No. 18-8369

In the Supreme Court of the United States

ARTHUR J. LOMAX, PETITIONER

v.

CHRISTINA ORTIZ-MARQUEZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether, under the Prison Litigation Reform Act's "three strikes" provision, 28 U.S.C. 1915(g), a district court's dismissal of an action without prejudice for failure to state a claim qualifies as a strike.

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INTEREST OF THE UNITED STATES

This case presents the question whether, under the Prison Litigation Reform Act's "three strikes" provision, 28 U.S.C. 1915(g), a district court's dismissal of an action without prejudice counts as a strike. The United States has a substantial interest in the resolution of that question, as the United States is frequently the defendant in suits that are subject to the Prison Litigation Reform Act. There are currently more than 175,000 inmates in federal custody, and those inmates frequently file suits against the United States, the Bureau of Prisons, and prison officials, see *Bruce* v. *Samuels*, 136 S. Ct. 627, 630 (2016). Accordingly, the United States has participated as amicus curiae in previous cases involving the statute's interpretation. See *Coleman* v. *Tollefson*, 135 S. Ct. 1759 (2015); *Woodford* v. *Ngo*, 548 U.S. 81 (2006); *Porter* v. *Nussle*, 534 U.S. 516

(2002); *Booth* v. *Churner*, 532 U.S. 731 (2001); *Miller* v. *French*, 530 U.S. 327 (2000).

STATEMENT

1. In 1892, Congress enacted the federal *in forma pauperis* statute to ensure that indigent litigants, including prisoners, "have meaningful access to the federal courts." *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989). In 1996, Congress amended the statute through the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, Tit. VIII, §§ 801-810, 110 Stat. 1321-66 to 1321-77, which was designed to reduce the burdens placed on the *in forma pauperis* system by a "flood of nonmeritorious" prisoner litigation. *Jones* v. *Bock*, 549 U.S. 199, 203 (2007). The PLRA included a series of reforms intended to "filter out the bad claims filed by prisoners and facilitate consideration of the good." *Coleman* v. *Tollefson*, 135 S. Ct. 1759, 1762 (2015) (brackets and citation omitted). One of those reforms was the three-strikes rule at issue in this suit. 28 U.S.C. 1915(g).

a. As originally enacted in 1892, the *in forma pauperis* statute permitted any citizen to "commence and prosecute to conclusion" a lawsuit in federal court "without being required to prepay fees or costs, or give security therefor before or after bringing suit." Act of July 20, 1892 (1892 Act), ch. 209, 27 Stat. 252. To qualify, a litigant was required to file "a statement under oath" attesting to his inability to pay and affirming his belief that "he is entitled to the redress he seeks." *Ibid.*

The 1892 Act also included a provision empowering a court to "dismiss" an action "if said court be satisfied that the alleged cause of action is frivolous or malicious." § 4, 27 Stat. 252 (previously codified at 28 U.S.C. 1915(d)). That provision allowed courts to dismiss suits predicated on "indisputably meritless legal theor[ies]"

or "baseless," "fantastic," or "delusional" factual allegations. *Neitzke*, 490 U.S. at 327-328. Dismissals could be issued *sua sponte* without adversarial briefing, *id.* at 329-330, and they could be either "with or without prejudice," depending on whether the defect in the suit could be "remedied through more specific pleading[s]," *Denton* v. *Hernandez*, 504 U.S. 25, 34 (1992). The provision could not be used, however, to dismiss every meritless action. Although some suits that failed to state a claim under Federal Rule of Civil Procedure 12(b)(6) could be dismissed as "frivolous" or "malicious," a dismissal was not permitted where a suit raised an "arguable question of law," even where that question could be "correctly resolved against the plaintiff." *Neitzke*, 490 U.S. at 324, 328.

b. By the mid-1990s, Congress had become concerned about the "sharp rise in prisoner litigation in the federal courts." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006). In 1994, for instance, more than 39,000 lawsuits were filed by prisoners in federal courts, "a staggering 15 percent increase over the number filed the previous year." 141 Cong. Rec. 26,553 (1995) (statement of Sen. Hatch). Many of those suits were brought *in forma pauperis*, raising the concern that "suing" had become a "recreational activity" for inmates. *Ibid.* Existing protections had proven ineffective at stopping prisoners from filing frivolous lawsuits, "[t]he crushing burden" of which "ma[de] it difficult for courts to consider meritorious claims." *Ibid.* (statement of Sen. Hatch).

The PLRA was Congress's response to that rising tide of prisoner suits. The Act contains a series of provisions that were intended to "reduce the quantity and improve the quality of prisoner suits." *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). Among other things, the PLRA

adopted a mandatory administrative exhaustion requirement, 42 U.S.C. 1997e, and required prisoners that have available funds to pay full, or at least partial, filing fees, 28 U.S.C. 1915(b). As especially relevant here, the PLRA also amended and added several provisions aimed at both promoting the prompt dismissal of suits that cannot succeed and deterring prisoners from filing those suits at all.

