generally improves any litigant's chances of success, *see* Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1842 (2019), but it is crucial for people who are incarcerated: the procedural obstacles posed by the PLRA and the complexity of the constitutional law and legal doctrines under which they often bring their claims make litigating these claims *pro se* difficult. Incarcerated people, however, have no constitutional right to an attorney when litigating civil rights claims or in post-conviction proceedings. *See* Alison Aimers, *Meaningful or Meaningless? The Temporal Scope of the Constitutional Right of Access to Courts for Incarcerated Litigants*, 2024 CARDOZO L. REV. DE NOVO 17, 41 (2024), https://perma.cc/2GDW-2NGF. For this reason, and those described below, more than 91 percent of people who are incarcerated litigate their cases without the assistance of counsel. *See Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. Courts (Feb. 11, 2021), https://perma.cc/X825-UY3M.

Practical obstacles make it difficult to vet and secure representation. Incarcerated individuals do not have easy access to the tools that most people use to secure representation, like the internet, phone books, or a network of available friends, family, and coworkers

who can either provide referrals or freely ask others they know for referrals. Even if they did, they do not have unfettered access to external communication, if they have such access at all. The federal prison system (where Mr. Parrish was held at the time of filing his complaint in this case) relies, for example, on the Trust Fund Limited Inmate Computer Link System ("TRULINCS") for email communication. *See Stay in Touch*, Federal Bureau of Prisons, https://perma.cc/DE2T-US5G (last visited Feb. 27, 2025). The system does not allow for internet access, and all messages are monitored, *see id.*, undermining the development of a privileged attorney-client relationship. Other facilities rely on different systems that require payment, sometimes per message; the two companies that dominate the market for state incarceration messaging systems, Securus/JPay and GTL, charge as much as $0.50 for an inbound or outbound message that is subject to a character limit. *See* Mike Wessler, *The Rapid and Unregulated Growth of E-Messaging in Prisons*, Prison Pol'y Institute (Mar. 2023), https://perma.cc/ED49-5YV2.

And to whatever extent lawyers on the outside might learn of possible meritorious cases, they often cannot prospectively connect with incarcerated potential clients. Some corrections systems will not accept legal mail or schedule a legal call or visit between a lawyer and an incarcerated person if the lawyer cannot establish they have an existing attorney-client relationship. *See, e.g.*, *Legal Mail Policy*, Pa. Dep't of Corrs., https://perma.cc/DC4P-5XKR (last visited Feb. 27, 2025) (requiring "any attorney, court or non-attorney/court entity wishing to send privileged correspondence" to request a "control number [that] . . . will only be issued

to attorneys who represent inmates or to verified court /court entities"). Indeed, even for *existing* clients, some systems delay setting up legal calls if an attorney cannot point to a specific upcoming deadline in the client's case.

Incarcerated plaintiffs who can navigate these communications obstacles will still encounter a dearth of lawyers who can or do take prisoner civil rights cases. Several factors contribute to this, the biggest being that Congress made the vast majority of suits subject to the PLRA financially unviable for private counsel. The PLRA prevents the recovery of monetary damage for mental or emotional injury. 42 U.S.C. § 1997e(e). And the Act contains a strict cap on attorneys' fees, limiting fee awards to 150% of the damage recovered, *id.* § 1997e(d)(2), disincentivizing attorneys from litigating large-scale or complicated violations of law on behalf of people who are indigent and incarcerated. Private counsel also know that for incarcerated clients who may have restitution orders from their criminal cases, settlements or verdict awards may be intercepted and garnished, even prior to the attorney's own contingency or fee recovery allowed under the cap. *See* 18 U.S.C. § 3613(a) (authorizing the United States to enforce a restitution order in accordance with the practices and procedures for the enforcement of civil judgments under Federal or State law, subject to limited exceptions); 18 U.S.C. § 3664(n) (requiring a person obligated to pay restitution if they "receive[] substantial resources from any source," including "judgment" "during a period of incarceration").[4] The

4 State law also sometimes provides independent avenues for enforcing the garnishment of judgments by, for example, requiring employees to report known judgments or windfalls received

complicated and time-intensive nature of these cases makes the prospect of expending dozens or even hundreds of hours at far below market rate unviable for many lawyers, even in meritorious cases. *See* Eleanor Umphres, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 AM. CRIM. L. REV. 261, 274 (2019).

