AND JUSTICE FOR ALL: INDIGENT LITIGANTS' ACCESS TO THE COURTS AND *HILL V. FORT LEAVENWORTH DISCIPLINARY BARRACKS*

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I. INTRODUCTION

In 1942, Congress adopted the Pledge of Allegiance;[1] and the United States adopted the promise of "justice for all."[2] Congress facilitated this promise when it passed 28 U.S.C. § 1915, the *in forma pauperis* statute.[3] The statute provides indigent litigants the opportunity to bring their cases before the United States' judicial system.[4] The statute dismisses one procedural hurdle for the impoverished but grants a court ample discretion to permit financial burdens to still pervade a pauper's access to justice. Although not the intention, the very real result of a court's exercise of discretion by dismissing a case for an indigent litigant's slight procedural defects is a subversion of justice as displayed in *Hill v. Fort Leavenworth Disciplinary Barracks*.[5]

This Comment first discusses the history of the *in forma pauperis* statute and the ongoing debate over balancing fiscal needs with the impoverished' s rights. Next, it discusses the recent decision in *Hill* and critiques the Tenth Circuit's decision to affirm the actions of the United

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1. Carrie Nie, *The Pledge of Allegiance, Croft v. Perry, and the Supreme Court's Second Chance to Clarify Establishment Clause Jurisprudence*, 64 SMU L. REV. 1463, 1466 (2011).
2. *Id.* at 1464 (quoting 4 U.S.C. § 4 (2006)).
3. 28 U.S.C. § 1915 (2012).
4. *Id.*
5. 660 F. App'x 623 (10th Cir. 2016).

States District Court for the District of Kansas. This Comment argues that a court does not have the discretion to deviate from procedural norms without due cause when that deviation prejudices a litigant's chance to receive a judicial determination on the merits of his or her case. That deviation is especially unjustified when both Congress and the courts have endeavored to fortify and guard the litigant's access to the judicial system.

II. HISTORY

A. A Balancing Act from the Beginning

The theory that justice should be available to rich and poor alike extends back to the Magna Carta.[6] This tradition was carried into the United States' legal system in 1892 through a bill considered the forerunner to the *in forma pauperis* statute.[7] Even at this stage, the legislature acknowledged the need of balancing justice for all and preventing "vexatious litigation."[8] Proponents of the bill argued that adequate safeguards were in place since the court could "dismiss the suit at any time if it be made to appear that the allegation of poverty is probably untrue, or if [it] be satisfied that the alleged cause of action is frivolous or malicious."[9]

After its passage in 1892, the statute went through five modifications.[10] These modifications broadened the scope of the statute and limited its financial impact to the government during times of tightening federal purse strings.[11] The current *in forma pauperis* statute explicitly shows the dichotomy from the 1892 statute and its amendments to be alive and well.[12] The statute provides that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."[13]

6. J.C. HOLT, MAGNA CARTA app. at 461 (2d ed. 1992).
7. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252, 252.
8. *See* H.R. REP. NO. 52–1079, at 1 (1892).
9. *Id.* at 2.
10. *See* Robert S. Catz & Thad M. Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 RUTGERS L. REV. 655, 657 (1978).
11. *See id.* at 657–59.
12. *See id.*
13. 28 U.S.C. § 1915(b)(4) (2012).

However, the statute still requires payment of filing fees in civil actions and appeals.[14] The burden is assuaged for prisoners by reducing the upfront initial filing fee and allowing full payment to be made in installments as the prisoner's account permits.[15]

B. Achieving Balance Through Discretion in Granting

The statute empowers the court with wide discretion in granting an *in forma pauperis* claim.[16] The court's discretion extends to whether a litigant's financial situation entitles them to proceed *in forma pauperis* and whether the litigant's action is frivolous or malicious.[17] Congress has not set a financial threshold at which an *in forma pauperis* motion must be granted.[18] This discretion is used to restrain litigants from bringing meritless actions while also seeking to give indigent litigants the same access paying litigants have to the courts. The statute places a monetary imposition on litigants by requiring the litigant to pay a reduced initial filing fee and eventually the full fee through installment payments, which incentivizes prisoners to refrain from bringing meritless litigation.[19]

Additionally, the statute allows a case to be dismissed if it is made frivolously or maliciously.[20] While the definitions of *frivolous* and *malicious* are heavily debated, most courts only choose to block *in forma pauperis* actions on this basis under extreme circumstances.[21] Requiring extreme circumstances helps safeguard an indigent litigant's equal access to justice. The Supreme Court has held that under circumstances where a paying litigant's appeal would not be dismissed, an indigent litigant's appeal should also not be dismissed.[22]