First, the PLRA strengthened and expanded the provision of the 1892 Act that permitted the *sua sponte* dismissal of any "frivolous" or "malicious" *in forma pauperis* suit. The PLRA made such dismissals mandatory: whereas the original statute stated that courts "may dismiss" a frivolous or malicious action, 1892 Act § 4, 27 Stat. 252, the PLRA dictates that courts "shall dismiss" on the specified grounds. 28 U.S.C. 1915(e)(2). The PLRA also expanded the grounds that require dismissal: courts "shall" dismiss an action not only if it is frivolous or malicious, but if it "fails to state a claim on which relief may be granted; or" "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. 1915(e)(2)(B)(ii) and (iii).

Second, the PLRA created an early screening mechanism specifically for prisoner suits filed against governmental entities and officers. 28 U.S.C. 1915A(a) and (b). Even before a responsive pleading has been filed, a district court must review "a complaint" that "seeks redress from a governmental entity" or official and must "dismiss the complaint, or any portion of the complaint" if it "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." *Ibid*. Congress thus required courts to pay par-

ticular attention to complaints filed by prisoners and determine at the outset whether those complaints are frivolous or malicious, fail to state a claim, or seek money damages barred by immunity.[1]

Third, Congress sought to deter prisoners from filing deficient suits in the first place through what has come to be known as 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). The three grounds for imposing a strike—the dismissal of an action or appeal that "is frivolous or malicious," or "fails to state a claim on which relief may be granted"—thus mirror three of the bases for dismissing any *in forma pauperis* action or appeal, see 28 U.S.C. 1915(e)(2)(B)(i) and (ii), and for dismissing a prisoner complaint after early screening, see 28 U.S.C. 1915A(b)(1); 42 U.S.C. 1997e(c)(1) and (2).

2. In 2006, petitioner was convicted of felony sexual assault in Colorado state court and sentenced to six

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[1] A similar provision mandates that a court shall dismiss a prisoner suit challenging the conditions of confinement as soon as the court determines that the suit is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune," even if the court has not yet enforced the exhaustion requirement. 42 U.S.C. 1997e(c)(1) and (2).

years to life for that offense. J.A. 19; *Lomax* v. *Davis*, No. 11-cv-3034 D. Ct. Doc. 14, at 2 (Mar. 1, 2012). He is currently serving his sentence at the Limon Correctional Facility in Colorado. Pet. App. 2.

a. In 2013, petitioner brought three actions under 42 U.S.C. 1983 that were dismissed for failure to state a claim. In the first, *Lomax* v. *Ruiz*, he sued three wardens, two prison directors, and three additional prison employees, alleging a violation of the Fifth Amendment. 13-cv-707 D. Ct. Doc. 1 (Mar. 18, 2013). The magistrate judge charged with screening the complaint found that it did not satisfy basic pleading requirements, but offered petitioner an opportunity to amend. 13-cv-707 D. Ct. Doc. 5 (Mar. 20, 2013). When petitioner's amended complaint suffered from the same defects, the magistrate judge again opted against dismissal and offered a second opportunity to amend. 13-cv-707 D. Ct. Doc. 10 (Apr. 26, 2013). After petitioner's second amended complaint remained deficient, some of petitioner's claims were dismissed as "legally frivolous," 13-cv-707 D. Ct. Doc. 15, at 4 (June 27, 2013), and the court granted a motion to dismiss under Rule 12(b)(1) and (b)(6) as to the remainder of the allegations, 13-cv-707 D. Ct. Doc. 43 (Apr. 21, 2014).

In the second action, *Lomax* v. *Hoffman*, petitioner brought claims against five state-court judges and two prosecutors, alleging that they had violated his speedy-trial rights, subjected him to excessive bail, imposed an unlawful sentence, prevented him from filing an appeal, and engaged in prosecutorial misconduct. 13-cv-2131 D. Ct. Doc. 1 (Aug. 8, 2013). The district court dismissed the action without prejudice for failure to state a claim under *Heck* v. *Humphrey*, 512 U.S. 477 (1994).

13-cv-2131 D. Ct. Doc. 5 (Aug. 15, 2013). The court explained that *Heck* precludes a prisoner from bringing a Section 1983 suit like petitioner's that would undermine the validity of his conviction or sentence. *Id.* at 3.

In the third suit, also captioned *Lomax* v. *Hoffman*, petitioner alleged that he had been illegally sentenced by a Colorado state court and that, under Colorado law, he should have been released in 2012. 13-cv-3296 D. Ct. Doc. 1 (Dec. 6, 2013). The district court again dismissed the complaint for failure to state a claim under *Heck*, finding that the action constituted another improper attempt to challenge petitioner's conviction and sentence through a premature Section 1983 suit. 13-cv-3296 D. Ct. Doc. 11 (Jan. 23, 2014).

b. In February 2018, petitioner filed the underlying complaint in this case, raising various constitutional challenges to his expulsion from a sex-offender treatment program. See J.A. 19. The magistrate judge charged with screening the complaint found multiple defects that prevented the complaint from satisfying basic pleading requirements. 18-cv-321 D. Ct. Doc. 5 (Feb. 8, 2018). But as with petitioner's previous suit in *Ruiz*, the magistrate judge declined to dismiss the action and instead offered an opportunity to amend. *Id.* at 2. The magistrate judge also granted petitioner's motion to proceed *in forma pauperis*. J.A. 62. Petitioner filed an amended complaint. J.A. 13-37.

