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## The Prison Mailbox Rule: Can Represented Incarcerated Litigants Benefit?

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# THE PRISON MAILBOX RULE: CAN REPRESENTED INCARCERATED LITIGANTS BENEFIT?

*Nico Corti\**

*In 1988, the U.S. Supreme Court created the “Prison Mailbox Rule,” which assesses the timeliness of incarcerated litigants’ filings based on the day they hand them to prison authorities. The rule reduces the structural barriers to filing while imprisoned. Although Houston v. Lack highlighted the unique challenges that pro se incarcerated litigants face, the Prison Mailbox Rule’s subsequent federal codifications did not limit its benefits to pro se litigants, despite purportedly “reflecting” the Houston decision. Federal circuit courts of appeal today are split on whether represented people in prison can benefit from the Prison Mailbox Rule, leaving both litigants and judges with the “unenviable” task of determining who is represented by counsel.*

*At the conflict’s core is a disagreement about whether incarcerated or freed litigants are in the same position when represented by counsel. This Note argues that, even when represented, people in prison face significant barriers to filing that outside litigants do not. Moreover, Houston never explicitly limited the rule to pro se litigants, and the rule’s policy justifications apply equally to those represented by counsel. Accordingly, this Note advocates for the Supreme Court to explicitly hold that all incarcerated litigants are entitled to the benefits of the Prison Mailbox Rule. This bright-line rule would enable courts to apply the Prison Mailbox Rule consistently and predictably, removing a barrier to filing for people in prison. Indeed, that is what the Prison Mailbox Rule was created to do.*

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#### INTRODUCTION

Accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this foundational protection through the courts, most of the rest of our promises of liberty and justice for all remain a mockery for the poor and the oppressed.

–Judge Jack B. Weinstein<sup>1</sup>

The night before his filing deadline, Andrew Justice realized that his geographical mistake could cost his client dearly.<sup>2</sup> Justice’s client, Blake Cretacci, was incarcerated in Coffee County Jail, which Justice previously thought was in the Middle District of Tennessee, where he was admitted to practice law.<sup>3</sup> He realized, however, that the jail is in the Eastern District of Tennessee, where Justice was not admitted to practice.<sup>4</sup> Justice, therefore, could not electronically file his client’s 42 U.S.C. § 1983 complaint against the county, the jail, and several jail officials.<sup>5</sup> If he failed to file the complaint the next day, his client’s § 1983 claim would be time-barred.<sup>6</sup>

The next morning, Justice scrambled to salvage the situation. He realized that he did not have time to seek admission in the proper district, so he drove to the Winchester courthouse in the Eastern District of Tennessee and tried

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1. Jack B. Weinstein, *The Poor’s Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 655 (1981).

2. *Cretacci v. Call*, 988 F.3d 860, 864 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 400.

3. *See id.*

4. *See id.*

5. *See id.* at 865.

6. *See id.*

to file the complaint in person.<sup>7</sup> Documents cannot be filed in person there, however, because it does not have a staffed clerk's office.<sup>8</sup>

Growing desperate, Justice turned to a procedural rule that benefits people in prison.<sup>9</sup> He rushed the complaint to Cretacci at the jail and told him to deliver it to a prison official immediately to take advantage of the "Prison Mailbox Rule" (the "Rule").<sup>10</sup> The Rule, as articulated by the U.S. Supreme Court in *Houston v. Lack*,<sup>11</sup> assesses the timeliness of litigants' filings on the day they hand them to prison authorities, rather than on when the court clerk receives them.<sup>12</sup> As instructed, Cretacci handed the papers to prison officials on the last day of his filing period.<sup>13</sup>

Justice's efforts failed. The U.S. Court of Appeals for the Sixth Circuit held that Cretacci could not benefit from the Prison Mailbox Rule because he was represented by counsel at the time he handed the complaint to prison officials.<sup>14</sup> Judge Chad A. Readler concurred but noted that determining whether an imprisoned litigant is "represented" is often "no easy task."<sup>15</sup> Indeed, does a litigant file a complaint *pro se*<sup>16</sup> if they hand it to prison officials themselves?<sup>17</sup> What if a litigant did not retain an attorney but received some legal advice before filing themselves?<sup>18</sup>

Courts struggle to answer these questions consistently.<sup>19</sup> To avoid these "thorny" questions of representation, Judge Readler advocated for the Judicial Conference of the United States Committee on Rules of Practice and Procedure (the "Standing Committee") to adopt a rule, governing civil complaints, that would mirror Federal Rule of Appellate Procedure 4(c) ("Rule 4(c)").<sup>20</sup> That federal rule appeared to establish a bright-line rule allowing all incarcerated litigants to use the Prison Mailbox Rule when they

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7. *See id.* at 864–65.

8. *See id.* at 865.

9. This Note refers to people in prison as "people in prison" to emphasize their humanity. *See* Seema Saifee, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53, 65 (2022); *see also* Open Letter from Eddie Ellis, Ctr. on NuLeadership for Urb. Sols. 1–2 (2017), <https://cmjcenter.org/wp-content/uploads/2017/07/CNUS-AppropriateLanguage.pdf> [<https://perma.cc/A6EY-YG65>] ("We habitually underestimate the power of language. . . . We think that by insisting on being called 'people' we reaffirm our right to be recognized as human beings, not animals, inmates, prisoners or offenders.").

10. *See Cretacci*, 988 F.3d at 865.

11. 487 U.S. 266 (1988).

12. *See id.*

13. *See Cretacci*, 988 F.3d at 865.

14. *See id.* at 866.

15. *Id.* at 872 (Readler, J., concurring).

16. *Pro se*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("For oneself; on one's own behalf; without a lawyer.").

17. *Compare* *United States v. Carter*, 474 F. App'x 331, 333 (4th Cir. 2012) (holding that a represented incarcerated litigant files *pro se* if they hand the filing to prison officials themselves), *with Cretacci*, 988 F.3d at 864–65 (holding that the fact that a represented incarcerated litigant filed the complaint themselves did not mean that they had filed the complaint *pro se*).

18. *Compare infra* notes 181–82, *with infra* note 183.

19. *See infra* Part II.

20. *Cretacci*, 988 F.3d at 872–73 (Readler, J., concurring).

file a notice of appeal.<sup>21</sup> Absent such a rule, courts interpret *Houston* differently, resulting in conflicting applications of the Prison Mailbox Rule.<sup>22</sup> Had Cretacci fired his attorney before handing the complaint to the prison officials,<sup>23</sup> or filed a notice of appeal instead of a civil complaint,<sup>24</sup> or been incarcerated in Virginia, where the U.S. Court of Appeals for the Fourth Circuit applies the Prison Mailbox Rule to all incarcerated litigants,<sup>25</sup> his complaint may have been timely.

These inconsistent results demonstrate the need to clarify and reconcile the Prison Mailbox Rule's application to incarcerated litigants represented by counsel. Like pro se incarcerated litigants, represented incarcerated litigants often struggle to understand numerous filing requirements,<sup>26</sup> and they face a multitude of barriers to communicating with their attorneys.<sup>27</sup> Thus, the policy considerations underpinning the *Houston* decision apply equally to represented incarcerated litigants.<sup>28</sup>

Accordingly, this Note argues that the Prison Mailbox Rule should apply equally to all people in prison, because, even when represented, incarcerated people are not in the same position as outside litigants.<sup>29</sup> Additionally, the Supreme Court is in the best position to provide such guidance, because the Rule's federal codifications are designed to reflect the Court's *Houston* decision.<sup>30</sup>

Part I provides background on the common-law mailbox rule (the "Common Law Rule"), the judicially created Prison Mailbox Rule, and the Rule's federal codifications. Part II examines conflicting viewpoints about whether incarcerated litigants represented by counsel can benefit from the Prison Mailbox Rule. Part III advocates for the Supreme Court to interpret *Houston* to allow all incarcerated litigants to benefit from the Prison Mailbox Rule. This would most efficiently ensure a consistent and predictable application of the Rule, while remaining faithful to the *Houston* holding and its reasoning.

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21. See *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004) (holding that a plain reading of Rule 4(c) entitles represented incarcerated litigants to benefit from the Rule); see also FED. R. APP. P. 4(c).

22. See *infra* Part II.

23. See *Cretacci*, 988 F.3d at 872–73 (Readler, J., concurring) (noting that a litigant would be unrepresented if “[she] fire[d] her counsel immediately before she turns her complaint over to a prison official”).

24. See FED. R. APP. P. 4(c); *Craig*, 368 F.3d at 740 (allowing a represented incarcerated litigant to benefit from the Prison Mailbox Rule when filing his notice of appeal).

25. See *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994); *infra* Part II.B.

26. See *infra* notes 69–72 and accompanying text; see also Howard M. Rubin, *The Civil Pro Se Litigant v. the Legal System*, 20 LOY. U. CHI. L.J. 999, 1000 (1989).

27. See *infra* notes 55–63 and accompanying text.

28. See *infra* Part III.B.

29. See *infra* Part III.A.1.

30. See *infra* Part III.B.1.

## I. THE MAILBOX RULE'S ORIGINS AND ITS APPLICATION TO INCARCERATED LITIGANTS

The Common Law Rule originated from an early seventeenth century British contract dispute<sup>31</sup> and evolved into a major American contract doctrine taught in every first-year law school curriculum.<sup>32</sup> The policy rationale for the Common Law Rule later underpinned the policy justifications for the Prison Mailbox Rule.<sup>33</sup> This part provides background on the Common Law Rule's development and its current application to incarcerated litigants' prison filings. Part I.A introduces the mailbox rule's British common-law origins and provides a brief overview of the way in which American courts later adopted the doctrine. Part I.B discusses the cruel realities of trying to litigate while incarcerated, both with and without the assistance of counsel. Part I.C examines the judicially created Prison Mailbox Rule that extends the principles of the Common Law Rule to pro se incarcerated litigants. Finally, Part I.D details the Prison Mailbox Rule's federal codifications.

### A. The Common-Law Mailbox Rule

The Court of King's Bench first articulated the mailbox rule in *Adams v. Lindsell*.<sup>34</sup> On September 2, 1817, the defendants, local wool dealers, mailed a letter to the plaintiffs, local wool manufacturers, offering to sell them wool fleeces.<sup>35</sup> The night the buyers received the offer letter, they mailed back an acceptance letter that was subsequently delayed.<sup>36</sup> The delay caused the sellers to mistakenly believe that the offer was rejected, so they sold the fleeces to another party.<sup>37</sup> The buyers sued for the losses they sustained as a result of not receiving the fleeces.<sup>38</sup>

The court in *Lindsell* held that mailing the acceptance letter triggered contract formation.<sup>39</sup> The court rejected the "receipt rule"—whereby contract formation only occurs when the offeror receives the acceptance—because of its "inherent uncertainty."<sup>40</sup> Reasoning instead that the offer was continuous while in transit, the court held that the contract was formed by the

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31. See *infra* notes 34–39 and accompanying text.

32. See Evan W. Bolla, *It's in the Mail: Issues Concerning Commercial Contracts in a Time of Delayed Mail*, AM. BAR ASS'N (Sept. 14, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/09/its-in-the-mail/](https://www.americanbar.org/groups/business_law/publications/blt/2020/09/its-in-the-mail/) [<https://perma.cc/MZ92-M77T>].

33. See *Faile v. Upjohn Co.*, 988 F.2d 985, 987 (9th Cir. 1993) (noting that "*Houston* relies on policy concerns surrounding the pro se prisoner's lack of control over delays").

34. (1818) 106 Eng. Rep. 250 (KB).

