

Nos. 23-15299 & 23-15396

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TOPAZ JOHNSON AND IAN HENDERSON,
Plaintiffs-Appellants,
v.
HIGH DESERT STATE PRISON, ET AL,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:22-cv-01235-TLN-EFB
Hon. Troy L. Nunley

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN
CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL
LIBERTIES UNION OF SOUTHERN CALIFORNIA, AND AMERICAN CIVIL
LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES
IN SUPPORT OF PETITION FOR REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amici curiae* state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

Date: March 24, 2025

/s/Isir M. Said

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STATEMENT OF INTEREST¹

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization. The ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties are regional affiliates of the ACLU. *Amici* are dedicated to defending the principles embodied in the Constitution and this Nation’s civil rights laws. For decades, they have advocated to ensure that this nation’s prisons, jails, and other places of detention treat incarcerated individuals with dignity and respect. They have frequently appeared before this Court, both as direct counsel and amici curiae, in cases implicating the rights of incarcerated people and their ability to access justice. *See, e.g., Saddozai v. Davis*, 35 F.4th 705, 706 (9th Cir. 2022); *Eaton v. Blewett*, 50 F.4th 1240 (9th Cir. 2022); *Ahlman v. Barnes*, 20 F.4th 489, 491 (9th Cir. 2021); *Parsons v. Ryan*, 949 F.3d 443 (9th Cir. 2020); *Mangiaracina v. Penzone*, 849 F.3d 1191 (9th Cir. 2017).

¹ *Amici* submit this brief pursuant to Circuit Rule 29-2(a) and certify that all parties have consented to its timely filing. Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), *amici* also certify that no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

INTRODUCTION

Most incarcerated people are poor. In fact, an overwhelming majority of people in our country’s prisons and jails—more than 80 percent—were low-income even before they were imprisoned.² Once incarcerated, people are forced to expend their scant resources on court and booking fees, phone calls, and living expenses, such as clothing, medicine, hygiene products, and even edible food. Those who work prison jobs are barely better off financially than those who do not; in California, for example, some prison laborers are paid as little as eight cents per hour.³ As a result, almost 70 percent of incarcerated people cannot afford basic necessities with their prison wages.⁴

Congress established the Prison Litigation Reform Act’s (“PLRA”) in forma pauperis (“IFP”) process to ensure that indigent incarcerated

² Saneta deVuono-powell, Chris Schweidler, Alicia Walters & Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, 9 (Sept. 2015), <https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-FINAL.pdf>.

³ See Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, Prison Pol’y Initiative (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages>.

⁴ *Captive Labor: Exploitation of Incarcerated Workers*, ACLU & The University of Chicago Law School Global Human Rights Clinic, 72 (Jun. 15, 2022), <https://www.aclu.org/publications/captive-labor-exploitation-incarcerated-workers>.

plaintiffs are not barred from accessing justice solely based on their lack of financial resources. *See* 28 U.S.C. § 1915. Although Congress required incarcerated people to pay *some* filing fee to disincentivize frivolous litigation, it expressly provided that “[i]n no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action.” 28 U.S.C. § 1915(b)(3). Yet the panel majority held that, when multiple incarcerated plaintiffs with IFP status jointly file suit, each individual must pay the full amount of a filing fee. As the petitioners persuasively explain, that holding cannot be squared with either section 1915(b)’s text or the broader statutory scheme.

Amici write to highlight the economic realities and practical difficulties that the panel’s decision will impose on incarcerated people’s access to justice. Although a \$350 filing fee may not seem cost prohibitive, it is a heavy—if not insurmountable—burden for most people in jail and prison. Incarcerated individuals with few or no financial resources and working for little to no pay must choose between meeting their basic needs and vindicating their constitutional rights. Given that our justice system relies significantly on private enforcement of fundamental rights, it is imperative that incarcerated people have access to the courts to right

wrongs within our penal system. As it stands, the panel majority's rule will meaningfully deter indigent litigants from filing potentially meritorious lawsuits. This Court should therefore grant rehearing en banc.