C. Achieving Balance Through Discretion After Granting

The court's discretion continues past the stage of granting *in forma*

14. *Id.* § 1915(b)(1).
15. *Id.* § 1915(b)(1)–(2).
16. *See* Catz & Guyer, *supra* note 10, at 655–56.
17. *See id.*
18. *See id.*
19. *See* Baker v. Suthers, 9 F. App'x 947, 949 (10th Cir. 2001) (citing In re Smith, 114 F.3d 1247, 1249 (D.C. Cir. 1997)).
20. 28 U.S.C. § 1915(e)(2).
21. *See* Catz & Guyer, *supra* note 10, at 672–74.
22. *See id.* at 674.

pauperis status. After granting the motion, a judge will assign an initial filing fee based on a prisoner's monthly deposits or the average monthly balance of a prisoner's account.[23] This initial filing fee is a statutorily-mandated court order.[24] If a prisoner fails to pay this initial filing fee within the time set by the court, Rule 41(b) of the Federal Rules of Civil Procedure grants the judge the power to dismiss the action.[25] The dismissal is appealable.[26] But the district court can block the appeal from proceeding *in forma pauperis* if it determines the appeal was not made in good faith.[27] The good faith requirement means the appeal advances a reasonable non-frivolous argument.[28] The district court's decision to dismiss under Rule 41(b) is reviewed for abuse of discretion.[29] And the court's decision regarding the appeal's conformance to the good faith requirement is reviewed for error with the court's decision given much weight.[30]

III. *HILL V. FORT LEAVENWORTH DISCIPLINARY BARRACKS*

A. Facts and Procedural History

Steven Hill, while in federal custody, "filed a complaint . . . against Fort Leavenworth [Disciplinary Barracks] and three [unnamed] soldiers."[31] The complaint alleged the soldiers drove negligently and erratically while transporting him to a medical facility, and those actions put Mr. Hill's safety at risk.[32] Mr. Hill proceeded pro se during both his district court proceeding and his appeal.[33]

The original complaint was filed in the United States District Court

23. 28 U.S.C. § 1915(b)(1)(A)–(B).
24. Hill v. Fort Leavenworth Disciplinary Barracks, 660 F. App'x 623, 625 (10th Cir. 2016).
25. FED. R. CIV. P. 41(b).
26. *Hill*, 660 F. App'x at 625.
27. 28 U.S.C. § 1915(a)(3).
28. *See* Scott v. Millyard, 350 F. App'x 213, 216 (10th Cir. 2009) (citing McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 812 (10th Cir. 1997)).
29. *See* Florence v. Decker, 153 F. App'x 478, 479 (10th Cir. 2005) (citing Cosby v. Meadors, 351 F.3d 1324, 1326 (10th Cir. 2003)).
30. *See* Coppedge v. United States, 369 U.S. 438, 445–46 (1962).
31. *Hill*, 660 F. App'x at 624.
32. *Id.*
33. *Id.*

for the District of Kansas on November 12, 2015.[34] At the time of filing, Mr. Hill did not pay the required filing fees or submit the complaint on the proper forms.[35] The district court gave Mr. Hill until December 14 to remedy the defects in his complaint.[36] "On November 23 . . . , Mr. Hill [corrected his filings] and . . . submitted a motion for leave to proceed *in forma pauperis* . . . ."[37] The filings included a statement of Mr. Hill's personal account at the prison that reflected a balance of over $124 and a record of regular monthly deposits.[38] Three months later, on March 31, the court granted Mr. Hill's motion and gave him fourteen days to pay a reduced filing fee.[39] The filing fee was set at $16.50 based on a calculation of Mr. Hill's account statements and monthly balances.[40] The court warned Mr. Hill that if the filing fee was not paid on time it would dismiss his action without further notice.[41] At some point, Mr. Hill requested to be notified a month before his initial filing fee's due date.[42] The court declined to do so.[43]

"On April 11, 2016, Mr. Hill filed [another] 'Motion to Proceed Indigent' . . . ."[44] At this time, his account balance lacked sufficient funds to pay the $16.50 initial filing fee.[45] However, Mr. Hill failed to attach an account statement to his motion reflecting the balance.[46] The next day, Mr. Hill received a deposit into his account bringing his balance close to $100.[47] Eight days after Mr. Hill's original due date, "the district court dismissed [Mr. Hill's] case without prejudice."[48] On May 9, Mr. Hill submitted his appeal to the Tenth Circuit Court of Appeals and shortly after paid the outstanding initial filing fee from his district court action.[49]