And even for private attorneys who take such cases or nonprofit counsel whose organizations focus on prison civil rights litigation, geographical considerations can still deter representation. Carceral facilities are commonly located in rural areas, far from the cities and metropolitan areas where many lawyers live and work. *See* Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POLICY REV. 15, 120 (2018) ("[A]ttorney shortages are nearly endemic to rural areas . . . Without enough lawyers, the legal needs of residents . . . cannot be met"); Jacob Kang-Brown & Ram Subramanian, *Out of Sight: The Growth of Rural Jails in America* 2 (Vera Institute, June 2017), https://perma.cc/B3YX-U677 ("During the past decade, the use of jails has *declined* sharply in urban areas while it has *grown* ever-higher in rural areas.") (emphasis in original); *see also* Eunice Hyunhye Cho et al., *Justice-Free Zones: U.S. Immigration Detention Under Trump* 20 (ACLU, Apr. 30, 2020) (stating that access to legal represent-

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by individuals who owe restitution. *See, e.g.*, Mont. Code Ann. § 46-18-237(2) (providing that, when the department of corrections becomes aware that an incarcerated individual is entitled to receive money from any source, it must submit such information to the office of victims services and the county attorney, either of whom may petition for a garnishment of the person's money for the payment of restitution).

ation for individuals held in immigration detention has been exacerbated by the Trump administration's "expansion in remote areas where attorneys are sparse and with fewer and less resourced legal service organizations").

Even for incarcerated plaintiffs who retain an attorney, prison regulations and practices may interfere with maintaining meaningful attorney-client contact. People who are incarcerated near their attorneys may eventually be transferred to a different facility farther away—which may eliminate access to their own legal materials for weeks or longer. Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1863 (2020) (explaining that the Bureau of Prisons "attempts to keep federal prisoners within 500 miles from home," but "prisoners can be shipped anywhere in the country, often far from family"). Even for people whose lawyers can and do visit them, prison systems often limit legal visits to only certain times and days. *See, e.g.,* 28 C.F.R. § 543.13(b) (delegating to BOP wardens the discretion to "set the time and place for [attorney] visits, which ordinarily take place during regular visiting hours").

Facilities may turn lawyers away because of the clothes they wear, the jewelry they use, the materials they have brought, or may remove a client to segregation or special custody status and unexpectedly cancel a visit (or a legal call) without notice. For lawyers who get in, true confidentiality may still not exist, with prison officials or correctional staff often lingering in earshot—ostensibly, as a matter of safety. In general, as discussed further in § I.C, prison officials may engage in conduct that significantly undermines the ability of incarcerated people to communicate with

their lawyers reliably in a confidential setting or through confidential means.

Ultimately, incarcerated *pro se* plaintiffs differ in important ways even from other *pro se* plaintiffs in the free world. At bottom, "the element of 'choice' . . . most clearly distinguishes *pro se* prisoner cases from [ordinary *pro se* cases] . . . an inmate's choice of self-representation is less than voluntary." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) (citing *Jacobsen v. Filler*, 790 F.2d 1362, 1365 n.4 (9th Cir. 1986)). And when involuntary self-representation couples with the further obstacles placed in a prisoner's path by his incarceration—for example, limited access to legal materials or sources of proof, *see infra* § I.B—a self-taught incarcerated plaintiff will struggle to bring a suit, "not because the prisoner does not know the law[,] but because he is not able to investigate before filing suit." *Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 790 (7th Cir. 1995).

### B. Procedural Obstacles to Litigating a Claim on the Merits.

Counseled or otherwise, plaintiffs subject to the PLRA face substantial procedural and remedial obstacles that hinder their abilities to bring claims "with respect to prison conditions" in federal court.[5] 42 U.S.C. § 1997e(a). The PLRA's "centerpiece" is its

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[5] Although Mr. Parrish's claims arise under the FTCA, incarcerated plaintiffs must still exhaust administrative remedies under the PLRA. *See, e.g.*, *Chandler v. Bureau of Prisons*, 229 F.Supp.3d 40, 44 (D.D.C. 2017). The PLRA also amended the FTCA through the addition of § 1346(b)(2), which precludes tort actions against the United States for "mental or emotional injury" absent a showing of physical injury or a sexual act, *see* 28 U.S.C. § 1346(b)(2).

administrative exhaustion provision, which requires incarcerated people to attempt to resolve their complaint through use of the correctional facility's internal grievance procedure before filing a lawsuit. *Woodford*, 548 U.S. at 84; 42 U.S.C. § 1997e(a). Other statutes applicable to claims commonly brought by incarcerated people also include administrative exhaustion requirements. *See, e.g.*, 28 U.S.C. § 2401(b). In practice, the administrative exhaustion requirement serves to prevent meritorious claims from ever getting before federal courts for adjudication on the merits, and to substitute litigation about the merits of claims relating to prison conditions with litigation of outcome-determinative, highly technical procedural questions.

Prison officials have wide discretion in designing and implementing a grievance procedure so long as it is not "so opaque that it becomes, practically speaking, incapable of use" or "operates as a dead end." *Ross v. Blake*, 578 U.S. 632, 643–44 (2016); *see Jones v. Bock*, 549 U.S. 199, 218 (2007) (holding that the requirements of a specific prison's own grievance system, rather than the PLRA, "define the boundaries of proper exhaustion"). This freedom "marries the prison's interest in immunizing itself from liability with the ability to do so." Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. 1145, 1150 (2023). Prison officials often set shorter timelines for submitting a grievance than the applicable statute of limitations for the underlying claim. Notably, the applicable statute of limitations in West Virginia, where Mr. Parrish's claims arose, is two years for personal injury claims. *See Green v. Rubenstein*, 644 F.Supp.2d 723, 746 (S.D.W. Va. 2009); W. Va. Code § 55-2-12 (2024). Similarly, the statute of limitations for claims brought under the FTCA is "within two years