ARGUMENT

I. Incarcerated people have limited access to financial resources.

The vast majority of people in our prisons and jails are eligible for IFP status under the PLRA. That is because incarcerated people, on average, have highly limited incomes and financial assets.

Right from the outset, incarcerated people face serious economic precarity. Most incarcerated people earned little to no income in the years prior to incarceration.⁵ Of those who earned an income, “their median earnings were only \$6,250 [and only] 13 percent earned more than \$15,000.”⁶ These limited incomes reflect the fact that many incarcerated people grew up in socioeconomically disadvantaged households: “Boys

⁵ Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, The Brookings Institution, 1 (Mar. 14, 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

⁶ *Id.*

who grew up in families in the bottom 10 percent of the income distribution (families earning less than about \$14,000) are 20 times more likely to be in prison on a given day in their early 30s than children born in top-decile families (where parents earn more than \$143,000).”⁷

Because most incarcerated people have little in the way of personal or familial financial assets or pre-incarceration income, they typically must work to cover prison costs—at extremely low wages. The wages that they earn behind bars are their primary means of paying for the necessities of incarcerated life. In jails and prisons, the best paying jobs involve providing vital public services, such as “repairing roads, fighting wildfires, or clearing debris after hurricanes.”⁸ Despite the challenging and dangerous nature of these positions, incarcerated people in these fields still make less than \$6 per day.⁹

⁷ *Id* at 2.

⁸ *Captive Labor, supra*, at 5; see Jaclyn Diaz, *Inmates Are Fighting California Wildfires in Long-running and Controversial Practice*, NPR (Jan. 14, 2025), <https://www.npr.org/2025/01/10/nx-s1-5254122/inmate-firefighters-california-wildfires>

⁹ Eric Escalante, *California’s Inmate Firefighters: 9 Things to Know*, ABC10 (Oct. 29, 2019), <https://www.abc10.com/article/news/local/wildfire/california-inmate-firefighters/103-0fdca69-2f30-4abe-99a1-838364d395e6>

Other prison jobs pay far less. Most incarcerated people work critical jobs in manufacturing, cooking, cleaning, grounds keeping, and harvesting, yet earn an average between 13 cents and 52 cents per hour, if their state pays incarcerated people for their labor.¹⁰ In this Circuit, for example:

- Alaska pays between \$0.30 to \$0.90 per hour;
- Arizona pays \$0.15 to \$0.45 per hour;
- California pays \$0.08 to \$0.37 per hour;
- Hawaii pays \$0.25 to \$1.00 per hour;
- Idaho pays \$0.20 to \$0.90 per hour;
- and Montana pays between \$0.35 to \$0.45 per hour.¹¹

And the situation is even worse in some state prisons. Nevada, for example, pays *no* wages for some prison jobs; and the pay scale for paid jobs is not publicly available.¹² In Oregon prisons, instead of wages, “compensation is paid via the Performance Recognition and Award

¹⁰ *Captive Labor*, *supra*, at 55–56; see Michael Sainato, ‘It’s Inhumane’: How US Prison Work Breaks Bodies and Minds for Pennies, *The Guardian* (July 13, 2022), <https://www.theguardian.com/us-news/2022/jul/13/us-prison-work-breaks-bodies-minds-for-pennies>

¹¹ *Captive Labor*, *supra*, at 57–58.

¹² *Id.*

system, through which workers may receive points that may be converted to a monthly monetary award.”¹³

County jails similarly pay incarcerated people little to no money for their labor. *See* 18 U.S.C. § 3626(g)(3) (PLRA applies to suits filed by “*any* person subject to incarceration, detention, or admission to *any* facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program” (emphasis added)). In California, for example, an incarcerated person’s wages cannot “exceed two dollars (\$2) for each eight hours of work done by him in such county jail.” Cal. Penal Code § 4019.3. And even more troubling, the California Supreme Court recently ruled that individuals detained pretrial are not entitled to *any wage* for their labor. *See Ruelas v. Cnty. of Alameda*, 15 Cal. 5th 968, 978, 980 (2024).