35. See *id.* at 250–52.

36. See *id.*

37. See *id.*

38. See *id.*

39. See *id.* at 251.

40. Courtenay Canedy, Comment, *The Prison Mailbox Rule and Passively Represented Prisoners*, 16 GEO. MASON L. REV. 773, 774–75 (2009); see also *Lindsell*, 106 Eng. Rep. at 251.

buyer's acceptance.<sup>41</sup> This continuing-offer approach purported to provide the "certainty that parties contracting at arms-length needed."<sup>42</sup>

American courts later adopted the mailbox rule and emphasized two additional rationales—agency and lack of control—to justify its application.<sup>43</sup> The agency rationale argues that the post office has become a "common agent" of both parties when the offer is sent by mail and is thus able to make contracts on behalf of its principals.<sup>44</sup> The lack-of-control rationale argues that, by placing the acceptance in the mail, the offeree has surrendered control over it.<sup>45</sup> And, "[i]f a party does all that he can do . . . [h]ow can he be responsible for that over which he has no control?"<sup>46</sup>

Today, the Restatement (Second) of Contracts,<sup>47</sup> the Uniform Commercial Code,<sup>48</sup> and state courts<sup>49</sup> have all adopted the Common Law Rule in various formulations. While the Prison Mailbox Rule concerns the timeliness of filings, not contract formation, the Common Law Rule's lack-of-control rationale informed much of the Supreme Court's reasoning in extending the mailbox rule to incarcerated litigants in *Houston*.<sup>50</sup> Before Parts I.C and I.D explore the *Houston* decision and its subsequent federal codifications, Part I.B discusses the realities of being an imprisoned litigant, which underpin the Supreme Court's policy justifications in *Houston*.

### *B. The Realities and Challenges of Litigating from Prison*

The U.S. Constitution guarantees incarcerated people the right to meaningful access to the courts.<sup>51</sup> Some restrictions on this access, however, are allowed to accommodate prisons' administrative concerns, which include (1) maintaining security and order, (2) preventing the introduction of contraband, (3) preventing regular users from dominating library resources, and (4) observing budget constraints.<sup>52</sup> These justifications give prisons broad discretion to limit litigants' access to legal resources.<sup>53</sup>

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41. See *Lindsell*, 106 Eng. Rep. at 251.

42. Canedy, *supra* note 40, at 774.

43. See Valerie Watnick, *The Electronic Formation of Contracts and the Common Law "Mailbox Rule"*, 56 BAYLOR L. REV. 175, 180–82 (2004).

44. Canedy, *supra* note 40, at 776.

45. See *id.*

46. *Dunlop v. Higgins* (1848) 9 Eng. Rep. 805, 812 (HL) (appeal taken from Scot.) (endorsing the British common-law mailbox rule and further articulating its rationale).

47. RESTATEMENT (SECOND) OF CONTRACTS § 63 (AM. L. INST. 1981).

48. See U.C.C. § 2-206(1) (AM. L. INST. & UNIF. L. COMM'N 2021).

49. See Canedy, *supra* note 40, at 775 ("The holding in *Adams v. Lindsell* has been widely accepted by state courts."); see also 2 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 6:32 n.4 (4th ed. 1991) (referencing several state court cases endorsing the Common Law Rule).

50. See *infra* notes 91–96 and accompanying text.

51. See *Substantive Rights Retained by Prisoners*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 915, 915–19 (2005).

52. See *id.*

53. See *id.*



At the same time, the judiciary affords some recognition that incarcerated litigants face a variety of restrictions on their movement<sup>54</sup> that result in practical difficulties in exercising their right to legal access.<sup>55</sup> They often struggle to communicate with their attorneys because facilities cannot handle enough phone calls.<sup>56</sup> For instance, the Metropolitan Detention Center in Brooklyn, New York, can only handle “15 to 20 phone calls a day for its 1,700 inmates.”<sup>57</sup> Although the COVID-19 pandemic worsened these legal-access restrictions,<sup>58</sup> incarcerated litigants struggled to communicate with their attorneys long before the pandemic began.<sup>59</sup>

Prisons also restrict other forms of communication. Prison officials sometimes delay or destroy legal mail.<sup>60</sup> They can also read incarcerated people’s emails to their attorneys without violating attorney-client privilege.<sup>61</sup> Officials also sometimes force incarcerated people to call their attorneys from public spaces rather than from private rooms.<sup>62</sup> And, crucially, in-person counseling is often limited because prisons are typically

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54. In the United States, “over 300,000 people have reportedly been placed in solitary” confinement in 2020, where they spend “22 to 24 hours a day confined in cells that measure about 6 X 9 feet.” UNLOCK THE BOX, SOLITARY CONFINEMENT IS NEVER THE ANSWER 1–2 (2020), <https://static.prisonpolicy.org/scans/UTB-Report-62020.pdf> [<https://perma.cc/C9TM-J4CS>].

55. People subjected to solitary confinement or other types of restrictive housing such as administrative segregation are subjected to even more restrictions on their communications than the general prison population are. *See, e.g.*, Sarah Kline, *Confronting Administrative Segregation in Texas: Ending Automatic Lockdown for Suspected Gang Affiliated Members*, 19 TEX. TECH. ADMIN. L.J. 197, 198 (2018).

56. *See Fed. Defs. of N.Y. Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 124 (2d Cir. 2020).

57. Frank G. Runyeon, *Judge Warns NYC Prisons To “Do Better” on Attorney Access*, LAW360 (Apr. 3, 2020, 3:54 PM), <https://www.law360.com/articles/1260215/judge-warns-nyc-prisons-to-do-better-on-attorney-access> [<https://perma.cc/5QXX-F9AU>].

58. *See* Frank G. Runyeon, *NYC Prisons Rebuked for Blocking Sick Inmates’ Phone Calls*, LAW360 (Apr. 10, 2020, 4:54 PM), <https://www.law360.com/articles/1262671/nyc-prisons-rebuked-for-blocking-sick-inmates-phone-calls> [<https://perma.cc/44PG-N6X7>].

59. *See, e.g.*, Stephanie Clifford, *Prosecutors Are Reading Emails from Inmates to Lawyers*, N.Y. TIMES (July 22, 2014), <https://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html> [<https://perma.cc/NQ4K-MXRK>] (reporting that “a paralegal spent four days and left eight messages” requesting an unmonitored phone call for an inmate to speak with his attorney, but the detention center never responded, despite being required to allow such calls).

60. *See, e.g.*, *Smith v. O’Connor*, 901 F. Supp. 644, 649 (S.D.N.Y. 1995) (noting that corrections officers destroyed an incarcerated litigant’s legal papers); *Herrera v. Scully*, 815 F. Supp. 713, 723–24 (S.D.N.Y. 1993) (noting that corrections officer prevented plaintiff’s legal mail from arriving at court in a timely manner).

61. *See* Carrie Johnson, *When It Comes to Email, Some Prisoners Say Attorney-Client Privilege Has Been Erased*, NPR (Mar. 31, 2021, 7:00 AM), <https://www.npr.org/2021/03/31/982339371/when-it-comes-to-email-some-prisoners-say-attorney-client-privilege-has-been-erased> [<https://perma.cc/QE22-DVGQ>] (noting that officials from the Federal Bureau of Prisons may read all emails between incarcerated people and their attorneys); *see also* Kayla Stachniak, *Your Right to Communicate with the Outside World*, in COLUMBIA HUM. RTS. L. REV., A JAILHOUSE LAWYER’S MANUAL, at 585, 585 (11th ed. 2017).

62. *See* Runyeon, *supra* note 58 (reporting that prison officials were “forcing the inmates to speak to their attorneys in a public setting where others can listen in”).

located in remote, rural areas, leaving attorneys struggling to make long trips to meet with their clients.<sup>63</sup>

Even when access to attorneys is theoretically available, restrictions on incarcerated litigants' movement—including solitary confinement or any lockdown measures—become restrictions on their access to counsel.<sup>64</sup> Incarcerated people are also frequently transferred between prison facilities, and there “may be examples where weeks go by and families and lawyers don't know where a prisoner is.”<sup>65</sup> These transfers illustrate the way in which forces outside of an incarcerated litigant's control can make it difficult, if not impossible, for them to communicate with their attorneys.

Additionally, attorneys that represent incarcerated litigants are typically public defenders or attorneys from legal services organizations that provide services without charge.<sup>66</sup> These attorneys are consistently burdened with unsustainable workloads, insufficient support staff, and inadequate funding.<sup>67</sup> Thus, the hardest-to-reach clients are often represented by the most underfunded and overburdened attorneys<sup>68</sup> who may struggle to navigate the hurdles of communicating with their incarcerated clients.

Not only do incarcerated litigants face structural barriers to communicating with their attorneys, but they also face more filing requirements than outside litigants do because of the Prison Litigation Reform Act of 1995<sup>69</sup> (PLRA). Designed to address the perceived problem of growing amounts of frivolous prisoner civil rights suits, the PLRA contains a number of access provisions including a requirement that an incarcerated litigant exhaust available administrative remedies before bringing suit in federal court.<sup>70</sup> The exhaustion requirement is recognized as the PLRA's largest hurdle because of the “increasing complexity of prison

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63. See Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 463 n.216 (1993).

64. See *supra* notes 54–56 and accompanying text.

65. Clark Merrefield, *Uncovering the US Prisoner Transfer System and Alleviating Coronavirus Outbreaks in Prisons: Q and A with Emma Kaufman*, JOURNALIST'S RES. (Apr. 23, 2020), <https://journalistsresource.org/home/prisoner-transfer-emma-kaufman/> [<https://perma.cc/SQK4-B6P4>] (discussing legal scholar's latest research on prison transfers).

66. See AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* iv–vi (2004), <https://www.in.gov/publicdefender/files/ABAGideonsBrokenPromise.pdf> [<https://perma.cc/77PW-Z4WM>].

67. See BRYAN FURST, BRENNAN CTR. FOR JUST., *A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 1* (2019), [https://www.brennancenter.org/sites/default/files/2019-09/Report\\_A%20Fair%20Fight.pdf](https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf) [<https://perma.cc/TD7Q-3UDK>] (“[I]ndigent defense systems across the country have been chronically under-resourced for decades.”).

68. See *id.*; see also AM. BAR ASS'N, *supra* note 66, at 7–14.

69. Pub. L. No. 104-134, tit. 8, 110 Stat. 1321-66, 1321-66 to 1321-77 (codified as amended in scattered sections of the U.S.C.). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of the U.S.C.).

70. See Melissa Benerofe, Note, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 153 (2021).

grievance procedures”<sup>71</sup> that are often “designed to foil prisoners’ lawsuits.”<sup>72</sup>

These procedural requirements are thus another structural barrier for incarcerated litigants to properly file. In response, courts sometimes relax certain procedural hurdles to permit imprisoned persons to file and bring claims;<sup>73</sup> the Prison Mailbox Rule is an example of this type of procedural leniency.<sup>74</sup>

### C. *The Judicially Created Prison Mailbox Rule*

Before *Houston v. Lack*, the Supreme Court long recognized the common-law mailbox rule in the context of contract formation but did not recognize it in the context of filing deadlines.<sup>75</sup> Although a contract is formed upon placing the acceptance in the mail, courts did not consider a pleading as filed until the court clerk received it.<sup>76</sup> The Supreme Court later recognized that pleadings filed by incarcerated litigants—especially those filing *pro se*—were uniquely vulnerable to delays that could bar litigants from continuing their litigation.<sup>77</sup>

Would the factors that justified the contract mailbox rule—namely the offeree’s lack of control once the acceptance was sent—justify a Prison Mailbox Rule? Part I.C.1 discusses the Supreme Court’s holding in *Houston*, which answered this question affirmatively and emphasized *pro se* litigants’ lack of control once they hand over their pleadings to prison officials. Part I.C.2 discusses how courts extended the judicially created Prison Mailbox Rule beyond notices of appeal, which were at issue in *Houston*.