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 624–25.
39. *Id.*
40. *Id.*
41. *Id.* at 624.
42. *Id.* at 626.
43. *Id.*
44. *Id.* at 624–25.
45. *Id.* at 625–26.
46. *Id.*
47. *Id.* at 626.
48. *Id.* at 625.
49. *Id.*; Appeal Docket Proceedings, Hill v. Fort Leavenworth Disciplinary Barracks, 660 F. App'x 623 (10th Cir. 2016) (No. 16-3097).

Mr. Hill submitted a motion to appeal *in forma pauperis*, which was denied.[50] Mr. Hill appealed this decision and submitted an affidavit stating he was unable to pay the initial filing fee at the time it was due because he sent money to his family or used it at the prison canteen.[51] The appellate court deferred ruling on Mr. Hill's motion to proceed *in forma pauperis* but allowed him to proceed while paying the docketing fee in partial payments.[52]

B. Opinion

The appellate court reviewed the dismissal for abuse of discretion.[53] Because the dismissal was without prejudice, the district court was not required to give "attention to any particular procedures."[54] In a previous case, the Tenth Circuit held a prisoner cannot spend money on personal comforts and then use a depleted account balance to defeat a court order to pay an initial filing fee.[55] The appellate court affirmed the lower court's dismissal by advancing the argument that requiring payment from a prisoner helps to quash frivolous cases and ultimately saw Mr. Hill's choice to send money home and make prison canteen purchases as a prioritization of personal comforts over his litigation.[56]

Mr. Hill's request to proceed *in forma pauperis* on appeal was also denied.[57] The appellate court adopted the district court's reasoning by finding Mr. Hill's appeal to be unreasonable.[58] As a result, once the case was dismissed, Mr. Hill was responsible for immediately paying the appellate filing fee.[59]

IV. ANALYSIS

Trial courts receive vague and fragmented instructions regarding *in forma pauperis* motions and procedures.[60] The lack of standards leads to

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *See* Cosby v. Meadors, 351 F.3d 1324, 1327 (10th Cir. 2003).
56. *Hill*, 623 F. App'x at 625–26.
57. *Id.* at 626.
58. *Id.*
59. *Id.*
60. *See* Catz & Guyer, *supra* note 10, at 683.

cases like Mr. Hill's. The trial court has wide discretion on procedural issues for *in forma pauperis* cases but no clear boundaries to guide it—or litigants—in pursuing fair access to the judicial system.[61] Discretion provides flexibility, but flexibility can lead to injustice when not coupled with proper boundaries. This court erred in dismissing Mr. Hill's original action due to lack of payment and its holding finding his appeal to be frivolous.[62]

A. The Dismissal

1. The Purpose of *In Forma Pauperis*

The rights of indigent litigants to access the American justice system fueled the passage of the *in forma pauperis* statute, and these rights should be given weight when deciding whether to dismiss a case for slight procedural defects.[63] Initially, courts construed the *in forma pauperis* statute narrowly.[64] However, Congress rebuffed such attempts through subsequent amendments that broadened the scope and amenities granted under the statute.[65] Courts are rightfully concerned with preventing burdensome and frivolous litigation.[66] But as the Honorable William O. Douglas opined, concern is a "dim view" in light of the potential dangers of injustice.[67] Justice Jerome Frank suggested that in the interest of saving one—just one—meritorious pauper appeal out of a hundred, the considerable expense of appointing more judges is warranted.[68]

The review for abuse of discretion gives great deference to a lower court's decision, but when a statute has a remedial purpose and there is a lack of explicit guidance, the court's decision should be viewed through the lens of the legislative intent.[69] The outer bounds of a judge's permitted action should not be the sole determination of whether a

61. *See id.*
62. *Hill*, 660 F. App'x at 626.
63. *See* Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute– Equality and Frivolity*, 54 FORDHAM L. REV. 413, 413–14 (1985).
64. *See* Catz & Guyer, *supra* note 10, at 657.
65. *See id.*
66. *See* Feldman, *supra* note 63, at 414–15.
67. William O. Douglas, *In Forma Pauperis Practice in the United States*, 2 N.H. B.J. 5, 9 (1959).
68. *Id.*
69. *See* Catz & Guyer, *supra* note 10, at 663.

judge's dismissal for a procedural flaw was an abuse of discretion for *in forma pauperis* cases. Debate centered around whether the merits of a case should be considered before granting *in forma pauperis* status points towards a desire to allow litigants to proceed to a stage where they can flesh out the merits of their case before a judge.[70] Dismissing cases for slight procedural defects at the outset of the litigation defeats that desire.

