No. 21-2628

and No. 21-2851

In the

United States Court of Appeals

for the Second Circuit

ALEXANDER ROSA,
Plaintiff-Appellant,

v.

JOHN DOE, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Connecticut
No. 3:21-cv-00481 before the Hon. Sarah A. L. Merriam

**BRIEF OF AMICI CURIAE
NATIONAL CENTER FOR ACCESS TO JUSTICE, ET AL. IN SUPPORT
OF PLAINTIFF-APPELLANT AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae National Center for Access to Justice, ACLU Foundation of Connecticut, American Civil Liberties Union of Vermont, Center for Community Alternatives, National Legal Aid and Defender Association, New York County Defender Services, Parole Preparation Project, and Prison Policy Initiative certify that each is a non-profit organization that does not have a parent corporation and does not issue public stock.

The Fines and Fees Justice Center is a project of New Venture Fund, a 501(c)(3) non-profit organization that does not have a parent corporation and does not issue public stock.

INTEREST OF AMICI CURIAE[1]

Amici curiae are nonprofit organizations dedicated to work that is rooted in the principle that all people should enjoy access to justice, which is the meaningful opportunity to be heard, secure one's rights, and obtain the law's protection.

Amici curiae are the National Center for Access to Justice, ACLU Foundation of Connecticut, ACLU Foundation of Vermont, Center for Community Alternatives, Fines and Fees Justice Center, National Legal Aid and Defender Association, New York County Defender Services, Parole Preparation Project, and Prison Policy Initiative. A more detailed description of each amicus and its mission is found in Appendix A.

SUMMARY OF THE ARGUMENT

The *in forma pauperis* (IFP) process is critical for ensuring that people experiencing poverty not denied access to justice for lack of funds. The district court clearly erred in denying Mr. Rosa's IFP application when it ignored binding Supreme Court and Second Circuit precedent that people should not be forced to sacrifice the necessities of life for themselves or their dependents in order to gain

[1] All parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel contributed money intended to fund the preparation of this brief.

access to the courts. The decision below can and should be reversed on that ground alone.

However, the decision highlights broader problems with the IFP process. The IFP system, particularly as applied to those who are incarcerated, is inefficient, lacks clear standards, and yields inconsistent results. It often fails to give due consideration to the legitimate expenses of people in prison. Amici therefore respectfully urge the Court to provide additional guidance to the lower courts in IFP matters involving indigent incarcerated people.

The Prison Litigation Reform Act (PLRA) weakened IFP protections for indigent incarcerated people in order to deter prison litigation. It nevertheless affirmed that they—like everyone else who is "unable to pay" court fees—are potentially eligible to proceed IFP. Although filing fees are waived entirely for those outside the prison system who qualify for IFP, an IFP incarcerated person must pay the full filing fee. This debt is subject to collection in installments, starting with an initial partial filing fee and followed by payments of 20% of the incarcerated person's monthly income, allowing the person to retain 80% of their trust account balance and monthly income for other purposes.

Similar considerations should govern the threshold decision whether to grant IFP status in the first place. Courts should recognize that incarcerated persons have ongoing expenses for the necessities of life, and should understand and factor in

those needs, and the needs of any dependents, in determining whether an individual is eligible to proceed IFP. It would be appropriate for courts to presume (with discretion to adjust for atypical cases) that an incarcerated person should be granted IFP status if the filing fee is more than 20% of the individual's currently available funds. Such a presumption would promote fairness, be a better use of judicial resources, and serve justice.

ARGUMENT

A. *In Forma Pauperis* Is Critical for Ensuring That Lack of Financial Resources Does Not Restrict Access to the Courts

1. The Right to Proceed *in Forma Pauperis* Has Long Been Recognized as Essential to Fairness

The Anglo-American legal system has for centuries recognized the imperative of ensuring access to the legal system without regard to wealth or poverty. English common law recognized the right to proceed IFP, and a statute adopted during the reign of Henry VII provided the poor with both the right to pursue legal matters before the king's justices and the assistance of counsel.[2] The United States continued to recognize the right to proceed IFP after independence. In 1892,

[2] *See* 7 *Encyclopaedia of the Laws of England* 192 (A. Wood Renton & Max A. Robertson eds., 2d ed. 1907) (describing early recognition of the "common-law right" to proceed IFP); Laura Flannigan, *Litigants in the English "Court of Poor Men's Causes," or Court of Requests, 1515-25*, 38 Law & Hist. Rev. 303, 311 (2020) (discussing *An Acte to admytt such persons as are poore to sue in forma pauperis*, 1495, 11 Hen. VII, c. 12).

Congress enacted an IFP statute providing that any citizen "may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs" upon showing "that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence."[3]

Over the next century, Congress amended the IFP statute several times to include noncitizens, defendants, and appellants, as well as to provide that the government pay for transcripts and the record in criminal appeals.[4] All of these amendments retained the fundamental objective of "guarantee[ing] that no citizen shall be denied an opportunity to commence, prosecute, or defend an action . . . solely because his poverty makes it impossible for him to pay or secure the costs." *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948); *see also Neitzke v. Williams*, 490 U.S. 319, 324 (1989) (the IFP statute "is designed to ensure that indigent litigants have meaningful access to the federal courts").