Before the magistrate judge could consider whether petitioner's amended complaint corrected the deficiencies in his earlier pleading, the district court realized that petitioner was not eligible for *in forma pauperis* status because the three suits petitioner filed in 2013 were all dismissed for failure to state a claim. J.A.

69-70. Each therefore qualified as a strike under Section 1915(g). *Ibid.* The court rejected petitioner's contention that his two *Heck* dismissals should not count as strikes because they were issued without prejudice. See J.A. 70-71.

c. The court of appeals affirmed the denial of petitioner's *in forma pauperis* status based on Section 1915(g). J.A. 76. The court explained that a "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 is without prejudice. J.A. 72 (quoting *Childs* v. *Miller*, 713 F.3d 1262, 1266 (10th Cir. 2013)). The court therefore held that the earlier dismissal in *Ruiz*, and the two *Hoffman* dismissals for failure to state a claim under *Heck*, "all count as strikes" and "the fact that [the *Hoffman*] dismissals were without prejudice is immaterial." Pet. App. 5.

SUMMARY OF ARGUMENT

The three-strikes provision bars a prisoner from proceeding *in forma pauperis* if he has had three prior actions "dismissed on the grounds that" they were "frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." 28 U.S.C. 1915(g). Petitioner has had three prior actions dismissed on the ground that they failed to state a claim upon which relief may be granted. Accordingly, under the plain text of Section 1915(g), petitioner cannot proceed *in forma pauperis*. Petitioner nevertheless asserts that two of those actions should not count because they were dismissed without prejudice. The text, context, history, and purposes of Section 1915(g) foreclose that assertion.

A. The statutory text provides that a strike accrues whenever an action is dismissed "on the ground[]" that

it "fails to state a claim upon which relief may be granted." It does not require that the claim be dismissed with prejudice, and this Court already has rejected "read[ing] the [PLRA] as if it" included limiting language that is absent from "the statute itself." *Coleman* v. *Tollefson*, 135 S. Ct. 1759, 1763 (2015). In addition, Congress referred to dismissals for "fail[ure] to state a claim upon which relief may be granted" in three other closely related provisions of the PLRA. In all three provisions, the phrase covers dismissals both with and without prejudice. Indeed, reading the phrase as petitioner suggests would have the self-defeating consequence of requiring courts to dismiss an *in forma pauperis* complaint with prejudice every time it fails to state a claim.

Petitioner advances two textual arguments, both of which are incorrect. First, petitioner argues that the phrase "dismissed" for "fail[ure] to state a claim" is a legal term of art that refers exclusively to dismissals issued with prejudice. But Congress borrowed the phrase from Federal Rule of Civil Procedure 12(b)(6), which—as petitioner acknowledges—permits dismissal for failure to state a claim both with *and* without prejudice. Petitioner therefore points to Federal Rule of Civil Procedure 41(b), which provides that a dismissal order will be treated as with prejudice unless it specifies otherwise. According to petitioner, Rule 41(b) thereby renders the phrase "dismissed * * * [for] fail[ure] to state a claim" a term of art that means with prejudice. Petitioner has it entirely backward: courts need to apply Rule 41(b) to orders that simply "dismiss[]" for "fail[ure] to state a claim," because that phrase—in both Rule 12(b)(6) and the PLRA—speaks solely to the *ground* for the dismissal, not its prejudicial effect.

Second, petitioner contends that the other two enumerated grounds in Section 1915(g)—*i.e.*, that the action is "frivolous" or "malicious"—necessarily refer to dismissals with prejudice, and the same should be true of dismissals for failure to state a claim. Petitioner similarly asserts that Congress omitted immunity as an enumerated ground in Section 1915(g) because Congress was focused only on dismissals with prejudice. But petitioner's premise is simply wrong: when a claim is dismissed as "frivolous" or "malicious," the dismissal may be with or without prejudice, depending in part on whether the court believes the defect "could be remedied." *Denton* v. *Hernandez*, 504 U.S. 25, 34 (1992). Moreover, Congress included failure to state a claim alongside the other grounds precisely to broaden the statute and capture the wide array of meritless filings that divert judicial resources from suits that are more likely to succeed.