after such claim accrues or unless action is begun within six months after . . . final denial of the claim by the agency." 28 U.S.C. § 2401(b). But the deadline for filing a prison grievance can be much shorter. A survey conducted in 2006 found that five states have grievance deadlines of three *days* or less. Katrina M. Smith, *We're Tired: The Exhaustion Requirement of the Prison Litigation Reform Act*, 6 UCLA CRIM. JUST. L. REV. 1, 15 (2022). Nine other states have grievance filing time bars of five days of or less. *Id.* Twenty-nine states, including West Virginia, have time bars of fifteen days or less, and just one state (North Carolina) explicitly allows up to a year. *Id.*

Besides establishing unrealistic timelines, a prison system may also design a grievance process that requires a higher level of factual and legal specificity than that required for a federal complaint to survive a motion to dismiss. *See* Yang at 1160–75. Prisons may even create multiple grievance processes, making it difficult to figure out how to properly exhaust. *See Muhammad v. Mayfield*, 933 F.3d 993, 1001 (8th Cir. 2019) (requiring prisoner to seek redress from both grievance process and prison chaplain, independently); *Prater v. Pa. Dep't. of Corrs.*, 76 F.4th 184 (3d Cir. 2023) (finding that although the prison had two grievance processes that "work[ed] in tandem," only one was the "exclusive means of exhaustion"). Prison systems may also require prisoners to state in the initial grievance —on the truncated timeline—exactly the relief they seek, including monetary damage that may not become apparent until later. Unless a grievant can demonstrate newly discovered evidence or intervening circumstances, they will generally be unable to recover money damage beyond what they pled in the initial claim,

even where they follow the administrative remedy process to completion. *See* 28 U.S.C. § 2675(b). Systems may also require prisoners to submit grievances to the very prison officials who are the subject of the complaint—prison staff who know that processing the grievance may make them a defendant in litigation. Such complicated, risky, and labor-intensive grievance processes increase the likelihood that incarcerated people will fail to adequately exhaust while ensuring that correctional defendants have abundant information about events giving rise to a claim in advance of a filed complaint, giving them an additional litigation advantage.

In addition to the exhaustion requirements established by the PLRA, the PLRA imposes other obstacles to filing and maintaining suit. The PLRA modified the requirements for proceeding *in forma pauperis* (IFP). Typically, indigent individuals may seek leave to file IFP, which allows them to file suit without paying the $405 filing fee typically applicable in civil cases. *See, e.g.*, *Fee Schedule*, U.S. Dist. Ct. for D.C., https://perma.cc/CE7C-JMQ3 (last visited Feb. 27, 2025); 28 U.S.C. § 1915. An incarcerated individual, however—even if they are granted IFP status—must still pay the full filing fee in installments over time, *see id.* § 1915(b), which is a particularly heavy burden and deterrent for prisoners who may earn wages averaging 86 cents per hour. *See* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, Prison Pol'y Initiative (Apr. 10, 2017), https://perma.cc/V3LK-946M.

The PLRA can also entirely bar individuals from proceeding IFP at all if they have, "on 3 or more occasions, while incarcerated or detained in any facility," brought an action or appeal that was "dismissed on

the grounds that it is frivolous, malicious," or—importantly—"fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). As any civil litigator knows, motions to dismiss can be granted for failures to state a claim in a host of non-frivolous situations, including in cases that present close questions, rely on incomplete or asymmetric information, or are missing a technical pleading requirement that can be resolved after a dismissal without prejudice. Further, district courts often fail to distinguish between which dismissals constitute "strikes" for purposes of the PLRA, resulting in considerable additional litigation regarding whether a previous dismissal constitutes a strike. *See, e.g., Talley v. Wetzel, et al.*, No. 21-1855, 2022 WL 3712869 (Sept. 16, 2022) (staying nine appeals pending resolution of a three-strikes issue in pending case). People who are incarcerated are penalized by the PLRA for raising even meritorious claims that may run into one or more of these pitfalls, even though the procedural vehicle through which they often bring claims, 42 U.S.C. § 1983, creates a "uniquely complicated (one might say Byzantine) liability scheme." Howard Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 823 (2003). For prisoners who accrue three such strikes, absent certain kinds of emergencies, they must pre-pay the entire filing fee at once, regardless of IFP status—a limitation that may make filing impossible.[6]

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6 It also makes little sense on its own terms—it may deter serious, meritorious claims from indigent prisoners, while still allowing prisoners with preexisting wealth or other financial support to file whatever claims they wish.