The current version of the statute promotes access to justice by fully waiving the filing fee for those who are not incarcerated and by requiring those who are

[3] Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252.

[4] Act of June 25, 1910, ch. 435, § 1, 36 Stat. 866 (defendants and appellants); Act of June 27, 1922, ch. 246, 42 Stat. 666 (record in criminal appeals); Act of Jan. 20, 1944, ch. 3, 58 Stat. 5 (transcripts); Act of Sept. 21, 1959, Pub. L. No. 86-320, 73 Stat. 590 (noncitizens).

incarcerated to pay the full fee over time in installments. 28 U.S.C. § 1915(a) & (b). It also provides for service of process by the U.S. Marshal, 28 U.S.C. § 1915(d), and government payment of certain transcript and appellate record costs, 28 U.S.C. § 1915(c). Importantly, the court may appoint counsel for an IFP litigant—just as the Court did in this appeal. 28 U.S.C. § 1915(e)(1).

2. A Court Must Not Require a Litigant to Choose Between Paying to Litigate and the Necessities of Life

Whether a civil litigant may proceed IFP is committed to the court's discretion. 28 U.S.C. § 1915(a)(1); *Monti v. McKeon*, 600 F. Supp. 112, 113 (D. Conn.), *aff'd*, 788 F.2d 1 (2d Cir. 1985). In exercising that discretion, a court must consider whether the burden of paying filing and service fees would force a person to choose between proceeding with the action and "provid[ing] himself and [his] dependents with the necessities of life." *Adkins*, 335 U.S. at 339-40. That is, "Section 1915(a) does not require a litigant to demonstrate absolute destitution." *Potnick v. E. State Hosp.*, 701 F.2d 243, 244 (1983) (per curium). "[N]o party must be made to choose between abandoning a potentially meritorious claim or forgoing the necessities of life." *Id*.

3. The PLRA Weakened IFP Protections for Incarcerated Individuals, But Does Not Alter the IFP Eligibility Standard

a. The PLRA Created a Two-Tiered IFP System

In 1996, Congress passed the PLRA and created a two-track IFP system: one for incarcerated persons and one for everyone else. As amended, the IFP statute

permits anyone, including an incarcerated individual, to pursue IFP status if he or she submits "a statement of all assets such [person][5] possesses" and states that "the person is unable to pay such fees." 28 U.S.C. § 1915(a)(1).[6] The court may waive filing fees for those who are not in prison. *Id*.

By contrast, an incarcerated person who is granted IFP status is *not* relieved of the obligation to pay the filing fee. Instead, imprisoned IFP litigants "shall be required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). The full fee is payable through an installment plan that starts with "an initial partial filing fee" of 20% of the greater of "(A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing," followed by monthly payments of 20% of his preceding month's income until the full fee is paid. 28 U.S.C. § 1915(b)(1) & (2). An incarcerated person may proceed without paying a fee in advance only if the person has "*no* assets and *no* means" to pay the initial partial filing fee. 28 U.S.C. § 1915(b)(4) (emphasis added). The statute also created a "three-strikes" rule under

[5] The statutory text uses the word "prisoner" rather than "person." This is a typographical error and Section 1915(a) is read to apply to all persons applying for IFP status. *Lister v. Dep't of Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005); *Floyd v. U.S. Postal Serv.*, 105 F.3d 274, 275 (6th Cir. 1997).

[6] In addition to the required affidavit, an incarcerated person also must submit account statements for any prisoner trust fund account for the preceding six months. 28 U.S.C. § 1915(a)(2).

which IFP status is not available to an incarcerated person regardless of their poverty if three or more prior suits have been dismissed as frivolous, malicious, or failing to state a claim. 28 U.S.C. § 1915(g).

This installment payment scheme is unique to incarcerated persons and stands in stark contrast to the full waiver of fees that is traditionally associated with IFP status, is available for anyone not incarcerated, and which was available to incarcerated persons until the PLRA eliminated it.

b. Courts Must Consider and Preserve an Incarcerated Person's Ability to Pay for the Necessities of Life

This Court has long recognized that incarcerated persons face costs for certain "necessities of life" notwithstanding state payment of some of their expenses. In *In re Epps*, 888 F.2d 964, 967 (2d Cir. 1989), this Court specifically rejected the view that "a partial fee is appropriate simply because a prisoner has the funds to pay for it but prefers to devote his limited resources to commissary purchases." *Id*. at 968 (disagreeing with *Lumbert v. Ill. Dep't of Corrs*, 827 F.2d 257, 260 (7th Cir. 1987)).[7] As this Court explained, "[t]o require the prisoner to part with a substantial portion of meager monthly income . . . creates a deterrence to litigation incompatible with at least the spirit of the *in forma pauperis* statute." *Id*.

[7] In its ruling denying reconsideration, the district court specifically relied on *Lumbert* and failed to acknowledge this Court's criticism of it in *Epps*. AA143–49.