B. The history of the PLRA confirms its plain text. The original version of the *in forma pauperis* statute permitted the *sua sponte* dismissal of an action only if it was frivolous or malicious. Faced with a flood of meritless prisoner litigation, some courts interpreted the term "frivolous" to include dismissals when a complaint failed to state a claim under Rule 12(b)(6). This Court held that such dismissals were inconsistent with the then-existing statutory text in *Neitzke* v. *Williams*, 490 U.S. 319, 326 (1989). Congress responded to *Neitzke* in the PLRA and amended the general *in forma pauperis* provision to require dismissal for failure to state a claim. Congress also added the three-strikes provision to deter prisoners from filing any suit that is "frivolous, ma-

licious, *or* fails to state a claim." 28 U.S.C. 1915(g) (emphasis added). The point of those amendments was to deter all meritless filings, not simply a subset of them.

C. Congress's purposes in Section 1915(g) thus further confirm that it applies to all dismissals on the listed grounds, whether with or without prejudice. A prisoner who files a complaint that lacks merit diverts judicial resources from more meritorious suits—and that is true whether or not the defect can be remedied in some *future* action. Petitioner exaggerates the harshness of that approach, because if the defect can be readily remedied, courts often grant the prisoner leave to amend (as occurred in one of petitioner's earlier actions). Petitioner offers no reason why a prisoner should avoid a strike when he fails to take advantage of leave to amend or files a defective suit that cannot be cured through amendment. Here, petitioner's rule would allow him to file limitless *Heck*-barred claims as an *in forma pauperis* litigant—exactly the type of wasteful conduct that prompted the three-strikes provision.

D. Finally, petitioner's abbreviated constitutional argument is meritless. The three-strikes provision does not bar prisoners' access to the courts. It merely requires a prisoner to pay the filing fee if, on three prior occasions, he has burdened the courts by filing a complaint that cannot succeed as pleaded. The Constitution poses no impediment to that reasonable means of protecting limited judicial resources.

ARGUMENT

Section 1915(g) of the PLRA states that "[i]n no event shall a prisoner bring a civil action" *in forma pauperis* if he has "on 3 or more prior occasions, * * * brought an action or appeal * * * 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." Before this Court, petitioner does not dispute that he has had three prior actions dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted, and he does not assert that he is under imminent danger of serious physical injury. Accordingly, under the plain text of Section 1915(g), petitioner cannot proceed *in forma pauperis*. The PLRA's other provisions, history, and purposes all confirm what its text plainly says.

A. Section 1915(g)'s Text And Context Indicate That Any Dismissal For Failure To State A Claim Is A Strike

1. Section 1915(g)'s text applies to all dismissals on the listed grounds, whether with or without prejudice

a. The text of Section 1915(g) is clear. Congress broadly mandated that "[i]n no event shall a prisoner bring" an action *in forma pauperis* if he has "on 3 or more prior occasions" had an action or appeal "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. 1915(g). Congress spoke only to the "grounds" for the dismissal, not to whether the dismissal precludes further litigation on the same claims. Section 1915(g) does not require that the action have been dismissed "with prejudice," and it does not create an exception for actions dismissed "without prejudice." The absence of such limiting language indicates that Section 1915(g) applies to all dismissals on any of the three enumerated grounds. See, *e.g.*, *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1900 (2019) (Courts have a "duty to respect not only what Congress wrote but, as importantly, what it didn't write.").

To confirm the point, Congress has elsewhere specified when a statutory provision should reach only dismissals with prejudice. See, *e.g.*, 42 U.S.C. 300aa-22(d) (new action may not be filed involving the National Vaccine Injury Compensation program where a plaintiff has previously brought a suit "which was dismissed with prejudice"); 29 U.S.C. 216(c) (Secretary's filing of a suit bars employee lawsuits unless "such action is dismissed without prejudice on motion of the Secretary"). Those provisions demonstrate that Congress is aware of the difference between dismissals with and without prejudice —and when it intends to refer exclusively to either type, it says so. In Section 1915(g), Congress referred broadly to all dismissals on certain grounds without any limitation for prejudicial effect, and that textual contrast is alone fatal to petitioner's case, even if this Court had not interpreted Section 1915(g) before.

Of course, this Court has interpreted Section 1915(g) before, and it declined to read in a limit that Congress did not provide. In *Coleman* v. *Tollefson*, 135 S. Ct. 1759 (2015), the Court unanimously rejected an analogous request to "read the [PLRA] as if it" included terms that were absent from "the statute itself." *Id.* at 1763. The plaintiff in *Coleman* urged the Court to hold that one of his past dismissals did not qualify as a strike under Section 1915(g) because his appeal of that dismissal was still pending. *Ibid.* The Court reasoned that such a reading would stray from what the "statute literally says" because the PLRA does not specify that only an "'affirmed dismissal'" qualifies as a strike. *Ibid.* That reasoning controls here. The statute does not specify that a dismissal must be "with prejudice" in order for a strike to accrue, and as in *Coleman* this Court

should not infer a limitation that is not apparent from a "literal reading" of the text. *Id.* at 1763-1764.