Courts can also apply these strikes by dismissing prisoner suits *sua sponte*. *See, e.g., Plunk v. Givens*, 234 F.3d 1128, 1129 (10th Cir. 2000) (holding that the power to dismiss "applies to all prison litigants, without regard to their fee status, who bring civil suits against a governmental entity, officer, or employee"). These *sua sponte* dismissals apply to cases that, in the eyes of the reviewing court, are frivolous, malicious, fail to state a claim, or involve arguably immune defendants. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c)(1). Again, however, whether a case fails to state a claim, involves an immune defendant, or even whether a cause is frivolous or malicious can be a close question or can eventually raise an argument "for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). Circuit courts have affirmed these dismissals, concluding that neither the PLRA nor the U.S. Constitution guarantee notice and a full and fair opportunity to be heard prior to dismissal. *See, e.g.*, *Ray v. Lara*, 31 F.4th 692, 697 (9th Cir. 2022); *Carr v. Dvorin*, 171 F.3d 115, 116 (2d Cir. 1999) (per curiam) ("The [PLRA] clearly does not require that process be served or that the plaintiff be provided an opportunity to respond before dismissal."); *Vanderberg v. Donaldson*, 259 F.3d 1321, 1324 (11th Cir. 2001) (considering the constitutionality of the PLRA provision that provides for *sua sponte* dismissal under Rule 12(b)(6), and concluding, "[d]ue process does not always require notice and the opportunity to be heard before dismissal").

Given the rigidity and breadth of the PLRA's procedural requirements, it is unsurprising that a significant percentage of prisoner suits are dismissed on procedural grounds. A recent analysis of a sample

of over 1,400 federal Eighth Amendment lawsuits filed between 2018 and 2022 found that 35 percent were dismissed by a district court for failing to comply with one or several PLRA requirements. Nicole Einbinder & Hannah Beckler, *The Myth of Frivolous Prisoner Lawsuits*, BUS. INSIDER (Dec. 20, 2024), https://perma.cc/8BYR-7TUT.

### C. Other Practical Obstacles to Vindicating Civil Rights in Prison.

Without the aid of a lawyer to guide an incarcerated person through the grievance process, perform legal research, prepare and file pleadings, and conduct discovery, incarcerated people face additional logistical obstacles that hinder their ability to develop legal arguments and the factual record.

First, there is the initial barrier of accessing legal information. Because incarcerated people do not have a freestanding right to an adequate law library, and because one cannot prove a violation of their right of access to the courts without "actual injury," *Lewis*, 518 U.S. at 351, prison officials are not incentivized to maintain law libraries that have comprehensive, accurate, and up-to-date materials. Though prisons and jails have largely turned to electronic law libraries, electronic access does not necessarily result in improvement. *See* Stephen Raher and Andrea Fenster, *A Tale of Two Technologies: Why "Digital" Doesn't Always Mean "Better" For Prison Law Libraries*, Prison Pol'y Initiative (Oct. 28, 2020), https://perma.cc/HZ9S-4ES3 (comparing a prison digital library designed to be responsive to needs of incarcerated people with one designed to cut costs). Facilities may abandon print materials all together, making it difficult for those

who lack computer literacy. Aimers, *Meaningful*, *supra*; Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1174 (2013). And even those with basic computer skills may find the research databases to be confusing and hard to navigate.

Even when a law library contains adequate content, prison officials may curtail access to those libraries, significantly reducing their utility. Access to a physical library may be limited as an operational necessity. *See Shango v. Jurich*, 965 F.2d 289, 292 (7th Cir. 1992) (describing law library that was "closed nights, weekends, and holidays and may be closed at other times due to lockdown, construction, or shortage of guards or librarians" and noting that "[f]requently, part of the inmates' allotted library time is consumed moving en masse to and from their housing unit, with meals, in other scheduled activities, and by proverbial delays"). Access to digital libraries available on tablets may also preclude meaningful access, depending how often and for how long an incarcerated person can use their tablet. And incarcerated people may completely lose access to both physical and digital libraries if they are housed in segregation. *See, e.g.*, *Lilly v. Jess*, 189 F. Appx. 542, 543 (7th Cir. 2006).

In response to constraints on physical access to law libraries, incarcerated people may turn to people on the outside for help accessing legal materials. Here, too, the mail delays and digitization of communications between incarcerated people and the free world place significant limitations on the speed with which information can be accessed and the total amount of information that can be relayed. Because so many facilities have transitioned to providing incoming non-

legal mail only on tablets or electronic kiosks that are not available 24/7 to the recipient of the mail, incarcerated people may have significantly limited time and ability to review incoming communications—in some facilities as little as fifteen minutes a day, three times a week.

Second, there is an inherent information asymmetry between incarcerated plaintiffs and the prison officials they sue. Prison officials are able to collect evidence held within carceral facilities, and they maintain exclusive access to that evidence. *See, e.g., Billman v. Ind. Dep't. of Corr.*, 56 F.3d 785, 789 (7th Cir. 1995) ("The state's attorney smiled when we asked him at argument whether [the plaintiff] would be given the run of the prison to investigate the culpability of prison employees for the rape."); *Smith v. Ind. Dep't. of Corr.*, 871 N.E.2d 975, 988 (Ind. Ct. App. 2007) (discussing prison defendants' exclusive possession of video of cell extraction at issue in lawsuit). *Pro se* prisoners, by contrast, cannot undertake pre-complaint investigations. They do not have access to staff rosters, incident reports, witness statements, or video recordings when they write their grievances, or at any time before filing a lawsuit. *Robinson v. Oliver*, No. 22-CV-4229, 2022 WL 22884673, at *1, n.1 (E.D. Pa. Nov. 8, 2022) (noting a request for appointment of counsel by a prisoner who has "limited access to the prison's law library, . . . limited legal knowledge and . . . unable to investigate and develop his claims due to his incarceration"); *Allah v. Hayman*, No. 08-1177, 2009 WL 2778290, at *1 (D.N.J. Aug. 31, 2009) (denying request for appointment of counsel from prisoner who explained he was "restricted from performing legal research at the prison's law library," had