Although the PLRA created a new deferred payment structure for incarcerated IFP litigants, it did not alter the § 1915(a) "unable to pay" standard for IFP eligibility. This Court confirmed post-PLRA that courts still must avoid requiring incarcerated litigants to choose between pursuing their legal rights and paying for the necessities of life. *See Whitfield v. Scully*, 241 F.3d 264, 273 (2d Cir. 2001) (following *Epps* and reaffirming that IFP status is not limited to those who are entirely destitute). The spirit and purpose of the IFP statute, both before and after the PLRA, is to ensure that people experiencing poverty—including those who are incarcerated—are not denied access to justice.

c. Inconsistent Approaches to IFP Applications Necessitate Clarification of the Standard

The Supreme Court and this Court have held that IFP status is not limited to those who are utterly destitute. *Adkins*, 335 U.S. at 339; *Potnick*, 701 F.2d at 244. But across and even within jurisdictions, the IFP process—from application through decision—varies depending on the court or even on the particular judge. More guidance is thus necessary to aid the courts in evaluating IFP applications for incarcerated individuals.

The multitude of different forms used by the 94 U.S. district courts to collect financial information from IFP applicants underscores the uneven application of

§1915.[8] Even the six district courts within the Second Circuit seek different information at different levels of detail from IFP applicants. The Districts of Connecticut and Vermont, and the Southern and Western Districts of New York each use different forms, and seek information not sought by the others.[9] Although the Eastern and Northern Districts of New York both use the AO 240 short form IFP application developed by the Judicial Conference, the Northern District of New York uses it only for IFP applicants from the general public and has a somewhat different application for incarcerated persons.[10]

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[8] *See generally* Andrew Hammond, *Pleading Poverty in Federal Court*, 128 Yale L. J. 1478, 1495 1500 (2019).

[9] U.S.D.C. for the District of Connecticut, https://www.ctd.uscourts.gov/sites/default/files/forms/IFP-for-CV-action-Rev-9-17-20.pdf (5 page form); U.S.D.C. for the Southern District of New York, https://nysd.uscourts.gov/sites/default/files/2019-04/appeal-motionforleavetoappealifp.pdf (7 page form); Western District of New York https://www.nywd.uscourts.gov/sites/nywd/files/ProSe_Forms_IFPApplicationForm.pdf (2 page form); U.S.D.C. for the District of Vermont, https://www.vtd.uscourts.gov/filing-without-attorney-1 (application plus 3 page form affidavit).

[10] U.S.D.C. for the Eastern District of New York, https://img.nyed.uscourts.gov/files/forms/ifpgeneral.pdf; U.S.D.C. for the Northern District of New York, https://www.nynd.uscourts.gov/sites/nynd/files/forms/AO240.pdf (non-prisoners); U.S.D.C. for the Northern District of New York, https://www.nynd.uscourts.gov/sites/nynd/files/forms/IFP_Inmate_0.pdf (prisoners).

Although the forms are intended to be helpful, the level of detail they demand may be onerous to pro se applicants and they are both over and under inclusive.[11] For example, the District of Connecticut asks about an applicant's educational attainment and the Western District of New York asks about bankruptcies within the last ten years, neither of which bears on an applicant's present ability to pay fees. And the Western District of New York asks only those who are *not* incarcerated for their total monthly household expenses, apparently assuming, erroneously, that incarcerated people do not have their own regular expenses.

Individual judges grant or deny IFP applications pursuant to highly general standards or no standard at all other than their own sense of who is "poor enough." One team of researchers analyzed the 34,001 applications to proceed *in forma pauperis* filed with the federal courts in 2016. Their research showed that whether a litigant was granted IFP status depended significantly on the judge:

> Average grant rates naturally differ among federal districts because cases are not randomly assigned to districts…. [I]f all judges reviewed fee waiver applications under the same standard, then grant rates should not systematically differ within districts. We find, however, that they do…. At the 95% confidence level, nearly 40% of judges—instead of

[11] In a survey of the information sought by the IFP forms of all 94 federal district courts, one commentator observed that "some of these forms betray a rich person's idea of assets, asking litigants about inheritances, jewelry, artwork, and stocks." *See* Hammond, *supra* note 8, at 1498. The District of Connecticut, for example, specifically asks about "valuable property, such as boats" and "[s]tocks, bonds, mutual funds or other investments owned." *See* D. Conn., *supra* note 9.

> the expected 5%—approve fee waivers at a rate that statistically significantly differs from the average rate for all other judges in their same district. In one federal district, the waiver approval rate varies [among judges] from less than 20% to more than 80%.[12]

As Mr. Rosa's brief argues, the District of Connecticut routinely denies IFP applications using pro forma language that relies on out-of-circuit cases that improperly presume no necessities of life for incarcerated people, rather than on this Court's precedents recognizing imprisoned persons have legitimate financial needs. *See* Rosa Br. at 24-29; *see also Arzuaga v. Quiros*, 781 F.3d 29, 34-35 (2d Cir. 2015) (per curium) (reversing District of Connecticut decision and holding that IFP status may not be revoked based on later-received funds).

The significant variation in IFP grant rates underscores that more guidance is needed.

