No. 20-3276

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CORDELL SANDERS, *Plaintiff-Appellant,* v. MICHAEL MELVIN, et al., *Defendant-Appellee.*	)))))))))	Appeal from the United States District Court for the Central District of Illinois (Peoria) No. 1:16-cv-01366-JEH Hon. Jonathan E. Hawley, Magistrate Judge.

BRIEF OF *AMICI CURIAE* LEGAL PROFESSORS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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Dated: February 24, 2021

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-3276

Short Caption: Cordell Sanders v. Michael Melvin, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervener or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[x] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Professors Erwin Chemerinsky, Sharon Dolovich, Andrew Hammond, Jon D. Hanson, and David Rudovsky as Amici Curiae (new)

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block LLP for Amici Curiae

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Gabriel K. Gillett Date: February 24, 2021

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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Attorney's Signature: /s/ Grace C. Signorelli-Cassady Date: February 24, 2021

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Attorney's Printed Name: Jeremy M. Sawyer

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N/A

Attorney's Signature: /s/ Elena M. Olivieri Date: February 24, 2021

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal professors who are experts on civil rights litigation, civil procedure, federal procedure, and the application of pleading standards to pro se litigants. *Amici* have researched and written extensively on federal jurisdiction and civil rights litigation; their publications include leading textbooks and treatises about federal jurisdiction and constitutional law, as well as several hundred law review articles. *Amici*'s scholarly contributions have resulted in numerous awards and recognitions: among these, *amicus* Dean Erwin Chemerinsky was named the most influential person in legal education in the United States by National Jurist magazine; *amicus* Prof. David Rudovsky received the MacArthur Foundation Fellowship and Award for Accomplishments in Civil Rights Law and Criminal Justice and the ACLU Civil Liberties Award; *amicus* Prof. Sharon Dolovich is the Director of the UCLA Prison Law & Policy Program, has served in leadership roles in the academy related to prisoners' rights, and has been widely published on those issues; *amicus* Prof. Jon Hanson is the Director of The Project on Law and Mind Sciences and The Systemic Justice Project at Harvard Law School, where he has received several awards; and *amicus* Prof. Andrew Hammond has served in leadership roles in the academy related to civil procedure and poverty law.

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person (other than *amici curiae*, their counsel, or their members) contributed money that was intended to fund the preparation or submission of this brief.

Through their participation in litigation in federal courts, *Amici* Professors provide the judiciary with an academic perspective on federal jurisdiction, civil rights claims, and the impact of judicial decisions on the course of litigation. They have previously appeared as *amici* in numerous cases, including: Brief of Amici Curiae Federal Procedure Scholars in Support of Respondent, *Phillip Morris USA Inc. v. Williams*, No. 07-1216 (U.S. Oct. 9, 2008), 2008 WL 4580038; Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae in Support of Petitioner, *Hamner v. Burls*, No. 18-1291 (U.S. June 8, 2020), 2020 WL 3317122; Brief Amicus Curiae of Professors of Civil Procedure in Support of Appellant Kelly Stephenson and Reversal, *Stephenson v. Chao*, No. 20-5042 (D.C. Cir. June 12, 2020), 2020 WL 3127924; and Brief Amicus Curiae of Professors of Civil Procedure in Support of Appellant Paul S. Morrissey and Reversal, *Morrissey v. Wolf*, No. 20-5024 (D.C. Cir. May 22, 2020), 2020 WL 2614756. *Amici* include the following legal professors:

- **Dean Erwin Chemerinsky:** Dean of University of California, Berkeley, School of Law. Dean Chemerinsky previously served as the Founding Dean and Distinguished Professor of Law at University of California, Irvine School of Law and as Professor of Law at Duke University and the University of Southern California, Gould School of Law.
- **Prof. Sharon Dolovich:** Professor of Law at UCLA School of Law, who serves as Director of the UCLA Prison Law & Policy Program and Director of the UCLA Law COVID-19 Behind Bars Data Project. Professor Dolovich

is an expert on the constitutional law of prisons, prisoners' rights, and related litigation in federal courts.