For incarcerated people, who typically had little to no money or assets before incarceration, these low wages mean that saving *any* meaningful amount of funds is challenging. Indeed, at the hourly rates detailed above, it could take as many as 4,375 hours of work—more than

¹³ *Id.*

two years—to pay a \$350 filing fee. And, as we explain below, the economic disadvantages that incarcerated people face are not limited to their low incomes and assets; they also must use their scarce financial resources to pay out-of-pocket for many basic, necessary expenses.¹⁴

II. The costs of incarceration are substantial.

Incarceration is expensive. Although prisons must provide “humane conditions of confinement,” such as “adequate food, clothing, shelter, and medical care,” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), the constitutional minimum is rarely sufficient to meet incarcerated people’s basic needs. This means that the vast majority of necessities, including food items, hygiene products, healthcare, and clothing, must be purchased from a private vendor, through the commissary.

While a necessity, food in prisons is not physically nourishing and often does not provide enough sustenance for survival. Most states spend less than “three dollars per person per day on prison food services.”¹⁵

¹⁴ Lauren-Brooke Eisen, *America’s Dystopian Incarceration System of Pay to Stay Behind Bars*, Brennan Center for Justice (Apr. 19, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/americas-dystopian-incarceration-system-pay-stay-behind-bars>

¹⁵ Elizabeth Allen, *Cheap Jail and Prison Food Is Making People Sick. It Doesn’t Have To.*, Vera Institute (Feb. 27, 2024),

Budget cuts in prison food spending have “led to fewer hot meals, smaller portions, lower-quality protein, fewer fresh fruits and vegetables, and more ultra-processed foods, as well as poorly equipped and ill-supervised kitchens that further compromise quality.”¹⁶ A 2020 investigation into prison food found that three out of four people surveyed were served rotten or spoiled food while incarcerated.¹⁷ Under such conditions, it comes as no surprise that individuals in correctional institutions are six times more likely to have an illness associated with a foodborne outbreak compared to the general public.¹⁸

Inadequate and low-quality prison diets all but force incarcerated people to purchase food from the commissary. Yet prison commissaries charge inflated prices to obtain essential items or supplements—often significantly higher than prices outside the prison. Some commissaries

<https://www.vera.org/news/cheap-jail-and-prison-food-is-making-people-sick-it-doesnt-have-to>.

¹⁶ Leslie Soble, Kathryn Stroud & Marika Weinstein, *Eating Behind Bars: Ending the Hidden Punishment of Food in Prison*, Impact Justice (Nov. 20, 2020), at 16, <https://impactjustice.org/wp-content/uploads/IJ-Eating-Behind-Bars.pdf>

¹⁷ *Id.* at 11.

¹⁸ Mariel A Marlow, Ruth E Luna-Gierke, Patricia M Griffin, & Antonio R Vieira, *Foodborne Disease Outbreaks in Correctional Institutions—United States, 1998–2014*, National Library of Medicine (July 2017), <https://pmc.ncbi.nlm.nih.gov/articles/PMC5463225/>

in state prisons can sell one 8 oz package of instant coffee for \$9.05, when it retails for \$7.49.¹⁹ Similarly, flour tortillas cost incarcerated people \$3.50, but are sold in ordinary retail stores for \$1.99.²⁰ These are substantial costs given the low wages earned by incarcerated people in these states.

Beyond food products, incarcerated people spend a significant amount of their earnings on hygiene products purchased at the commissary. It is estimated that it takes the average 10.9 hours of work to afford toothpaste and 10.1 hours to afford deodorant in prison.²¹ Moreover, like food prices, the prices for these items are often at significant markup from the price of the exact same product outside of the prison walls. To take one example, “[i]n Oregon, prison commissaries sold eight hearing aid batteries for \$11.49. However, Target sells an eight-pack for \$6.50. Oregon Department of Corrections (ODOC) policy

¹⁹ Eliza Partika, *Canteen Prices in California Prisons Skyrocket, Incarcerated People Go Hungry*, Afro LA News (Nov. 2, 2023), <https://afrolanews.org/2023/11/canteen-prices-in-california-prisons-skyrocket-incarcerated-people-go-hungry/>.

