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 FOR RESPONDENTS

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QUESTION PRESENTED

Does a dismissal without prejudice for failure to state a claim count as a strike under 28 U.S.C. § 1915(g)?

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STATEMENT OF THE CASE

A. Statutory Background

1. The first federal *in forma pauperis,* or IFP, statute, enacted in 1892, permitted any indigent U.S. citizen to "commence and prosecute to conclusion any . . . suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action[.]" Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252. By enacting this statute, Congress sought "to lower judicial access barriers to the indigent," *Denton v. Hernandez*, 504 U.S. 25, 31 (1992), while recognizing "that a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). Thus, Congress limited the circumstances under which a citizen could commence and maintain an IFP action by permitting federal courts to dismiss certain causes of action, including those that were "frivolous or malicious." Act of July 20, 1892, ch. 209, § 4.

This Court has consistently given the terms used by Congress in IFP statutes their plain meaning. It has interpreted a "frivolous" claim to mean one that is "lack[ing] an arguable basis either in law or in fact," which "embraces not only the inarguable legal conclusion, but also the fanciful factual allegation." *Neitzke*, 490 U.S. at 325. A "frivolous" complaint is not necessarily coextensive with a complaint that "fails to state a claim upon which relief can be granted" under Federal Rule of

Civil Procedure 12(b)(6)—because both standards "were devised to serve distinctive goals, . . . it does not follow that a complaint which falls afoul of the former standard will invariably fall afoul of the latter." *Id.* at 326-27 (noting that the prohibition against the filing of frivolous claims was intended to "discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate," while Rule 12(b)(6) "streamlines litigation by dispensing with needless discovery and factfinding"). Because of the indistinct boundaries between various standards of dismissal, "frivolous" does not have a precise definition. *See Denton*, 504 U.S. at 31-33 (reaffirming *Neitzke* and holding that "frivolousness is a decision entrusted to the discretion of the court entertaining the *in forma pauperis* petition").

While this Court has not specifically addressed the meaning of "malicious" in IFP statutes, other courts have held that "malicious" means filings that abuse the judicial process or duplicate allegations of another pending federal lawsuit by the same plaintiff. *Pittman v Moore*, 980 F.2d 994, 995 (5th Cir. 1993); *Johnson v. Edlow*, 37 F. Supp. 2d 775, 777 (E.D. Va. 1999).

Despite the limitation on "frivolous or malicious" actions, federal IFP litigation began to proliferate unabated in the years following the IFP statute's enactment. *See Woodford v. Ngo*, 548 U.S. 81, 84 (2006). And "as the years passed, Congress came to see that prisoner suits . . . represented a disproportionate share of federal filings." *Coleman v. Tollefson*, 135 S. Ct. 1759, 1762 (2015). Prisoner lawsuits ran the gamut, from serious allegations

raising meritorious claims to trivialities such as an inmate who "alleged that being forced to listen to his unit manager's country and western music constituted cruel and unusual punishment," or another inmate who sued "because he was served chunky instead of smooth peanut butter." 142 Cong. Rec. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham). Congress recognized that many IFP prisoner lawsuits were non-meritorious and brought only "for the purpose of harassment or recreation." H.R. Rep. No. 104-21, at 22 (1995).

Congress concluded that amending the IFP statute was necessary to "stem the tide of prison litigation." 142 Cong. Rec. S10576 (daily ed. Sept. 16, 1996) (statement of Sen. Abraham). In doing so, Congress sought to "ensur[e] that the flood of non-meritorious claims d[id] not submerge and effectively preclude consideration of the allegations with merit." *Jones v. Bock*, 549 U.S. 199, 203 (2007).

2. In 1996, Congress enacted the Prison Litigation Reform Act ("PLRA"). Pub. L. No. 104-134, 110 Stat. 1321. The PLRA sought "to filter out the bad claims and facilitate consideration of the good." *Jones*, 549 U.S. at 204. It achieved this goal through several provisions limiting the ease and frequency with which baseless prisoner lawsuits could be brought, including, as relevant here, the "three-strikes" provision:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a

> court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). This provision curtails prisoners' ability to file new IFP lawsuits once they have filed three that are non-meritorious on their face. Prisoners with three strikes but "under imminent danger of serious physical injury" fall outside of this limitation, and prisoners can file unlimited lawsuits by paying the filing fee. *Id.*

Other provisions also reduce meritless prisoner lawsuits, while identifying claims that may succeed. *First*, courts must screen prisoner suits and dismiss them if the suit or appeal "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." *Id.* § 1915(e)(2)(B) (expanding the bases for dismissal under the original IFP statute).

Second, the PLRA directs federal courts to review prisoner complaints that seek "redress from a governmental entity or officer or employee of a governmental entity" either "before docketing" or "as soon as practicable after docketing." *Id* § 1915A(a). Courts are also instructed to "dismiss" any such complaint "or any portion of the complaint," if it is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from an immune defendant. *Id.* § 1915A(b).

Third, it requires that prisoners exhaust all available administrative remedies before filing a federal action about "prison conditions." 42 U.S.C. § 1997e(a).

And *fourth*, prisoners who qualify for IFP status must "pay an initial partial filing fee" out of the prisoner's trust account, subject to a "safety-valve provision to ensure that the fee requirements [do] not bar access to the courts" for prisoners who have no assets. *Bruce v. Samuels*, 136 S. Ct. 627, 630 (2016) (citing § 1915(b)).

B. Facts and Procedural History

1. Petitioner Mr. Lomax was convicted of sexual assault in 2006 and is currently incarcerated in Colorado. J.A. 19, 69. In 2018, he filed suit in the District of Colorado, challenging his termination from the Sex Offender Treatment and Monitoring Program at a prior facility. J.A. 5, 69. Mr. Lomax sued under 42 U.S.C. § 1983, alleging violations of his constitutional due process rights, among other things, and sought damages and an injunction. J.A. 13-36.

Mr. Lomax asked to proceed *in forma pauperis* under 28 U.S.C. § 1915 because he was indigent. J.A. 8-10. He also alleged imminent danger of serious physical injury because, he claimed, prison staff and other inmates had threatened him because he was a sex offender and one officer had physically assaulted him. J.A. 8-10. The court initially granted him IFP status. J.A. 6.