Moreover, the Court's other PLRA precedents similarly decline to read extra-textual limitations into the statute. For example, in *Ross* v. *Blake*, 136 S. Ct. 1850 (2016), the Court observed that, in interpreting the PLRA's exhaustion requirement, it has "reject[ed] every attempt to deviate" from the statute's "textual mandate" by creating exceptions that Congress did not include. *Id.* at 1857 (citing *Woodford* v. *Ngo*, 548 U.S. 81 (2006); *Porter* v. *Nussle*, 534 U.S. 516 (2002); *Booth* v. *Churner*, 532 U.S. 731 (2001)). The Court reiterated that judges have no discretion to "add unwritten limits onto" a statute's "rigorous textual requirements." *Ibid.* And in the Court's most recent PLRA case, it echoed that sentiment, observing that "respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of [the Court's] own." *Murphy* v. *Smith*, 138 S. Ct. 784, 788 (2018).

Here, "the words [Congress] chose" in Section 1915(g) make only one criterion relevant in determining whether the dismissal of an action counts as a strike: the "grounds"—that is, the court's basis or reason—for the dismissal. *Black's Law Dictionary* 710 (7th ed. 1999) (defining "ground" as the "reason or point that something * * * relies on for validity"). If the previous action "was dismissed on the grounds that it [wa]s frivolous, malicious, or fail[ed] to state a claim," it counts as a strike. 28 U.S.C. 1915(g). Whether an action was dismissed with prejudice has no bearing on that criterion. Rather, the prejudice distinction determines whether a dismissal will "bar[] the plaintiff from returning later, to the same court, with the same underlying claim."

Semtek Int'l Inc. v. *Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001). An action dismissed with prejudice is an "'adjudication upon the merits'" that will "bar[] refiling of the same claim." *Id.* at 506. By contrast, an action that is "dismissed without prejudice" is "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim." *Id.* at 505. (quoting *Black's Law Dictionary* 482).

Those post-dismissal consequences do not affect whether an action "was dismissed on [a] ground[]" enumerated in Section 1915(g). To the contrary, a district court may dismiss an action on any one of the three enumerated grounds with or without prejudice. A few years before the PLRA was enacted, this Court recognized that a dismissal for frivolousness or maliciousness under the *in forma pauperis* statute may be either "with or without prejudice." *Denton* v. *Hernandez*, 504 U.S. 25, 34 (1992). Courts of appeals have recognized the same remains true for that provision as amended and expanded by the PLRA. See, *e.g.*, *Mathis* v. *New York Life Ins. Co.*, 133 F.3d 546, 548 (7th Cir. 1998) (per curiam); *Marts* v. *Hines*, 117 F.3d 1504, 1505-1506 (5th Cir. 1997) (en banc), cert. denied, 522 U.S. 1058 (1998). Accordingly, the courts of appeals have routinely affirmed dismissals without prejudice of frivolous or malicious complaints. See, *e.g.*, *Ackerman* v. *Mercy Behavior Health*, 617 Fed. Appx. 114, 115 (3d Cir. 2015) (per curiam) (affirming dismissal of frivolous complaint without prejudice), cert denied, 136 S. Ct. 1194 (2016); *Schmidt* v. *Navarro*, 576 Fed. Appx. 897, 898 (11th Cir. 2014) (per curiam) (affirming dismissal of malicious complaint without prejudice).

Dismissals on the ground that a complaint "fails to state a claim upon which relief may be granted" may

also be with or without prejudice. 28 U.S.C. 1915(g). Petitioner recognizes (Br. 15) that this statutory language "mirrors" Federal Rule of Civil Procedure 12(b)(6), which likewise permits dismissal for "failure to state a claim upon which relief can be granted." And petitioner concedes (Br. 15-16) that although "most" Rule 12(b)(6) dismissals are with prejudice, "some" are issued without prejudice—where, for example, it appears that the defect in the complaint might ultimately be remedied.[2] Petitioner therefore explicitly acknowledges that, under Rule 12(b)(6), a dismissal for "failure to state a claim upon which relief can be granted" may be a dismissal either with or without prejudice. When a statutory term is "obviously transplanted from another legal source," it generally "brings the old soil with it." *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013) (citation omitted). Here, when Congress borrowed the phrase "fail[s] to state a claim upon which relief may be granted" from Rule 12(b)(6) in Section 1915(g), the phrase maintained its broad, well-established meaning as a term that covers dismissals issued both with and without prejudice.

