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

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

The Roderick and Solange MacArthur Justice Center (MJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. MJC has offices at the Northwestern Pritzker School of Law, at the University of

[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. MJC attorneys have led civil rights litigation in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

SUMMARY OF ARGUMENT

The Prison Litigation Reform Act restricts future litigation by prisoners who have accrued three strikes. But, as in baseball, not every foul counts as a strike.

A strike accrues if and only if: (1) a person who is incarcerated or detained in a facility (2) brings in a court of the United States (3) an action or appeal (4) that is dismissed (5) on particular grounds enumerated in the statute. 28 U.S.C. § 1915(g). These enumerated grounds for dismissal are: (a) the action or appeal is frivolous, (b) the action or appeal is malicious, or (c) the action or appeal fails to state a claim upon which relief may be granted. *Id.*

Amicus submits this brief to discuss certain issues regarding 28 U.S.C. § 1915(g) closely related to the question presented and the facts of the case.

First, the lower court assumed that a dismissal of one of Petitioner's cases partly for lack of jurisdiction and partly for failure to state a claim counts as a strike. The Court's opinion should avoid any implicit endorsement of this manifestly incorrect assumption. A dismissal for lack of jurisdiction falls outside the enumerated grounds. And a "hybrid dismissal"—one based partly on an enumerated ground and partly on an unenumerated ground—is not a strike.

Second, every dismissal under *Heck v. Humphrey*, 512 U.S. 477 (1994), falls outside the enumerated grounds and does not constitute a strike, provided the suit is not frivolous or malicious. The *Heck* bar's closest cousin is dismissal for lack of ripeness, not for failure to state a claim. The question presented focuses on the distinction between dismissals with prejudice and without prejudice, but no *Heck* dismissal—*even with prejudice*—is a dismissal for failure to state a claim. The Court should expressly reserve the question whether a *Heck* dismissal counts as a strike.

Third, in cases brought by prisoners, the Court should remind lower courts to be especially attentive to the distinction between dismissing an action and dismissing a complaint. If there is any possibility of curing pleading deficiencies through amendment, only the complaint should be dismissed, and the litigant should not accrue a strike. Under Respondents' view, § 1915(g) would create additional consequences to dismissal without prejudice of an action for failure to state a claim where the plaintiff is incarcerated. Those consequences would not accompany dismissal of a complaint.

ARGUMENT

I. The Court's Opinion Should Not Imply that a Dismissal Partly for Lack of Jurisdiction and Partly for Failing to State a Claim Is a Strike.

One of Petitioner's prior cases was dismissed partly for lack of jurisdiction and partly for failure to state a claim. The lower courts counted that dismissal as a strike.

That was error. Absent frivolousness or maliciousness, a dismissal partly for lack of jurisdiction and partly for failure to state a claim is not a strike. *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1150-51 (D.C. Cir. 2017); *accord Escalera v. Samaritan Vill.*, 938 F.3d 380, 383-84 (2d Cir. 2019); *Harris v. Harris*, 935 F.3d 670, 674 (9th Cir. 2019). This is so because (1) lack of jurisdiction is an unenumerated ground for dismissal, and (2) dismissal based partly on an unenumerated ground is not a strike.

Petitioner's "strike" for a dismissal based partly on lack of jurisdiction and partly on failure to state a claim is not before this Court. The Court should avoid any implied endorsement of the lower court's error on this issue when it summarizes Plaintiff's strike count in its opinion.

1. Dismissal for lack of jurisdiction falls outside the grounds enumerated in § 1915(g). *Thompson v. Drug Enf't Admin.*, 492 F.3d 428, 437 (D.C. Cir. 2007); *Moore v. Maricopa Cty. Sheriff's Office*, 657 F.3d 890, 894 (9th Cir. 2011); *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1283-84 (11th Cir. 2016); *Haury v. Lemmon*, 656 F.3d 521, 522 (7th Cir. 2011).

a. A jurisdictional dismissal is not a dismissal for "failing to state a claim" under § 1915(g). That term "mirror[s] the language of Federal Rule of Civil Procedure 12(b)(6), not 12(b)(1)." *Thompson*, 492 F.3d at 437. "Nowhere does the three-strikes rule mention 'lack of subject-matter jurisdiction,' the text of Rule 12(b)(1)." *Moore*, 657 F.3d at 894.

b. Nor is a failed bid for federal jurisdiction frivolous or malicious by definition. "[T]here is nothing necessarily frivolous or malicious in bringing

an action for which the court lacks jurisdiction." *Thompson*, 492 F.3d at 437; *see also Haury*, 656 F.3d at 522. After all, "understanding federal court jurisdiction is no mean feat even for trained lawyers," to say nothing of *pro se* prisoners. *See Thompson*, 492 F.3d at 437.