#### 1. *Houston v. Lack*

In *Houston*, the Supreme Court held that notices of appeal from *pro se* incarcerated litigants are considered filed when the litigant delivers the notice to prison authorities for mailing to the court.<sup>78</sup> Prentiss Houston, the incarcerated petitioner in *Houston*, had drafted a *pro se* notice of appeal following the district court’s judgment dismissing his *pro se* petition for a writ of habeas corpus.<sup>79</sup> Twenty-seven days after the judgment, Houston deposited the notice with prison authorities for mailing to the district court.<sup>80</sup> The prison authorities recorded the date of the deposit in the outgoing mail log, but it is unclear when they actually mailed the notice.<sup>81</sup>

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71. *Id.* at 156.

72. Derek Borhardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 472 (2012).

73. See *Substantive Rights Retained by Prisoners*, *supra* note 51, at 915–19.

74. See *id.*

75. See *supra* notes 48–50 and accompanying text.

76. See *supra* notes 48–50 and accompanying text.

77. See *infra* Part I.C.1.

78. See *Houston v. Lack*, 487 U.S. 266, 270 (1988).

79. See *id.* at 268.

80. See *id.*

81. See *id.*

Although there was no direct evidence indicating when the district court physically received the notice, the clerk of the district court stamped it “filed” at 8:30 a.m., thirty-one days after the judgment.<sup>82</sup> Because this was one day after the expiration of the thirty-day filing period established by Federal Rule of Appellate Procedure 4(a)(1), the district court entered an order dismissing the appeal as untimely.<sup>83</sup> Justice William J. Brennan Jr.’s opinion for the Supreme Court relied on both statutory interpretation and policy considerations to reverse the lower court’s decision.<sup>84</sup>

First, Justice Brennan considered Federal Rules of Appellate Procedure 3(a) and 4(a)(1).<sup>85</sup> Together, these rules required that a notice of appeal in a civil case “be filed with the clerk of the district court within 30 days after the date of entry of the judgment.”<sup>86</sup> Justice Brennan construed those rules to mean that, when Houston handed his notice of appeal to a prison official, he had “filed his notice . . . [with] the District Court.”<sup>87</sup>

However, this analysis was not novel. It relied heavily on Justice Potter Stewart’s concurrence in *Fallen v. United States*,<sup>88</sup> which argued that, for the purposes of this type of inmate-filing rule, “the jailer is in effect the clerk of the District Court.”<sup>89</sup> Accordingly, Justice Stewart argued that a pro se incarcerated litigant files their notice of appeal on time if they deliver the notice to prison authorities before the filing deadline.<sup>90</sup>

Further, Justice Brennan relied on policy considerations to underscore the need for a Prison Mailbox Rule.<sup>91</sup> The Court emphasized the unique challenges that pro se incarcerated litigants face when seeking appeal.<sup>92</sup> They cannot file the notice at the courthouse.<sup>93</sup> They cannot place it “directly into the hands of the United States Postal Service” and track its progress.<sup>94</sup> Nor can counsel do this for them.<sup>95</sup> Because these litigants are “[u]nskilled in law, unaided by counsel, and unable to leave the prison,” they must “entrust the forwarding of [their] notice of appeal to prison authorities whom [they] cannot control or supervise and who may have every incentive to delay.”<sup>96</sup> Although Justice Brennan never explicitly mentioned the mailbox

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82. *Id.* at 268–69.

83. *See id.* at 269.

84. *See id.*; *see also* Canedy, *supra* note 40, at 777–78.

85. *See Houston*, 487 U.S. at 272.

86. *Id.* (quoting FED. R. APP. P. 4(a)(1)).

87. *Id.* at 270. The *Houston* decision does not call this rule the “prison mailbox rule,” but lower court cases interpreting *Houston* do. *See, e.g.*, Cretacci v. Call, 988 F.3d 860, 867 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 400 (“[T]he *prison mailbox rule* applies only to prisoners who are not represented by counsel and are proceeding pro se.” (emphasis added)).

88. 378 U.S. 139 (1964).

89. *Id.* at 144.

90. *See id.*

91. *See* Canedy, *supra* note 40, at 777.

92. *See Houston*, 487 U.S. at 271.

93. *See id.*

94. *Id.*

95. *See id.*

96. *Id.*

rule, this reasoning mirrors the lack-of-control rationale underpinning the Common Law Rule.<sup>97</sup>

The Court adopted a bright-line rule that recognizes the delivery to prison authorities as the moment of filing because it would decrease disputes and uncertainty about the timeliness of filings.<sup>98</sup> The Court did not want to rely on the date of receipt by the clerk because it raises difficult-to-resolve questions concerning who is responsible for any delays: the U.S. Postal Service, the prison authorities, or the county clerk's office?<sup>99</sup> Instead, the Court was more comfortable relying on the detailed mail logs that prison authorities maintain, which establish precise records of when prison officials received a document for mailing.<sup>100</sup>

For instance, Prentiss Houston's notice was stamped as "filed" by the clerk's office at 8:30 a.m., which may suggest that it was received the day before and merely processed and stamped at "the start of the *following* working day."<sup>101</sup> The bright-line Prison Mailbox Rule avoids this type of difficult inquiry.

In his *Houston* dissent, Justice Antonin Scalia agreed that the Prison Mailbox Rule "makes a good deal of sense," but he dissented because the Rule was not promulgated through congressionally prescribed procedures.<sup>102</sup> He warned that interpreting the federal rules to mean "delivered to the clerk or, if you are a prisoner, delivered to the warden," could lead to an infinite number of other unacceptable variations.<sup>103</sup> Despite Justice Scalia's objections, the Court held that notices of appeal from pro se incarcerated litigants are considered filed when the litigant delivers the notice to prison authorities for mailing.<sup>104</sup>

## 2. Courts Extend *Houston* Beyond Notices of Appeal

Although *Houston* concerned a notice of appeal in a habeas proceeding, the holding was not explicitly limited to that type of filing.<sup>105</sup> Courts reasoned that all the justifications for applying the mailbox rule in *Houston* apply "with equal persuasive force to required filings other than notices of appeal."<sup>106</sup> Moreover, *Houston* stands for the principle that an incarcerated

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97. See Canedy, *supra* note 40, at 778; *Houston*, 487 U.S. at 275 ("[T]he moment at which pro se prisoners necessarily *lose control* over and contact with their [documents] is at delivery to prison authorities, not receipt by the clerk." (emphasis added)); *Faille v. Upjohn Co.*, 988 F.2d 985, 987 (9th Cir. 1993) (noting that *Houston* relied on policy concerns surrounding pro se incarcerated litigants' lack of control over delays).

98. See *Houston*, 487 U.S. at 271.

99. See *id.* at 275–76.

100. See *id.*

101. *Id.* at 276 n.3.

102. *Id.* at 277 (Scalia, J., dissenting).

103. *Id.*

104. See *id.* at 270 (majority opinion).

105. See *Hostler v. Groves*, 912 F.2d 1158, 1160 (9th Cir. 1990) (observing that "*Houston* gives no indication that its holding should be limited to habeas cases").

106. *Faille v. Upjohn Co.*, 988 F.2d 985, 988 (9th Cir. 1993); see also, e.g., *Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002).

litigant's freedom cannot "hinge on either the diligence or the good faith of his custodians."<sup>107</sup> The mechanism that incarcerated individuals use to seek that freedom "makes no difference."<sup>108</sup> Accordingly, circuit courts of appeal have held that the Rule should apply equally to other filings, including civil complaints<sup>109</sup> and habeas corpus petitions.<sup>110</sup> Thus, the Prison Mailbox Rule is no longer limited to notices of appeal.

#### D. *The Prison Mailbox Rule's Federal Codifications*

In the years following the *Houston* decision, the Supreme Court codified the Prison Mailbox Rule into several federal rules governing filings from imprisoned persons.<sup>111</sup> Although these rules were intended to reflect the *Houston* decision,<sup>112</sup> their text did not limit the availability of the Prison Mailbox Rule to pro se incarcerated litigants.<sup>113</sup> Part I.D.1 discusses Rule 4(c)(1), which governs notices of appeal in federal court. Part I.D.2 discusses other federal rules that mirror Rule 4(c), including Federal Rule of Appellate Procedure 25, U.S. Supreme Court Rule 29.2, and a statutory note to Rule 4(c) called rule 3 that governs §§ 2254 and 2255 habeas cases.

##### 1. Rule 4(c)(1): The Prison Mailbox Rule Applies to Any "Inmate Confined to an Institution"

Five years after the *Houston* decision, the Standing Committee recommended amendments to Rule 4(c)(1) to the Supreme Court, which quickly promulgated the amendments.<sup>114</sup> Rule 4(c) provides that "an inmate confined in an institution" has filed a paper on time so long as they deposited it in the institution's mailing system "on or before the last day" of the filing

107. *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994).

108. *Id.*

109. *See, e.g., Richard*, 290 F.3d at 813 (noting that "[a]ll of the justifications for applying the mailbox rule in [*Houston*]" apply to civil complaints); *Hostler*, 912 F.2d at 1160 (extending the Prison Mailbox Rule to § 1983 actions because "prison authorities would have greater incentive to delay the processing of Section 1983 suits, since such suits often target prison officials").

110. *See Jones v. Bertrand*, 171 F.3d 499, 501–02 (7th Cir. 1999).

111. *See infra* notes 114–16 and accompanying text.

112. *See* FED. R. APP. P. 4(c) advisory committee's note to 1993 amendment.

113. *See id.* 4(c).

114. *See id.* 4(c) advisory committee's note to 1993 amendment. Amendments to federal rules are conceived by the advisory committees before they are submitted to the Standing Committee, which then independently reviews the proposal, and if satisfied, recommends the changes to the Judicial Conference of the United States. *See How the Rulemaking Process Works*, U.S. CTS., <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> [<https://perma.cc/8ZTM-82BL>] (last visited Nov. 7, 2022). The Judicial Conference can then recommend the changes to the Supreme Court, which can choose to promulgate the revised rule "unless Congress enacts legislation to reject, modify, or defer the pending rules." *See id.*

period.<sup>115</sup> The “inmate confined in an institution” must use the institution’s legal mail system, if it has one.<sup>116</sup>

Rule 4(c) purportedly codified the *Houston* decision. The Advisory Committee on Rules of Appellate Procedure noted that the Rule 4(c) amendment “reflects” the *Houston* decision, which concerned a pro se litigant.<sup>117</sup> The advisory committee notes explain the history of the rules and clarify their application.<sup>118</sup> The rule itself, however, does not include any language concerning the litigant’s representation status.<sup>119</sup> Some courts refused to pencil in “unrepresented” before “inmate,” and thus now apply the mailbox rule to incarcerated litigants who are represented by counsel when they file notices of appeal.<sup>120</sup> Some courts noted the issue and declined to address it,<sup>121</sup> while another ignored Rule 4(c) entirely.<sup>122</sup>

## 2. Other Federal Rules Mirror Rule 4(c)

There are important connections between Rule 4(c) and related rules and doctrines. In 1993, the advisory committee noted that amendments to Federal Rule of Appellate Procedure 25(a) (“Rule 25(a)”) accompanied the Rule 4(c) amendment and “extend[ed] the holding in [*Houston*] to all papers filed in the courts of appeals by persons confined in institutions.”<sup>123</sup> Rule 25(a)’s language is virtually identical to Rule 4(c)’s, except that it concerns any “paper not filed electronically”<sup>124</sup> instead of only “notice[s] of appeal in either a civil or criminal case.”<sup>125</sup> In other words, Rule 25(a) “applies the ‘prison mailbox rule’ to all appellate papers.”<sup>126</sup>

U.S. Supreme Court Rule 29.2 also includes an inmate-filing provision that is similar, but not identical, to Rule 4(c).<sup>127</sup> Like Rule 4(c), U.S. Supreme Court Rule 29.2 refers to any “inmate confined to an institution” without limitation based on representation status.<sup>128</sup> Likewise, since a 2004 amendment, two versions of a statutory note to Rule 4(c) called rule 3 that

115. FED. R. APP. P. 4(c)(1).

116. *See id.* Rule 4(c)’s other procedural requirements, including proof of timely delivery to prison officials and prepaid postage, are outside this Note’s scope.