A magistrate judge reviewed Mr. Lomax's complaint, following the procedure of the District of Colorado's Local Civil Rule 8.1. The court first

requested that Mr. Lomax amend his complaint to use the current form for prisoner lawsuits in the District of Colorado. *Lomax v. Ortiz-Marquez*, No. 18-321, slip op. at 2 (D. Colo. Feb. 8, 2018). After Mr. Lomax filed an Amended Complaint, the court again reviewed it and found that it did not satisfy Rule 8's plain statement requirement. The court provided a detailed explanation of the deficiencies in the Amended Complaint and gave Mr. Lomax another opportunity to amend his complaint. *Lomax v. Ortiz-Marquez,* No. 18-321, slip op. at 6 (D. Colo. Mar. 19, 2018.

Then, learning of Mr. Lomax's prior lawsuits, the court required him to show cause as to why IFP status should not be denied under § 1915(g). J.A. 5-6, 38-41. The court found that Mr. Lomax had sued three times in the District of Colorado and that each suit had been dismissed: (1) *Lomax v. Hoffman*, No. 13-3296 (D. Colo. filed Dec. 6, 2013) (dismissed without prejudice as premature under *Heck v. Humphrey*, 512 U.S. 477 (1994)); (2) *Lomax v. Hoffman*, No. 13-2131 (D. Colo. filed Aug. 8, 2013) (dismissed without prejudice as premature under *Heck*); and (3) *Lomax v. Trani*, No. 13-707 (D. Colo. filed Mar. 18, 2013) (dismissing some claims with prejudice for failure to state a claim, and others for lack of subject-matter jurisdiction). J.A. 38-41, 69-70, 73 n.2. The court held that each of these dismissals counted as a "strike," and that he was not in imminent danger of serious physical injury because his allegations were "vague and refer[red] to a past alleged attack." J.A. 39-40.

Mr. Lomax argued that the first two *Heck* dismissals did not count as strikes because they

were dismissed without prejudice. J.A. 43. The court rejected this argument and ordered him to pay the $400 filing fee if he wished to proceed. J.A. 65-67.

2. On appeal, the Tenth Circuit affirmed the denial of IFP status. J.A. 76. It held that a dismissal for prematurity under *Heck* is equivalent to a dismissal for failure to state a claim, which counts as a strike under the plain language of § 1915(g). J.A. 72. The court further held that in the Tenth Circuit, "'it is immaterial to the strikes analysis [whether] the dismissal was without prejudice,' as opposed to with prejudice." J.A. 72 (quoting *Childs v. Miller*, 713 F.3d 1262, 1266 (10th Cir. 2013)). Thus, the court found that all three of Mr. Lomax's former lawsuits—both those that were dismissed with and without prejudice—counted as strikes for purposes of the PLRA. J.A. 73.

SUMMARY OF THE ARGUMENT

1. The plain language of § 1915(g)—"was dismissed on the grounds that it . . . fails to state a claim upon which relief may be granted"—includes both dismissals with, and without, prejudice.

Under both common dictionary definitions and the Federal Rules of Civil Procedure in effect at the time Congress passed the PLRA, dismissals for failure to state a claim included dismissals with, and without, prejudice. Just as the Court did in *Coleman*, 135 S. Ct. at 1763-64, this Court should endorse a "literal reading of the 'three strikes' provision" and not read a limiting phrase—"with prejudice"—into the statute.

Mr. Lomax's argument seeks to transform the default presumption under Rule 41(b)—that dismissals for failure to state a claim are with prejudice if the dismissal order in question does not otherwise specify—into a limitation on what kinds of dismissals count as strikes under § 1915(g). This gets the argument backwards: this default presumption is needed only because both kinds of dismissals are "dismissals" under the Rules, and Rule 41(b)'s presumption fills the gap only if the order is silent about which kind of dismissal it is.

In addition, the other categories of strikes under § 1915(g)—actions dismissed as "frivolous" or "malicious"—include dismissals with, and without, prejudice. Nothing in the statute or its legislative history suggests that these neighboring provisions contemplate a different meaning of "dismissed" than strikes based on "failure to state a claim."

The plain meaning definition of "dismissed" allows the term to have a consistent, plausible meaning throughout the PLRA. Mr. Lomax's reading, on the other hand, either requires that the term mean something different within the PLRA, or turns the PLRA into an implausibly harsh regime that would require district courts to, on initial screening, dismiss lacking claims *with prejudice*, forever barring a prisoner from bringing a claim even if they paid the filing fee. This reading would strip district courts of the current discretion given to them by Rule 41(b) and lead to significant injustice.

Congress often does explicitly what Mr. Lomax claims Congress did implicitly here—limit legal consequences just to dismissals with prejudice. In ERISA, the Family Medical Leave Act, the Federal Food Drug and Cosmetic Act, the Fair Labor Standards Act, and the Patent Act, Congress specifically stated when it intended for legal consequences to only attach to dismissals with prejudice. Since Congress frequently uses the phrase "with prejudice" but has not done so in § 1915(g), this Court should not insert it by implication.

Lastly, the PLRA's limited legislative history and historical context supports interpreting § 1915(g) to include both dismissals with and without prejudice. The legislative history reveals that Congress intended to impose meaningful limits on prisoner lawsuits in federal courts by reducing frivolous suits and encouraging proactive screening of cases by district courts. And Congress passed the PLRA shortly after this Court's decision in *Neitzke*, where it acknowledged the appeal of screening

inmate complaints for failure to state a claim but held the IFP statute at that time did not permit doing so. 490 U.S. at 325-26. Reading into the PLRA an implicit limit on what counts as a strike under § 1915(g) is inconsistent with these legislative objectives.

2. Nor does the plain meaning of § 1915(g) create the harms that Mr. Lomax claims. District courts commonly have screening procedures in place to review and improve prisoner complaints before any type of dismissal. Mr. Lomax's own experience demonstrates these safeguards in action: the court gave him two separate opportunities to amend and improve his complaint, along with specific direction on how his complaint could be improved before considering whether to dismiss his case.

The three-strikes provision of § 1915(g) only counts certain kinds of dismissals, excludes judgments on other grounds, and ensures that all prisoners can obtain IFP status for claims involving imminent danger of serious physical injury.

The kinds of cases that fall under the three-strikes provision often are exactly the kind of cases that Congress sought to limit in the PLRA because they have little hope of succeeding. For example, the substantial majority of claims dismissed under *Heck v. Humphrey* will never succeed because most convictions are never vacated or reversed. 512 U.S. at 486-87. Cases where the prisoner fails to timely exhaust administrative remedies are of a similar stripe—an inmate may be forever prohibited from bringing their federal suit if they fail to timely raise their grievance through the administrative process. Far from constituting mere temporary or curable

flaws, these threshold requirements frequently bar prisoner suits permanently.