B. The PLRA Should Be Interpreted and Administered so as to Promote Access to Justice

1. Civil Rights Actions by Incarcerated Persons Serve an Important Public Purpose in Helping Repair Problems in the Prison System

History confirms that IFP lawsuits initiated by incarcerated persons are important—indeed critical—to our system of justice. Clarence Earl Gideon, for example, was serving a five-year sentence in Florida state prison when he filed a

[12] Adam R. Pah, et al., *How to Build a More Open Justice System: Court Records Are Unstructured and Costly to Access—Here's How To Fix It*, Science, July 10, 2020 at 134, https://par.nsf.gov/servlets/purl/10170352.

handwritten petition to the U.S. Supreme Court, along with a request to proceed IFP. The Court granted Gideon's IFP request in a case that eventually culminated in the Court's landmark, unanimous holding that indigent criminal defendants have the right to counsel at state expense. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Other examples include IFP cases finding that prison officials violated the Eighth Amendment by, *inter alia*, creating living conditions that resulted in a constant threat of violence, *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976); failing to provide adequate housing, *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980), *aff'd in part, modified in part and remanded*, 651 F.2d 96 (2d Cir. 1981); and subjecting incarcerated people "to excessive force including assaults, beatings, and naked cagings in inclement weather," *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

Ensuring that incarcerated persons have access to the courts is a critical tool for righting wrongs within our penal system. In discussing the "complete turnabout of conditions in county jails and prisons" since the 1970s, Congressional testimony explained that such "[t]urnabouts" are "often . . . the result of court actions or the threat of such actions."[13] As one former U.S. attorney stated: "[P]risoner litigation

[13] Prison Reform; Enhancing the Effectiveness of Incarceration - Hearings on S. 3, S. 38, S. 400, S. 866, S. 930, and K.R. 667 Before the U.S. Senate Committee on the Judiciary, 104th Cong., 1st Sess. (July 27, 1995) at 208.

has been instrumental and often necessary to end practices that would shock the conscience of any civilized human being, resulting in remedial court orders in about 40 state prison systems."[14]

2. The PLRA Sharply Reduced the Number of Civil Rights Actions

"When the PLRA was being debated, lawmakers who supported it claimed that too many people behind bars were filing frivolous cases against the government."[15] The PLRA's "main purpose . . . 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)).

That mission was successful. The multiple hurdles created by the PLRA, including the "three strikes" rule, drastically reduced the number of federal civil rights prison filings even though incarceration rates continued to increase.[16] Although the goal was to deter frivolous cases, the PLRA made every case brought by an incarcerated person "harder to bring, harder to win, and harder to settle."[17]

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[14] Paul Curran & John Dunner, *The Truth About Prisoner Litigation: Perspective*, 216 N.Y.L.J. 1 (1996).

[15] *See* Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 years of evidence for repealing the Prison Litigation Reform Act*, Prison Policy Initiative (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html.

[16] *Id.*

[17] *Id.*

However, "cutting off access to justice ensures only that civil rights violations never reach the public eye, not that such violations never occur."[18]

3. In Exercising Discretion, Courts Must Consider the Expenses of Incarcerated People and Their Limited Resources

The district court denied Mr. Rosa's application because, "[a]s a prisoner, Rosa does not pay for room or board" and the court could thus "discern no reason why requiring Rosa to pay the filing fee of $402 would force him to forego the necessities of life or abandon this action." AA123-24. The district court's assumption that incarcerated people have no expenses for "necessities of life" ignores not just Mr. Rosa's daily and financial circumstances, but those of most people in the prison system. Many have pre-existing financial obligations such as child support, court fines and fees, student debt, or restitution,[19] as well as substantial costs for basic necessities that are not provided by the prison.

Although institutions must provide "humane conditions of confinement," including "adequate food, clothing, shelter, and medical care," *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), there is a vast chasm between that constitutional minimum

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[18] *Id.*

[19] Incarcerated people with debts such as restitution, child support or student loans may be required to make installment payments on these debts. 28 C.F.R. § 545.11 (specifying the priority of payments under the Bureau of Prison's "Inmate Financial Responsibility Program"). The program excludes from its assessment $75 per month "to allow the inmate the opportunity to better maintain telephone communication" with those outside the prison. *Id.*

and many things that by any measure are necessities of life. Even basic nutrition is a challenge for many incarcerated people, who must supplement inadequate prison meals with commissary food.[20] In most states, incarcerated people must pay co-pays for physician visits, medications, and other health services,[21] and often pay for necessities such as glasses.[22] Many prisons either do not provide standard hygiene products or provide extremely low-quality products.[23] The National Institute for Jail Operations' standards do not deem toiletries such as toothpaste "essential."[24] Often, incarcerated women must pay for their own "feminine hygiene" products because they too are deemed nonessential.[25] In FY2016, incarcerated persons in

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[20] *See generally* Wendy Sawyer, *Food for thought: Prison food is a public health problem*, Prison Policy Initiative (Mar. 3, 2017), https://www.prisonpolicy.org/blog/2017/03/03/prison-food/.

[21] Wendy Sawyer, *The steep cost of medical co-pays in prisons puts health at risk*, Prison Policy Initiative (Apr. 19, 2017), https://www.prisonpolicy.org/blog/2017/04/19/copays/.

[22] Financial Justice Project, *Survey of People Incarcerated in San Francisco County Jails* (Feb. 2021), https://sfgov.org/financialjustice/sites/default/files/2021-02/Survey%20of%20Incarcerated%20People%20in%20SF%20County%20Jails%20FINAL.pdf.