- **Prof. Jon Hanson:** Alan A. Stone Professor of Law at Harvard Law School, who serves as the Faculty Director of the Systemic Justice Project, and the Director of the Project on Law and Mind Sciences at Harvard Law School. Professor Hanson's research focuses on systemic injustice and the role of implicit motives in shaping policy.
- **Prof. Andrew Hammond:** Assistant Professor of Law at University of Florida, Levin College of Law, whose scholarship focuses on civil procedure, federal courts, and how agencies, courts, and legislatures respond to the claims of impoverished individuals.
- **Prof. David Rudovsky:** Senior Fellow at the University of Pennsylvania Carey Law School, who serves as one of the nation's leading civil rights and criminal defense attorneys, and who co-founded the public interest law firm of Kairys, Rudovsky, Messing, Feinberg & Lin LLP.

INTRODUCTION AND SUMMARY OF ARGUMENT

The legal system's requirements are complex and often difficult to navigate. These conditions require precision and careful attention to detail. Even for lawyers, successfully steering a case from complaint to judgment can be a real challenge. Along the way, lawyers may struggle to convey with clarity the specific facts and circumstances of a case as well as the legal arguments that support awarding the relief requested. Occasionally, they may use ambiguous language that inadvertently suggests something unintended.

These challenges are all the more intense for pro se and incarcerated litigants. Untrained in the ways of the law—and without sophisticated research and writing skills, much less an advanced legal degree—their legal briefs and submissions often leave courts wanting. Recognizing these realities, this Court and others have long recognized that allegations in pro se complaints, however inartfully pleaded, must be construed liberally and held to standards less stringent than those that apply to represented parties. So, too, courts are to treat pro se plaintiffs with special care and solicitude throughout the litigation process. This "heightened judicial solicitude is justified in light of the difficulties of the pro se litigant in mastering the procedural and substantive requirements of the legal structure." *Caruth v. Pinkney*, 683 F.2d 1044, 1050 (7th Cir. 1982).

That solicitude applies with particular force when a pro se plaintiff's claims are on the brink of dismissal, a juncture where there is an acute risk that justice will be denied simply because the litigant is unrepresented. Recognizing this risk and the importance of mitigating that risk, this Court has held that courts have an affirmative obligation to ensure that a pro se litigant's claims are not dismissed as a result of procedural unfairness. *See Timms v. Frank*, 953 F.2d 281, 285 (7th Cir. 1992).

The District Court's actions in this case—to not only sanction a pro se litigant based on ambiguous language, but to dismiss his *entire* case as a result—are wholly inconsistent with these longstanding principles. The District Court's approach also was particularly harsh and unnecessarily punitive. Sanctions must be narrowly tailored to litigant misconduct. *See* Fed. R. Civ. P. 11(c)(4);

see also Divane v. Krull Elec. Co., 200 F.3d 1020, 1030 (7th Cir. 1999). Failure to do so risks chilling legitimate, if vigorous advocacy, particularly where unsophisticated pro se or inmate litigants are concerned. Moreover, because dismissal with prejudice is the most severe sanction, it should only be meted out with extreme caution and, even if warranted, should be limited to the specific tainted claim. Sanctions should be used as a scalpel to surgically address issues where appropriate, not as a sledgehammer to squash an entire case.

The District Court's process for determining (wrongly) to impose sanctions was similarly flawed. When both a sanctions motion and a summary judgment motion are pending, district courts should resolve the summary judgment motion first. Among other things, this approach both promotes the resolution of cases on their merits, and ensures that litigants benefit from the safeguards available at summary judgment. This approach also makes certain that the rare remedy of sanctions is not imposed based on an opponent's slanted version of the story when the facts are genuinely and fairly disputed.

When the court is charged to resolve factual disputes in the context of allegations of fraud on the court, it must likewise tread very carefully. A fraud on the court "occurs only in the most extraordinary and egregious circumstances and relates to conduct that might be thought to corrupt the judicial process itself, such as where a party bribes a judge or inserts bogus documents into the record." *Citizens for Appropriate Rural Rds. v. Foxx*, 815 F.3d 1068, 1080 (7th Cir. 2016). A fraud on the court also requires specific findings of materiality and intentionality. When making these determinations, courts should err strongly

on the side of pro se or incarcerated parties. Courts should also remain mindful of the barriers that these litigants face, and thus be particularly cautious before concluding that assertions in these litigants' pleadings constitute a fraud on the court.

