No. 18-8369

IN THE
Supreme Court of the United States

ARTHUR JAMES LOMAX,
Petitioner,

v.

CHRISTINA ORTIZ-MARQUEZ, NATASHA KINDRED, DANNY DENNIS, MARY QUINTANA
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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The most important point made in respondents' cursory brief in opposition is a concession: at least two circuits (the Third and Fourth) "have adopted a different rule" than the Tenth Circuit applied in this case. BIO 3-5. In those two circuits, "dismissals without prejudice for failure to state a claim do *not* count as strikes" under the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g). BIO 5 (emphasis added). By contrast, here the Tenth Circuit prevented petitioner from proceeding *in forma pauperis* because it concluded that "the dismissals without prejudice of two of his prior actions" *do* count as strikes. Pet. App. 5. That result was dictated by circuit precedent, which holds that "'it is immaterial to the strikes analysis [whether] [a] dismissal was without prejudice.'" *Id.* (quoting *Childs v. Miller*, 713 F.3d 1262, 1266 (10th Cir. 2013)). This case thus clearly implicates an acknowledged circuit split on the question presented: *i.e.*, whether a dismissal for failure to state a claim that the district court ordered to be without prejudice necessarily counts as a strike under 28 U.S.C. § 1915(g).

Respondents try to downplay this circuit division by asserting (at 3) that "most circuits" have taken the Tenth Circuit's side. That argument provides no basis to deny review. This is not a circumstance in which a circuit split could resolve on its own, based on the possibility that a single outlier circuit might reconsider its position. Both the Fourth Circuit and the Third Circuit adopted their statutory interpretations of § 1915(g) in full knowledge of the conflicting

decisions from other circuits. And the Third Circuit discussed the existing circuit split at length when it decided to join the Fourth Circuit's side, reasoning that the Fourth Circuit's opinion had "persuasively disposed of th[e] contrary case law" from other circuits. *Millhouse v. Heath*, 866 F.3d 152, 162 (3d Cir. 2017) (citing *McLean v. United States*, 566 F.3d 391, 398-99 (4th Cir. 2009)). The circuit split on the proper interpretation of § 1915(g) is thus deeply entrenched, and will remain in place absent this Court's review.

This case is also an excellent vehicle to review the question presented. Respondents contend (at 5-6) that petitioner would not benefit from the rule applied by the Third and Fourth Circuits because his actions supposedly were "frivolous," which could provide a separate basis for a strike under 28 U.S.C. § 1915(g). But that is just wrong. Two of the three strikes found by the Tenth Circuit resulted from orders that were unequivocally dismissed without prejudice "for failure to state a claim" in light of *Heck v. Humphrey*, 512 U.S. 477 (1994). Pet. App. 5. The applicable district court decisions never suggested petitioners' claims were being dismissed as frivolous. And the Tenth Circuit's decision specifically noted that petitioners' previous actions were all "dismissed on the grounds that they failed to state a claim." Pet. App. 2, 3 n.1. To the extent respondents mean to suggest that courts in the Third and Fourth Circuits treat all actions dismissed based on *Heck* as inherently frivolous, their assertion is not only unsupported, but is directly contradicted by case law. *See* pp. 6-8, *infra*.

The question presented is also frequently recurring and important. The ability of indigent prisoners to access federal courts should not turn on where they are incarcerated. This Court should grant the petition for a writ of certiorari.

I. There Is A Firmly Entrenched Split On The Question Presented That Warrants This Court's Review.

The existence of a circuit split on the question presented is beyond dispute. As respondents concede, "the Third and Fourth circuits have adopted a different rule" than the Tenth Circuit, "holding that a dismissal without prejudice for failure to state a claim does not count as a strike." BIO 3-4 (quoting *McLean*, 566 F.3d at 396-97).