When a trial court refuses to grant a motion to proceed *in forma pauperis*, it is considered an appealable order under the *Cohen* doctrine.[71] Under the *Cohen* doctrine, a decision is final when it resolves an important issue and the resolution leads to an unreviewable outcome on appeal.[72] Because litigants cannot afford to proceed with a case unless they are granted *in forma pauperis* status, the decision is immediately reviewable on appeal.[73] This concept holds true for *in forma pauperis* cases that are not certified by a trial court to proceed *in forma pauperis* on appeal.[74] Without the appellate court's approval to reduce the initial filing fee and arrange a payment plan, litigants are immediately liable to the court for several hundred dollars. The looming possibility of crippling liability is a disincentive for indigent litigants as opposed to wealthier litigants. The gravity of a court denying a litigant the right to proceed *in forma pauperis* advances the argument that the facts should be reviewed leniently and in favor of the plaintiff.

Many litigants utilizing the *in forma pauperis* statute are pro se prisoners.[75] These plaintiffs are at a particular disadvantage when it comes to parsing and understanding the rules of civil procedure.[76] The court's reluctance to award Mr. Hill's request for additional notice a month before his initial payment's due date reflects a rigidity in court proceedings that undermines the congressional intent to provide each litigant with equal access to the judicial system.[77]

70. *See id.* at 673–75.
71. *See* Roberts v. U.S. Dist. Court for the N. Dist. of Cal., 339 U.S. 844, 845 (1950).
72. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).
73. *See id.* at 546–57.
74. *See id.* at 545.
75. Feldman, *supra* note 63, at 419.
76. *Id.*
77. Hill v. Fort Leavenworth Disciplinary Barracks, 660 F. App'x 623, 625–26 (10th Cir. 2016).

2. Mr. Hill's Actions

The court's dismissal of Mr. Hill's case, due to insufficient funds in his account from prison canteen purchases, is flawed because Mr. Hill requested to be notified a month in advance before a fee was due to ensure he had enough money in his account. Those purchases were made prior to the court's decision to grant the *in forma pauperis* motion.[78] Mr. Hill waited four months before receiving the court's ruling on his motion.[79] At that point the court confirmed Mr. Hill's prison account did not have sufficient funds to remit the initial filing fee.[80] The court relied on a previous decision to assert that a prisoner who chooses to spend money on personal comforts rather than pay his litigation fees has surrendered his right to litigate.[81]

But unlike Mr. Hill's case, previous judgment was rendered when a prisoner was aware of his initial filing fee and then proceeded to spend his account to a balance below the threshold needed for the court to exact payment.[82] The plaintiff had notice of the requirement to pay the filing fee and received deposits to his account after the motion was granted.[83] Instead of paying for the initial filing fee, the plaintiff chose to spend money on personal comforts for over five months.[84] In a different case the court expressly stated it was not attempting "to deny a prisoner access to the courts" but was "requir[ing] the prisoner to consider whether the merits of his claim are worth the cost of bringing the action."[85] This consideration is only fairly applied if a prisoner makes a fully informed decision to spend money at the canteen instead of paying filing fees and is cognizant of the fact this will result in the loss of the right to litigate.

The court is silent on exactly when Mr. Hill's account dropped below the $10 threshold.[86] But the opinion states that on April 11, when Mr. Hill filed his motion to proceed indigent, his account lacked

78. *See id.*
79. *Id.*
80. *Id.*
81. *Id.* at 626.
82. *See* Cosby v. Meadors, 351 F.3d 1324, 1327–30 (10th Cir. 2003).
83. *See id.*
84. *See id.* at 1330.
85. *See* Baker v. Suthers, 9 F. App'x 947, 950 (10th Cir. 2001).
86. *See Hill*, 660 F. App'x at 625–26.

sufficient funds.[87] Mr. Hill was not making a flagrant decision to spend his money on personal comforts rather than meet a court-ordered mandate to pay his reduced filing fee by the due date. He was simply unaware of when the court would respond to his motion.