ARGUMENT

I. Pro Se Litigants, And Particularly The Incarcerated, Must Be Treated Leniently To Ensure Access To The Court.

A. Pro Se Litigants Often Struggle To Represent Themselves.

Individuals' right to pursue their own claims in court is a bedrock principle of the American legal system. The Judiciary Act of 1789, for example, recognized "[t]hat in all courts of the United States, the parties may plead and manage their own causes personally[.]" Judiciary Act of 1789, ch. 20, 1 Stat., § 35 (1789); *see also* 28 U.S.C § 1654.

Yet, the judicial system is complex and its requirements are challenging to manage—especially for those without legal training. The Supreme Court has acknowledged that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law," the result being an inability to adequately prepare a defense, even when "a perfect one" might exist. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932); *accord Mayberry v. Pennsylvania*, 400 U.S. 455, 462 (1971) (noting pro se defendants might find themselves "foolishly trying to defend themselves").

The same legal complexities and inherent risks of ineffective self-representation persist in civil matters. Pro se complaints are, for example, more likely to contain "emotional language, legal jargon, tangents, and less direct or

incomprehensible assertions of fact." Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. Pa. L. Rev. 585, 602 (2011). Pro se litigants also often have trouble conforming to what is expected of them in a courtroom setting. *See* Eric J.R. Nichols, Note, *Preserving Pro Se Representation in an Age of Rule 11 Sanctions*, 67 Tex. L. Rev. 351, 371–72 (1988). Partly as a consequence of this dynamic, pro se plaintiffs' claims are dismissed at a significantly higher rate than those of represented parties. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 Am. U. L. Rev. 553, 615 (2010).

B. To Attempt To Level The Playing Field, Courts Give Pro Se Plaintiffs Special Solicitude.

Needless to say, most pro se litigants do not have legal training and may be unfamiliar with litigation's technical quirks and with the importance of clear, concise writing. Courts have thus held that "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks and citation omitted); *cf.* Fed. R. Civ. P. 8(f) (2007) (amended 2010) ("All pleadings shall be so construed as to do substantial justice"). This lenient approach to pro se pleadings has been reaffirmed time and again by both the Supreme Court and this Circuit. *See, e.g.*, *Erickson*, 551 U.S. at 94; *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (reminding courts to "construe pro se complaints liberally and hold them to a less stringent standard than formal pleadings drafted by lawyers").

A court thus must construe pro se filings to account for linguistic and stylistic choices, "disregarding poor style, vocabulary, syntax, superfluities, and the like," and instead "read[ing] only for substance." Schneider, 159 U. Pa. L. Rev. at 602. In so doing, the court's role is to inquire whether a pleading "adequately presents the legal and factual basis for the claim, even if the precise legal theory is inartfully articulated or more difficult to discern." *Ambrose v. Roeckeman*, 749 F.3d 615, 618 (7th Cir. 2014) (citation omitted) (holding that, when construing the pro se litigant's petition for habeas corpus "liberally," it "adequately presented" the claim to the district court and thus the claim could be raised on appeal).

The flexibility afforded pro se litigants extends beyond the pleading stage to encompass all stages of litigation. For example, district courts may not reject a pro se litigant's discovery requests because, although the requests "might have been phrased more artfully and handled better in the hands of an experienced lawyer, they are more than enough to indicate the kind of information" the pro se litigant sought and was entitled to receive. *Farmer v. Brennan*, 81 F.3d 1444, 1451 (7th Cir. 1996). Likewise, this Court has recognized that pro se filings also must be given a "liberal construction," noting that, although pro se litigants "will, at times, confuse legal theories or draw the wrong legal implications from a set of facts," this Court does "not treat every technical defect as grounds for rejection." *Osagiede v. United States*, 543 F.3d 399, 405 (7th Cir. 2008). Indeed, on appeal, this Court "will address any cogent arguments we are able to discern

in a *pro se* appellate brief." *Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 811 (7th Cir. 2017).