Thus, in either the Third Circuit or the Fourth Circuit, petitioner would have been allowed to bring his action *in forma pauperis*, because the two previous without prejudice dismissals of his actions under *Heck* (Pet. App. 5) would not have counted as strikes. That is not mere speculation: district courts in both circuits have readily concluded that precedent dictates that dismissals without prejudice for failure to state a claim based on *Heck* are not strikes. *See, e.g.*, *Eaker v. Burns*, No. 10-cv-657, 2011 WL 304701, at *1 (W.D.N.C. Jan. 28, 2011) (concluding that prior dismissal did not count as a strike under *McLean* because "while the Court did dismiss Plaintiff's . . . claim noting that 'Plaintiff has no claim under [§ 1983]' based on [*Heck*], the Court specifically dismissed the matter without prejudice"); *Wilson v. Cassell*, No. 09-cv-267, 2009 WL 2207921, at *1, *2 n.1 (W.D. Va. July 23, 2009) ("I dismiss the com-

plaint without prejudice for failing to state a claim upon which relief may be granted, pursuant to [*Heck*] . . . . [T]his dismissal does not constitute a strike under [§ 1915(g)].").

Respondents have nonetheless tried to minimize the clear circuit split by insisting that it is too "lopsided" to warrant this Court's attention. BIO 6. That argument is misguided. This Court regularly grants certiorari to resolve circuit conflicts even when there is only one circuit on the short-side of a split—a circumstance that is not present here. *See, e.g.*, *Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL 429919, at *1 (U.S. June 3, 2019) (granting certiorari to review whether a formal objection is required to preserve appellate review of a criminal sentence's substantive reasonableness, as only the Fifth Circuit has held); *Peugh v. United States*, 569 U.S. 530, 535 & n.1 (2013) (reviewing an issue that was the subject of a 5-1 circuit split). And the Court has often vindicated the minority position in supposedly "lopsided" circuit splits. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 & n.4 (2018) (noting a 7-1 circuit split *against* the position ultimately adopted by the Court). In fact, the last time this Court addressed a question about the application of § 1915(g)'s "three strikes" provision, it unanimously embraced the reasoning of a court of appeals decision that had departed from "the vast majority of the other Courts of Appeals." *Coleman v. Tollefson*, 135 S. Ct. 1759, 1762 (2015). The Court acknowledged that the circuit breakdown on the issue was lopsided, *see Henslee v. Keller*, 681 F.3d 538, 541 (4th Cir. 2012) (describing the split), but still granted review "[i]n light of the division of opinion among the

Circuits" and then went on to endorse the *minority* view, *see Coleman*, 135 S. Ct. at 1762-63.

To the extent an uneven circuit headcount ever provides an argument against certiorari, it is only compelling in circumstances where a circuit adopted an outlier view that it could be expected to revisit based on the accumulation of contrary authority. That situation does not exist here. The Fourth Circuit's decision in *McLean* discussed conflicting decisions from the Ninth and Tenth Circuits, but reasoned (in the face of a dissent) that those courts' interpretation of 28 U.S.C. § 1915(g) was unpersuasive. 566 F.3d at 398-99. The Third Circuit then deepened the circuit division in *Millhouse*. The court noted that "most circuits" have held that without prejudice dismissals for failure to state a claim count as strikes. 866 F.3d at 162-63. But the Third Circuit nevertheless threw its lot in with the Fourth Circuit, reasoning that the Fourth's Circuits approach was more persuasive than those of other circuits because it was more consistent with both the text and purpose of § 1915(g).

This circuit split is not going anywhere. And there is no reason for the Court to leave such a clear division of authority in place.