"no access to legal books," and stated "that his incarceration impedes his ability to gather evidence, interview witnesses or to make legal-related telephone calls," and he had "not received assistance from the Inmate Legal Association or the prison's paralegals and his attempts to obtain counsel have been fruitless"). This lack of access and inability to investigate disadvantages incarcerated plaintiffs relative to the parties they litigate against.

Incarcerated plaintiffs also generally rely on paper filings, subject to a host of additional difficulties in sending mail. Because internet access is severely limited or outright prohibited in carceral facilities, the most common and accessible way for incarcerated people to file documents in the court is via U.S. mail. But preparing and submitting a filing by mail can be difficult. It is not uncommon for incarcerated people to lack access to paper, writing instruments, and postage. A 2021 survey of all 50 states and the federal prison system found that free basic supplies, including postage, are provided only to those deemed "indigent," a term that is often narrowly defined. Tiana Herring, *For the poorest in prison, it's a struggle to access even basic necessities*, Prison Pol'y Initiative, (Nov. 18, 2021), https://perma.cc/MVU3-W433 (finding that monetary thresholds for determining indigency range from 0–25 dollars). The same survey also found that "the number of free letters allowed range from one per month in Ohio to seven per week in Maryland. . . . In some states, people have to choose between using their mail supplies for personal or legal mail, as they aren't always considered separate services." *Id.* And for people who must pay postage that often requires several stamps for legal filings that can run dozens of pages, the costs

add up quickly for someone earning 86 cents or less an hour.

In addition to being costly, sending and receiving mail can be significantly delayed—a particular problem for *pro se* plaintiffs with a ticking clock to meet a deadline. Such delays are standard across correctional facilities and result, at least in part, from those facilities' failure to receive, screen, and deliver mail, including legal mail, in a timely manner. These delays of weeks and even months may be particularly lengthy in facilities that process mail through a third-party vendor—a growing trend in carceral settings. Ultimately, these mail processing delays contribute to incarcerated people having insufficient time to write pleadings, or even missing important deadlines—through no fault of their own.

Finally, even if incarcerated people can surmount these operational hurdles, they must contend with prison officials "who may have every incentive to delay" or prevent access to the courts. *Houston v. Lack*, 487 U.S. 266, 271 (1988). Because prison officials exercise complete control over incarcerated people and their possessions, it is not uncommon for prison officials to find ways to preclude access to the law library, destroy legal materials, lock up people in segregation, or transfer people to facilities far from family and counsel. *See, e.g.*, *Silva v. Di Vittorio*, 658 F.3d 1090, 1096 (9th Cir. 2011) ("Silva alleged that as soon as he began pursuing civil rights lawsuits . . . officials began transferring him within and among prison facilities . . . and confiscating and destroying his legal documents and materials."); *Hill v. Lappin*, 630 F.3d 468, 469 (6th Cir. 2010) ("Hill alleges that . . . prison staff placed him in segregated housing and threatened to transfer him to the lock-down

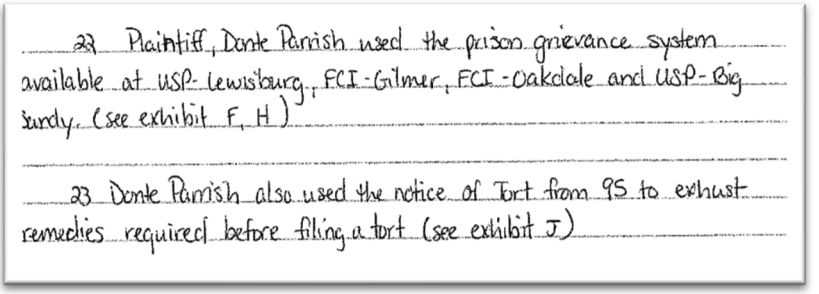
unit at [USP] Lewisburg in retaliation for grievances that he had filed against the [prison] staff."). Crucially, during these transfers, incarcerated people may lose control of their possessions, which prison systems often transfer separately from the prisoners themselves. Those separations—which often deprive prisoners of access to notes, legal research, witness declarations, grievance systems carbon copies needed to prove exhaustion under the PLRA, and other crucial materials —often last weeks or months, and prisoners have no recourse or ability to recover their possessions in the meantime.