Moreover, in several circumstances, courts have an affirmative duty to assist pro se litigants. For example, this Court will construe a pro se litigant's district court filing as what the pro se intended, regardless of its label. *See, e.g.*, *United States v. Sutton*, 962 F.3d 979, 984 (7th Cir. 2020). This Court has also repeatedly held that pro se litigants must be afforded notice not granted to non-pro se litigants, including notice of a court's "recharacterization" of their filings, *United States v. Guerrero*, 946 F.3d 983, 987 (7th Cir. 2020), and notice of the consequences of failing to respond to a summary judgment motion, if not otherwise provided, *Timms*, 953 F.2d at 285. The overarching point, at bottom, is that pro se plaintiffs deserve extra care.

Taking a lenient approach to pro se litigants, including at the pleading stage, is even more of a necessity for incarcerated inmates. They often confront additional barriers when attempting to pursue their legal rights—including, for example, the sparsity of legal libraries, inability to access the internet, the high incidence of inmate mental illness, and inmates' overall lower than average education levels. *See* Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 Wash. U. L. Rev. 899, 902, 907 (2017).

Recognizing the additional hurdles pro se inmate litigants face, courts are particularly charitable in construing their pleadings. *See Haines,* 404 U.S. at 520–21 (1972). This forgiving approach has long been embraced by this Court, which has a policy "to construe liberally the pleadings and papers filed by a

prison inmate without funds who represents himself." *Bracey v. Herringa*, 466 F.2d 702, 703 (7th Cir. 1972). And this Court has not hesitated to reverse district courts that failed to construe pro se inmates' filings generously and to treat pro se inmates' conduct forgivingly. *See, e.g.*, *Evans v. Griffin*, 932 F.3d 1043, 1048–49 (7th Cir. 2019); *Perez v. Fenoglio,* 792 F.3d 768, 782 (7th Cir. 2015) (reversing dismissal of pro se inmate's complaint alleging deliberate indifference where the district court did not read the complaint liberally and draw all reasonable inferences in the pro se inmate's favor); *cf. also Long v. Steepro*, 213 F.3d 983, 986–89 (7th Cir. 2000) (holding that the district court abused its discretion in dismissing a pro se inmate's case with prejudice for failure to follow the court's scheduling order); *cf. Emory v. Duckworth*, 555 F. Supp. 985, 991 (N.D. Ind. 1983) (noting the court was "loath to grant a motion for summary judgment whenever there appears even the slightest possibility that there may be some merit to an inmate's complaint"). It is imperative—and also mandatory—that district courts continue to take this lenient approach.

II. The District Court's Sanction Of Dismissal With Prejudice Of Plaintiff's Entire Case Was Overly Harsh And Overbroad.

Sanctions, whether imposed under Federal Rule of Civil Procedure 11 or a court's inherent authority, must be aimed at deterring future violations rather than punishing litigants. In the rare case where the district court imposes sanctions, they should be the least severe sanction that is adequate to deter future violations. Failure to consider lesser sanctions is an abuse of discretion. Dismissal with prejudice—the most severe sanction—should be meted out only

in the most extreme circumstances and when tailored to the litigant's alleged misconduct.

A. Sanctions Must Be Narrowly Tailored To Litigant Misconduct, And Courts Imposing Sanctions Must Not Chill Vigorous Advocacy.

When an attorney or pro se litigant files a complaint, they certify that the claims "are warranted" and that the factual contentions either have evidentiary support or will after discovery. Fed. R. Civ. P. 11(b). Violations of this rule are sanctionable, and district courts have discretion to determine the nature and extent of the sanctions. District courts also have inherent authority to sanction litigation misconduct. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991).