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[2] This Court and the courts of appeals have considered cases involving both forms of dismissal for failure to state a claim. See *Northwest, Inc.* v. *Ginsberg*, 572 U.S. 273, 279 (2014) (observing that the "remaining claim * * * was dismissed *without prejudice* under Federal Rule of Civil Procedure 12(b)(6)") (emphasis added); *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 67 (1990) (observing that the district court "dismissed the complaint *with prejudice* * * * for failure to state a claim") (emphasis added); see also, *e.g.*, *Yith* v. *Nielsen*, 881 F.3d 1155, 1160-1161 (9th Cir. 2018) (district court dismissed action "without prejudice on the ground that it failed to state a claim"); *Douglas* v. *Yates*, 535 F.3d 1316, 1320 (11th Cir. 2008) (action was dismissed "with prejudice on the ground that it fails to state a claim") (citation and internal quotation marks omitted).

b. Petitioner contends, however, that the phrase in Section 1915(g) should be understood as a term of art referring exclusively to dismissals with prejudice. Petitioner offers (Br. 17-26) three textual arguments to support that contention—the first based on the Federal Rules, and the second and third based on the text of Section 1915(g) itself. All three are incorrect.

i. As petitioner acknowledges (Br. 15-16), a dismissal under Rule 12(b)(6) for failure to state a claim may be either with or without prejudice. Accordingly, when a district court dismisses an action for failure to state a claim and neglects to specify whether its order precludes bringing a second action, it is necessary to determine the order's prejudicial effect. Courts do so by applying Federal Rule of Civil Procedure 41(b), which codifies a longstanding rule of equity that "[w]here words of qualification, such as 'without prejudice,' * * * do not accompany [a judicial] decree, it is presumed to be rendered on the merits." *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 109 (1869); see Fed. R. Civ. P. 41(b) ("Unless the dismissal order states otherwise," most forms of involuntary dismissal "operate[] as an adjudication on the merits.").

Petitioner tries to work backward from Rule 41(b) to his reading of Section 1915(g). He argues that when a court enters an order dismissing for "'fail[ure] to state a claim upon which relief can be granted,'" courts understand that phrase as meaning "a dismissal *with* prejudice"—and Congress must have used the phrase in the same sense in Section 1915(g). Br. 18. But the reason courts understand the phrase in that way when it appears in an individual dismissal order is not because the phrase is a legal "term of art" that means dismissals with prejudice. Br. 17 (citation omitted). The reason is

Rule 41(b), which expressly instructs courts that "[u]nless the dismissal order states otherwise," a dismissal under Rule 12(b)(6) "operates as an adjudication on the merits." Fed. R. Civ. P. 41(b). Rule 41(b) tells courts what preclusive effect to give to a silent dismissal order; in effect, Rule 41(b) requires reading the order as if it contains the words "with prejudice." But none of that alters the meaning of the general phrase "fail[ure] to state a claim upon which relief can be granted" in Rule 12(b)(6). That phrase means the same thing both there and in Section 1915(g): a dismissal on the ground that a plaintiff cannot obtain relief.

Put differently, Rule 41(b) is necessary precisely because the text of Rule 12(b)(6)—which allows dismissal for "failure to state a claim upon which relief can be granted"—covers dismissals both with and without prejudice. Because Rule 12(b)(6)'s language goes only to the *basis* for the dismissal, Rule 41(b)'s default rule is needed to determine a dismissal order's *preclusive effect* on later litigation. But nothing about Rule 41(b)'s operation in deeming a dismissal order as with prejudice narrows the meaning of Rule 12(b)(6)'s language. The phrase "fail[ure] to state a claim upon which relief can be granted" in Rule 12(b)(6) means *all* such dismissals, whether with or without prejudice. Even when a court dismisses under Rule 12(b)(6) without prejudice, it remains a dismissal for failure to state a claim under that Rule. And petitioner offers no valid reason why a phrase drawn from Rule 12(b)(6) would mean one thing in that Rule (dismissals with or without prejudice) and another thing in Section 1915(g) (only dismissals with prejudice).

ii. Petitioner next turns to the actual text of Section 1915(g) and relies on "'the familiar interpretive canon

noscitur a sociis.'" Br. 21 (quoting *McDonnell* v. *United States*, 136 S. Ct. 2355, 2368 (2016)). Petitioner asserts that when an action is dismissed on one of the other two enumerated grounds in Section 1915(g)—*i.e.*, that the action is "'frivolous'" or "'malicious'"—the court necessarily has found the complaint "irredeemable" and determined that the action "cannot succeed and should not return." Br. 21-22. The same should be true, he argues, of "[S]ection 1915(g)'s third category of dismissals" for failure to state a claim: it should capture "only *with* prejudice dismissals [to] harmonize the three grounds for strikes." Br. 22-23.

Petitioner is doubly wrong. First, his premise is mistaken. It is simply not true that dismissing an action as frivolous or malicious is invariably with prejudice. As explained earlier, see p. 15, *supra*, an action may be dismissed as frivolous or malicious *without* prejudice, if the court believes that the plaintiff can (and should be afforded the opportunity to) remedy the frivolity or malice. Indeed, the Court explicitly acknowledged as much in its pre-PLRA decision in *Denton*. There, the Court held that an abuse-of-discretion standard applies in reviewing the dismissal of an action as frivolous or malicious under the pre-PLRA *in forma pauperis* statute. 504 U.S. at 33. The Court further explained that one relevant consideration in applying the standard is "whether the dismissal was with or without prejudice." *Id.* at 34. The Court cautioned that a district court might abuse its discretion if it dismisses an *in forma pauperis* action with prejudice where "the frivolous factual allegations could be remedied through more specific pleading." *Ibid*. Given that the three-strikes provision was enacted four years after *Denton*, Congress

had reason to know that strikes would accrue even if the flaws could potentially be remedied in some future action.