## II. MR. PARRISH'S CASE EXEMPLIFIES MANY OF THESE OBSTACLES.

In this case, Mr. Parrish confronted many of the barriers described above, resulting in protracted litigation that has kept him from getting anywhere close to presenting the merits of his claims. Most obviously, Mr. Parrish experienced mail delays resulting from his transfer between correctional systems, giving rise to the issue now before this Court. *See* Pet. Br. at 13. But that was just the most recent in a long line of hurdles he had to overcome to get to where he is today, including:

### 1. Exhaustion of Administrative Remedies.

Mr. Parrish, who was incarcerated in a BOP facility, had only twenty calendar days to attempt to informally resolve or submit a formal grievance. 28 C.F.R. § 542.14. Prior to filing suit, Mr. Parrish exhausted his claims by using the prison grievance system across four facilities.


22 Plaintiff, Donte Parrish used the prison grievance system available at USP-Lewisburg, FCI-Gilmer, FCI-Oakdale and USP-Big Sandy. (see exhibit F, H)

23 Donte Parrish also used the notice of Tort from 95 to exhaust remedies required before filing a tort (see exhibit J)

{Transcription}

22. Plaintiff, Donte Parrish used the prison grievance system available at USP-Lewisburg, FCI-Gilmer, FCI-Oakdale and USP-Big Sandy. (see exhibit F, H)

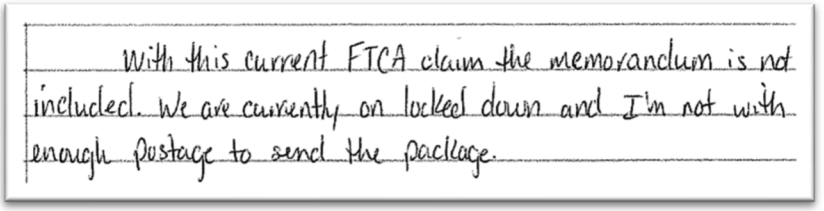
23. Donte Parrish also used the notice of Tort form 95 to exhaust remedies required before filing a tort (see exhibit J)

**2. Inability to Access Counsel.**

Mr. Parrish filed a handwritten *pro se* complaint on May 3, 2017, alleging false imprisonment, abuse of process, negligence and intentional infliction of emotional distress under West Virginia law arising from placement in "administrative detention status . . . without hearing or consent." Complaint, ECF No. 1 ¶ 7; *see also id.* ¶ 21. His motion for appointment of counsel was denied. Order, ECF No. 19.

**3. Inability to Pay for Postage.**

Mr. Parrish appended to the complaint a letter to the clerk explaining that he did not file a related memorandum because "we are currently on lockdown and I'm not with enough postage to send the package." Letter to Clerk, ECF No.1-1.

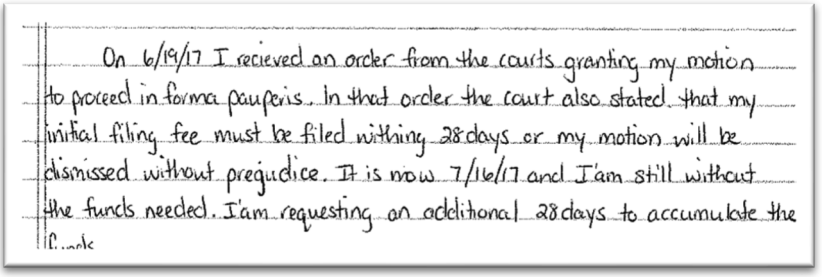

With this current FTCA claim the memorandum is not included. We are currently on locked down and I'm not with enough postage to send the package.

{Transcription}

With this current FTCA claim the memorandum is not included. We are currently on locked down and I'm not with enough postage to send the package.

**4. Inability to Pay Filing Fees.**

Mr. Parrish filed a motion requesting additional time to pay the initial filing fee. He explained that he received the order granting his motion to proceed IFP at a reduced filing cost, but almost a month later, "I am still without the funds needed. I am requesting an additional 28 days to accumulate the funds." Motion, ECF No. 13.


On 6/19/17 I recieved an order from the courts granting my motion to proceed in forma pauperis. In that order the court also stated that my initial filing fee must be filed within 28 days or my motion will be dismissed without prejudice. It is now 7/16/17 and I'am still without the funds needed. I'am requesting an additional 28 days to accumulate the

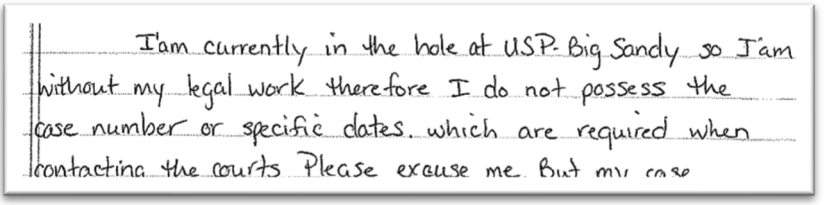
{Transcription}

On 6/19/17 I received on order from the courts granting my motion to proceed in forma pauperis. In that order the court also stated that my initial filing fee must be filed within 28 days or my motion will be dismissed without prejudice. It is now 7/16/17 and I

am still without the funds needed. I am requesting an additional 28 days to accumulate the funds.