Importantly, whether grounded in Rule 11 or a court's inherent authority, any sanction "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). The Seventh Circuit has recognized this limitation as well, noting "an award of sanctions should be the least severe that is adequate to serve the purposes of deterrence." *Divane*, 200 F.3d at 1030 (reviewing the imposition of sanctions "with great care"); *see also* 5A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1336.3, Westlaw (4th ed. database updated Oct. 2020). To avoid unfairness and abuse, a district court's raw power to sanction "must be exercised with restraint and discretion" and any punishment must be "grounded in factual

findings supported by the record." *See Evans*, 932 F.3d at 1047 (quoting *Chambers*, 501 U.S. at 44).[2]

Beyond these factors, courts also must take great care to avoid using sanctions in a way that could "chill" vigorous advocacy or otherwise dampen a pro se litigant's or an attorney's "enthusiasm or creativity in pursuing factual or legal theories." Fed. R. Civ. P. 11 advisory committee's note to 1983 amendment; *see also LaSalle Nat'l Bank of Chicago v. Cnty. of DuPage*, 10 F.3d 1333, 1338 (7th Cir. 1993); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). To guard against the chilling effect of sanctions, courts, among other things, should vigorously avoid "hindsight"—such as the temptation to conclude later in litigation that a pleading had no reasonable basis merely because the evidence did not ultimately demonstrate everything the pleading alleged—and instead focus solely on "the time the pleading . . . was submitted." Fed. R. Civ. P. 11 advisory committee's note to 1983 amendment; *see also Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451, 454 (7th Cir. 1987) ("Rule 11 does not require the updating of papers that were not subject to sanctions when filed."); *Samuels v. Wilder*, 906 F.2d 272, 275 (7th Cir. 1990) (collecting cases).

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[2] *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1137 (9th Cir. 2001) (citing *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 128 (2d Cir. 1998)); *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 74 (3d Cir. 1994) ("[D]istrict court[s] must ensure that there is an adequate factual predicate for flexing its substantial muscle under its inherent powers, and must also ensure that the sanction is tailored to address the harm identified. In exercising its discretion under its inherent powers, the court should be guided by the same considerations that guide it in the imposition of sanctions under the Federal Rules.").

The importance of discretion and restraint when considering sanctions applies with equal if not greater force in situations involving pro se litigants. Because district courts have a "responsibility to ensure that *pro se* claims are given a fair and meaningful consideration on their merits," when imposing sanctions against pro se litigants they must take extra care not to exceed the minimum sanction necessary to effect deterrence. *See Schilling v. Walworth Cnty. Park & Plan. Comm'n*, 805 F.2d 272, 277–78, 277 n.9 (7th Cir. 1986); *Palmer v. City of Decatur*, 814 F.2d 426, 428–29 (7th Cir. 1987). Indeed, to avoid deterring legitimate, if inartfully-phrased, pro se claims, it is essential that pro se litigants be able to make allegations without fear that courts will sanction them if they are not able to later prove those allegations word-for-word. *See* Nichols, 67 Tex. L. Rev. at 380.

B. Dismissal With Prejudice Must Be Meted Out With Extreme Caution, Particularly For Pro Se And Inmate Litigants.

Dismissal with prejudice is a "draconian," "severe," "harsh," "powerful," "serious," and "extreme" sanction, which may be imposed only for a party's "contumacious" misconduct. *Greyer v. Illinois Dep't of Corr.*, 933 F.3d 871, 877 (7th Cir. 2019) (quoting *Barnhill v. United States*, 11 F.3d 1360, 1367–69 (7th Cir. 1993)). It is the "death penalty" of sanctions. *James v. Caterpillar, Inc.*, 824 F. App'x 374, 377 (6th Cir. 2020) (citation omitted). Thus, "in all but the most extreme situations courts should consider whether a lesser sanction than dismissal with prejudice would be appropriate." *Greyer*, 933 F.3d at 877.