Finally, the plain meaning of § 1915(g) does not pose any constitutional concerns. Every court of appeals to evaluate the constitutionality of the three-strikes provision has upheld it—even courts from the circuits that have adopted Mr. Lomax's position.

ARGUMENT

I. "[D]ismissed on the Grounds That It . . . Fails to State a Claim for Which Relief May Be Granted" Covers All Such Dismissals, Including Those With, and Without, Prejudice

The plain text of § 1915(g) covers all dismissals for failure to state a claim, regardless of whether they are with or without prejudice. As it does today, when Congress passed the PLRA in 1996 "dismissed" encompassed both types of dismissals because the Federal Rules of Civil Procedure specified that dismissals for failure to state a claim for which relief may be granted could be either with, or without, prejudice.

The other grounds for strikes in § 1915(g)—"frivolous" and "malicious" dismissals—also include dismissals with and without prejudice. Other provisions of the PLRA also use the similar phrase "dismiss the complaint [or action] . . . if [it] fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b)(1); 42 U.S.C. § 1997e(c)(1). Limiting this phrase to just with-prejudice dismissals would wrongly limit district court discretion in exercising the screening function the PLRA requires.

A review of Congress's use of "dismissed" in the U.S. Code makes clear that Congress well knows and specifies when it intends to attach consequences only to dismissals with prejudice. For example, in ERISA, the Family Medical Leave Act, the Federal Food Drug and Cosmetic Act, the Fair Labor Standards Act, and the Patent Act, Congress used explicit language to attach consequences just to dismissals with prejudice. Congress's failure to similarly limit the language in the PLRA provides strong evidence that it did not intend the limitation Mr. Lomax claims. Finally, the limited legislative history of the PLRA supports the plain language reading of "dismissal" as covering both dismissals with and without prejudice.

A. The Plain Meaning of "Dismissed" Includes All Types of Dismissals

When determining the meaning of statutes, "words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (citations and quotations omitted). This Court has consistently followed this approach with the PLRA. *See, e.g., Coleman*, 135 S. Ct. at 1763 (interpreting PLRA based on "what the statute literally says"). The plain text of the statute includes all types of dismissals. The meaning of "dismissed" in 1996—and now—includes dismissal with and without prejudice. Dictionaries do not limit the meaning of "dismissed." And courts should not limit the general meaning of such well-developed terms.

"Dismiss," when Congress passed the PLRA, meant "to put (a legal action or a party) out of

judicial consideration: refuse to hear or hear further in court." Webster's Third New International Dictionary 652 (1993). This well-known definition does not require a final determination on the merits; rather, just that the court "refuse to . . . hear further in court." *Id.*

Black's Law Dictionary at the time defined "dismiss" to include both dismissals with and without prejudice. "Dismiss" meant "[t]o dismiss an action or suit without any further consideration or hearing." Black's Law Dictionary 469 (6th Ed. 1990). It then defined "dismissal" as an "order or judgment finally disposing of action, suit, motion, etc., without trial of the issues involved. Such may be either voluntary or involuntary." *Id.* (citing Fed. R. Civ. P. 41). Black's Law Dictionary then listed seven types of dismissals, two of which are "dismissal without prejudice" and "dismissal with prejudice." *Id.*

Most of the courts of appeals that hold dismissals without prejudice count as strikes under the PLRA rely on the plain meaning of this language. Judge McHugh, in the opinion below, followed Tenth Circuit precedent that held "dismissal for failure to state a claim under Rule 12(b)(6) satisfies the plain text of § 1915(g) and therefore will count as a strike," regardless of "whether the dismissal was without prejudice." J.A. 72 (citations and quotations omitted).

The Seventh Circuit recognized that "[a] dismissal is a dismissal, and provided that it is on one of the grounds specified in section 1915(g) it counts as a strike, whether or not it's with prejudice." *Paul v. Marberry*, 658 F.3d 702, 704 (7th

Cir. 2011) (citations omitted). The Eighth Circuit held that an "action thus can be dismissed on the grounds that it fails to state a claim upon which relief may be granted, even if the dismissal is without prejudice." *Orr v. Clements*, 688 F.3d 463, 465 (8th Cir. 2012) (citations and quotations omitted). The Ninth Circuit held that "§ 1915(g) of the current PLRA does not distinguish between dismissals with and without prejudice," and, therefore, "a dismissal without prejudice may count as a strike." *O'Neal v. Price*, 531 F.3d 1146, 1154 (9th Cir. 2008) (citations omitted).

This meaning of "dismissed" is consistent with the General Terms Canon of statutory interpretation: "General terms are to be given their general meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012). Under this canon, "general words . . . are to be accorded their full and fair scope. They are not to be arbitrarily limited." *Id.*; *see*, *e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 79 (1998) (holding that Title VII's protections covered same-sex harassment because the Court found "no justification in the statutory language . . . for a categorical rule excluding" such claims).

In *Coleman*, the Court declined to read in "affirmed" to qualify the type of dismissal referenced in § 1915(g). 135 S. Ct. at 1763-64. The same conclusion flows from the literal reading of "dismissed" in this case. "Dismissed," a general word, includes both types of dismissals and this Court should not read into the statute a limitation of just dismissals with prejudice.

B. "Dismissal for Failure to State a Claim Upon Which Relief May Be Granted" Has a Distinct Meaning That Includes Both Types of Dismissals

Section 1915(g)'s use of essentially the same language as Rule 12(b)(6) brings the settled meaning of that phrase under the Rules of Civil Procedure into the statute. *Sekhar v. United States*, 570 U.S. 729, 732-33 (2013) (recognizing that use of "terms of art" by Congress adopts the well-settled meaning associated with those terms). Mr. Lomax agrees. Pet. Br. 17.

Under this well-settled meaning, Rule 12(b)(6) dismissals can be with or without prejudice. Rule 41(b) provides the consequences for an involuntary dismissal, such as a 12(b)(6) dismissal. Rule 41(b), in effect in 1996 and now, states that such dismissals include both dismissals with and without prejudice, setting a default rule of dismissal with prejudice but permitting a court to specify otherwise in its order:

> Unless the court in its order for dismissal otherwise specifies, . . . any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. P. 41(b) (1995). "Adjudication on the merits" is the opposite of dismissal without prejudice. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001). And a leading treatise makes clear that "Rule 41(b) expressly provides that the district court may specify that a

dismissal is without prejudice." 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2373 (3d ed. 2019).