**5. Curtailed Access to Legal Materials.**

Mr. Parrish submitted an untitled filing on September 8, 2017, informing the court that he had the money to pay the initial filing fee, but was unable to correctly caption the filing because he was in segregation at USP Big Sandy without access to his legal work. Letter to Clerk, ECF No. 16.


I'am currently in the hole at USP-Big Sandy so I'am without my legal work therefore I do not possess the case number or specific dates. which are required when contactina the courts Please excuse me But mv case

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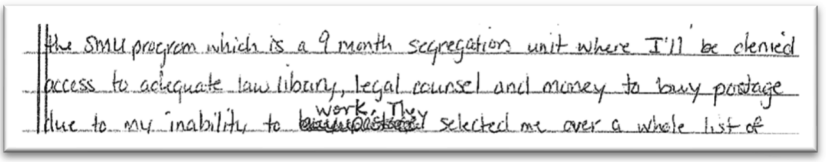
I am currently in the hole at USP-Big Sandy so I am without my legal work therefore I do not possess the case number or specific dates, which are required when contacting the courts. Please excuse me…

In a later filing, he explained that while in segregation, he'd be denied access to an adequate law library, legal counsel, and postage.


the SMU program which is a 9 month segregation unit where I'll be denied access to adequate law library, legal counsel and money to buy postage due to my inability to work. They selected me over a whole list of

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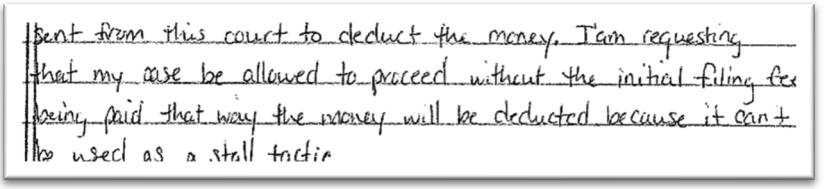
the SMU program which is a 9 month segregation unit where I'll be denied access to adequate law library, legal counsel and money to buy postage due to my inability to work…

In June 2019, Mr. Parrish wrote a letter to his sister, describing the issues he was experiencing with legal mail, asking her to "please try to look up some case law for me . . . like I said before I'm being denied law library access and I've been strip[p]ed of my property. I haven't seen it since now 2018. Please help me if you can[.] I have a hard time sending out legal mail." Letter, ECF No. 105 at 3. The letter was docketed as Mr. Parrish's objections to the magistrate judge's report and recommendation denying his motion to amend the complaint.

**6. Impediments from Prison Officials.**

Shortly after filing his complaint, Mr. Parrish asked the clerk to have "someone from the court contact USP Big Sandy business office and have [the filing fee] deducted from my account. The courts have sent an order instructing them how to handle the [IFP] but the prison has not complied with the order." Letter to Clerk, ECF No. 16. The district court issued an order directing the warden to pay the filing fee, as well as "to provide a response to explain why the IPFF has not been received by the Court." Order, ECF No. 18.

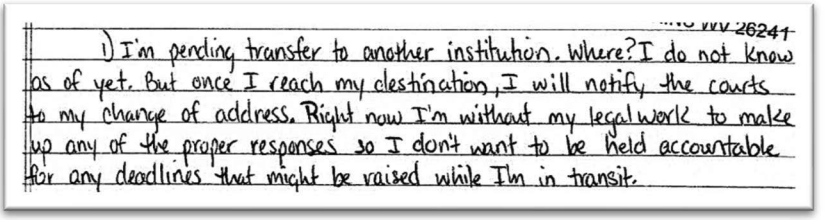

sent from this court to deduct the money. I am requesting that my case be allowed to proceed without the initial filing fee being paid. that way the money will be deducted because it can't be used as a stall tactic

{Transcription}

. . . I am requesting that my case be allowed to proceed without the initial filing fee being paid. That way the money will be deducted because it can't be used as a stall tactic.

**7. Transfers Between Facilities.**

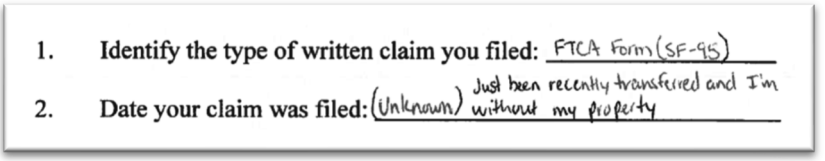
Mr. Parrish was transferred between facilities on multiple occasions, resulting in mail delays and difficulties accessing his property. On one occasion, Mr. Parrish informed the court clerk that he was pending transfer to another institution. Letter to Clerk, ECF No. 33. He advised that he was without access to his legal work and requested leniency in missing "any deadlines that might be raised while I am in transit." He also requested a case update because "I[] Haven't heard from your courts in awhile." *Id.*


1) I'm pending transfer to another institution. Where? I do not know as of yet. But once I reach my destination, I will notify the courts to my change of address. Right now I'm without my legal work to make up any of the proper responses so I don't want to be held accountable for any deadlines that might be raised while I'm in transit.