After Mr. Hill received a deposit to his account, he paid his reduced initial filing fee.[88] This payment coincided with Mr. Hill filing his appeal.[89] There was a discrepancy in the timing; Mr. Hill received the deposit on April 12, which was two days before the April 14 deadline.[90] However, it is possible Mr. Hill anticipated the money would not reach the court before the deadline. Additionally, Mr. Hill had filed a motion to proceed indigent and could have been mistaken as to whether the initial filing fee was still due.[91] Before the court granted Mr. Hill's motion to proceed *in forma pauperis*, it gave Mr. Hill leave to correct the forms he initially submitted to the court.[92] Mr. Hill responded to that order and made the corrections twenty days before the due date.[93] Mr. Hill demonstrated an overall willingness to pay his filing fee and a desire to continue his litigation. These actions should be construed generously in Mr. Hill's favor because he proceeded pro se.[94] His right to the court system should not be undercut when his actions are completely void of flagrant bad faith or a cognizant desire to prioritize other amenities above his right to litigate.

3. The District Court's Actions

The district court had the authority to dismiss the case, but because of the method utilized, the court's actions are an abuse of discretion. Mr. Hill did not receive adequate time and notice. In addition, it is unclear if the court made the necessary inquiries into Mr. Hill's attempt to pay his initial filing fee.

No codified rule exists regulating the amount of time granted to a pro se litigant to pay their initial filing fee after being granted the right to proceed *in forma pauperis*. Other circuits give prisoners twenty to thirty

87. *Id.*
88. *Id.* at 625.
89. *Id.*
90. *Id.* at 625–26.
91. *See id.* at 625–26.
92. *Id.* at 624.
93. *Id.*
94. *Id.*

days, beginning with the day the motion is granted, to comply with the court order regarding filing fees for *in forma pauperis* cases.[95] The prevailing practice among trial courts in the Tenth Circuit is to allow thirty days after a court order for the plaintiff to comply.[96] At the outset of Mr. Hill's case, the court gave him thirty days to resubmit his complaint using the correct forms.[97] Mr. Hill promptly complied.[98] But after receiving the correct forms and granting the *in forma pauperis* motion, the trial court gave Mr. Hill only fourteen days to fulfill the requirement to pay his court ordered fee.[99] The court did not mention what motivated it to truncate the time allotted for compliance. Mr. Hill did not have a record of flouting court orders or bad faith. Nor did the court explicitly state an administrative need for the filing fee to be paid by an accelerated deadline.

Not only was the initial payment due date less than half of the thirty-day standard allotment, the dismissal eight days later does not comport with the actions of most courts. If pro se prisoners miss their payment date, a court will often allow another thirty days before holding a show cause hearing.[100] The Tenth Circuit has even given a prisoner two months to pay off the initial filing fees before dismissing the plaintiff's case.[101] Here, the court dismissed Mr. Hill's case eight days after his initial filing fee was due without holding a show cause hearing.[102] The Tenth Circuit held that" [b]efore a district court can dismiss a prisoner's action for failing to comply with a fee order under the Prisoner Litigation Reform Act, the court must at least give the prisoner an adequate opportunity to comply."[103] While the court never explicitly stated what constitutes an adequate opportunity, the upper bounds have extended to a court

95. *See* Redmond v. Gill, 352 F.3d 801, 802–03 (3d Cir. 2003); Taylor v. Delatoore, 281 F.3d 844, 846 (9th Cir. 2002); Larson v. Scott, 157 F.3d 1030, 1031 (5th Cir. 1998); Wilder v. Chairman of Cent. Classification Bd., 926 F.2d 367, 369 (4th Cir. 1991).

96. *See* Brown v. Beck, 203 F. App'x 907, 908–09 (10th Cir. 2006); Florence v. Decker, 153 F. App'x 478, 479 (10th Cir. 2005); Baker v. Suthers, 9 F. App'x 947, 948 (10th Cir. 2001).

97. *See Hill*, 660 F. App'x at 624.

98. *See id.*

99. *Id.*

100. *See Brown*, 203 F. App'x at 909; *Florence*, 153 F. App'x at 479; Cosby v. Meadors, 351 F.3d 1324, 1324 (10th Cir. 2003).

101. *See Florence*, 153 F. App'x at 479.

102. *Hill*, 660 F. App'x at 625.