This interaction between Rule 41(b) and Rule 12(b)(6) dismissals was well-settled when Congress passed the PLRA. *See, e.g., Paganis v. Blonstein*, 3 F.3d 1067, 1071 (7th Cir. 1993) (holding "Rule 41(b) states that unless the judgment provides otherwise, involuntary dismissal, including a dismissal for failure to state a claim under Rule 12(b)(6), is an adjudication on the merits—in other words, a dismissal with prejudice"); Wright & Miller § 2373 ("Dismissals under Rule 12(b)(6) for failure to state a claim on which relief can be granted . . . come[] within the literal language of the last sentence of Rule 41(b).").

And Congress well knew of these Rules, for 28 U.S.C. § 2074(a) has required since 1988 that the Supreme Court "transmit to the Congress" the Federal Rules of Civil Procedure every time they are modified. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401(a), 102 Stat. 4642 (1988).

The Federal Rules of Civil Procedure provided a default presumption—with prejudice—if the order did not specify what type of dismissal it was. Mr. Lomax's argument that this default rule should limit the types of dismissals considered dismissals under § 1915(g) gets the argument backwards—that default presumption was needed only because the Rules permitted both types of dismissals.

The Third and Fourth Circuits make this same mistake when they conflate the presumption under

the Rules—with prejudice—with the permitted scope of the Rules—both with and without prejudice. *McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009) (stating default rule that Rule 12(b)(6) dismissal "is presumed" to be with prejudice "unless otherwise specified" and that it therefore "follows that the type of prior dismissal for failure to state a claim contemplated by § 1915(g) is one" with prejudice); *Millhouse v. Heath*, 866 F.3d 152, 162-63 (3d Cir. 2017) (adopting the "*McLean* approach" and quoting opinion extensively).

Put more basically, if *A* includes *Aa* and *Ab*, and is presumed to mean *Aa* unless otherwise specified, that presumption does not exclude *Ab* from the meaning of *A*.

The well-settled meaning of "dismissed for failure to state a claim" provides further support for the conclusion that dismissals under § 1915(g)—just like dismissals under Rule 12(b)(6)—include dismissals with and without prejudice.

C. Other Types of Dismissals Under § 1915(g) Include Dismissals With and Without Prejudice

Section 1915(g) also counts "frivolous" and "malicious" dismissals as strikes. Under well-established law, dismissals based on "frivolous" or "malicious" filings count as strikes, regardless of whether they are with or without prejudice. There is no textual basis to count only one type of dismissal for failure to state a claim as a strike when both types of dismissals for the other two statutory criteria count as strikes.

"[A] word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008); *see also* Garner & Scalia, *Reading Law* 195 ("Associated words bear on one another's meaning (*noscitur a sociis*)."). Because the other two types of dismissals count as strikes regardless of whether they are dismissals with or without prejudice, they strongly support a similar, consistent interpretation of dismissals for failure to state a claim.

In *Denton*, 504 U.S. at 27, this Court discussed the standard for "dismissal for frivolousness" under the predecessor of the PLRA, 28 U.S.C. § 1915(d). This Court reaffirmed what "frivolous" claims brought by prisoners meant—when "the facts alleged are 'clearly baseless'"—and held that the abuse of discretion standard governs the review of district court determinations. *Id.* at 32-33 (quoting *Neitzke*, 490 U.S. at 327). In determining whether a district court abused its discretion in dismissing a claim for being frivolous, the Court noted that one important factor was "whether the dismissal was with or without prejudice." *Id.* at 34.

Denton therefore recognized that dismissals of prisoner lawsuits because they were frivolous could be both with and without prejudice. The Court issued this opinion shortly before Congress passed the PLRA, and Congress did not disturb this clear holding in the PLRA, leading to a strong presumption that Congress "intended for [the term] to retain its established meaning." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have

settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."). Therefore, "frivolous" dismissals, regardless of whether they are with or without prejudice, count as strikes under § 1915(g).

Similarly, cases dismissed for lack of federal jurisdiction—which under Rule 41(b) normally are dismissed without prejudice—can qualify as strikes. A "prisoner's invocation of federal jurisdiction in and of itself may be frivolous where there is 'no possible ground upon which a reasoned argument can be made to sustain jurisdiction.'" *Cohen v. Corrections Corp. of America*, 439 F. App'x 489, 492 (6th Cir. 2011) (quoting *De La Garza v. De La Garza*, 91 F. App'x 508 (7th Cir. 2004)).

So, too, for dismissals of "malicious" prisoner suits. Because courts often deem it "malicious" for "a pauper to file a lawsuit that duplicates allegations of another pending federal lawsuit by the same plaintiff," they recognize that dismissal without prejudice is appropriate so that the "plaintiff obtains one bite at the litigation apple—but not more." *Pittman*, 980 F.2d at 995 (modifying dismissal with prejudice for malicious filing to without prejudice so that it would not impact earlier-filed lawsuit); *Kennedy v. Getz*, 757 F. App'x 205, 207-08 (3d Cir. 2018) (affirming dismissal of duplicative lawsuit without prejudice and determining that it was malicious under the PLRA).

Courts also dismiss prisoner lawsuits as "malicious" for abusing the judicial process, but often do so without prejudice. For example, in

Johnson, 37 F. Supp. 2d at 777, the court found that the prisoner, who had filed twenty lawsuits in nine years, had "demonstrated a pattern of filing civil actions and thereafter moving the Court to dismiss them, often after the Court and defendants have expended considerable time and resources addressing the claims." In response to the prisoner's motion for voluntary dismissal, the court dismissed the case without prejudice but deemed it malicious under the PLRA. *Id.* And in *Jackson v. Florida Department of Financial Services*, 479 F. App'x 289, 292 (11th Cir. 2012), the court of appeals affirmed the finding that a dismissal without prejudice should count as malicious because the prisoner did not disclose, as required, prior lawsuits to determine whether § 1915(g) barred IFP status.

Many of these "frivolous" and "malicious" dismissals without prejudice undercut Mr. Lomax's core claim—that "'frivolous' or 'malicious'" under § 1915(g) "apply to actions that cannot succeed" and that such actions are "irredeemable." Pet. Br. 21.