Even assuming sanctions were warranted, numerous less draconian alternatives are available. These would include, for example, revoking a pro se

plaintiff's IFP status, requiring payment of monetary sanctions (nominal or otherwise), or requiring pro se litigants to follow certain supplementary procedures before filing additional suits. *See, e.g., Hill v. Madison Cnty.*, 983 F.3d 904, 907 (7th Cir. 2020). In addition, courts may determine certain facts in favor of opposing litigants, or even dismiss a case without prejudice. *See Evans*, 932 F.3d at 1048. At least one among these many options "will often be enough to deter and punish misconduct." *Id.*

The harshness of dismissing a case with prejudice and the well-recognized latitude afforded pro se litigants strongly counsel against imposing this sanction where a pro se inmate litigant's pleadings simply contain some alleged inconsistencies subject to reasonable dispute. Indeed, several courts faced with more egregious circumstances have found dismissal with prejudice to be inappropriate. *See, e.g.*, *Ramos v. Drews*, No. 14-CV-2556, 2018 WL 5046087, at *10–11 (N.D. Ill. Oct. 16, 2018) (concluding that "a series of alleged inconsistencies among plaintiffs' allegations" did not warrant the extraordinary remedy of dismissal); *see also Allen v. Chicago Transit Auth.*, 317 F.3d 696, 703 (7th Cir. 2003) (observing that even misconduct that is sufficiently serious to meet the definition of criminal perjury may not warrant dismissal).[3] Several courts have likewise found dismissal with prejudice inappropriate when counsel

[3] *Graham v. Chesapeake La., L.P.*, No. 5:13-CV-1571, 2013 WL 5673858, at *9 (W.D. La. Oct. 16, 2013), *aff'd*, 568 F. App'x 307 (5th Cir. 2014) (concluding dismissal with prejudice was not appropriate where the parties "disagree about what the relevant facts are and how those facts should be interpreted and applied").

made unsupported statements in pleadings. *See, e.g.*, *In re Sony Corp. SXRD Rear Projection Television Mktg., Sales Pracs. & Prods. Liab. Litig.*, 268 F.R.D. 509, 511, 521 (S.D.N.Y. 2010) (concluding a reprimand was sufficient to address counsel's objectively unreasonable representations in pleadings and statements on the record).[4] This speaks volumes about just how rarely sanctions should be imposed on a pro se inmate plaintiff.

C. Even Where Dismissal With Prejudice Is Warranted, It Should Be Limited To The Specific Claim Found To Be Inaccurate.

When the basis of only some claims in a complaint are challenged pursuant to a Rule 11 motion, dismissal of the remaining claims in a ruling on that motion is not warranted. *See Sneller v. City of Bainbridge Island*, 606 F.3d 636, 639–40 (9th Cir. 2010). The Seventh Circuit's decision in *Barnhill v. United States*—where the Court determined that it was disproportionate and inequitable to enter judgment against a litigant for misconduct that did not prejudice the opposing party—likewise counsels in favor of proportionality here. *See* 11 F.3d 1360, 1370 (7th Cir. 1993).

As a comparison, it is instructive to consider how courts address a discovery violation. In that context, courts often decline to dismiss with prejudice so long as those violations do not infect the litigant's entire case. *See, e.g.*, *Evans*, 932 F.3d at 1047–49; *Patrick v. City of Chi.*, 974 F.3d 824, 831–32 (7th Cir. 2020); *Moore v. City of Chi.*, No. 02 C 5130, 2006 WL 1710234, at *11,

[4] *In re Sargent*, 136 F.3d 349, 353 (4th Cir. 1998) (public reprimand sufficed to deter counsel's future Rule 11 violations); *Soo San Choi v. D'Appolonia*, 252 F.R.D. 266, 268–69 (W.D. Pa. 2008) (same).

*14–15 (N.D. Ill. June 14, 2006). Just as the proper sanction for evidentiary violations is not dismissal with prejudice but rather a more tailored approach, the appropriate sanction for an unsupported pleading allegation is, at most, dismissal of the single claim arising from that allegation—not dismissal with prejudice of the entire action. *Cf. Sneller*, 606 F.3d at 639–40.

In addition, a strong policy favors the disposition of cases on their merits, and this policy counsels strongly against dismissal. *See Schilling*, 805 F.2d at 275; *English v. Cowell*, 969 F.2d 465, 473 (7th Cir. 1992) (quoting *Schilling*); *Long*, 213 F.3d at 986–89 (quoting *Schilling*). In light of this, district courts should be particularly reluctant to dismiss claims with prejudice as a sanction where those claims are wholly unrelated to the litigant's alleged misconduct.