[23] ACLU & The University of Chicago Law School Global Human Rights Clinic, *Captive Labor: Exploitation of Incarcerated Workers*, 73 (2022), https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf.

[24] National Institute for Jail Operations, *Standard I01.03.02: Personal Hygiene Items Issued to Inmates*, https://jailtraining.org/standard-i-01-03-02-personal-hygiene-items/.

[25] *See, e.g.*, Federal Bureau of Prisons, FCI Commissary List, https://www.bop.gov/locations/institutions/dub/DUB_CommList.pdf (listing

Massachusetts spent an average of $22 annually for soap to supplement the rations of institution-provided soap—hardly the type of expense incarcerated persons are likely to take on as an extravagance.[26] Toilet paper is rationed in many prisons, including in New York.[27] The Connecticut commissary form, which includes a long list of over-the-counter medications and basic hygiene items, demonstrates that those living in state prison must rely on the commissary for basic necessities.[28] In short, "data contradict the myth that incarcerated people are buying luxuries; rather, most of the little money they have is spent on basic necessities."[29]

Moreover, the vast majority of states allow people to be charged for the cost of their own incarceration—a debt that will follow them after release.[30] Although

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prices).

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

[27] *See, e.g.*, Tamar Kraft-Stolar (Correctional Association of New York), *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* 68 (2015), https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf (also noting that an imprisoned person "earning 17 cents per hour would have to work for three hours to make enough money for a single roll of toilet paper").

[28] *See* Connecticut Dept. of Correction, General Population Commissary Order Form, https://portal.ct.gov/-/media/DOC/Pdf/CommissaryOrderFormpdf.pdf (last visited July 21, 2022).

[29] Raher, *supra* note 26.

[30] Conn. Gen. Stat. § 18-85a(b); Sarah Lehr, *The vast majority of states allow people to be charged for time behind bars*, NPR (Mar. 4, 2022),

not mentioned by the district court, Connecticut law imposes a lien for incarceration costs of $249 per day—more than $90,000 per year—on Mr. Rosa and others in Connecticut prisons, which it may collect against certain of his assets following release.[31]

Keeping in contact with family is both vital and expensive for incarcerated people. At prison wages, *see infra*, it may take several hours of work to pay for a single postage stamp, and the prison phone calls are notoriously and exploitatively expensive.[32] Maintaining contact with families is essential—not just for the emotional well-being of the entire family, but because strong family connections are critical to successful re-entry and thus benefit society as a whole.[33] Moreover, failure

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https://www.npr.org/2022/03/04/1084452251/the-vast-majority-of-states-allow-people-to-be-charged-for-time-behind-bars.

[31] State of Conn. Judiciary Comm., J. Favorable Rep. for HB-5390, 2022 Gen. Assemb., at 2, 5 (2022) (discussing $249 per day lien); *see also* Dave Byrnes, *Federal lawsuit denounces Connecticut's prison debt law*, Courthouse News Service (Mar. 14, 2022), https://www.courthousenews.com/federal-lawsuit-denounces-connecticuts-prison-debt-law/. The statute recently was amended to exempt up to $50,000 of assets from claims made under the lien, except against persons convicted of one of six serious crimes. *See* House Bill No. 5506 at 643, https://legiscan.com/CT/text/HB05506/id/2588770.

[32] *See* Prison Legal News, *Intrastate (in-state) Collect Prison Phone Rates* https://www.prisonphonejustice.org/ (last visited July 21, 2022) (15-minute prison phone call is $3.75 in federal prison, $4.87 in Connecticut prison, $0.64 in New York prison, and $1.04 in Vermont prison).

[33] *See, e.g.*, Leah Wang, *The positive impacts of family contact for incarcerated people and their families*, Prison Policy Initiative (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/.

to maintain family connections can have dire consequences: incarcerated people face termination of parental rights if they fail to keep in touch with their children.[34]

Beyond their own immediate expenses, incarcerated people often have families to support. As one incarcerated person explained: "When a guy goes to prison, his family still has those bills even though the provider's not there anymore."[35] By extension, "[t]he probability that a family is in poverty increases by nearly 40 percent while a father is incarcerated."[36] As to children specifically, "47% of state prisoners and 58% of federal prisoners have at least one child under the age of 18."[37] Over five million U.S. children have a parent who is or was incarcerated.[38]

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[34] Emily K. Nicholson, *Racing against the ASFA Clock: How Incarcerated Parents Lose More than Freedom*, 45 Duq. L. Rev. 83 (2006), https://dsc.duq.edu/cgi/viewcontent.cgi?article=3540&context=dlr.

[35] Rebecca McCray, *Prison Work Is Work*, Popula (Aug. 28, 2018), https://popula.com/2018/08/28/prison-work-is-work/ (quoting former inmate).

[36] Executive Office of the President, *Economic Perspectives on Incarceration and the Criminal Justice System* 5 (Apr. 23, 2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf; *see also* Saneta deVuono-Powell, et al., *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center (2015), https://ellabakercenter.org/who-pays-the-true-cost-of-incarceration-on-families/ (detailing the extraordinary financial toll incarceration takes on families of those in prison).