Indeed, none of these without prejudice dismissals held that the claims could not succeed, and often expressly left open that possibility. In *Pittman* and *Kennedy*, the courts expressly made clear that the earlier-filed claims covering the same allegations should continue on. 980 F.2d at 995; 757 F. App'x at 207-08 (noting that the district court instructed the prisoner to "seek leave to amend his [earlier-filed] complaint"). In *Johnson*, the court denied defendants' motions to dismiss (one of which it treated as a motion for summary judgment) and only then granted plaintiff's motion for voluntary dismissal without prejudice. 37 F. Supp. 2d at 776,

777. In *Cohen*, the strike at issue occurred because there was no diversity jurisdiction, not because the court found that the claim could not succeed. 439 F. App'x at 491-92. Finally, in *Jackson*, the district court dismissed the case without prejudice as a sanction for litigation conduct and did not pass judgment on the merits of the complaint. 479 F. App'x at 292.

In sum, § 1915(g) lists three different grounds for dismissals as strikes—frivolous, malicious, and failure to state a claim for which relief may be granted. This Court explicitly held that "frivolous" dismissals can be with, or without, prejudice, shortly before Congress passed the PLRA. *Denton*, 504 U.S. at 32. Other courts hold that "malicious" dismissals can be with, or without, prejudice. The scope of covered "frivolous" and "malicious" dismissals provides powerful support for a similar scope of covered dismissals for failure to state a claim for which relief may be granted.

D. Excluding "Without Prejudice" Dismissals from § 1915(g) Would Create Conflict with Other Sections of the PLRA

The common legal phrase "dismiss for failure to state a claim upon which relief can be granted" (or its functional equivalent) appears five times in the PLRA. Once, in § 1915(g), the PLRA establishes the consequences for such dismissals. In the other four instances, the PLRA requires courts to review and dismiss cases that fail to state a claim. Mr. Lomax's proposed interpretation that without prejudice dismissals do not count as dismissals for failure to state a claim would either 1) create an untenable

limitation on the discretion currently given to courts by the Federal Rules of Civil Procedure, or 2) require the same phrase to have different meanings in the same statute. Both alternatives counsel against Mr. Lomax's proposed interpretation.

The PLRA uses this common phrase five times:

- ". . . the court shall dismiss the case at any time if the court determines that . . . (B) the action or appeal . . . (ii) fails to state a claim on which relief may be granted . . ." 28 U.S.C. § 1915(e)(2)(B)(ii).
- "In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, . . . brought an action . . . that was dismissed on the grounds that it . . . fails to state a claim upon which relief may be granted . . . ." § 1915(g).
- "On review, the court shall . . . dismiss the complaint, or any portion of the complaint, if the complaint (1) . . . fails to state a claim upon which relief may be granted . . . ." § 1915A(b)(1).
- "The court shall . . . dismiss any action brought with respect to prison conditions . . . if the court is satisfied that the action . . . fails to state a claim upon which relief can be granted . . . ." 42 U.S.C. § 1997e(c)(1).
- "In the event that a claim . . . fails to state a claim upon which relief can be granted . . . the court may dismiss the underlying claim without first requiring

> the exhaustion of administrative remedies." § 1997e(c)(2).

If, as Mr. Lomax contends, dismissal for failure to state a claim means dismissal *with prejudice* for failure to state a claim, then the PLRA's screening requirements would require courts to dismiss with prejudice any action that they determine fails to state a claim, an implausibly harsh requirement that would create serious problems in the administration of justice.

Removing the discretion that Rule 41(b) gives courts in deciding whether to dismiss with or without prejudice would result in dismissal with prejudice of lawsuits that fail to state a claim, but for which valid claims lurk poorly articulated or unperfected because the litigants are proceeding IFP. This approach would transform a statute that focuses on whether prisoners must prepay filing fees into a statute forever barring prisoners from bringing claims based solely on a court's routine screening of their initial filings. And it would likely create follow-on *res judicata* effects for other claims. *McLean*, 566 F.3d at 408 (Shedd, J., dissenting) (noting that "district courts often dismiss prisoner cases—including those that wholly lack merit—for failure to state a claim without prejudice simply to avoid burdening the prisoner with potential res judicata implications that a dismissal with prejudice may cause"). No textual support exists for such an extreme interpretation.

On the other hand, claiming that the phrase dismissal for failure to state a claim for which relief may be granted means something different in § 1915(g) than it does in the rest of the PLRA would

violate "fundamental rules of statutory interpretation." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019). "In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning. We therefore avoid interpretations that would 'attribute different meanings to the same phrase.'" *Id.* (quoting *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 329 (2000), other citations omitted).

If all uses of the phrase dismissal for failure to state a claim in the PLRA mean what Mr. Lomax claims—dismissal with prejudice—that statute would create unjust results, requiring the dismissal with prejudice of claims solely on the grounds that the prisoner sought to avoid paying the filing fee when filing suit. And the alternative—interpreting the phrase differently in different parts of the PLRA—would be "at odds with fundamental rules of statutory interpretation." *Id.*

But if the phrase is given its plain-text meaning—covering both dismissals with and without prejudice—none of these concerns arise. The phrase has the same fixed meaning throughout the PLRA. District courts' discretion under Rule 41(b) to dismiss with or without prejudice remains intact. And the PLRA remains focused on when prisoners must prepay filing fees before filing additional lawsuits, rather than facing a special, for-prisoners-only gauntlet that mandates dismissals with prejudice.

E. In Other Statutes, Congress Specifies When It Attaches Consequences Just to Dismissals With Prejudice

Throughout the U.S. Code, Congress makes clear when it seeks to differentiate between dismissals with, and without, prejudice. Congress's silence in not limiting dismissal to a specific type in § 1915(g)—when it has done so frequently in other statutes—provides strong support that § 1915(g) covers both types of dismissals.

E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015), demonstrates why this is so. There, Abercrombie sought to add a qualifier to Title VII—actual knowledge of a conflict between a work rule and a job applicant's religious practice—before liability attached. *Id.* at 2032. The Court unanimously rejected this claim:

> The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: silence.

Id. Here, Congress's silence on limiting the PLRA to one type of dismissal or another supports the conclusion that the statute covers both types of dismissals, particularly when Congress so frequently specifies in other statutes that only one type of dismissal matters.