103. *Brown*, 203 F. App'x at 909–10 (citing Redmond v. Gill, 352 F.3d 801, 803–04 (3rd Cir. 2003)).

notifying a prisoner twice that without paying the filing fee the case would be dismissed, allotting the prisoner thirty days to respond after each court order, and waiting two months after a show cause order before dismissing the case.[104] Here, the trial court fell short by not giving Mr. Hill an adequate opportunity to comply with its order. Mr. Hill received one notice saying his case would be dismissed if he did not pay the filing fees. He received only fourteen days to respond to the court order, and the case was dismissed only eight days after the payment date passed.[105]

In addition to the failure to afford Mr. Hill adequate opportunity to comply, the court also failed to take into consideration Mr. Hill's actions to comply with its order. Before a prisoner's complaint is dismissed, the Tenth Circuit requires the court to take reasonable steps to see if the plaintiff took measures to meet the court-ordered fee by authorizing withdraws from the prisoner's account.[106] Here, the record does not reflect such an inquiry. There is a dearth of discussion on the topic. But the record does reflect that Mr. Hill paid the initial filing fee after filing his appeal.[107] Mr. Hill also complied with previous court requests.[108] And Mr. Hill did not spend his prison account to zero after being informed of his initial reduced filing fee.[109] If the court were to balance the actions of Mr. Hill, it would see that he has taken reasonable steps to pursue his litigation.

B. The Appeal

1. Frivolous Argument

The personal facts, lack of notice, and diversion from court procedural norms in Mr. Hill's case produce a reasoned argument. Mr. Hill advanced that argument through appeal, in good faith, devoid of any motivation to advance frivolous litigation. Appeals in the Tenth Circuit may proceed *in forma pauperis* if the plaintiff has insufficient funds and the appeal constitutes a "nonfrivolous argument on the law and facts in

104. *See id.*
105. *Hill*, 660 F. App'x at 624–25.
106. Cosby v. Meadors, 351 F.3d 1324, 1331 (10th Cir. 2003) (citing Wilson v. Sargent, 313 F.3d 1315, 1320–21 (11th Cir. 2002)).
107. *Id.*
108. *Id.* at 624.
109. *See id.* at 625–26.

support of the issues raised on appeal."[110] Because both the trial and appellate courts did not find Mr. Hill's appeal to meet this standard, he was unable to proceed *in forma pauperis*.

The Supreme Court extends "less stringent standards" to the pleadings of pro se plaintiffs.[111] This policy suggests that the Court allows more flexibility in compliance with procedural regulations when a plaintiff is not represented by counsel. This flexibility allows plaintiffs to have a fair chance of reaching a stage of litigation that allows them to argue the merits of their claims. Without counsel, plaintiffs are less likely to be aware of and track the complex requirements of procedural rules. Mr. Hill asked the court to give him a one-month notice before the due date of his initial fee, but the court declined to do so.[112] In fact, it would be impossible for the court to grant Mr. Hill's simple request because it extended him less than a month for compliance. Mr. Hill's request reflects his attempt to comply with the court's order; the refusal to oblige Mr. Hill's request reflects the court's lack of flexibility.

In a maneuver displaying further rigidity, the court denied Mr. Hill's request to proceed *in forma pauperis* on appeal.[113] The district court is the first body to determine whether an appeal from its court should proceed *in forma pauperis*.[114] The appellate court reviews the district court's decision on a de novo basis.[115] The practice of allowing a district court to determine if an appeal from its own court is frivolous or malicious should require strict scrutiny. In deeming an appeal nonfrivolous, the district court is implying its decision could be soundly overruled. The district court's decision is only fairly determined if centered on the facts pertaining to a plaintiff's actions to comply with a court order or if the district court met the required procedural rules. But again, because of the lack of express procedural rules, both the plaintiff's and court's actions should be viewed through the lens of the legislative intent—to provide equal access to justice—and this intent is furthered by the court's decision to extend less stringent standards to pro se plaintiff's claims. Mr. Hill repeatedly showed his desire to continue his litigation as

110. *See* Scott v. Milyard, 350 F. App'x 213, 216 (10th Cir. 2009) (quoting McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 812 (10th Cir. 1997)).

111. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

112. *Hill*, 660 F. App'x at 626.

113. *Id.*

114. 28 U.S.C. § 1915(a)(3) (2012).

115. Cruz v. Hauck, 404 U.S. 59, 62–63 (1971) (Douglas, J., concurring).

previously discussed. And the court's decision to dismiss Mr. Hill's case without providing the thirty-day window to respond to its order presents a reasoned and nonfrivolous legal argument.