[37] National Conference of State Legislatures, *Child Support and Incarceration* (Feb. 1, 2022), https://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx.

[38] *Id.*

At least 20% of incarcerated persons have a child support obligation,[39] yet hourly prison wages are insufficient to meet the obligation.[40] As a result, upon release unpaid child support amounts may be listed on formerly incarcerated persons' credit reports and pursued by agencies with the power to garnish wages, intercept tax refunds, freeze bank accounts, and suspend drivers' licenses.[41] "Because the fathers don't have large incomes to garnish, bank accounts to tap or property to seize . . . they are more likely to face re-incarceration for not paying their arrears."[42]

Meanwhile, those who are in prison have little to no opportunity to earn money. Only half of incarcerated people have paying jobs.[43] In federal prison, people earn just 12¢ to 40¢ per hour for institutional work assignments.[44] Eight

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[39] *Id.*

[40] Eli Hager, *For Men in Prison, Child Support Becomes a Crushing Debt*, The Marshall Project (Oct. 18, 2015), https://www.themarshallproject.org/2015/10/18/for-men-in-prison-child-support-becomes-a-crushing-debt.

[41] *Id.*

[42] *Id.*

[43] Daniel Moritz-Rabson, *'Prison Slavery': Inmates Are Paid Cents While Manufacturing Products Sold to Government*, Newsweek (Aug. 28, 2018), https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729 (discussing how prisoners working at minimal "wages" produced goods that resulted in more than $450 million in annual sales).

[44] *See* Federal Bureau of Prisons, Custody & Care: Work Programs, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp (last visited July 25, 2022).

states do not pay imprisoned people *at all* for their labor.[45] On average, other states pay imprisoned persons between 14¢ and 52¢ per hour.[46] Within this Circuit, Connecticut pays between 75¢ and $1.75 per day, New York pays 10¢ to 33¢ per hour, and Vermont pays 25¢ per hour.[47] With pitifully low pay and significant costs, it is unsurprising that 80% to 85% of incarcerated persons leave prison in debt.[48]

Given the high cost of incarceration and low or non-existent wages, families with incarcerated loved ones are forced to collectively spend an estimated $2.9 billion on commissary accounts and phone calls each year.[49] The loss of a primary income earner and these expenses mean that two out of three families with incarcerated loved ones have difficulty paying for basic needs, and nearly one in five families cannot afford housing costs.[50]

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[45] Moritz-Rabson, *supra* note 43.

[46] *See Captive Labor*, *supra* note 23, at 57–58.

[47] *Id*. Prisoners who can work in prison "industry" jobs—in which they manufacture products that are sold at enormous profit—make between 30¢ and $1.50 per hour in Connecticut, 25¢ to $1.35 per hour in Vermont, and 16¢ to 65¢ per hour in New York. *Id*.

[48] Gene B. Sperling, *The New Debt Prisons*, N.Y. Times (Feb. 16, 2021), https://www.nytimes.com/2021/02/16/opinion/politics/debt-america.html#:~:text=This%20increasing%20use%20of%20punitive,money%2C%20often%20a%20significant%20amount.

[49] Nicole Lewis & Beatrix Lockwood, *How Families Cope with the Hidden Costs of Incarceration for the Holidays*, N.Y. Times (Dec. 17, 2019), https://www.nytimes.com/2019/12/17/us/incarceration-holidays-family-costs.html.

[50] *See* deVuono-Powell, *supra* note 36.

C. This Court Should Reverse the Decision Below and Provide Additional Guidance to the District Courts

In this case, the Court has directed Appellant to address whether "[a]ppellant, a prisoner, was financially eligible to proceed [IFP] when he had sufficient funds to pay the filing fee, but sent those funds to his family for their 'necessities of life.'" The answer to this question must be "yes." Applying Supreme Court precedent, no person—including any incarcerated person—must be forced to choose between proceeding with an action and providing "himself *and [his] dependents* 'with the necessities of life.'" *Adkins*, 335 U.S. at 339 (emphasis added).

The record shows that Mr. Rosa had just $576.98 in his prison account when he filled out his IFP application on January 29, 2001. AA100. That amount was anomalous, reflecting a $1,200 pandemic-related stimulus check Mr. Rosa had received, $600 of which he had previously sent to his family "to relieve eviction & unpaid family bills." AA101, AA125. His own income was very limited; the monthly deposits into his trust account averaged just $74.71. AA104. Before he actually filed his complaint and IFP application on April 5, 2021, Mr. Rosa received another $600 in COVID-19 relief funds, which he also sent to his family. AA112, AA135. Mr. Rosa's trust account balance as of the date he filed suit was just $60.54. AA112.

The district court denied Mr. Rosa's IFP application, emphasizing that Mr. Rosa "does not pay for room or board" and seeing "no reason why requiring Rosa

to pay the filing fee of $402 would force him to forego the necessities of life or abandon this action." AA123-24. On reconsideration, the Court affirmed its denial, reasoning that the $1,800 in COVID-19 relief payments was more than sufficient to pay the $402 filing fee, and that "[w]hile the desire to help his family is admirable, plaintiff still made a choice to do so rather than paying the filing fee." AA148.