Statutes on the books in 1996 that attach consequences or specify that a dismissal must be with or without prejudice include:

- *ERISA*. Under 29 U.S.C. § 1342(d)(1)(A), if a court "dismisses the application with prejudice," an ERISA trustee "shall transfer all assets and records" to the plan administrator.
- *The Interstate Agreement on Detainers Act*. Under this agreement between states and the federal government, if 1) trial is not held before the prisoner is returned to the original place of imprisonment, "the court shall enter an order dismissing [the indictment, information, or complaint] with prejudice;" 18 U.S.C. App. 2 § 2 art. III(d) & art. IV(2); or 2) if another state or federal government refuses to accept custody of the prisoner and trial does not occur within the required time, "the appropriate court . . . shall enter an order dismissing the [indictment, information, or complaint] with prejudice." *Id.* at art. V(c).
- *The National Vaccine Injury Compensation Program*. Under 42 U.S.C. § 300aa-22(d), the program does not authorize "a person who brought a civil action for damages against a vaccine manufacturer for a vaccine-related injury or death . . . which was dismissed with prejudice to bring a new civil action."
- *The Family Medical Leave Act*. Under 29 U.S.C. § 2617(a)(4), "the right . . . to bring an action by or on behalf of any employee shall terminate . . . unless the [filing of a

complaint by the Secretary] is dismissed without prejudice on motion of the Secretary."

- *The Federal Food, Drug, and Cosmetic Act*. 21 U.S.C. § 355(c)(3)(D)(i)(II) prevents declaratory suits by applicants who have been sued, unless those suits were "dismissed without prejudice;" § 355(j)(5)(C)(i)(II) permits lawsuits by certain applicants, but not those who have been sued by patent holders unless those suits were "dismissed without prejudice;" and § 355(q)(2)(B) requires dismissal "without prejudice" of any civil action filed "before the Secretary has taken final agency action."
- *The Fair Labor Standards Act*. 29 U.S.C. § 216(c) bars lawsuits by employees after the Secretary of Labor has filed suit to recover unpaid minimum wages on their behalf, unless "such action is dismissed without prejudice on motion of the Secretary."
- *The Patent Act*. 35 U.S.C. § 271(e)(6)(A)(ii)(II) limits damages to a reasonable royalty for certain patents described in the Public Health Service Act and for covered biological products where suits were brought within a certain time but were "dismissed without prejudice."

Congress's frequent, express recognition of different consequences between dismissals with,

and without, prejudice in other statutes supports not reading in such an atextual exclusion in § 1915(g). If Congress wanted to limit strikes to only those actions or appeals dismissed with prejudice, it surely would have said so, just as it did elsewhere. Its silence on the type of dismissal provides strong support that it sought to include both under § 1915(g). *See Abercrombie*, 135 S. Ct. at 2033.

Counsel for Respondents have found only one example in the U.S. Code where Congress expressly stated that dismissal meant with or without prejudice. In 2010, the Affordable Care Act added a section to 42 U.S.C. § 262(k) covering the licensing of biosimilar products. § 7002, 124 Stat. 119. There, the ACA set forth different timelines for how long a product may have exclusivity, one of which said for "18 months after . . . (ii) the dismissal with or without prejudice of a [patent lawsuit filed under this section]." 42 U.S.C. § 262(k)(6)(B)(ii).

This sole example of Congress specifying that dismissal includes dismissals with and without prejudice does not undercut the significance of Congress's frequent limitation to just one type of dismissal above and the silence in § 1915(g). The ACA was passed well after the PLRA, and after uncertainty had developed as to what type of dismissals were covered under § 1915(g). *See, e.g., McLean*, 566 F.3d at 396-97 (decided in 2009).

Because other sections of the U.S. Code make clear when Congress seeks to limit a statute just to a particular type of dismissal, its use of just "dismissed" in § 1915(g) counsels against reading the limitation "with prejudice" into the statute.

F. The Limited Legislative History Supports the Plain Meaning of § 1915(g)

This Court need not consult legislative history because the statutory text is clear. *See United States v. Woods*, 571 U.S. 31, 46 n.5 (2013) ("Whether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous."). However, even if the Court were to do so, the limited legislative history of the PLRA supports the plain meaning discussed above.

Nowhere in the legislative history does Congress discuss or seek to limit the statute's application just to certain types of dismissals. Nor is there any effort to recognize different meanings of "dismissed" in § 1915(g) and its other uses in the PLRA. Rather, the legislative history emphasizes that Congress intended to impose real and meaningful limits on prisoner access to federal courts

Typical of the legislative statements is Senator Hatch's comment:

> The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims. Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system.

104 Cong. Rec. S14627 (daily ed. Sept. 29, 1995); *see also* 104 Cong. Rec. S7526 (daily ed. May 25, 1995)

(statement of Sen. Kyl) (noting "the burden that disposing of meritless complaints imposes on efficient judicial administration" and "the need to discourage prisoners from filing frivolous complaints").

In addition, Congress passed the PLRA shortly after this Court decided *Neitzke*, where, under the old IFP statute, the Court distinguished between "frivolous" dismissals and Rule 12(b)(6) dismissals. 490 U.S. at 325-26. The Court recognized that *sua sponte* screening for prisoner complaints that failed to state a claim might be an excellent way to address the challenges facing federal courts, but that it was not permitted under the statute at that time: "Appealing though petitioner's proposal may appear as a broadbrush means of pruning meritless complaints from the federal docket, as a matter of statutory construction it is untenable." *Id.* at 326.

Congress likely heeded this Court's suggestion when it passed the PLRA in 1996, by both permitting early screening for failure to state a claim in § 1915(e), § 1915A, and § 1997e and by counting all such dismissals as strikes under § 1915(g). Given the statements in *Neitzke*, it is hard to imagine Congress meant to create the authority for *sua sponte* dismissals but, at the same time, to place implicit limits on what counts as a strike under § 1915(g).

This history and context indicate that Congress sought both to reduce prisoner incentives to bring frivolous lawsuits and require that courts more proactively screen for them. Giving "dismissed" in § 1915(g) its plain meaning is fully consistent with those legislative goals.

II. The Plain Meaning of "Dismiss" in § 1915(g) Does Not Create the Harms Claimed by Mr. Lomax

Mr. Lomax's policy arguments overstate the harms and ignore the benefits of the plain meaning of "dismiss" in § 1915(g). *First*, courts commonly have robust processes in place to review and improve prisoner complaints before any type of dismissal. Mr. Lomax's own experience in this case demonstrates those at work. *Second*, the three-strikes provision covers only certain claims. It gives all prisoners three lawsuits or appeals, regardless of their merits, and allows prisoners to bring claims when they are in "imminent danger of serious physical injury." And the PLRA does not bar any litigant from filing any claim; it just requires those with three strikes to pay the normal filing fee before doing so. *Third*, many dismissals without prejudice do not present claims "with temporary and curable procedural flaws," as Mr. Lomax claims. *Fourth*, the PLRA presents no constitutional issues of access to courts; courts on both sides of the split in this case find the three-strikes provision constitutional.