II. Respondents' Only Vehicle Objection Is Baseless.

This case is an excellent vehicle to review the question presented. Petitioner squarely raised the issue below, urging the Tenth Circuit that two of the three dismissals counted against him were not really strikes under § 1915(g), because "a dismissal without prejudice for failure to state a claim does not count

as a strike." Pet. App. 5.[1] The Tenth Circuit's rejection of petitioner's argument was outcome-determinative. The court recognized that "'the dismissal of a civil rights suit for damages based on prematurity under *Heck* is for failure to state a claim.'" *Id.* (quoting *Smith v. Veterans Admin.*, 636 F.3d 1306, 1312 (10th Cir. 2011)). And it acknowledged that the two previous *Heck* dismissals were "without prejudice." *Id.* at 3 n.1. But, in direct contradiction to the Third and Fourth Circuits, the court held that the dismissals still counted as strikes because their without-prejudice status was "immaterial" under circuit precedent. *Id.* at 5.

Despite this clarity, respondents try to manufacturer a vehicle problem by asserting (at 5-6) that the Third and Fourth Circuits would have reached the same result as the Tenth Circuit under the facts of this case. Respondents assert that those courts supposedly would have treated petitioners' *Heck* dismissals as strikes on the separate ground that his claims were frivolous. The argument is puzzling, because it unabashedly tries to rewrite the record: there is no question that petitioner's previous claims were *not* dismissed as frivolous. Both the district court that dismissed the claims, and the Tenth Circuit in the decision below, expressly recognized the two *Heck* dismissals were for failure to state a claim. Pet. App. 2, 3 n.1; Opp. App. 12.

To the extent their position can be discerned, respondents' argument appears to be that although petitioner's actions were in fact dismissed without prejudice for failure to state a claim, he could not

[1] Petitioner also raised this argument in the district court in response to the court's order to show cause. Opp. App. 13.

have benefited from the precedents set by the Third and Fourth Circuits because district courts in those circuits supposedly treat *all Heck*-barred actions as frivolous. But that is simply not the law. District courts in those circuits routinely characterize *Heck* dismissals as dismissals for failure to state a claim without finding that the actions are frivolous. *See, e.g., Lee v. Krom*, No. 17-cv-338, 2017 WL 3015887, at *3, *4 (M.D. Pa. June 5, 2017), *report and recommendation adopted by* 2017 WL 3008581 (M.D. Pa. July 14, 2017) ("[I]t is recommended that Lee's federal civil rights claims be dismissed [under *Heck*] without prejudice for failure to state a claim upon which relief can be granted."); *Wilson*, 2009 WL 2207921, at *1 ("I dismiss the complaint without prejudice for failing to state a claim upon which relief may be granted, pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994)."). And as discussed, p. 3, *supra*, courts in those circuits have held that such dismissals do *not* count as strikes. *See, e.g.*, *Eaker*, 2011 WL 304701, at *1; *Wilson*, 2009 WL 2207921, at *2 n.1.

Notably, in *Wilson*, the district court called attention to the fact that, under Fourth Circuit precedent, "a dismissal without prejudice for failing to state a claim does not constitute a strike," but "a dismissal of an action with prejudice as frivolous does." 2009 WL 2207921, at *2 n.1. The district court declined to dismiss the plaintiff's *Heck*-barred claim as frivolous, while warning him that "additional attempts to relitigate the issues in a district court during his life sentence without showing a favorable termination shall be dismissed as frivolous and count as a strike under § 1915(g)." *Id.* The court's reasoning directly contradicts respondents' assertion (at 5) that "[i]n the

Fourth Circuit, *Heck* dismissals are dismissed because they are frivolous, and not for failure to state a claim on which relief may be granted."

The three unpublished court of appeals decisions cited by respondents (at 5) do not support a contrary argument. At most, the cited cases show, quite unremarkably, that a district court *may* dismiss a complaint as frivolous if it concludes that the action is clearly barred under *Heck*; the decisions do not suggest that a district court *must* do so. In fact, in two of the cases cited, the court of appeals "modified" the district court's order dismissing claims as frivolous, concluding that the dismissal should be "without prejudice" instead. *Ewing v. Silvious*, 481 F. App'x 802, 802 (4th Cir. 2012); *see also Russell v. Guilford Cty. Municipality*, 599 F. App'x 65, 65 (4th Cir. 2015) ("[W]e modify the dismissal to be without prejudice because Russell may refile his claims should his conviction ever be invalidated by the appropriate court."). In any event, these decisions certainly provide no basis to conclude that the dismissals of petitioner's two previous actions could be retroactively characterized as frivolous so as to qualify as strikes under the Third and Fourth Circuits' rule. *Cf. Haury v. Lemmon*, 656 F.3d 521, 523 (7th Cir. 2011) (declining to issue a strike based on the possibility that the district judge *might* have believed that a suit dismissed for lack of jurisdiction was also frivolous, because the appellate court could not "read into [the judge's] decision a ground for dismissal that he did not state").