As explained in Mr. Rosa's opening brief, this was error. Mr. Rosa was, by any reasonable measure, "unable to pay" the required court fees, and was thus eligible under § 1915(a) to proceed IFP. Controlling Supreme Court and Second Circuit precedent confirm that a litigant—whether incarcerated or not—is not required to devote their "last dollar" to court fees before being granted IFP status. *Adkins*, 335 U.S. at 339; *Potnick*, 701 F.2d at 244. The $402 filing fee was approximately 70% of Mr. Rosa's total assets when he filled out the IFP application in January 2021, and more than five times his average monthly income. And Mr. Rosa, in fact, *did not* have the money to pay the court fees by the time he filed suit in April 2021, when he had just $60 to his name.

Even focusing on Mr. Rosa's $576.98 trust account balance in January 2021, to require him to pay the entire $402 filing fee up front—rather than paying that full amount in installments as provided by the PLRA—would require him to devote the vast majority of his meager net worth to the filing fee. This would go far beyond requiring Mr. Rosa to "think twice" about filing suit to inappropriately deterring

litigation to vindicate his right to appropriate medical care. *In re Epps*, 888 F.2d at 968. His suit can and should be decided on the merits, not effectively decided against him because he does not have the cash on hand to cover the filing fee up front.

The district court assumed that, in the absence of costs for his own room and board, Mr. Rosa had no legitimate expenses. But this Court has correctly recognized that incarcerated people have real expenses that *must* be considered. *Potnick*, 701 F.2d at 244; *In re Epps*, 888 F.2d at 967. As shown above, incarcerated persons can and do have substantial external financial responsibilities such as prior fines, fees, and family support obligations. They also have in-prison costs for necessities such as supplemental food, hygiene products, and communication with family. The IFP analysis is not just a question of mathematics where if the incarcerated person's trust account balance is more than the filing fee, the IFP application is denied. *In re Epps*, 888 F.2d at 967. Consistent with *Epps*, the question is whether requiring the incarcerated person to pay the entire fee up front rather than in installments would deter litigation. *Id*. And that question must be answered with an awareness that the purpose of Section 1915 is to ensure that people experiencing poverty have access to the courts.

The district court erred in holding that Mr. Rosa must face the consequences of his "choice" to help support his family. AA148. Even assuming that Mr. Rosa does not have a court-ordered support obligation for his son—something the record

does not address—there can be no question that keeping his son and the child's mother from eviction is a "necessi[ty] of life." *Adkins*, 335 U.S. at 339. Forcing Mr. Rosa to choose between allowing his family to be evicted and paying the filing fee would over deter litigation and violate the spirit of the IFP statute and this Court's precedent. *See In re Epps*, 888 F.2d at 968.

At a minimum, this Court should reverse the District of Connecticut's ruling, find that Mr. Rosa qualified for IFP status, and unequivocally affirm its prior holdings in *Potnick* and *Epps*. Amici respectfully urge this Court also to provide additional guidance that would assist the lower courts and ensure that impoverished persons in prison have practical access to the legal system.

This Court's decision should make clear, consistent with *Adkins* and its own prior holdings, that courts considering IFP applications from incarcerated individuals must give proper weight to the applicant's actual expenses and obligations, including those paid to support the applicant's family, while heeding the requirement that a litigant should not be forced to devote all of his or her resources to litigation. The PLRA itself gives useful guidance in this regard. It structures the initial filing fee as 20% of either the average balance of the commissary account over six months, or the average monthly deposits to that account, 28 U.S.C. § 1915(b)(1)(A) & (B), and subsequent installments based on 20% of the preceding

month's income. 28 U.S.C. § 1915(b)(2). Thus, the PLRA recognizes that the incarcerated person should be able to retain 80% of his or her monthly income.

Similar considerations should govern the threshold decision whether to establish IFP status in the first place. Taking into account the realities of each individual's circumstances, those who seek to litigate from prison should be able to retain at least modest savings and income and still qualify for IFP status.

The Court could adopt the PLRA's 80/20 recoupment framework as a reasonable rule of thumb to guide this initial determination. While always retaining discretion to make an IFP determination based on the particular facts of record, it would be appropriate for courts to presume that an incarcerated person should be granted IFP status if the filing fee is more than 20% of the individual's currently available funds. The few who have significant resources should pay a filing fee up front. But for the rest, the $402 federal filing fee is a lot of money, and it is entirely appropriate to allow their lawsuits to proceed IFP.

Such a presumption would promote fairness, be a better use of judicial resources, and serve justice. The presumption is consistent with the reality—recognized by the PLRA itself—that an incarcerated person has ongoing and necessary expenses and should not be required to spend down the majority of any

funds he or she may have in order to meet the filing fee.[51] A presumption would also aid the courts, as it is a poor use of an Article III judge's time to scrutinize commissary receipts to gauge whether a bar of soap, additional food, or postage stamps are luxuries or necessities.