A. Courts Commonly Employ Screening Processes to Review and Improve Prisoner Complaints Before Any Type of Dismissal

Courts have addressed the challenge of pro se prisoner lawsuits in several different ways that result in prisoners having opportunities to amend and improve their complaints before dismissal.

The District of Colorado, where Mr. Lomax filed suit, has a local rule with special procedures for

prisoner filings to ensure that they receive specific attention before dismissal. And a 2011 Federal Judicial Center survey of Federal Clerks of Courts and Chief Judges identified several different procedures in place to assist prisoner filings prior to dismissal. These processes work to provide opportunities for prisoner complaints to be reviewed and improved before any dismissal so that courts can identify potentially meritorious claims.

The District of Colorado Local Civil Rule 8.1(b), Review of Prisoner Pleadings, gives the Chief Judge authority to designate a judicial officer to review prisoner pleadings to determine whether those pleadings should be dismissed summarily. As part of that review, the "judicial officer may request additional facts or documentary evidence necessary to make this determination." *Id.* In practice, one magistrate judge for the district reviews all pleadings and often has many rounds of back and forth with the prisoner to improve the complaint before making a dismissal decision.

Mr. Lomax's case is typical of this process. The case was assigned to Magistrate Judge Gallagher, the judicial officer designated to review prisoner pleadings. On the same day Mr. Lomax filed suit, Judge Gallagher issued an order directing Mr. Lomax to cure his deficient filing by using the current designated form for prisoner complaints. *Lomax v. Ortiz-Marquez*, No. 18-321, slip op. at 2 (D. Colo. Feb. 8, 2018). Mr. Lomax filed an Amended Complaint, and then Judge Gallagher issued an order finding that the Amended Complaint did not comply with Rule 8's short and plain statement requirement. *Lomax v. Ortiz-Marquez*, No. 18-321,

slip op. at 2-3 (D. Colo. Mar. 19, 2018). He gave Mr. Lomax two pages of specific information on how to amend his complaint, including stating that Mr. Lomax "must explain what each defendant did to him, when the defendant did it, how the defendant's action harmed him, and what specific legal right he believes the defendant violated" and that Mr. Lomax "must assert personal participation in the alleged constitutional violation." *Id.* The Order gave Mr. Lomax thirty days to file another Amended Complaint. During this time, Mr. Lomax's prior lawsuits came to the court's attention, causing the court to issue a show cause order. J.A. 38-41.

Mr. Lomax had two opportunities to improve his complaint before any dismissal—first to use the required court form which addressed the defendants, prior lawsuits, and exhaustion (among other things); and second to improve his pleading to comply with Rule 8, with detailed requirements provided by the court.

Even a case Mr. Lomax relies on shows this process in action in other districts. In *Orr v. Clements*, 688 F.3d at 465, the prisoner filed suit claiming inadequate medical care in violation of the Eighth Amendment, but, as is common, did not allege the required personal responsibility of the named defendant. *Orr v. Purkett*, No. 05-280, slip op. at 4 (E.D. Mo. Mar. 28, 2005). But rather than dismiss the case immediately as controlling law permitted, the district court identified the alleged deficiency and gave plaintiff thirty days to amend the complaint to "state how the named defendant is personally and directly responsible for the alleged violation of his rights." *Id.* at 5-6. Plaintiff did not do

so during the required time and only then did the court dismiss the complaint without prejudice because it failed to state a claim upon which relief may granted and "because plaintiff failed to comply with this Court's prior order." *Orr v. Purkett*, No. 05-280, slip op. at 1-2 (E.D. Mo. May 5, 2005).

The Federal Judicial Center's survey highlights many other ways that prisoner complaints receive attention and opportunities to correct pleading deficiencies before dismissal. Eighty-four percent of Federal Clerks of Court stated that their "clerk's office staff" provided "direct assistance" to pro se litigants "as part of their regular duties." Donna Stienstra et al., Fed. Judicial Ctr., *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges* at v (2011)*; see also Role of the Pro Se Intake Unit*, U.S. Dist. Court. S.D.N.Y (Jan. 9, 2020), https://nysd.uscourts.gov/prose/role-of-the-prose-intake-unit (explaining that "[s]taff in the Pro Se Intake Unit may assist pro se litigants by explaining Court procedures and filing requirements"). This Federal Judicial Center survey identified numerous other measures used by districts, including the use of pro se law clerks and providing "clear orders and instructions, standardized forms, and methods for responding to filings without delay." *Assistance to Pro Se Litigants*, *supra*, at viii.

Contrary to those who argue that counting without prejudice dismissals as strikes will remove judges' inherent authority to leave the courthouse door open to meritorious inmate suits, *see* Br. of Nat'l Assoc. of Crim. Defense Lawyers as *Amicus Curiae* at 9-13, these robust procedures frequently

result in prisoners having multiple opportunities to clarify and improve their claims before their lawsuits face dismissal. As they have for years, district courts may continue to exercise discretion under these procedures to ensure that potentially meritorious prisoner suits are not hastily dismissed with a strike.

B. The Three-Strikes Provision Covers Only Certain Claims and Does Not Bar Any Prisoner from Filing

The three-strikes provision only applies if 1) the prisoner seeks IFP status; 2) federal courts have dismissed three prior cases or appeals as frivolous, malicious, or for failing to state a claim for which relief may be granted; and 3) the prisoner is not under imminent danger of serious physical injury.

The imminent danger exception covers such claims as denial of medical treatment, *O'Connor v. Backman*, 743 F. App'x 373, 376 (11th Cir. 2018); unhealthy prison conditions, *Brown v. Secretary Pennsylvania Department of Corrections*, 486 F. App'x 299, 301-303 (3d Cir. 2012); and fear of future injury, either from others or self-inflicted, *Wallace v. Baldwin*, 895 F.3d 481, 484-85 (7th Cir. 2018) (claim that solitary confinement increased risk to prisoner with mental illness permitted to proceed IFP); *Williams v. Paramo*, 695 F. App'x 200, 201 (9th Cir. 2017) (claim that prisoner was under threat of attack because of her designation as sex offender permitted to proceed IFP).