117. FED. R. APP. P. 4(c) advisory committee’s note to 1993 amendment.

118. *See Williamson v. United States*, 512 U.S. 594, 615 (1994) (Kennedy, J., concurring).

119. *See* FED. R. APP. P. 4(c).

120. *See infra* notes 202–10 and accompanying text.

121. *See, e.g., United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143 n.3 (10th Cir. 2004) (“We also do not decide whether a represented prisoner may take advantage of Rule 4(c)(1).”).

122. *See infra* notes 164–65 and accompanying text.

123. FED. R. APP. P. 25(a)(2)(A) advisory committee’s note to 1993 amendment.

124. *Id.* 25(a)(2)(A)(iii).

125. *Id.* 4(c).

126. *Chavarria-Reyes v. Lynch*, 845 F.3d 275, 277 (7th Cir. 2016).

127. *See* SUP. CT. R. 29.2.

128. *Id.*; *see also* Memorandum from Catherine T. Struve, U.S. Rep., to Advisory Comm. on App. Rules (Sept. 10, 2013), [https://www.uscourts.gov/sites/default/files/fr\\_import/AP2013-10.pdf](https://www.uscourts.gov/sites/default/files/fr_import/AP2013-10.pdf) [<https://perma.cc/Z5LL-CM4Z>].

govern habeas corpus petitions under 28 U.S.C. §§ 2254 and 2255, include provisions that mirror Rule 4(c).<sup>129</sup>

The U.S. Court of Appeals for the Eighth Circuit also held that Rule 4(c)'s requirements should apply, even in contexts in which filings are not governed by a particular inmate-filing rule, for the sake of uniformity.<sup>130</sup> As discussed in Part II, however, courts failed to achieve uniformity.<sup>131</sup> Because some circuits disagree about *Houston*'s scope and how incarceration affects litigants' access to counsel,<sup>132</sup> circuits also disagree about whether incarcerated litigants represented by counsel can benefit from the Prison Mailbox Rule.<sup>133</sup> Part II lays out these conflicting arguments in detail.

## II. CAN REPRESENTED LITIGANTS BENEFIT FROM THE PRISON MAILBOX RULE?: INCONSISTENCY AMONG APPELLATE COURTS

Although courts consistently apply *Houston*'s Prison Mailbox Rule to pro se incarcerated litigants, they are split on whether it applies equally to incarcerated litigants represented by counsel.<sup>134</sup> To complicate matters further, some filings are now governed by federal inmate-filing rules that deliberately omit any reference to a litigant's representation status.<sup>135</sup> Part II.A discusses the arguments for limiting the Prison Mailbox Rule's benefits to pro se litigants. Part II.B discusses the arguments for allowing represented litigants to benefit from the Prison Mailbox Rule, only if one of its federal codifications governs the filing at issue. Finally, Part II.C discusses the arguments for applying the Rule equally to all incarcerated persons, including those represented by counsel.

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129. See 28 U.S.C. § 2254 note (Rules Governing Section 2254 Proceedings for the United States District Courts) (rule 3); *id.* § 2255 note (Rules Governing Section 2255 Proceedings for the United States District Courts) (rule 3).

130. See *Grady v. United States*, 269 F.3d 913, 916 (8th Cir. 2001) ("Under our jurisprudence . . . a prisoner seeking to benefit from the prison mailbox rule must satisfy the requirements of Rule 4(c) whether he files a notice of appeal, a habeas petition, or a § 2255 motion.").

131. See *infra* Part II.

132. See *infra* notes 145–49 and accompanying text.

133. See *infra* note 134 and accompanying text.

134. Compare *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004) (applying the mailbox rule equally to represented litigants), and *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994) (same), with *Cretacci v. Call*, 988 F.3d 860, 867 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 400 (denying represented incarcerated litigant filing civil complaint the benefit of mailbox rule), and *Burgs v. Johnson County*, 79 F.3d 701, 702 (8th Cir. 1996) (denying represented incarcerated litigant filing notice of appeal the benefit of mailbox rule).

135. See *supra* notes 114–16 and accompanying text.



A. *The Narrow Approach: Incarcerated Litigants Represented by Counsel Can Never Benefit from the Prison Mailbox Rule*

The U.S. Courts of Appeals for the Fifth,<sup>136</sup> Sixth,<sup>137</sup> Eighth,<sup>138</sup> and Eleventh<sup>139</sup> Circuits narrowly interpret *Houston* to deny represented litigants access to the Prison Mailbox Rule.<sup>140</sup> Part II.A.1 details the reasoning that these courts use to narrowly interpret *Houston*. Part II.A.2 discusses how these courts apply the narrow interpretation, regardless of any inmate-filing rules that may govern the filing at issue. Part II.A.3 examines the way in which judges undertake the challenging task of determining whether a litigant is represented by counsel.

1. Pro Se Incarcerated Litigants Face Unique Challenges

Courts that narrowly interpret *Houston* reason that the decision highlighted the unique challenges facing pro se incarcerated litigants, and that allowing all incarcerated litigants to benefit from the Prison Mailbox Rule would be unfair to outside litigants because legal representation negates any disadvantages of being incarcerated.<sup>141</sup> These courts point to language in *Houston* that emphasized that the “situation of prisoners seeking to appeal without the aid of counsel is unique.”<sup>142</sup> They cannot take the precautions that outside litigants can, like mailing the filing themselves or delivering it to the court in person, nor “do they have lawyers who can take these precautions for them.”<sup>143</sup>

The U.S. Courts of Appeal for the Fifth, Eighth, and Seventh Circuits all reason that represented incarcerated litigants “are in no different position than litigants who are at liberty”<sup>144</sup> because, whether or not they are incarcerated, a represented litigant can rely on their attorney to file pleadings on time.<sup>145</sup> This view aligns with Justice Scalia’s position on the issue.<sup>146</sup> During oral arguments in *Houston*, Justice Scalia noted that, because of potential post office delays, “some of us feel just as helpless putting [mail]

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136. See *Cousin v. Lensing*, 310 F.3d 843 (5th Cir. 2002).

137. See *Cretacci*, 988 F.3d at 860.

138. See *Burgs*, 79 F.3d at 702.

139. See *Allen v. Culliver*, 471 F.3d 1196 (11th Cir. 2006).

140. The U.S. Court of Appeals for the Ninth Circuit also denies represented litigants the benefit of the Rule unless their counsel effectively abandoned them. See *Faile v. Upjohn Co.*, 988 F.2d 985, 988 (9th Cir. 1993). The U.S. Court of Appeals for the Tenth Circuit also noted the issue without resolving it. See *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143 n.3 (10th Cir. 2004) (“We also do not decide whether a represented prisoner may take advantage of Rule 4(c)(1).”).

141. See *infra* notes 144–45 and accompanying text.

142. *Houston v. Lack*, 487 U.S. 266, 270 (1988).

143. *Id.* at 271.

144. *United States v. Kimberlin*, 898 F.2d 1262, 1265 (7th Cir. 1990).

145. See *Burgs v. Johnson County*, 79 F.3d 701, 702 (8th Cir. 1996); *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002).

146. Oral Argument at 7:23, *Houston v. Lack*, 487 U.S. 266 (1988) (No. 87-5428), <https://www.oyez.org/cases/1987/87-5428> [<https://perma.cc/38BV-F4RW>].

in the mailbox as a prisoner might feel delivering it to the warden.”<sup>147</sup> Justice Scalia dissented from the majority in *Houston*,<sup>148</sup> but this reasoning—that incarceration itself is not enough of a barrier to warrant leniency for incarcerated litigants—persists.<sup>149</sup>

Supporters of *Houston*’s narrow interpretation reason that, “a represented prisoner has control over the filing process and can be certain that the appeal has been filed through his lawyer.”<sup>150</sup> Moreover, they note that access to a lawyer significantly decreases the risk of nondelivery because the lawyer can always confirm whether the clerk received the filing.<sup>151</sup> Some concede, however, that this approach assumes that represented incarcerated litigants can effectively communicate with their attorneys.<sup>152</sup> The Fourth Circuit agreed with this criticism and noted that if “it is possible that prison officials could choose to delay a prisoner’s attempt to communicate with the courts, it is just as possible that they could choose to delay his access to counsel.”<sup>153</sup>

Despite this criticism, the narrow-interpretation approach limits the Prison Mailbox Rule to pro se litigants, reasoning that its extension to represented incarcerated litigants would afford them an unfair advantage over outside litigants who must also trust their attorneys to file their documents on time.<sup>154</sup> The Fourth Circuit criticized this argument, holding that allowing represented incarcerated litigants to benefit from the Prison Mailbox Rule “does not offend our notion of fairness” because outside litigants “would gladly trade those few extra days [afforded to incarcerated litigants] for the opportunity to timely deliver their notices in person.”<sup>155</sup>

## 2. The Narrow Approach Applies *Houston* Regardless of Inmate-Filing Federal Rules

Some courts limit the Prison Mailbox Rule to pro se litigants regardless of any inmate-filing rules on point.<sup>156</sup> When a Rule 4(c)-type inmate-filing regulation does not govern a filing at issue, these courts apply their *Houston* interpretations and exclude represented litigants.<sup>157</sup> This occurs when incarcerated litigants file civil complaints, for instance, because the Prison Mailbox Rule has not been codified in the Federal Rules of Civil

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147. *Id.*

148. *See supra* note 102 and accompanying text.

149. *See supra* note 145 and accompanying text.

150. Canedy, *supra* note 40, at 785; *see also* Rutledge v. United States, 230 F.3d 1041, 1052 (7th Cir. 2000) (“[A] prisoner represented by counsel can have that attorney file whatever motions or notices the prisoner desires, and so does not need to rely on prison authorities.”).

151. *See* Canedy, *supra* note 40, at 785; *cf.* Lewis v. Richmond City Police Dep’t, 947 F.2d 733, 735 (4th Cir. 1991) (“Because [the incarcerated litigants] are acting pro se, they do not have an attorney who can monitor the process for them.”).

152. Canedy, *supra* note 40, at 785.

153. United States v. Moore, 24 F.3d 624, 625 (4th Cir. 1994).

154. *See id.* (noting that the government made this argument before refuting it).

155. *Id.* at 625–26.

156. *See infra* notes 163–65 and accompanying text.

157. *See, e.g.,* Stillman v. LaMarque, 319 F.3d 1199 (9th Cir. 2003); United States v. Kimberlin, 898 F.2d 1262, 1265 (7th Cir. 1990).

Procedure.<sup>158</sup> This also previously occurred in §§ 2254 and 2255 habeas cases because the Prison Mailbox Rule was not codified as a rule governing those types of filings until 2004.<sup>159</sup>

When an inmate-filing federal rule governs the filing at issue, these courts still apply the narrow interpretation of *Houston* by either ignoring the on-point rule<sup>160</sup> or referencing it without addressing it head on.<sup>161</sup> Although no decision has directly held that Rule 4(c) is inapplicable to represented incarcerated litigants,<sup>162</sup> several decisions refer to the rule—in dicta—in terms indicating that it is limited to pro se litigants.<sup>163</sup>

Additionally, the Eighth Circuit ignored Rule 4(c) entirely in *Burgs v. Johnson County*.<sup>164</sup> The court barred an incarcerated litigant from taking advantage of the Prison Mailbox Rule without even discussing Rule 4(c), which governed the filing at issue in the case.<sup>165</sup> In short, regardless of whether inmate-filing rules govern the filing at issue, *Houston*'s narrow interpretation always limits the Prison Mailbox Rule to pro se litigants.