Second, as explained in more detail below, see pp. 23-26, *infra*, Congress included the third ground for dismissal—failure to state a claim—precisely to expand the statute beyond its historical application to frivolous and malicious suits. Seven years before the PLRA was enacted, this Court recognized that the federal dockets were clogged with a "surfeit" of prisoner suits that failed to state a claim under Rule 12(b)(6), but that could not be dismissed under the then-existing version of the *in forma pauperis* statute because they could not be described as frivolous or malicious. *Neitzke* v. *Williams*, 490 U.S. 319, 325-327 (1989). Congress closed that gap in the PLRA by adding "fail[ure] to state a claim" as a ground for dismissal in the general *in forma pauperis* statute and as a ground for strikes in the newly enacted Section 1915(g). Interpreting that phrase based on the two existing grounds for dismissal—rather than based on its established meaning in Rule 12(b)(6)—would defeat Congress's expansion of the statute beyond frivolous and malicious actions to meritless actions as well. See *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 702, 705 (1995) (rejecting application of *noscitur* canon to "[a]n obviously broad word that the Senate went out of its way to add" to the statute).

iii. Relatedly, petitioner observes (Br. 23-26) that Congress did not include dismissals on immunity grounds within Section 1915(g), an omission that he says is best explained as an attempt to exclude any ground that might give rise to a dismissal without prejudice. But the argument fails at the threshold because all three

grounds included in Section 1915(g) may give rise to dismissals with or without prejudice. See pp. 15-16, *supra*. Thus, Congress might have omitted immunity dismissals from Section 1915(g) for any number of reasons. For example, it may have believed immunity defenses are particularly difficult for prisoners to spot, or it may have been focused on deterring the types of suits discussed in *Neitzke*, see pp. 23-26, *infra*. But whatever the rationale, there is no reason to believe that Congress was concerned with the prejudicial effects of dismissals.

2. Related PLRA provisions use the same language to refer to dismissals both with and without prejudice

Congress referred to dismissals for "fail[ure] to state a claim upon which relief may be granted" in three other closely related provisions of the PLRA. 28 U.S.C. 1915(g). It is a familiar rule that "[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning" across the statute. *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019). Here, in all three other uses of the phrase within the PLRA, it cannot possibly mean only dismissals with prejudice. Indeed, if it did, petitioner's position would be not only self-defeating, but far harsher than the government's approach.

First, Section 1915(e) mandates that a "court shall dismiss [a] case at any time" if it "determines" that "the action or appeal * * * fails to state a claim on which relief may be granted." 28 U.S.C. 1915(e)(2)(B)(i) and (ii). Second, Section 1915A provides that a court must screen prisoner suits with governmental defendants "as soon as practicable" and "dismiss the complaint, or any portion of the complaint" that "fails to state a claim upon which relief may be granted." 28 U.S.C. 1915A(a)

and (b). Third, Section 1997e mandates that a court shall "dismiss any action brought with respect to prison conditions * * * if the court is satisfied that" it "fails to state a claim upon which relief can be granted." 42 U.S.C. 1997e(c)(1) and (2).

If petitioner is right that dismissal for "failure to state a claim" is a "term of art" that means with prejudice, Br. 17, then each of these other provisions requires a court to dismiss *with prejudice*. In other words, whenever a court determines that a prisoner has filed a suit that fails to state a claim, it must dismiss the action with prejudice to refiling. To be sure, on the government's approach, a dismissal on that ground will count as a strike—whether the court dismisses with or without prejudice. But at least the court retains the power to dismiss without prejudice and allow the prisoner another bite at the apple. On petitioner's reading, Congress was referring in Section 1915A(b) to a particular type of dismissal—one with prejudice. Going forward, all complaints screened and dismissed for failure to state a claim under Section 1915A(b) would qualify as strikes, rendering petitioner's interpretation of the three-strikes provision meaningless. And prisoners could not even attempt to remedy their suits' defects and refile their actions. What is more, that harsh result would follow for *all* dismissals for failure to state a claim under the general *in forma pauperis* provision, Section 1915(e)(2)(B). Petitioner points to no evidence that Congress wanted to impede all *in forma pauperis* litigation in that way.

B. Section 1915(g)'s History Confirms That Any Dismissal For Failure To State A Claim Is A Strike

Petitioner briefly asserts (Br. 26-27) that the scant legislative history of the PLRA suggests Congress intended only to punish irremediable suits with a strike. Given the clarity of Section 1915(g)'s text, the Court need not resort to the undeveloped legislative history. See, *e.g.*, *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945) ("The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."). In any event, petitioner is wrong about what the history shows. Congress enacted the PLRA to deter a wide range of unsuccessful suits extending well beyond the obviously insubstantial cases that had been targeted by the prior *in forma pauperis* statute.