2. If a court dismisses some claims on an enumerated ground and others on an unenumerated ground—such as lack of jurisdiction—the dismissal of the case is not a strike. The statute provides that a strike accrues when an "action or appeal" is "dismissed on the [enumerated] grounds." 28 U.S.C. § 1915(g). Congress's use of the term "action"—not "claim," "count," or "cause of action"—means that "a case counts as a strike only if all of the claims were dismissed on grounds enumerated in the PLRA." *Fourstar*, 875 F.3d at 1151 (Kavanaugh, J.). That is "the obvious reading of the statute." *Turley v. Gaetz*, 625 F.3d 1005, 1008-09 (7th Cir. 2010). Nine circuits follow that rule categorically.[2]

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[2] *See Fourstar*, 875 F.3d at 1151; *Escalera*, 938 F.3d at 382; *Washington v. L.A. Cty. Sheriff's Dep't*, 833 F.3d 1048, 1057 (9th Cir. 2016); *Brown v. Megg*, 857 F.3d 287, 291 (5th Cir. 2017); *Daker*, 820 F.3d at 1283-84; *Byrd v. Shannon*, 715 F.3d 117, 125 (3d Cir. 2013); *Taylor v. Hull*, 538 F. App'x 734, 735 (8th Cir. 2013); *Tolbert v. Stevenson*, 635 F.3d 646, 651 (4th Cir. 2011); *Turley*, 625 F.3d at 1008-09. Two circuits have created a singular exception "in the specific context where claims were dismissed in part on § 1915(g) grounds and in part for failure to exhaust administrative remedies, and no claims were allowed to proceed on the merits." *See Escalera*, 938 F.3d at 382 n.3.

II. The Court Should Reserve the Question Whether a *Heck* Dismissal Is a Strike.

Petitioner's previous dismissals under the *Heck* bar do not count as strikes. Provided that a suit is not frivolous or malicious, a *Heck* dismissal—without prejudice *or with prejudice*—is not a strike.[3] The Court should reserve that issue expressly in its decision.

1. Federal courts are divided on whether a *Heck* dismissal is a species of dismissal for failure to state a claim and thus a strike under § 1915(g). Some courts assign strikes for *Heck* dismissals. *E.g.*, *In re Jones*, 652 F.3d 36, 38-39 (D.C. Cir. 2011); *Hamilton v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996).

The better view, however, is that a *Heck* dismissal is *not* for failure to state a claim and therefore is not a strike (unless the suit is frivolous or malicious). A Seventh Circuit panel consisting of Judges Easterbrook, Williams, and Kanne adopted that view in an unpublished decision, *Mejia v. Harrington*, 541 F. App'x 709, 710 (7th Cir. 2013). In *Mejia*, the district court stated that dismissal on *Heck* grounds counted

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[3] A *Heck* dismissal with prejudice ought to be an oxymoron because the theoretical possibility of a state reconsidering its adjudication exists in every case. Nonetheless, in practice, courts dismiss cases under *Heck* both with prejudice and without prejudice. *E.g.*, *Johnson v. McElveen*, 101 F.3d 423, 424 (5th Cir. 1996) ("A preferred order of dismissal [under the *Heck* bar] would read: Plaintiffs claims are dismissed with prejudice to their being asserted again until the *Heck* conditions are met."); *Abella v. Rubino*, 63 F.3d 1063, 1065 (11th Cir. 1995) ("We affirm the dismissal of [plaintiff's] claims with prejudice; [plaintiff] may bring his *Bivens* damages claims in the future should he meet the requirements of *Heck*.").

as a strike for the plaintiff. *Id.* The dismissal was with prejudice. Judgment, *Mejia v. Harrington*, No. 12-cv-02826 (N.D. Ill. May 25, 2012), ECF No. 7-2. The plaintiff did not challenge the assessment of the strike on appeal. *See* Brief of Plaintiff-Appellant, *Mejia*, 541 F. App'x 709 (No. 13-1064), ECF No. 17.