### 3. The “Unenviable” Representation Inquiry

Because *Houston*'s narrow interpretation limits the Prison Mailbox Rule to unrepresented litigants, courts must engage in the “unenviable task” of determining whether a litigant is represented by counsel.<sup>166</sup> To make this determination, courts look to (1) whether a litigant retained an attorney (or has been appointed one) in the action at issue;<sup>167</sup> (2) whether a litigant received legal advice or drafting help from an attorney;<sup>168</sup> and/or (3) how state laws define the “practice of law” and, thus, when an attorney represents a litigant.<sup>169</sup> Part II.A.3.a explores how courts use these three factors to

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158. See *Cretacci v. Call*, 988 F.3d 860, 867 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 400 (relying solely on *Houston*'s narrow interpretation “because this case is not governed by Appellate Rule 4(c)” and is thus “readily distinguished from *Moore* and *Craig*”).

159. See, e.g., *Cousin v. Lensing*, 310 F.3d 843, 843 (5th Cir. 2002); *Stillman*, 319 F.3d at 1201. Rule 3, which governs these habeas filings, was amended the year after *Stillman* was decided. See *supra* note 129 and accompanying text.

160. See *Burgs v. Johnson County*, 79 F.3d 701, 702 (8th Cir. 1996) (applying *Houston*'s narrow interpretation to a notice of appeal without discussing Federal Rule of Appellate Procedure 4(c), which governed the filing at issue).

161. See *supra* note 140.

162. See Memorandum from Catherine T. Struve to Advisory Comm. on App. Rules, *supra* note 128, at 114 (noting lack of decisions “that actually held that Rule 4(c)(1) is inapplicable to represented inmates”).

163. See, e.g., *Allen v. Culliver*, 471 F.3d 1196, 1198 (11th Cir. 2006) (suggesting Rule 4(c) is only available to “pro se prisoner[s]”); *United States v. Grigsby*, 579 F. App'x 680, 684 (10th Cir. 2014) (suggesting an incarcerated litigant can only benefit from Rule 4(c) “when appearing pro se”).

164. 79 F.3d 701 (8th Cir. 1996).

165. See Memorandum from Catherine T. Struve to Advisory Comm. on App. Rules, *supra* note 128, at 113 (noting *Burgs* concerned a filing “made after the effective date of the amendment adopting Rule 4(c),” but that “the decision failed to cite Rule 4(c)”).

166. *Cretacci v. Call*, 988 F.3d 860, 872 (6th Cir. 2021) (Readler, J., concurring).

167. *Id.* at 866 (majority opinion).

168. See *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003).

169. See *infra* notes 188–91 and accompanying text.

determine if an incarcerated litigant is represented by counsel. Part II.A.3.b discusses an alternative representation inquiry that focuses on whether a litigant is “actively” or “passively” represented.

*a. The Three Representation Factors*

The first factor courts employ to determine whether an incarcerated litigant is “represented” is whether the litigant retained, or was appointed, an attorney for the proceedings at issue.<sup>170</sup> In *Cretacci v. Call*,<sup>171</sup> the Sixth Circuit held that Blake Cretacci, the defendant, was represented by counsel when he filed because he “had an explicit attorney-client relationship in which Justice agreed to represent Cretacci in his lawsuit.”<sup>172</sup> Judge Readler’s concurrence, however, highlighted that the representation inquiry was an “unenviable task” for judges.<sup>173</sup> Judge Readler suggested that, had Cretacci fired his attorney before handing his complaint to prison officials, it would have been timely.<sup>174</sup> But what if a litigant was represented at the district court level but not when filing a notice of appeal? Under Judge Readler’s approach, they would likely be considered unrepresented.<sup>175</sup>

In *Burgs v. Johnson County*, the Eighth Circuit confronted this same question and looked to the district court proceedings rather than the moment of filing.<sup>176</sup> *Burgs* held that Nathaniel Burgs, the defendant, could not benefit from the Prison Mailbox Rule, despite not being represented by counsel when he handed his notice of appeal to prison officials<sup>177</sup> because Burgs was represented by counsel at the district court level.<sup>178</sup> The court reasoned that *Houston* “was premised on the plight of an inmate who proceeded pro se in the district court, lost, and then sought to appeal without the benefit of counsel.”<sup>179</sup>

The second factor that courts consider during the representation inquiry is whether the litigant received legal advice and/or help drafting pleadings.<sup>180</sup> For instance, in *Stillman v. LaMarque*,<sup>181</sup> the court held that the litigant could not use the Rule because an attorney prepared his filings, even though she explicitly refused to represent him pro bono.<sup>182</sup> In his *Cretacci* concurrence, however, Judge Readler suggested that this factor was not determinative

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170. See *infra* notes 171–74 and accompanying text.

171. 988 F.3d 860, 866 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 400.

172. *Id.*

173. *Id.* at 872 (Readler, J., concurring).

174. See *id.* at 872–73.

175. See *id.*

176. See 79 F.3d 701, 702 (8th Cir. 1996).

177. See *id.* (appointing Burgs an attorney and simultaneously holding that he could not benefit from the mailbox rule because he was already represented).

178. See *id.*

179. *Id.*

180. See *infra* notes 181–83 and accompanying text.

181. 319 F.3d 1199 (9th Cir. 2003).

182. See *id.* at 1200–01 (noting that the attorney, who previously represented litigant, declined to represent him pro bono but agreed to provide “some assistance” as he sought post-conviction relief).

because there was no clear answer to the inquiry when a litigant “consult[s] with a lawyer only informally” or “with a family member with a law degree” who offered to assist the litigant.<sup>183</sup> The emergence of unbundled services, or “limited scope representation,” further complicates the issue.<sup>184</sup> When attorneys unbundle their services, they agree to handle some of the litigant’s legal needs, but not all of them.<sup>185</sup> It is unclear what combination of services would be enough to consistently qualify as full representation for the purposes of this inquiry.<sup>186</sup>

The third factor that courts consider in the representation inquiry is how relevant state law defines the “practice of law.”<sup>187</sup> In *Cretacci*, the Sixth Circuit looked to Tennessee state law, which defines the “practice of law” as appearing as an advocate in a representative capacity, drafting papers, pleadings, or any other legal documents, or “the performance of any act in such capacity in connection with proceedings pending or prospective before any court.”<sup>188</sup> Or, as California’s definition of practicing law puts it, “the preparing of legal documents and the giving of legal advice.”<sup>189</sup> Some states have similar definitions of practicing law on the books,<sup>190</sup> but others note that such a definition is inherently elusive.<sup>191</sup>

Courts rely on these three factors to make a binary distinction between a represented litigant and one proceeding pro se. Some argue that the representation inquiry should focus less on whether a litigant is technically represented by counsel and more on whether that counsel is actively representing the litigant in their proceedings.<sup>192</sup> Part II.A.3.b discusses this alternative “passive representation” inquiry.

*b. The “Passive Representation” Inquiry: Representation as a Spectrum*

Courts that rely on the three factors discussed above consider the representation inquiry to be a zero-sum determination.<sup>193</sup> Either someone is

183. *Cretacci v. Call*, 988 F.3d 860, 872 (6th Cir. 2021) (Readler, J., concurring).

184. See *Limited Scope Representation*, AM. BAR ASS’N, [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defense/resource\\_center\\_for\\_access\\_to\\_justice/resources---information-on-key-atj-issues/limited\\_scope\\_unbundling/](https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/resources---information-on-key-atj-issues/limited_scope_unbundling/) [https://perma.cc/SW5D-QEUV] (last visited Nov. 7, 2022).

185. See *id.*

186. See *supra* notes 181–83 and accompanying text.

187. See *infra* notes 188–89 and accompanying text.

188. *Cretacci*, 988 F.3d at 866 (citing TENN. CODE ANN. § 23-3-101(3) (West 2020)).

189. *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003); see also *Practice of Law*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “practice of law” as “conducting cases in court,” preparing or drafting papers, legal opinions, and wills, and “advising clients on legal questions”).

190. See, e.g., GA. CODE ANN. § 15-19-50 (2022) (defining the practice of law broadly as “[r]epresenting litigants in court and preparing pleadings” related to legal proceedings, preparing any kind of legal instrument, giving any kind of legal advice, and any other action “taken for others in any matter connected with the law”).

191. See, e.g., Ark. Bar Ass’n v. Block, 323 S.W.2d 912, 914 (Ark. 1959) (“The practice of law is difficult to define. Perhaps it does not admit of exact definition.”).

192. See Canedy, *supra* note 40, at 787.

193. See *supra* notes 166–68 and accompanying text.

represented by counsel or they are not. But a commentator has advocated for an inquiry that distinguishes between “active” and “passive” representation.<sup>194</sup> A “passively represented” incarcerated litigant is technically represented by counsel but “act[s] unaware or independent of that fact.”<sup>195</sup> Determining whether someone is passively represented would require courts to weigh the “agency, control, risk allocation, and certainty concerns underlying the prison mailbox rule.”<sup>196</sup>

The U.S. Court of Appeals for the Ninth Circuit seemingly took this approach, holding that “a prisoner whose counsel has not been technically discharged may nonetheless invoke the rule in *Houston* if he can show that his counsel has abandoned him.”<sup>197</sup> Although the Ninth Circuit also does not typically allow represented litigants to benefit from the Prison Mailbox Rule, it reasoned that when counsel abandons their incarcerated client, that litigant is “in the same position as the pro se prisoners described in *Houston*.”<sup>198</sup> In essence, the Ninth Circuit held that the litigant was only passively represented and was thus entitled to use the Prison Mailbox Rule.

Unlike the Ninth Circuit, however, all the other circuits that apply *Houston*’s narrow interpretation inquire only into whether a litigant retained an attorney or received legal advice, and is, therefore, barred from utilizing the Prison Mailbox Rule.<sup>199</sup> Part II.B explores a hybrid, textual approach that sometimes allows represented incarcerated litigants to benefit from the Prison Mailbox Rule, but only when one of the relevant inmate-filing federal rules governs the filing at issue.

*B. The Textual Approach: Represented Litigants Can Only Use the Prison Mailbox Rule if a Federal Inmate-Filing Rule Governs the Filing at Issue*

The textual approach reads both the *Houston* decision and the codified federal rules strictly.<sup>200</sup> Accordingly, this approach only allows represented litigants to benefit from the Prison Mailbox Rule if one of the inmate-filing federal rules is on point.<sup>201</sup> Part II.B.1 discusses Judge Frank H. Easterbrook’s strict textualist interpretation of Rule 4(c). Part II.B.2 details the way in which Rule 4(c)’s legislative history supports Judge Easterbrook’s reading. Finally, Part II.B.3 explores the potential inconsistencies that arise under the textual approach.

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194. See generally Canedy, *supra* note 40.

195. *Id.* at 787.

196. *Id.*

197. *Faille v. Upjohn Co.*, 988 F.2d 985, 988 (9th Cir. 1993); see also *Vaughan v. Ricketts*, 950 F.2d 1464, 1467 (9th Cir. 1991).

198. *Vaughan*, 950 F.2d at 1467.