{Transcription}

I'm pending transfer to another institution. Where? I do not know as of yet. But once I reach my destination, I will notify the courts to my change of address. Right now I'm without my legal work to make up any of the proper responses so I don't want to be held accountable for any deadlines that might be raised while I'm in transit.

Mr. Parrish subsequently filed a notice of a change of address, noting that he had not had access to his property and hadn't received mail in over two weeks. Notice of Change of Address, ECF No. 37. Several weeks later, Mr. Parrish submitted an amended complaint on a FTCA complaint form. He was still without access to his property. Amended Complaint, ECF No. 39-2 at 4.



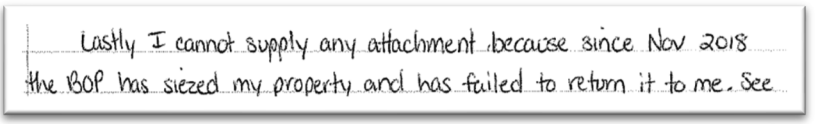
1. **Identify the type of written claim you filed:** FTCA Form (SF-95)
2. **Date your claim was filed:** (Unknown) Just been recently transferred and I'm without my property

{Transcription}

1. Identify the type of written claim you filed: FTCA Form (SF-95)

2. Date your claim was filed: (unknown) Just been recently transferred and I'm without my property

In a filing over a year later, Mr. Parrish advised the court that he "cannot supply any attachment [to this motion] because since Nov[ember] 2018 the BOP has seized my property and has failed to return it to me." Opposition to United States Motion to Dismiss, ECF No. 117 at 6.

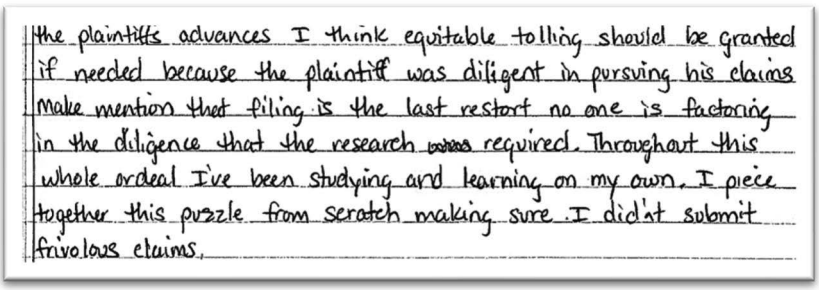

Lastly I cannot supply any attachment because since Nov 2018 the BOP has siezed my property and has failed to return it to me. See

{Transcription}

Lastly I cannot supply any attachment because since Nov 2018 the BOP has siezed [sic] my property and had failed to return it to me.

**8. Case Dismissal on Procedural Grounds.**

After considering the government's motion to dismiss the complaint, or in the alternative, for summary judgement, the district court dismissed Mr. Parrish's FTCA claims, finding that one was barred by the applicable statute of limitations, and the others had not been exhausted. In his opposition to the government's motion to dismiss, in a section on timeliness, Mr. Parrish asked the court to consider "the complex and tricky nature of the circumstances" and to "factor[] in the diligence that the research required. Throughout this whole ordeal, I've been studying and learning on my own." Objections to Report and Recommendations, ECF No. 81 at 4.


the plaintiffs advances I think equitable tolling should be granted if needed because the plaintiff was diligent in pursuing his claims Make mention that filing is the last restort no one is factoring in the diligence that the research ~~was~~ required. Throughout this whole ordeal I've been studying and learning on my own. I piece together this puzzle from scratch making sure I didn't submit frivolous claims.

{Transcription}

. . . I think equitable tolling should be granted if needed because the plaintiff was diligent in pursuing his claims. Make mention that filing is the last restort [sic] no one is factoring in the diligence that the research required. Throughout this whole ordeal I've been studying and learning on my own. I piece together this puzzle from scratch making sure I didn't submit frivolous claims.

**9. Appeal Dismissal, Through No Fault of His Own.**

Which brings us to the obstacle before the court today: the dismissal of Mr. Parrish's appeal for failing to file a second, duplicative notice of appeal after his original notice of appeal was construed as a motion to reopen under Fed. R. App. P. 4(a)(6) and subsequently granted. This is the rare case where both Respondent and Petitioner agree that this is a procedural barrier that need not exist. The weight of legal authority supports their position. This Court should too.

## CONCLUSION

By holding that a notice of appeal filed after the ordinary appeal period expires ripens when reopening under Fed. R. App. P. 4(a)(6) is granted, this Court can adopt "a straightforward, intuitive rule that can readily be applied in every case." Pet. Br. at 35. Adopting such a commonsense approach is of critical importance to the thousands of incarcerated people who, every day, seek justice for the serious harms they've suffered while incarcerated. Accordingly, *amici* urge the Court to reverse the Fourth Circuit's holding.

Respectfully submitted,

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