The court of appeals did not disturb the district court's dismissal with prejudice—but it did reject the strike *sua sponte*. 541 F. App'x at 710. The court reasoned that *Heck* dismissals are not dismissals for "fail[ing] to state a claim upon which relief may be granted" under § 1915(g) because *Heck* and *Edwards v. Balisok*, 520 U.S. 641 (1997) "deal with timing rather than the merits of litigation." *Meija*, 541 F. App'x at 710. As the court explained, a *Heck* dismissal resembles a dismissal for lack of ripeness: "Until the conviction or disciplinary decision is set aside, the claim is *unripe*, and the statute of limitations has not begun to run. *Heck* and *Edwards* do not concern the adequacy of the underlying claim for relief." *Id.* (emphasis added). The court therefore concluded that the *Heck* dismissal did not "count[ ] as a 'strike' under § 1915(g)." *Id.*

This Court's recent decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), lends support to *Meija*'s understanding of the *Heck* bar as a closer cousin to lack of ripeness than failure to state a claim. In *McDonough*, the Court described civil actions barred by criminal proceedings as "dormant" and "unripe." *Id.* at 2158.

This analysis supports Petitioner's view that a *Heck* dismissal without prejudice does not constitute a strike, but with somewhat different reasoning. A *Heck* dismissal, whether with prejudice or without

prejudice, is not a strike because such a disposition is not a dismissal for failure to state a claim.

2. The question presented—"Does a dismissal without prejudice for failure to state a claim count as a strike under 28 U.S.C. §1915(g)?"—concerns Petitioner's two prior *Heck* dismissals. *See* Question Presented, *Lomax v. Ortiz-Marquez*, No. 18-8369 (S. Ct.). The question therefore could be taken to imply that a *Heck* dismissal is a dismissal for failure to state a claim. Regardless of the answer to the question presented—in other words, whether or not a dismissal without prejudice for failure to state a claim is a strike—a *Heck* dismissal is not a strike because it is not a dismissal for failure to state a claim. To avoid an unintentional signal to lower courts, the Court's decision should expressly reserve the question whether a *Heck* dismissal is a dismissal for failure to state a claim, irrespective of whether the dismissal is with or without prejudice.

III. Where an Inartful or Incomplete Complaint by a *Pro Se* Litigant Fails To State a Claim, District Courts Should Dismiss the Complaint—Not the Action.

A plaintiff—especially a *pro se* plaintiff—should not receive a strike for filing a complaint that does not state a claim when the pleading, though inartful or incomplete, is potentially curable. The Court should remind lower courts that the proper course in that circumstance is to dismiss the complaint with leave to amend, not to dismiss the action. Dismissal of a complaint with leave to amend is not a strike because 1915(g) requires dismissal of an "action or appeal."

Whether proceeding *in forma pauperis* or not, a *pro se* plaintiff must be allowed "to amend his complaint prior to its dismissal for failure to state a claim, unless the court can rule out any possibility, *however unlikely* it might be, that an amended complaint would succeed in stating a claim." *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 796 (2d Cir. 1999) (emphasis added). *See also generally Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" (citation omitted, quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))).

Nonetheless, lower courts sometimes dismiss the action when the proper course is to dismiss only the complaint. *See, e.g.*, *Gomez*, 171 F.3d at 796 (holding that district court erred in dismissing the action rather than dismissing the complaint with leave to amend).

Under Respondents' position, the erroneous dismissal of an action instead of a complaint could result in a plaintiff accruing a strike for an inartful complaint that she later amends to state a claim. Moreover, such an erroneous dismissal could result in a third strike, preventing the litigant from refiling a meritorious action just because she cannot afford the fee. In the event Respondents prevail on the question presented, the Court should therefore remind lower courts to exercise special care not to dismiss an action brought by a prisoner who has any chance of curing a deficient complaint.

CONCLUSION

The Court should: (1) avoid any implicit endorsement of the view that a hybrid dismissal partly for lack of jurisdiction and partly for failure to state a claim counts as a strike, (2) explicitly reserve the question whether *Heck* dismissals count as strikes, and (3) remind lower courts to dismiss only the complaint, not the action, where a *pro se* prisoner has any chance of curing a deficient complaint.

Respectfully submitted,

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