199. See *supra* Part II.A.3.a.

200. See *infra* notes 202–04 and accompanying text.

201. See *infra* Part II.B.1.

### 1. Judge Easterbrook's Textual Reading of Rule 4(c)

The Seventh Circuit addressed Rule 4(c) head on in *United States v. Craig*,<sup>202</sup> where Judge Easterbrook made clear that Rule 4(c) applies to any “inmate confined in an institution,” regardless of their representation status.<sup>203</sup> Judge Easterbrook held that the rule applied equally to represented incarcerated litigants because the court “ought not pencil ‘unrepresented’ or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd.”<sup>204</sup>

Other circuits endorsed this textualist reading of Rule 4(c). For instance, when discussing Rule 4(c) in *Amaker v. Schiraldi*,<sup>205</sup> the U.S. Court of Appeals for the Second Circuit never mentioned any limitations to the rule based on the representation status of the incarcerated litigant.<sup>206</sup> The Fourth Circuit explicitly endorsed Rule 4(c)'s strict textual reading, noting that Rule 4(c) “does not distinguish between represented prisoners and those acting *pro se*.”<sup>207</sup> Additionally, the Sixth Circuit—in holding that Rule 4(c) did not apply in *Cretacci*—was careful to distinguish *Cretacci* from *Craig* and *United States v. Moore*<sup>208</sup> so that it was not bound by the rule's plain text.<sup>209</sup> Indeed, *Cretacci*'s concurrence explicitly adopted Judge Easterbrook's Rule 4(c) interpretation.<sup>210</sup>

### 2. Legislative History: The Standing Committee Notes and Meeting Minutes Support the Plain Text Reading

The Standing Committee's notes and meeting minutes support the argument that the federal rule deliberately applies to all incarcerated individuals, regardless of their representation status.<sup>211</sup> A draft of the Rule 4(c) amendment that limited its application to persons “not represented by an attorney” was considered in the Standing Committee's 1989 meeting, but it was not adopted.<sup>212</sup> When the Standing Committee took up the issue again

202. 368 F.3d 738 (7th Cir. 2004).

203. *Id.* at 740 (citing FED. R. APP. P. 4(c)).

204. *Id.* Although no court has explicitly disagreed and held that Rule 4(c) does not extend to represented litigants, some courts have suggested as much in dicta or ignored the rule completely. *See supra* notes 162–64 and accompanying text.

205. 812 F. App'x 21, 23 (2d Cir. 2020).

206. *See id.* (describing Rule 4(c) without any limitation based on representation status).

207. *United States v. Moore*, 24 F.3d 624, 626 n.3 (4th Cir. 1994).

208. 24 F.3d 624 (4th Cir. 1994).

209. *See Cretacci v. Call*, 988 F.3d 860, 867 (6th Cir. 2021) (“And because this case is not governed by Appellate Rule 4(c), it is readily distinguished from *Moore* and *Craig*.”).

210. *See id.* at 873 (Readler, J., concurring) (“By its plain terms, Rule 4(c)'s articulation of the mailbox rule applies to ‘an inmate,’ whether *pro se* or represented, when she files a notice of appeal.”).

211. *See infra* notes 212–15 and accompanying text.

212. ADVISORY COMM. ON APP. RULES OF THE MEETING ON OCTOBER 26, 1989, at 6, [https://www.uscourts.gov/sites/default/files/fr\\_import/AP10-1989-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/AP10-1989-min.pdf) [<https://perma.cc/9UXJ-VYWW>].

in 1991, it adopted the amendment but explicitly excised the “not represented by an attorney” language from the rule.<sup>213</sup>

After the *Moore* and *Craig* decisions applied Rule 4(c) to all incarcerated litigants, the Standing Committee had ample opportunity to amend the rule to limit it to pro se litigants.<sup>214</sup> Instead, when discussing the issue in summer 2013, the Standing Committee members “were in agreement that the inmate-filing rule should apply to items filed by the inmate, whether or not the inmate is represented,” because they “could not think of any realistic scenario in which that would be likely to be abused by the lawyer who represents the inmate.”<sup>215</sup> As such, Judge Easterbrook’s plain reading of the rule’s text is consistent with the intent of its drafters and the intent of those who could have subsequently modified it.

### 3. The Potential for Inconsistency Under the Textual Approach

The textual approach can lead to inconsistent applications of the Prison Mailbox Rule depending on whether an inmate-filing rule governs the filing at issue. Fourteen years before writing for the majority in *Craig*, and before Rule 4(c) was enacted, Judge Easterbrook narrowly interpreted *Houston* to conclude that a represented incarcerated litigant could not benefit from the mailbox rule.<sup>216</sup> In *Craig*, Judge Easterbrook held that, when Rule 4(c) governs the filing at issue, a represented incarcerated litigant can benefit from the Prison Mailbox Rule.<sup>217</sup> This illustrates how the textual approach plays out. When an inmate-filing rule like Rule 4(c) applies, represented litigants can use the Prison Mailbox Rule.<sup>218</sup> Absent such a codified rule, they cannot.<sup>219</sup>

In his *Cretacci* concurrence, Judge Readler endorsed Judge Easterbrook’s strict reading of Rule 4(c) but noted the resulting inconsistent applications of the Prison Mailbox Rule across filing types.<sup>220</sup> Judge Readler thus called on Congress or the Standing Committee to enact an inmate-filing rule to govern civil complaints mirroring Rule 4(c), because it “would instill a bright-line rule that asks only whether the litigant filing the complaint is an inmate, not

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213. ADVISORY COMM. ON FED. RULES OF APP. PRO., MINUTES OF THE APRIL 17, 1991 MEETING OF THE COMMITTEE ON FEDERAL RULES OF APPELLATE PROCEDURE 26, [https://www.uscourts.gov/sites/default/files/fr\\_import/AP04-1991-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/AP04-1991-min.pdf) [<https://perma.cc/8Y6H-EDUJ>].

214. The Standing Committee amended Rule 4(c) in 1991; the Fourth Circuit decided *Craig* in 1994. See *supra* notes 114–16 and accompanying text. Then, in 2013, the Standing Committee decided against adding language to limit access to the rule based on representation status. See *infra* note 215 and accompanying text.

215. Memorandum from Catherine T. Struve to Advisory Comm. on App. Rules, *supra* note 128.

216. See *United States v. Kimberlin*, 898 F.2d 1262, 1265 (7th Cir. 1990) (denying a represented incarcerated litigant benefit of the mailbox rule).

217. See *supra* notes 202–04 and accompanying text.

218. See *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004) (“Today the mailbox rule depends on Rule 4(c), not on how *Kimberlin* understood *Houston*. Rule 4(c) applies to ‘an inmate confined in an institution.’ *Craig* meets that description.”).

219. See *supra* Part II.A.

220. *Cretacci v. Call*, 988 F.3d 860 (6th Cir. 2021).



whether the inmate is also unrepresented.”<sup>221</sup> Justice Scalia argued that promulgating bright-line rules is generally advantageous because it creates predictability and consistency, reassures litigants that their case was fairly decided, and constrains judges from indulging in personal preferences.<sup>222</sup>

This rule-promulgation solution will be tested the next time a represented incarcerated litigant files a habeas petition and attempts to use the Rule. Although some courts have held that represented litigants could not use the Rule when filing a habeas petition, they only did so before the 2004 amendments to rule 3 governing §§ 2254 and 2555 that mirrored Rule 4(c).<sup>223</sup> Accordingly, practitioners anticipate that the next time a court is presented with this issue, a consistent reading of inmate-filing rules should allow represented incarcerated litigants to use the Rule when filing habeas petitions.<sup>224</sup>

If no inmate-filing rules govern, however, like in *Cretacci*, courts must choose between a narrow interpretation of *Houston* that limits the mailbox rule to pro se litigants<sup>225</sup> and a broad interpretation that extends it to all incarcerated litigants.<sup>226</sup> Part II.C discusses this broad interpretation in detail.

### C. The Broad Approach: All Incarcerated Litigants Can Benefit from *Houston* and Its Codifications

The Fourth Circuit interprets *Houston* to apply to all incarcerated litigants.<sup>227</sup> In *United States v. Moore*, the Fourth Circuit held that a represented incarcerated litigant who filed his own notice of appeal with prison authorities could benefit from the Prison Mailbox Rule.<sup>228</sup> Although the *Moore* court noted that this result was consistent with a straightforward reading of Rule 4(c),<sup>229</sup> the court reasoned that “whenever a prisoner attempts to file a notice of appeal from prison he is acting ‘without the aid of counsel,’ even if he is ‘represented’ in a passive sense.”<sup>230</sup>

Highlighting that the “Supreme Court did not expressly limit *Houston*’s application to cases involving unrepresented prisoners,” *Moore* held that *Houston* should apply equally to incarcerated litigants represented by

221. *Id.* at 873 (Readler, J., concurring).

222. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989).

223. See *supra* note 159 and accompanying text.

224. See BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 9A:138 (2022) (“[S]ome courts have held that prisoners represented by counsel are, like *pro se* inmates, entitled to the benefit of the mailbox rule.”).

225. See *supra* Part II.A.

226. See *infra* Part II.C.

227. See *infra* notes 228–30 and accompanying text.

228. *United States v. Moore*, 24 F.3d 624, 626 (4th Cir. 1994) (holding that “*Houston* governs all notices of appeal filed by prisoners . . . without regard to whether they are represented by counsel”).

229. *Id.* at 626 n.3 (noting that Rule 4(c) “does not distinguish between represented prisoners and those acting *pro se*”).

230. *Id.* at 625.

counsel.<sup>231</sup> Moreover, the court noted that doing so did not afford incarcerated litigants an unfair advantage because they would gladly trade those extra filing days for the freedom that outside litigants enjoy.<sup>232</sup>

The Fourth Circuit stated that the Seventh Circuit interpreted *Houston* too narrowly when it addressed the same issue in *United States v. Kimberlin*<sup>233</sup> and reached the opposite conclusion.<sup>234</sup> *Moore* reasoned that the Seventh Circuit failed to consider that *Houston* was concerned that prison officials could intentionally delay an incarcerated litigant's communications with the courts, and it is just as possible for prison officials to intentionally delay an incarcerated litigant's communications with counsel.<sup>235</sup>

The Fourth Circuit also indicated that "there is no reasonable basis" for limiting this broad interpretation of *Houston* to notices of appeal because *Houston* stands for the principle that an imprisoned person's freedom should not hinge on the "diligence or good faith of his custodians."<sup>236</sup> Indeed, the way in which someone seeks their freedom "makes no difference" to the policy considerations articulated in *Houston*.<sup>237</sup> Thus, although the *Moore* decision concerned notices of appeals, the reasoning likely extends to all filings to which the Prison Mailbox Rule applies.

Critics argue that this type of rulemaking should be left to the Standing Committee and Congress.<sup>238</sup> Moreover, they highlight that the *Houston* decision emphasized the unique nature of pro se incarcerated litigants.<sup>239</sup> The Fourth Circuit, however, continues to apply *Houston*'s broad interpretation.<sup>240</sup> Part III of this Note proposes that the Supreme Court should endorse the Fourth Circuit's approach to allow all incarcerated litigants to benefit from the Prison Mailbox Rule.

### III. THE SUPREME COURT SHOULD APPLY THE PRISON MAILBOX RULE EQUALLY TO ALL INCARCERATED LITIGANTS

When courts deny represented incarcerated litigants access to the Prison Mailbox Rule, they deny them further access to the courts.<sup>241</sup> Incarcerated litigants, however, are not in the same position as outside litigants when they are represented by counsel.<sup>242</sup> Accordingly, this Note argues that a

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231. *Id.* at 626.

232. *See id.* at 625–26.

233. 898 F.2d 1262 (7th Cir. 1990).

234. *Moore*, 24 F.3d at 626 ("We believe that our sister circuit has interpreted *Houston* too narrowly.").

235. *See id.* at 625–26.

236. *Id.* at 625.

237. *Id.*

238. *See* Scalia, *supra* note 222, at 1178–80.

239. *See supra* notes 145–47 and accompanying text.

240. *See, e.g.*, *United States v. Carter*, 474 F. App'x 331, 333 (4th Cir. 2012).

241. *See, e.g.*, *Cretacci v. Call*, 988 F.3d 860, 866 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 400 (denying incarcerated litigant ability to commence § 1983 action); *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003) (denying incarcerated litigant ability to pursue post-conviction relief).

242. *See infra* notes 246–63 and accompanying text.

bright-line rule applying the Prison Mailbox Rule equally to all incarcerated litigants will result in a more predictable and consistent application of the Rule. Part III.A argues that all represented litigants should have access to the Prison Mailbox Rule, regardless of their representation status. Part III.B argues that the Supreme Court is in the best position to resolve this conflict because the codified rules reflect the Court's own judicially created Prison Mailbox Rule.