²⁰ *Id.*

²¹ Florian Zandt, *How Overpriced Are Basic Necessities In Prisons?*, Statista (Aug. 9, 2024), <https://www.statista.com/chart/32824/hours-needed-at-average-prison-job-wage-to-afford-selected-commissary-items/>.

states that items are marked up at least 20 percent unless otherwise specified.”²² Even soap is not provided in many prisons.²³ A staggering 245,000 bars of soap, costing a total of \$215,057, were purchased by people incarcerated in Massachusetts prisons through the commissary in one fiscal year.²⁴ This is an average expenditure of \$22 annually for soap to supplement the institutionally provided rations.²⁵

In addition to paying for basic necessities, incarcerated people are also expected to cover various costs relating to their own confinement. Many prisons across the country charge incarcerated people for their room and board while incarcerated.²⁶ In Oregon, incarcerated people are charged “\$60 per day or its actual daily cost of safekeeping and maintaining the person, whichever is less, multiplied by the total number

²² Elizabeth Weill-Greenberg & Ethan Corey, *Locked In, Priced Out: How Prison Commissary Price-Gouging Preys on the Incarcerated*, The Appeal (Apr. 17, 2024), <https://theappeal.org/locked-in-priced-out-how-much-prison-commissary-prices/>.

²³ Erica Bryant, *Working for Pennies Just to Buy Overpriced Soap in Prison*, Vera Institute (Apr. 30, 2021), <https://www.vera.org/news/working-for-pennies-just-to-buy-overpriced-soap-in-prison>.

²⁴ Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Pol’y Initiative (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>.

²⁵ *Id.*

²⁶ Eisen, *supra*.

of days the person was confined to the local correctional facility, including, but not limited to, any period of pretrial detention[.]” Or. Rev. Stat. § 169.151(1)(a). Incarcerated people are excluded from Medicaid coverage and in all federal prisons and 40 states they must pay a copay for physician visits, medications, dental treatments, and other health services.²⁷ In Nevada, if an incarcerated person works in prison, they are required to pay for items related to the work, “including, but not limited to, clothing, shoes, boots, tools, [and] a driver’s license or identification card.” Nev. Rev. Stat. § 209.246(1)(a)(6).²⁸

Maintaining contact with their families and communities is also vital to incarcerated people—and another expense. Nearly half of all people in prisons are parents to minor children.²⁹ Contact between these individuals and their families increases prison safety, promotes positive

²⁷ Tiana Herring, *COVID Looks Like It May Stay. That Means Prison Medical Copays Must Go.*, Prison Pol’y Initiative (Feb. 1, 2022), https://www.prisonpolicy.org/blog/2022/02/01/pandemic_copays/.

²⁸ *See also Is Charging Inmates to Stay in Prison Smart Policy?*, Brennan Center for Justice (Sep. 9, 2019), <https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy>.

²⁹ Leah Wang, *Both Sides of the Bars: How Mass Incarceration Punishes Families*, Prison Pol’y Initiative (Aug. 11, 2024), https://www.prisonpolicy.org/blog/2022/08/11/parental_incarceration/.

mental health outcomes, and lowers the likelihood of recidivism.³⁰ Yet, staying in touch can be extremely challenging. Not only are incarcerated people often far from home, but also some institutions have even eliminated in-person visits altogether.³¹ So incarcerated people must increasingly rely on phone and video calls, as well as mail, to stay connected with their families.

However, placing calls or sending mail is incredibly expensive. Recently, the Federal Communications Commission (“FCC”) limited the rates that prison telecommunications companies can charge incarcerated people for phone and video calling services.³² The FCC’s capped rates for these services highlights the predatory practices that incarcerated people and their families have been subjected to for simply wanting to maintain

³⁰ Nicole Loonstyn & Alice Galley, *Low-Cost Phone Calls Benefit Incarcerated People, Their Families, and Criminal Legal Institutions*, Urban Institute (Aug. 30, 2023), <https://www.urban.org/urban-wire/low-cost-phone-calls-benefit-incarcerated-people-their-families-and-criminal-legal>.