Further, the Supreme Court supports the right of indigent plaintiffs to have a full review of their cases on the merits.[116] The advocacy extends to both criminal and civil appeals.[117] If a lower court's decision that a prisoner has received a fair trial were enough to block appellate review for an indigent plaintiff, justice would not be served. The Court points out how this conduct would bar an indigent person from appealing, but paying plaintiffs would be able to proceed with their litigation.[118] The Court's overarching goal is to afford "[e]qual [j]ustice [u]nder [l]aw" to non-paying litigants.[119] In a case centered on the procedural requirements for paying a transcript fee, the Court held that failure to pay a twenty-dollar sum should not hinder a plaintiff's ability to proceed with an appeal.[120] Mr. Hill never received a judgment on the merits of his claim, instead the claim was dismissed for the failure to pay a paltry sum of $16.50.[121] Mr. Hill's access to the judicial system was disrupted in a manner that a wealthier litigant would not have faced. This form of disruption is contrary to the purpose behind the *in forma pauperis* statute.

2. Dismissal's Impact

The combined effect of dismissing Mr. Hill's case for a slight procedural defect and blocking his appeal from proceeding *in forma pauperis* is an extreme sanction.[122] A court can effectively use two arguments to deny an indigent plaintiff a judgment on the merits of his case. The first argument asserts that a prisoner retains the safeguard of refiling his case in dismissals without prejudice.[123] This argument defends a court's wide discretion to dismiss *in forma pauperis* cases without prejudice. The second argument defends a court's ability to

116. *See Cruz*, 404 U.S. at 61 n.8; Lane v. Brown, 372 U.S. 477, 484 (1963); Burns v. Ohio, 360 U.S. 252, 257–58 (1959).
117. *See Cruz*, 404 U.S. at 61–63.
118. *See Lane*, 372 U.S. at 484.
119. *See Burns*, 360 U.S. at 258.
120. *See id.* at 255, 258.
121. Hill v. Fort Leavenworth Disciplinary Barracks, 660 F. App'x 623, 625–26 (10th Cir. 2016).
122. *See id.* at 625–26.
123. *See* Brown v. Beck, 203 F. App'x 907, 910–11 (10th Cir. 2006).

refuse granting an *in forma pauperis* motion because it encourages frivolous and expensive litigation.[124] This is furthered through the *in forma pauperis* statute, which provides a three-strikes rule.[125]

The first argument does not provide full relief to Mr. Hill because the safeguard will often fail to protect a plaintiff's rights. While dismissing Mr. Hill's action without prejudice does not bar him from refiling, it does require him to pay filing fees again. Additionally, because Mr. Hill's appeal was not allowed to proceed *in forma pauperis*, Mr. Hill is now required to pay the full cost of filing an appeal; this cost is over $500.[126] This leaves Mr. Hill two options: he can wait until he has the requisite funds, or he can file the case again and submit a motion to proceed *in forma pauperis*.[127]

Mr. Hill's financial situation makes waiting until he has the requisite funds a null option. Waiting will effectively bar him from bringing his case before the statute of limitations lapses. The second option is to refile and submit another motion to proceed *in forma pauperis*. However, this process will end up increasing the cost of his litigation. This is so because the court will need to reprocess his claim, incurring overhead and labor costs. And again, the court will grant Mr. Hill's motion to proceed *in forma pauperis* because his account will surely stay below $10 as he pays his appellate filing fees. Those who advance the second argument, that *in forma pauperis* cases create an undue financial burden on courts, will disfavor this option and use these types of scenarios as exemplars of why further restrictions should be placed on *in forma pauperis* cases. A trial court could use both arguments to bolster its exercise of discretion in dismissing and not certifying *in forma pauperis* cases.

A court's discretion to choose a sanction is not without limit.[128] The sanction must be just and tailored to achieve the desired effect without overstepping.[129] Dismissing a case is normally considered a severe sanction, and a slight procedural misstep deserves a less severe

124. *See* Douglas, *supra* note 67, at 9.

125. *See* 28 U.S.C. § 1915(g) (2012).

126. *Court Fees*, THE UNITED STATES CT. OF APPEALS FOR THE TENTH CIR., HTTPS://PERMA.CC/J26E-AWXC (last visited September 1, 2018).