*A. Represented Litigants Should Have Access to the Prison Mailbox Rule*

*Houston* should be broadly interpreted to apply equally to all incarcerated litigants, regardless of their representation status. Part III.A.1 refutes the core assumption of *Houston*'s narrow interpretation by detailing the ways in which incarcerated litigants are not in the same position as outside litigants, even when they are represented by counsel. Part III.A.2 argues that this interpretation is proper because the *Houston* decision did not explicitly limit its holding to pro se litigants. Part III.A.3 underscores the need for a bright-line rule to ensure that incarcerated litigants can reliably understand the procedural requirements for their prison filings. Finally, Part III.A.4 proposes a bad-faith exception to the Rule to prevent unlikely attempts to use it to gain an unfair advantage.

1. Inside Litigants Are Not in the Same Position as Outside Litigants

The *Houston* Prison Mailbox Rule is, fundamentally, a rule of equal treatment that "seeks to ensure that imprisoned litigants are not disadvantaged by delays which other litigants might readily overcome."<sup>243</sup> In *Houston*, Justice Brennan underscored that pro se incarcerated litigants should be afforded the Prison Mailbox Rule's leniency because they are "[u]nskilled in law, unaided by counsel, and unable to leave the prison."<sup>244</sup> Incarcerated litigants who are technically represented by counsel are also "unskilled in law" and "unable to leave the prison."<sup>245</sup> Moreover, the brutal realities of incarceration mean that they are also often practically and effectively "unaided by counsel."<sup>246</sup>

Contrary to the Fifth, Sixth, and Eighth Circuits' positions,<sup>247</sup> being represented by counsel does not mean that incarcerated litigants are in "no different position than litigants who are at liberty."<sup>248</sup> Supporters of the narrow interpretation argue that anyone—incarcerated or at liberty—who is represented by counsel is in the same position, because the lawyer can always

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243. *Lewis v. Richmond City Police Dep't*, 947 F.2d 733, 735 (4th Cir. 1991); *see also* *Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002) (quoting the same language with approval).

244. *Houston v. Lack*, 487 U.S. 266, 271 (1988); *see also supra* notes 91–96 and accompanying text.

245. *See Houston*, 487 U.S. at 271.

246. *See supra* notes 56–68 and accompanying text.

247. *See supra* notes 144–49 and accompanying text.

248. *United States v. Kimberlin*, 898 F.2d 1262, 1265 (7th Cir. 1990).

file the pleading or, at least, confirm whether the filing was received.<sup>249</sup> This conclusion rests on the core assumption that incarcerated litigants can adequately communicate with their attorneys.<sup>250</sup>

That assumption is incorrect. Despite Justice Scalia's suggestion that, because of potential post office delays, "some of us feel just as helpless putting [mail] in the mailbox as a prisoner might feel delivering it to the warden,"<sup>251</sup> imprisoned litigants are not in the same position as free ones. Rather, incarcerated litigants face additional barriers including (1) communication restrictions, (2) under-resourced attorneys, and (3) additional procedural requirements.

First, incarcerated litigants' communications are often restricted because they struggle to contact their attorneys by phone,<sup>252</sup> they know that their emails are being monitored by prison officials,<sup>253</sup> and they are often forced to call their attorneys from public spaces without any privacy.<sup>254</sup> Even when they do have theoretical access to counsel, incarcerated people cannot communicate with their attorneys when prison officials institute any kind of movement restriction.<sup>255</sup> Prisons are also typically in intentionally remote areas, creating prohibitively long commutes for attorneys.<sup>256</sup> Outside litigants face none of these challenges because they can freely call their attorneys and travel to their offices at their convenience.

Second, the dynamics of the legal profession exacerbate these communication restrictions because incarcerated litigants' attorneys are often the most overworked and underfunded in the profession.<sup>257</sup> Incarcerated people struggle to afford legal representation, and the PLRA deters civil rights attorneys from taking them on as clients because the PLRA limits attorneys' fees awards and restricts damages to nominal figures unless the incarcerated plaintiff can show significant physical injury.<sup>258</sup> Instead, most incarcerated litigants rely on public defenders, legal aid attorneys, or pro bono counsel.<sup>259</sup> These attorneys are faced with unsustainable workloads, insufficient support staff, and inadequate government funding.<sup>260</sup> Thus, the hardest-to-reach clients are often represented by the most overburdened attorneys.

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249. See *supra* notes 150–51 and accompanying text.

250. See *supra* notes 152–53 and accompanying text.

251. Oral Argument, *supra* note 146, at 7:23.

252. See *supra* notes 56–57 and accompanying text.

253. See *supra* note 61 and accompanying text.

254. See *supra* note 61 and accompanying text.

255. See *supra* notes 54–55, 64–65 and accompanying text.

256. See *supra* note 63 and accompanying text.

257. See *supra* notes 66–68 and accompanying text.

258. Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), [https://www.prisonpolicy.org/reports/PLRA\\_25.html](https://www.prisonpolicy.org/reports/PLRA_25.html) [<https://perma.cc/VA66-AM9G>] ("The result [of the PLRA provisions] is that—knowing incarcerated plaintiffs cannot win reasonable attorney's fees—civil rights lawyers are deterred from taking them on as clients.").

259. See FURST, *supra* note 67, at 1.

260. See *id.*

Third, incarcerated litigants must navigate more procedural requirements than outside litigants because of the PLRA's access provisions, especially the exhaustion requirement.<sup>261</sup> Under the PLRA, incarcerated litigants are required to exhaust all administrative remedies, which are often "designed to foil prisoners' lawsuits,"<sup>262</sup> before they can bring suit in federal court.<sup>263</sup> In short, the PLRA "makes it much harder for incarcerated people to file and win federal civil rights lawsuits."<sup>264</sup>

Outside litigants rarely face similar obstacles.<sup>265</sup> As such, the crucial assumption of *Houston*'s narrow interpretation—that mere representation means equal access to the courts—does not withstand scrutiny. The question remains, however, whether *Houston* explicitly limited its holding to pro se litigants, or whether the mailbox rule could be applied equally to other incarcerated litigants who face obstacles that litigants who are at liberty never do. Part III.A.2 argues that the *Houston* holding was not explicitly limited to pro se litigants, and that courts' previous extensions of the *Houston* decision to other types of prison filings support the broad interpretation in this context.

## 2. *Houston* Does Not Exclude Represented Litigants from the Prison Mailbox Rule

The *Houston* decision did not explicitly bar represented litigants from benefiting from the Prison Mailbox Rule,<sup>266</sup> just as it did not indicate that it should be limited to notices of appeal in civil cases.<sup>267</sup> Courts extend the *Houston* holding to types of filings other than notices of appeal in habeas cases because *Houston* did not explicitly limit itself to that type of filing,<sup>268</sup> and the policy considerations that drove the Court's reasoning apply equally to other types of filings.<sup>269</sup> Likewise, if *Houston*'s underlying policy also supports applying the Rule equally to represented litigants, *Houston* does not restrict the courts from doing so.<sup>270</sup>

*Houston*'s underlying policy—that of not penalizing incarcerated litigants "for delays over which they have no control"<sup>271</sup>—does, in fact, apply with equal force to incarcerated litigants who are represented by counsel. As discussed in Part III.A.1, legal representation alone does not solve the challenges that pro se incarcerated litigants face.<sup>272</sup> Moreover, represented

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261. See Benerofe, *supra* note 70, at 153–54.

262. Borchardt, *supra* note 72, at 472.

263. See *supra* notes 70–72 and accompanying text.

264. Fenster & Schlanger, *supra* note 258.

265. *Id.*

266. See *United States v. Moore*, 24 F.3d 624, 626 (4th Cir. 1994) (noting that "the Supreme Court did not expressly limit *Houston*'s application to cases involving unrepresented prisoners").

267. See *supra* notes 105–10 and accompanying text.

268. See *Hostler v. Groves*, 912 F.2d 1158, 1160 (9th Cir. 1990) (observing that "*Houston* gives no indication that its holding should be limited to habeas cases").

269. See *supra* notes 107–08 and accompanying text.

270. See *Moore*, 24 F.3d at 626.

271. *Hamm v. Moore*, 984 F.2d 890, 892 (8th Cir. 1992).

272. See *supra* notes 252–63 and accompanying text.

incarcerated litigants would not gain an “unfair advantage” by having access to the Rule. Those fortunate enough to be free would never trade that freedom for a few extra days to file from a prison cell.<sup>273</sup>

In short, when courts looked to apply *Houston* to other types of filings, they did not shy away from looking to the Prison Mailbox Rule’s underlying policy.<sup>274</sup> When those policy considerations pointed to extending *Houston* to other types of filing, *Houston* did not restrict courts from doing so.<sup>275</sup> Likewise, when policy considerations point to applying the Rule equally to all incarcerated litigants, *Houston* should not restrict courts from doing so.<sup>276</sup> Thus, there is no reasonable basis for limiting *Houston* to unrepresented litigants, just as there was “no reasonable basis for limiting *Houston* to civil actions.”<sup>277</sup>

### 3. The “Unenviable” Representation Inquiry Punishes Incarcerated Litigants Who Need Clear Guidance to File on Time

When courts limit the Prison Mailbox Rule to pro se incarcerated litigants, they must decide who qualifies as represented by counsel. According to Judge Readler, this “unenviable” inquiry is “often no easy task” for judges and can lead to inconsistent or unpredictable outcomes.<sup>278</sup> This unpredictability is an additional barrier that incarcerated litigants must navigate.<sup>279</sup>

As demonstrated by the cases discussed in Part II.A.3, Judge Readler’s concern is well founded. In *Cretacci*, the court held that the incarcerated litigant was represented by counsel, despite having handed in the filings himself, because he retained an attorney who prepared the legal documents on his behalf.<sup>280</sup> Judge Readler noted, however, that had *Cretacci* fired his attorney before handing his complaint to prison officials, it would have been timely because he would have no longer been represented by counsel.<sup>281</sup> This analysis contradicts the Ninth Circuit’s reasoning in *Stillman*, in which the court held that the incarcerated litigant was represented by counsel, despite not having retained an attorney, because a pro bono attorney helped draft legal documents and coordinate signatures.<sup>282</sup> If this is enough to be considered represented by counsel, how would *Cretacci* evade that label by firing his attorney before filing himself?

Reliance on inherently elusive state law definitions of “practicing law” to determine whether someone is represented by counsel also leads to

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273. *Moore*, 24 F.3d at 625–26; *cf. supra* note 154 and accompanying text.

274. *See supra* notes 106–10 and accompanying text.

275. *See supra* notes 266–70 and accompanying text.

276. *See supra* notes 266–70 and accompanying text.

277. *See Moore*, 24 F.3d at 625.

278. *Cretacci v. Call*, 988 F.3d 860, 872 (6th Cir. 2021) (Readler, J., concurring).

279. *See infra* notes 280–85 and accompanying text.

280. *See* 988 F.3d at 866.

281. *See id.* at 872–73 (Readler, J., concurring).