III. Respondents' Merits Arguments Provide No Reason To Deny Review.

Respondents also urge the Court to deny review because they insist (at 3-4) that the Tenth Circuit's decision blocking petitioner from bringing an action *in forum pauperis* was "correct[]." But respondents' premature merits arguments provide no basis to leave an acknowledged circuit split in place. Respondents assert that the Tenth Circuit's statutory interpretation is compelled by the plain language of § 1915(g), because they say that the statute does not expressly "differentiate dismissals with prejudice and those without." BIO 3. And respondents also argue that a rule treating without-prejudice dismissals as strikes "is consistent with the stated purpose of the Prison Litigation Reform Act to reduce the quantity and increase the quality of prisoner litigation." *Id.* at 4. But respondents ignore that the Third and Fourth Circuit decisions considered both of these arguments "at some length," and explained why they are not persuasive. *Millhouse*, 866 F.3d at 162-63; *see McLean*, 566 F.3d at 396-99.

As the Fourth Circuit discussed, the "complete phrase" used in § 1915(g)—"dismissed" for "fail[ure] to state a claim upon which relief can be granted"—"has a well-established legal meaning" that presupposes "a judgment on the merits . . . rendered *with prejudice*." *McLean*, 566 F.3d at 396 (emphasis added). It thus "follows that the type of prior dismissal for failure to state a claim contemplated by § 1915(g) is one that constituted an adjudication on the merits and prejudiced the filing of a subsequent complaint with the same allegations"—a category that necessarily excludes dismissals ordered without prejudice.

Id. at 396–97. This interpretation is based on the "unambiguous meaning" of the term of art "failure to state a claim upon which relief can be granted" used in § 1915(g). *Id.* at 397. But it is also further supported by "the legislative purpose of the PLRA," which was meant to deter substantively meritless litigation rather than to penalize prisoners from filing actions that were inartfully pleaded or contained potentially curable procedural defects. *Id.* at 397-98.

At a minimum, there are certainly substantial arguments in support of the statutory interpretation adopted by two different courts of appeals. Those arguments deserve this Court's attention. The question presented regarding how to interpret § 1915(g)'s three-strikes provision is both frequently recurring and important. Congress created a right to pursue actions *in forma pauperis* in order "to ensure that indigent litigants" who cannot prepay filing fees "have meaningful access to the federal courts." *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016); *accord Coleman*, 135 S. Ct. at 1761-62. In the specific context of indigent prisoners, the IFP statute serves a critical role in ensuring that "[o]ur legal system" lives up to its commitment of "guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law." *Jones v. Bock*, 549 U.S. 199, 203 (2007).

To be sure, Congress adopted the PLRA, which includes the three-strikes provision, because it recognized that the right to proceed *in forma pauperis* is sometimes abused. But in doing so, Congress did "not use a meat-axe approach to achieving its goal of stemming the flood of frivolous prisoner litigation and conserving judicial resources." *Millhouse*, 866

F.3d at 163. Rather, Congress carefully enumerated the categories of dismissals that count as strikes. This Court should grant review to decide whether actions dismissed without prejudice fit within the statute's enumeration, rather than leaving indigent prisoners in dozens of states subject to restrictions on their right to access the federal courts that do not apply to indigent prisoners within the Third and Fourth Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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