Dismissals for any reason other than the three categories listed in § 1915(g)—such as for lack of subject-matter or personal jurisdiction, improper

venue, or failure to join an indispensable party—do not count, nor do losses on summary judgment or after verdicts. And even when the three-strikes rule does apply, it does not bar a prisoner from suing if they pay the filing fee.

Mr. Lomax claims that the plain meaning of § 1915(g) would create a "serious anomaly" because dismissals for failure to exhaust administrative remedies could be treated as strikes if that failure was apparent from the face of the complaint. Pet. Br. 30-31. But that possibility is not anomalous at all. "Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground, not on the nature of the ground in the abstract." *Jones*, 549 U.S. at 215.

And *Jones* held that the PLRA did not change the normal pleading rules of exhaustion and that prisoners "are not required to specially plead or demonstrate exhaustion in their complaints." *Id.* at 216. The same pleading rules that apply to other litigants apply to prisoners under the PLRA. *See, e.g.*, *Colby v. Herrick*, 849 F.3d 1273, 1278-79 (10th Cir. 2017) (affirming Rule 12(b)(6) dismissal of claim on statute of limitations ground based on dates in the complaint).

The three-strikes provision does not unduly interfere with access to the courts.

C. Many Dismissals Without Prejudice Do Not Present Claims with Temporary and Curable Procedural Flaws

Mr. Lomax claims that dismissals without prejudice often present claims with "temporary and curable procedural flaws," such as *Heck v. Humphrey* bars to suit and administrative exhaustion requirements. Pet. Br. 29-34. But these threshold requirements often bar suits permanently.

Heck v. Humphrey bars inmate claims for damages if success on the claim would call into question the underlying criminal conviction or sentence, unless and until that criminal conviction is reversed or vacated. 512 U.S. at 486-87. But most criminal convictions and sentences are upheld, forever preventing claims that fall under *Heck*. The Administrative Office of the Courts indicates that for federal convictions, the U.S. Courts of Appeal reversed only 6.9% of all criminal cases appealed in 2015. *Just the Facts: U.S. Courts of Appeals*, Administrative Office of the U.S. Courts (Dec. 20, 2016), https://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals. The Department of Justice found that in state courts, appellate courts reversed, remanded, or modified a component of the trial court decision in just 12% of criminal appeals in 2010. Nicole L. Waters et al., *Criminal Appeals in State Courts* at 1 (Sep. 2015), https://www.bjs.gov/content/pub/pdf/casc.pdf.

Of course, not all convictions result in appeals, and some of those reversals result in retrials and convictions, so the overall percentage of convictions

reversed for *Heck* purposes is likely much lower than those numbers reported above. But by any measure, *Heck* will permanently bar the vast majority of prisoners from filing suit for damages related to their conviction or sentence.

Exhaustion requirements also can result in dismissals without prejudice for defects that are not temporary or curable. The PLRA requires "proper exhaustion of administrative remedies." *Woodford*, 548 U.S. at 84. This requirement permanently bars all claims where a plaintiff failed to timely comply with the administrative procedures, like Mr. Ngo did in *Woodford*. *Id.* at 87 (noting that Mr. Ngo filed a grievance six months after the event, well after the 15 working day deadline). While exhaustion under the PLRA normally arises as an affirmative defense for which a defendant has the burden of proof, occasionally the complaint will make clear on its face that the prisoner has failed to exhaust, and in those cases, dismissal will be appropriate. *See, e.g., Jones*, 549 U.S. at 215-16.

As noted in *Woodford*, most prison systems impose relatively quick procedural deadlines for filing grievances, which will have most likely expired by the time that a prisoner lawsuit is filed and dismissed for failure to exhaust. *See* 548 U.S. at 95-96. Most dismissals for failure to exhaust likely, as in *Woodford*, create a permanent bar to suit.

Mr. Lomax brings forward only a handful of isolated examples to demonstrate the claimed hardship. But an examination of how *Heck* and administrative exhaustion dismissals play out in the real world demonstrates that the impacts are much less than claimed. Most such dismissals are not just

temporary and curable procedural flaws. And, more importantly, these kinds of meritless lawsuits are the kind of claims that Congress sought to limit with the PLRA.

D. The Plain Meaning of "Dismissed" in § 1915(g) Poses No Constitutional Concerns

Mr. Lomax does not claim that his lawsuit seeks to vindicate any fundamental constitutional right. Nor does he identify any case—regardless of what meaning "dismissed" has in § 1915(g)—that has held the three-strikes provision unconstitutional. Indeed, courts on both sides of the circuit split at issue in this case hold that the PLRA satisfies constitutional requirements. *See Lewis v. Sullivan*, 279 F.3d 526, 528 (7th Cir. 2002) (cataloging all circuits that have agreed § 1915(g) is constitutional); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316-19 (3d Cir. 2001) (en banc).

Mr. Lomax seeks to expand the "narrow category of civil cases in which the [government] must provide access to its judicial processes without regard to a party's ability to pay court fees" far beyond the limited circumstances where fundamental rights are at stake. *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996). But he makes no claim that any of the limited and narrow recognized fundamental interests are at issue in this case. If they were, a court facing such a lawsuit from an inmate with three strikes could decide to nevertheless waive the filing fee to avoid any constitutional concerns. Indeed, courts have recognized this possibility. *See, e.g., Daker v. Jackson*, 942 F.3d 1252, 1258-59 (11th Cir. 2019)

("[T]here may be situations in which waiver of the filing fee is constitutionally required for a three-strikes litigant, if a fundamental interest is involved.").

But that narrow possibility of an exception in another case does not justify a departure from the plain text of the statute in all cases. Every court of appeals to review the issue has found § 1915(g) constitutional for good reason—it just addresses the waiver of a fee and allows for suits where imminent danger of serious physical injury is at issue. There is "no constitutional entitlement to a subsidy." *Lewis*, 279 F.3d at 528.

Nor does the canon of constitutional avoidance apply here. It "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions *as a means* of *choosing between them*." *Clark v. Martinez*, 543 U.S. 371, 385 (2005). Here, applying ordinary textual analysis does not lead to the conclusion that the statute is susceptible to more than one construction. And, regardless, every circuit to examine the issue—even those that adopt Mr. Lomax's claimed reading—has found the PLRA constitutional. There is no constitutional issue to avoid.

* * *

The plain meaning of § 1915(g) controls the outcome here. "Dismissed" means dismissed, whether it is with or without prejudice. The remainder of the PLRA, the Rules of Civil Procedure, and language in other statutes all support this plain meaning.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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