282. *See Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003); *supra* notes 181–82 and accompanying text.

inconsistent results.<sup>283</sup> The Eighth Circuit's *Burgs* decision compounds this confusion. There, the court held that an incarcerated litigant was barred from using the mailbox rule, despite filing his notice of appeal pro se, because he was represented by counsel at the district court level.<sup>284</sup> Other courts look, instead, to when the filing occurred.<sup>285</sup>

Effectively, the representation inquiry is a multi-factored test<sup>286</sup> under which various jurisdictions weigh the factors differently.<sup>287</sup> If this type of complex, multi-factored legal analysis to determine representation status is "no easy task" for federal judges,<sup>288</sup> it is a near impossible one for incarcerated people.<sup>289</sup> Any kind of legal advice received, no matter the source or its potentially limited nature, might deny them the Rule's benefits.<sup>290</sup> Forcing incarcerated litigants to predict this complicated representation inquiry's outcome just to determine when they must file by is yet another barrier to court access. The Prison Mailbox Rule, however, was created to simplify filing for incarcerated people, not to complicate it further.<sup>291</sup>

Accordingly, courts should apply the Rule equally to all incarcerated litigants, like the Fourth Circuit did *Moore*.<sup>292</sup> This would, as Judge Readler noted, "avoid tasking courts with resolving thorny questions of representation."<sup>293</sup> A bright-line rule would better serve both the courts and incarcerated litigants.<sup>294</sup> Moreover, any concerns with the unlikely possibility of litigants using the Rule to game the system can be addressed with the bad-faith exception proposed in Part III.A.4.

#### 4. The Bad-Faith Exception

This Note proposes that an interpretation of the Prison Mailbox Rule should also include a bad-faith exception. If a bad-faith exception exists, it would permit appellate courts to remand cases to the district court level for a hearing on whether an incarcerated litigant acted in bad faith in trying to take advantage of the Rule. Realistically, such instances should be rare, given that members of the Standing Committee "could not think of any realistic scenario in which [the Rule] would be likely to be abused by the lawyer who

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283. See *supra* notes 190–91 and accompanying text.

284. See *Burgs v. Johnson County*, 79 F.3d 701 (8th Cir. 1996); *supra* notes 176–79 and accompanying text.

285. See, e.g., *Cretacci*, 988 F.3d at 866–67 ("We affirm the district court's finding that Cretacci was represented by counsel *when he filed his complaint*." (emphasis added)); *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002) (denying incarcerated litigant access to the prison mailbox rule because he was represented by counsel *when he filed a notice of appeal*).

286. See *supra* notes 167–69 and accompanying text.

287. See *supra* notes 280–85 and accompanying text.

288. *Cretacci*, 988 F.3d at 872–73 (Readler, J., concurring).

289. See Rubin, *supra* note 26, at 1000.

290. See *supra* note 183 and accompanying text.

291. See *supra* notes 91–98 and accompanying text.

292. See *supra* Part II.C.

293. *Cretacci*, 988 F.3d at 860, 873 (Readler, J., concurring).

294. See Scalia, *supra* note 222, at 1178–80.

represents the inmate.”<sup>295</sup> Even in *Cretacci*, the attorney was not acting in bad faith. He made a mistake and then did his best to make sure that his client’s pleadings were filed on time.<sup>296</sup> This was not an intentional ploy to extend a filing period.

Bad-faith exceptions to federal rules exist in other contexts, such as the bad-faith exception to the American rule concerning attorneys’ fees<sup>297</sup> or the bad-faith exception to Federal Rule of Civil Procedure 15(a), which governs when parties are allowed to amend their complaints.<sup>298</sup> Although it would rarely be utilized, this bad-faith exception to the Prison Mailbox Rule would likely alleviate any concerns about litigants trying to use the Rule to gain an unfair advantage.<sup>299</sup>

### B. The Supreme Court Can, and Should, Resolve This Conflict

The Supreme Court should take up this issue and explicitly apply *Houston*’s Prison Mailbox Rule to incarcerated litigants represented by counsel. Part III.B.1 argues that the Supreme Court is in the best position to resolve this conflict because the Prison Mailbox Rule is judicially created, and its federal codifications purportedly codify the *Houston* holding. Part III.B.2 proposes that, in the alternative, the Standing Committee should promulgate more federal rules governing prison filings that are consistent with Judge Readler’s proposal in his *Cretacci* concurrence.

#### 1. The Supreme Court Is Best Positioned to Resolve This Conflict

Because the Prison Mailbox Rule is a judicially created rule, and its federal codifications “reflect” the *Houston* holding, the Supreme Court is in the best position to make clear that *Houston*’s Prison Mailbox Rule applies equally to those represented by counsel.<sup>300</sup> Indeed, the *Houston* decision effectively rewrote Federal Rules of Appellate Procedure 3(a) and 4(a)(1).<sup>301</sup> Justice Scalia criticized the opinion for “obliterat[ing] the line between textual construction and textual enactment.”<sup>302</sup> Despite acknowledging that the rule made “a good deal of sense,” he argued that this type of rulemaking was best

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295. Memorandum from Catherine T. Struve to Advisory Comm. on App. Rules, *supra* note 128.

296. *See supra* notes 2–13 and accompanying text.

297. *See* Jacob Singer, *Bad Faith Fee-Shifting in Federal Courts: What Conduct Qualifies?*, 84 ST. JOHN’S L. REV. 693, 693 (2010) (identifying the “bad faith exception” as one of numerous exceptions to the American rule on attorneys’ fees).

298. *See* *Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that “Rule 15(a) declares that leave to amend shall be freely given when justice so requires” unless there has been “undue delay, bad faith, or dilatory motive on the part of the movant” (emphasis added)).

299. *See supra* note 154 and accompanying text.

300. *See supra* notes 117–19 and accompanying text.

301. *See supra* note 86 and accompanying text.

302. *Houston v. Lack*, 487 U.S. 266, 277 (1988) (Scalia, J., dissenting) (“Today’s decision obliterates the line between textual construction and textual enactment.”).



left to the Standing Committee.<sup>303</sup> Judge Readler also endorsed this view in his *Cretacci* concurrence.<sup>304</sup>

Both Justice Scalia and Judge Readler's concerns, however, no longer apply, because the Standing Committee has since promulgated rules codifying the Rule without limiting its benefits based on an incarcerated litigant's representation status.<sup>305</sup> Unlike the initial *Houston* decision, there would be no "textual enactment" involved.<sup>306</sup> Instead, the Court would be reasonably interpreting its previous holding<sup>307</sup> to comport with the Standing Committee's position on the issue.<sup>308</sup>

Relying instead on the Standing Committee to promulgate further federal rules, as proposed by Judge Readler,<sup>309</sup> would not definitively resolve the conflict. The federal rules codifying the Prison Mailbox Rule purport to "reflect" the *Houston* holding.<sup>310</sup> So long as *Houston*'s application to represented litigants is debated, courts will use the codified rules in different ways. Some courts look to the *Houston* decision to complement,<sup>311</sup> or sometimes replace,<sup>312</sup> the federal rules, while others ignore *Houston* and look only to on-point federal rules.<sup>313</sup> Additional rulemaking would not necessarily resolve the conflicting ways in which courts interpret and rely on the *Houston* holding. The Supreme Court should instead resolve this conflict itself.

## 2. Alternatively, the Standing Committee Should Promulgate More Prison Mailbox Rule Codifications

If the Supreme Court chooses not to resolve this conflict, the Standing Committee should heed Judge Readler's calls and promulgate further federal rules mirroring Rule 4(c) to apply to all filings that the Prison Mailbox Rule can affect. Despite not initially resolving the circuits' disagreement on how to interpret *Houston*, which the federal rules are designed to "reflect,"<sup>314</sup> this approach could influence the circuits to adopt the same position over time.

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303. *Id.*

304. See *Cretacci v. Call*, 988 F.3d 860, 871 (2021) (Readler, J., concurring) ("Despite my disagreement with the process that gave rise to the 'mailbox rule,' I am not blind to the challenges inmates face in pursuing legal remedies.").

305. See *supra* notes 114–15 and accompanying text.

306. See *Houston*, 487 U.S. at 277 (Scalia, J., dissenting).

307. See *id.* at 268 (majority opinion).

308. See *supra* note 215 and accompanying text.

309. See *Cretacci*, 988 F.3d at 873 (Readler, J., concurring).

310. See *supra* note 117 and accompanying text.

311. See Canedy, *supra* note 40, at 778 ("The federal circuits have understood the Rule as codifying [*Houston*] and sometimes refer back to the Supreme Court's opinion to help solve interpretive problems.").

312. The Eighth Circuit previously ignored Rule 4(c) in the context of notices of appeal and relied exclusively on its narrow *Houston* reading. See *supra* notes 164–65 and accompanying text.

313. See *supra* notes 202–04 and accompanying text.

314. See *supra* note 112 and accompanying text.

Members of the judiciary may be more comfortable deferring to the Standing Committee on federal rule enactment or clarification.<sup>315</sup> The Eighth Circuit, for instance, has long looked to the Rule 4(c) procedural requirements—even when the filing at issue is not governed by that rule—to “maintain a uniform construction of the [prison mailbox] rule irrespective of context.”<sup>316</sup> Therefore, by enacting a Federal Rule of Civil Procedure that allows all incarcerated litigants to benefit from the Rule, the committee would put pressure on courts to follow this approach. This type of judicial approach reflects courts’ deference to the Standing Committee on these issues, as well as their affinity for consistency. If the Standing Committee continues to promulgate federal rules that do not limit the Prison Mailbox Rule to pro se litigants, courts that seek to “maintain a uniform construction” of the rule should adopt this same position.<sup>317</sup>

A new Federal Rule of Civil Procedure should mirror the language of Rules 4(c) and 25(a).<sup>318</sup> This language is also present in U.S. Supreme Court Rule 29.<sup>319</sup> and rule 3 governing §§ 2254 and 2255 habeas cases.<sup>320</sup> Using it again here would ensure consistency and predictability.<sup>321</sup> As previously discussed, the judicially created Prison Mailbox Rule now applies to other types of filings that are not governed by any inmate-filing federal rules, and that would not be governed by a new Federal Rule of Civil Procedure.<sup>322</sup> To ensure consistency, the Standing Committee would therefore need to promulgate more rules for all the types of filings that the Prison Mailbox Rule can affect.

The need for so many separate, different inmate-filing rules illustrates the appeal of this Note’s proposed approach detailed in Part III.B.1. Under that approach, the Supreme Court can definitively resolve this conflict by holding that its own decision in *Houston* applies equally to all incarcerated litigants.

#### CONCLUSION

The Supreme Court created the Prison Mailbox Rule to ensure that imprisoned persons do not face barriers to filing that do not exist for outside

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315. See *supra* notes 303–04 and accompanying text.

316. *Grady v. United States*, 269 F.3d 913, 916 (2001); see *supra* note 130 and accompanying text.

317. See *Grady*, 269 F.3d at 916 (“Under our jurisprudence . . . a prisoner seeking to benefit from the prison mailbox rule must satisfy the requirements of Rule 4(c) whether he files a notice of appeal, a habeas petition, or a § 2255 motion.”); *supra* note 130 and accompanying text.

318. Rule 4(c), which governs notices of appeal, states: “If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution’s internal mail system on or before the last day for filing . . . .” FED. R. APP. P. 4(c). A new Federal Rule of Civil Procedure governing civil complaints would state: “If an inmate files a complaint in a civil case, the complaint is timely if it is deposited in the institution’s internal mail system on or before the last day for filing . . . .”

319. See *supra* notes 127–28 and accompanying text.

320. See *supra* note 127 and accompanying text.

321. See *supra* note 130 and accompanying text.

322. See *supra* Part I.D.2.

litigants.<sup>323</sup> Today, federal circuit courts' conflicting applications of the Rule when incarcerated litigants are represented creates confusion for judges and litigants and encourages barriers to filing.<sup>324</sup> Incarcerated litigants are not, in fact, in the same position as outside litigants simply because they are represented by counsel.<sup>325</sup> Accordingly, this Note proposes applying the Prison Mailbox Rule equally to all incarcerated litigants, regardless of their representation status, to ensure a more predictable and consistent application of the Rule.<sup>326</sup> This bright-line rule would simplify the filing process for all and provide people in prison with one less barrier to accessing the courts.

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323. *See supra* Part I.C.1; *Houston v. Lack*, 487 U.S. 266 (1988).

324. *See supra* Part II.

325. *See supra* Part III.A.1.

326. *See supra* Part III.