127. *See Brown*, 203 F. App'x at 911 (first citing Lemons v. K.C. Mo. Police, 158 F. App'x 159, 160 (10th Cir. 2005)); and then House v. Utah, 129 F. App'x 432, 434 (10th Cir. 2005)).

128. *See* Ehrenhaus v. Reynolds, 965 F.2d 916, 920 (10th Cir. 1992).

129. *See id.*

punishment.[130] To safeguard against an inappropriate use of severe sanctions, the lower court must consider a host of criteria on the record.[131] The factors must show the plaintiff's noncompliant actions "outweigh the judicial system's strong predisposition to resolve cases on their merits."[132] For *in forma pauperis* cases, courts have found dismissal without prejudice to be an appropriate and effective sanction because a financial sanction is not effective due to the plaintiff's monetary plight.[133] However, the dismissal mainly operates as a financial sanction to the plaintiff. The plaintiff is still liable for filing fees incurred during the first action and for any filing fees in the future.

In addition, each dismissal of an *in forma pauperis* case is a severe sanction due to the provisions of 28 U.S.C. § 1915.[134] The statute requires courts to count how many of a plaintiff's filed claims were dismissed because they were "frivolous, malicious, or fail[ed] to state a claim."[135] If a court finds a prisoner filed three of the above claims, the prisoner is barred from bringing another civil action unless he or she is in imminent danger or can pay the full filing fee upfront.[136] Any dismissal of the action can bring the prisoner one step closer to being barred from filing another claim. Because courts treat any dismissal that bars a plaintiff from bringing a claim as severe, a dismissal under 28 U.S.C. § 1915 is severe.[137]

Due to the severity of dismissing the case, the court's opinion should have evaluated the factors put forth in *Erenhaus v. Reynolds*.[138] The

130. *See id.*
131. *See id.* at 921.
132. *See id.* (quoting Meade v. Grubbs, 841 F.2d 1512, 1521 n.7 (10th Cir 1988)).
133. *See* Florence v. Decker, 153 F. App'x 478, 480 (10th Cir. 2005).
134. *See* 28 U.S.C. § 1915(g) (2012).
135. *Id.*
136. *Id.*
137. *See Ehrenhaus*, 965 F.2d at 920 (citing Meade v. Grubbs, 841 F.2d 1512, 1520 (10th Cir. 1988); M.E.N. Co. v. Control Fluidics, Inc., 834 F.2d 869, 872–73 (10th Cir. 1987); In re Standard Metals Corp., 817 F.2d 625, 628–29 (10th Cir.1987)).
138. *Ehrenhaus*, 965 F.2d at 921.

> Before choosing dismissal as a just sanction, a court should ordinarily consider a number of factors, including: '(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; . . . (3) the culpability of the litigant,' (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

court's dismissal without developing a record of the enumerated factors denied Mr. Hill his due process rights. Administering those due process rights would require weighing the damage of Mr. Hill's slight procedural misstep against the prejudice he would incur from the dismissal of his case. That analysis would reflect an imbalance. Mr. Hill's failure to pay the filing fee within the truncated time allotted does not override the predisposition of the court to decide a case on its merits.

V. CONCLUSION

The court's use of discretion to dismiss Mr. Hill's case after allowing only fourteen days to comply with a court order was an abuse of discretion. There was not a pressing need for the court to halve the usual time allotted for compliance nor for the absence of a show cause hearing. The facts developed on the record show Mr. Hill desired to have the merits of his case litigated, and he did not explicitly choose material comforts over asserting his right to the courts.

Furthermore, the appellate court's decision to affirm the trial court's ruling and not allow the appeal to be taken *in forma pauperis* prejudiced the plaintiff.[139] The actual effect of imposing the full appellate cost immediately on Mr. Hill prevented him from refiling his case, blocking any chance of receiving a judgment on the merits. Further, the only reason Mr. Hill's appeal was not taken *in forma pauperis* was because the court found his argument to be unreasonable and frivolous.[140] But in light of the arguments put forth in this Comment, Mr. Hill had standing to appeal.

While the court's desire to enforce court orders and prevent costly and meritless litigation is commendable, those desires should not override an indigent pro se litigant's access to the justice system. The overriding interest of Congress is to preserve the promise taught to school children and citizen applicants alike; the promise that the United States is "one Nation under God, indivisible, with liberty and justice for all."[141]

Id. (citations omitted).

139. *See id.* at 626.

140. *Id.*

141. *See* Nie, *supra* note 1, at 1464 (quoting 4 U.S.C. § 4 (2006)).