It would also be just to routinely allow an imprisoned litigant to proceed IFP where the filing fee would be more than 20% of their currently available funds. Under the PLRA, the filing fee is not waived for incarcerated people, is always owed, and is routinely recouped via installment payments. At the same time, a presumption would preserve judicial discretion to deal with the relatively rare incarcerated IFP applicant who has significant resources or spends his or her funds on true luxury items. It would also leave in place the underlying PLRA screen that filters out IFP applications based on three strikes. Last, the district courts' traditional authority to filter out cases for lack of merit is entirely preserved. 28 U.S.C. § 1915(e)(2).

CONCLUSION

Consistent with *Adkins*, *Potnick*, and *Epps*, it is essential that IFP determinations of indigency within this Circuit take a realistic view of incarcerated

[51] Such an approach would be generally consistent with the way the government evaluates eligibility for other means-tested benefits that exclude numerous categories of resources from consideration. *See generally* Hammond, *supra* note 8, at 1507–1510 (discussing how means tested benefits could be a model for evaluating IFP eligibility, albeit expressly in the non-prisoner context).

persons' financial needs and obligations to align with the vital goal of ensuring access to justice. For the reasons above, and for those stated in Mr. Rosa's brief, Amici respectfully suggest that the Court reverse the decision of the district court, hold that Mr. Rosa is eligible to proceed *in forma pauperis*, and provide additional guidance on the standards for evaluating IFP applications from incarcerated people.

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Respectfully submitted,

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APPENDIX A – IDENTIFICATION OF AMICI CURIAE

The **National Center for Access to Justice** (NCAJ) uses data, research and policy analysis to expose how the legal system promises equal justice but too often fails to deliver it. NCAJ works to establish and preserve the real and meaningful opportunity for every person to be heard and to secure his or her rights in civil and criminal cases alike. NJAC's flagship project is the Justice Index, an empirical resource that illuminates the performance of all 50 states in relation to one another on a matrix of pragmatic, baseline policies—including on court fees—determined in consultation with experts to be essential to ensuring access to justice. NJAC works to bring rigorous, principled research and analysis to the task of advancing progress toward a fairer legal system, and in so doing, to achieve a better society.

The **ACLU Foundation of Connecticut** and the **ACLU Foundation of Vermont**, affiliates of the national American Civil Liberties Union, are non-partisan, nonprofit organizations that defend, promote, and preserve the civil rights and civil liberties guaranteed by state and federal law. Both organizations routinely represent incarcerated people in the United States District Court in their respective judicial districts, and both endeavor to maximize incarcerated people's access to the courts as a means of vindicating their rights.

Center for Community Alternatives promotes reintegrative justice and a reduced reliance on incarceration through advocacy, services, and public policy

development in pursuit of civil and human rights. Through our work, we know the burdensome financial cost of the criminal legal system and incarceration on impacted people and families and seek to alleviate this burden and end the criminalization of poverty.

The **Fines and Fees Justice Center** (FFJC) is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in federal, state, and local courts, jails, and prisons. It is a project of the New Venture Fund, which is a section 501(c)(3) non-profit organization. FFJC's mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably. As a national hub for information, resources, and technical assistance on fines and fees, FFJC works with impacted communities, researchers, advocates, legislators, justice system stakeholders, and media across the nation. FFJC also provides amicus curiae assistance at the state and federal level in cases where issues of economic justice intersect with state and constitutional law.

The **National Legal Aid & Defender Association** (NLADA), founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. For over 100 years, NLADA has pioneered access to justice and right to counsel at the national, state, and local levels and serves as a collective voice for our country's public defense

providers and civil legal aid attorneys and provides advocacy, training, and technical assistance to further its goal of securing equal justice. The Association pays particular attention to procedures and policies that disproportionately affect people based on economic means, notably including the rights to counsel and due process. Specifically, NLADA is committed to ensuring that people are not denied access to courts and vindication of their rights in an equitable manner simply because they cannot afford to pay. The concept of *in forma pauperis* and its fair and equitable application underlies the very core of NLADA's mission of ensuring equal justice regardless of an individual's ability to pay for access.

New York County Defender Services (NYCDS) is a public defender office serving indigent clients in the borough of Manhattan in New York City since 1997. As such, our clients typically cannot afford court fees. All of our clients, including those who are incarcerated, deserve full access to the courts, unrestricted by insurmountable litigation expenses.

The **Parole Preparation Project** is a non-profit organization that works closely with parole candidates serving long sentences and seeks to assist them after release. It has trained more than 500 community volunteers, who have collaborated with more than 250 incarcerated people on their applications to and appearances before the New York Board of Parole. Through its work, the organization sees

firsthand the high costs of prison on individuals and their families, and knows the importance of people being able to access the courts to assert their rights.

Prison Policy Initiative is a non-profit, non-partisan organization that produces cutting edge research to expose the broader harm of mass criminalization, and then sparks and supports advocacy campaigns to create a more just society. The organization's work examines who is incarcerated, conditions of confinement, mechanisms for release, collateral consequences of incarceration and conviction, and restrictions placed on people who are incarcerated. In April 2021, the Prison Policy Initiative published a report with Margo Schlanger—*Slamming the Courthouse Door: 25 years of evidence for repealing the Prison Litigation Reform Act*—examining how the PLRA has impacted access to justice.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,392 words.

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Dated: July 25, 2022

/s/ *Susan Baker Manning*
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on July 25, 2022. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Susan Baker Manning*