Yet here, the District Court dismissed an entire case as a sanction for a years-old assertion relating to a single claim, without even considering the public's interest in favor of resolving cases on the merits. These factors demand an alternative, more precise approach, whereby sanctions are narrowly tailored to the pleading violation.

III. Procedural Fairness Supports Resolving Summary Judgment Motions Before Sanctions Motions, and Requiring Strong Evidentiary Support Before Finding A Fraud On The Court.

Recognizing the inherent potential for abuse and unfairness when a district court exerts its sanctioning powers, sanctions are not appropriate when based upon disputed facts, particularly where a summary judgment motion is simultaneously pending to determine whether any disputed facts are material. If a district court is going to find facts in the context of an allegation of fraud on

the court, it should only do so after a deliberate evidentiary hearing that affords the potentially sanctioned party an opportunity to mount a viable defense.

A. District Courts Should Resolve Pending Summary Judgment Motions Before Sanctions Motions.

As previously noted, a strong judicial policy favors the resolution of cases on the merits. *See, e.g., Schilling*, 805 F.2d at 275. For this reason, when motions for summary judgment and for sanctions are pending simultaneously, courts frequently rule on the summary judgment motion first, and defer consideration of the sanctions motion until after the disposition of the case on the merits. *See, e.g., Lichtenstein v. Consol. Servs. Grp., Inc.*, 173 F.3d 17, 23 (1st Cir. 1999); *Mann v. G & G Mfg., Inc.*, 900 F.2d 953, 960–61 (6th Cir. 1990); *Almeida v. Bennet Auto Supply, Inc.*, 335 F.R.D. 463, 465–66 (S.D. Fla. 2020). Resolving summary judgment motions before sanctions motions ensures litigants receive the important and well-developed procedural protections afforded at summary judgment, including the judicial obligation to view the evidence in the light most favorable to the non-movant and to draw all reasonable inferences in the non-movant's favor.

Because sanctions motions lack the procedural protection of requiring courts to construe the facts in the non-movant's favor, taking the opposite approach—as the District Court did here—risks unfairness and abuse. In particular, ruling on a motion for sanctions before summary judgment offers a defendant an end-run around the applicable legal standard; it allows the movant "all the benefits of a summary judgment" without subjecting the movant to "the strictures associated with the summary judgment procedure." *Safe-Strap Co. v.*

Koala Corp., 270 F. Supp. 2d 407, 412–22 (S.D.N.Y. 2003) (detailing why Rule 11 sanctions are not a proper substitute for summary judgment as a means to resolve a case on the merits); 5A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1336, Westlaw (2d ed. database updated Oct. 2020).[5] District courts should accordingly be strongly discouraged from subverting summary judgment procedures in the manner the District Court did here, particularly when the result is to eliminate summary judgment as to all claims, even those untainted by alleged misrepresentations.

Imposing sanctions based on disputed allegations when a motion for summary judgment is pending is also incongruous because the court *may not* make factual findings as to disputed facts at summary judgment, whereas the court *must* make factual findings as to disputed facts in the context of sanctions. By deciding to impose sanctions first, however, the District Court has put the proverbial cart before the horse. It has opted to punish a litigant without first deciding whether there is a genuine and material dispute about the underlying facts that might obviate the imposition of sanctions.

Further, nothing prevents the court from deciding sanctions at some point down the road, once the case is further developed. *See, e.g.*, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 244 F.R.D. 70, 74 (D. Me. 2007) (citation

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[5] *See also, e.g.*, *Blue v. United States Dep't of the Army*, 914 F.2d 525, 535–36 (4th Cir. 1990) (stating that a defendant should seek to dismiss a plaintiff's claims on the merits through summary judgment rather than sanctions); *SortiumUSA, LLC v. Hunger*, No. 3:11-cv-1656, 2014 WL 1080765, at *5–6 (N.D. Tex. Mar. 18, 2014) (same); *Mark's Airboats, Inc. v. Thibodaux*, No. CIV.A 6:13-0274, 2015 WL 1467097, at *4–5 (W.D. La. Mar. 27, 2015) (same).