³¹ Dan Slepian, Kenzi Abou-Sabe & Alexandra Chaidez, *Denied the 'Right to Hug': In Many U.S. Jails, Video Calls Are the Only Way Detainees Can See Loved Ones*, NBC News (Jun. 20, 2024), <https://www.nbcnews.com/investigations/many-us-jails-video-calls-are-only-way-detainees-can-see-loved-ones-rcna158048>.

³² See Press Release, FCC, *FCC Caps Exorbitant Phone & Video Call Rates for Incarcerated Persons & Their Families* (Jul. 18, 2024), <https://docs.fcc.gov/public/attachments/DOC-404087A1.pdf>.

contact with their loved ones. While this is a major improvement, the capped rates continue to be prohibitive or limiting to people who must use their meager wages for myriad necessities. Many incarcerated people report forsaking buying food and necessities so that they can afford phone calls to their families.³³ If incarcerated people must hold off on buying food and necessities such as toothpaste, tampons, and ibuprofen so that they can speak to their loved ones, imagine how many choose not to pursue a meritorious claim because they cannot afford the filing fee?³⁴

To deal with the excessively high costs, some individuals turn to their families for financial support. However, many families are unable to afford the additional costs of incarceration, since they are already strained from the loss of a household income.³⁵ The financial disruption from the incarceration of a loved one takes a devastating toll on families. A 2018 study of women with loved ones who are incarcerated found that 35 percent of respondents “experienced homelessness or other housing

³³ Soble et al., *supra* at 64.

³⁴ *Id.*

³⁵ *Mass Incarceration: Punishing Families*, Jane Addams College of Social Work, University of Chicago, (Jan. 15, 2020), <https://socialwork.uic.edu/news-stories/mass-incarceration-punishing-the-families/>

insecurity because of a loved one's incarceration.”³⁶ Moreover, about 65 percent of families with an incarcerated member were unable to meet their family's basic needs.³⁷ With low wages and little to no assistance from family members, most incarcerated people do not have the means to pay for the costs of incarceration, making budgeting money for additional costs—such as court filing fees—difficult if not impossible.

III. The panel majority's rule will negatively impact incarcerated people's access to justice.

“A prison inmate's right of access to the courts is the most fundamental right he or she holds.” *DeMallory v. Cullen*, 855 F.2d 442, 446 (7th Cir. 1988). Indeed, “[a]ll other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden.” *Id.* Yet, as described above, the economic reality for incarcerated people means that many of them have little potential to save sufficient funds to pay for the cost of a filing fee. Although the PLRA permits IFP plaintiffs to pay such fees in monthly

³⁶ Gina Clayton, Endria Richardson, Lily Mandlin & Brittany Farr, PhD, *Because She's Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones*, Essie Justice Group, 13 (2018), https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Powerful-Report.pdf.

³⁷ *Id.* at 55.

installments, *see* 28 U.S.C. § 1915(b)(1)–(2), even that amount is extremely onerous for most people—who will often be forced to choose between making such payments and purchasing basic necessities or communicating with their loved ones.

The panel majority’s holding will only exacerbate this Hobson’s choice by requiring each individual incarcerated plaintiff in a joint action to pay the full \$350 filing fee. To be sure, Congress enacted section 1915(b) to impose “an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.” *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). But, in doing so, Congress’s intent was “to ensure prisoners ‘pay the fees that *normally* accompany the filing of a lawsuit.’” Op. 7 (quoting 141 Cong. Rec. S14413–14 (daily ed. Sept. 27, 1995) (statement of Sen. Bob Dole)) (emphasis added).

The panel majority turned this principle on its head; under its rule, indigent incarcerated people must pay *more* than non-indigent incarcerated people—and ordinary civil plaintiffs—when they file suit jointly with others who experienced the same violations and harms. As Judge Graber rightly recognized, nothing in the PLRA’s text or history supports this “perverse result.” *Id.* at 34 (Graber, J., dissenting).

CONCLUSION

The Court should grant the petition for rehearing en banc.

Date: March 24, 2025

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- ☐ complies with the length limit designated by court order dated .
- ☐ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

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