omitted); *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, No. 00 CIV. 1115, 2000 WL 528633, at *1 (S.D.N.Y. May 2, 2000); *Almeida*, 335 F.R.D. at 465–66. This approach may even yield efficiencies: granting summary judgment could point the path to why sanctions are appropriate, just as denying summary judgment could demonstrate that sanctions are not. The better course, then—especially in the context of a pro se inmate plaintiff—is to proceed with caution, allow the parties to marshal their facts and legal arguments, and wait to determine the propriety of any sanctions until after the court has had an opportunity to resolve the case on a dispositive motion.

B. Courts Must Exercise Extreme Caution When Sanctioning Litigants And Finding A Fraud On The Court Based On Disputed Facts.

Fraud on the court "occurs only in the most extraordinary and egregious circumstances" and involves outrageous conduct "that might be thought to corrupt the judicial process itself, such as where a party bribes a judge or inserts bogus documents into the record." *Citizens for Appropriate Rural Rds.*, 815 F.3d at 1080; *see also Kenner v. Comm'r of Internal Revenue*, 387 F.2d 689, 691 (7th Cir. 1968) (explaining that a fraud on the court "does, or attempts to, defile the court itself").[6] Fraud on the court also requires the court to specifically find both materiality and intentionality. *Greyer,* 933 F.3d at 877–78.

[6] *See also, e.g.*, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944) (finding fraud on the court based on "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.").

Applying this standard in cases where the underlying facts are disputed, it is particularly important that district courts set a high bar before finding a litigant has committed something as extreme as a fraud on the court. For many of the same reasons just discussed in the context of summary judgment, it behooves the court to take a meticulous and methodical approach that allows the parties to each present their version of events to allow the court to determine whether there is a valid disagreement. If there is, after all, then it would seem the case is not the exceedingly rare type that would support a finding of fraud on the court.

Caution in finding a fraud on the court is particularly warranted where, as here, the party alleged to have committed the fraud is a pro se, mentally-ill inmate. Pro se litigants, and especially the incarcerated and mentally ill, are more likely than represented parties to plead claims imprecisely. It is thus singularly critical to require courts to make appropriate evidentiary findings, something which should be informed by situational context, including mental health, education, and other personal characteristics of the individual plaintiff. *See Greyer*, 933 F.3d at 875–76, 882 (concluding, after considering pro se inmate's situation and the potential impact of their mental illness, that the omission of information did not support a finding of a fraud on the court).

Indeed, instead of reflexively punishing pro se inmate litigants' errors, "district courts must ensure that a prisoner's negligent or even reckless mistake is not improperly characterized as an intentional and fraudulent act" that would support a finding of fraud upon the Court. *Ruiz v. Bautista*, 801 F. App'x 439,

442–43 (7th Cir. 2020) (quoting *Greyer*, 933 F.3d at 881). An alternative result would contravene the liberal pleading standards afforded to pro se and inmate litigants, and violate the core principle that "[p]leadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end." *Maty v. Grasselli Chem. Co.*, 303 U.S. 197, 200 (1938).

CONCLUSION

For the reasons stated, *amici curiae* urge this Court to reverse the decision below and remand for further proceedings.

Dated: February 24, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,547 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 12 point Bookman Old Style font for the main text and footnotes.

Dated: February 24, 2021

/s/*Gabriel K. Gillett*
Gabriel K. Gillett

CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on February 24th, 2021, I caused the foregoing **Brief of *Amici Curiae* Legal Professors in Support of Plaintiff-Appellant and Reversal** to be electronically filed with the Clerk of the Court for the United States Court Of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF procedure (h)(2) and circuit rule 31(b), and upon notice of this court's acceptance of the electronic brief for filing, I certify that I will cause fifteen copies of the **Brief of *Amici Curiae* Legal Professors in Support of Plaintiff-Appellant and Reversal** to be transmitted to the court via UPS overnight delivery, delivery fee prepaid within five days of that date.

/s/*Gabriel K. Gillett*
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