In the decade before the PLRA, courts confronted an onslaught of *in forma pauperis* litigation "generated by prisoners." *Neitzke*, 490 U.S. at 325. Under the then-existing version of the *in forma pauperis* statute, courts could reduce the burdensome nature of this litigation by issuing *sua sponte* dismissals only when a claim was "frivolous" or "malicious." 1892 Act § 4, 27 Stat. 252. In order to address the "surfeit of meritless" litigation, some courts adopted an aggressive approach, holding that "a complaint which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) automatically satisfies th[e] frivolousness standard." *Neitzke*, 490 U.S. at 325-326.

In *Neitzke*, this Court deemed that approach inconsistent with the language of the former *in forma pauperis* statute. 490 U.S. at 325. The Court reasoned that,

in the context of prisoner litigation, "the overlap" between actions that are frivolous and those that fail to state valid claims "is considerable," but not absolute. *Id.* at 326. The Court explained that an action should be dismissed as frivolous when its "factual contentions are clearly baseless" or it is "based on an indisputably meritless legal theory." *Id.* at 327. But the Court held that Rule 12(b)(6) is both broader and narrower: it "does not countenance * * * dismissals based on a judge's disbelief of a complaint's factual allegations," but it does allow a dismissal based on a "close but ultimately unavailing" legal theory. *Ibid.*

The Court ultimately concluded that the gap between the two standards had an important consequence. Under Section 4 of the 1892 Act, a court could dismiss an *in forma pauperis* complaint *sua sponte* if it asserted "baseless," "fantastic" or "delusional" factual scenarios or a "meritless" legal theory, but could not dismiss a complaint without adversarial presentation if it raised "substantial legal claims" that merely failed to satisfy Rule 12(b)(6). *Neitzke*, 490 U.S. at 328-330. The Court concluded that although the *sua sponte* dismissal of *all* complaints that fail to satisfy Rule 12(b)(6) "may appear [appealing] as a broadbrush means of pruning meritless complaints from the federal docket, as a matter of statutory construction it is untenable." *Id.* at 326.

In enacting the PLRA seven years later, Congress effectively codified what the lower courts had been doing before *Neitzke*: it permitted *sua sponte* dismissal of any *in forma pauperis* complaint that failed to satisfy Rule 12(b)(6). First, Congress added "fail[ure] to state a claim" as a ground for dismissal under the general *in forma pauperis* statute. 28 U.S.C. 1915(e). Second,

Congress required courts to screen and dismiss prisoner suits on the same ground. 28 U.S.C. 1915A(a) and (b). Third, Congress created Section 1915(g), which gave prisoners a strike whenever they had an action dismissed as "frivolous [or] malicious" or for "fail[ure] to state a claim." Through these provisions, Congress aimed to deter a broad swath of prisoner litigation—both suits so obviously "fantastic" that they cannot succeed and complaints that advance "close but ultimately unavailing" legal arguments. *Neitzke*, 490 U.S. at 327-328. After all, either type of litigation compels courts to expend resources in vain. Petitioner does not point to any specific evidence that in "pruning meritless complaints from the federal docket," *id.* at 326, Congress cared whether the complaints might someday be improved and refiled.

Petitioner instead points (Br. 27) to statements by individual Members of Congress criticizing prisoner suits over things like pizza parties and peanut butter. But there is no reason to infer those Members, let alone Congress as a whole, were concerned only about the worst of the worst. Rather, those examples were illustrative of their general concern with meritless litigation clogging the federal courts. As Senator Kyl explained, the basic goal of the PLRA was to "free up judicial resources for claims with merit." 141 Cong. Rec. 38, 276 (1995). Screening and dismissing a complaint that fails to state a valid claim diverts limited "judicial resources" from "claims with merit." *Ibid.* That is true whether or not the dismissal is with prejudice. As this Court explained in *Coleman*, "[t]he 'three strikes' provision was 'designed to filter out the bad claims and facilitate con-

sideration of the good'"; "refus[ing] to count a prior dismissal * * * would produce a leaky filter." 135 S. Ct. at 1764 (citation omitted).

C. Section 1915(g)'s Purposes Further Confirm That Any Dismissal For Failure To State A Claim Is A Strike

Petitioner argues at length (Br. 29-36) that treating a dismissal without prejudice as a strike would be unduly harsh toward prisoners. Even reasonable policy considerations do not allow courts to replace Congress's words "with others of [their] own," *Murphy*, 138 S. Ct. at 788, but in this case petitioner's concerns are unfounded.

1. Petitioner contends that allowing a strike to accrue when an action is dismissed without prejudice will cause a prisoner to receive a strike when his complaint merely suffers from a "temporary and curable" flaw. Br. 29 (capitalization and emphasis omitted). But as the history indicates, pp. 23-26, *supra*, there is no reason to think that Congress would have intended to exempt a petitioner from accruing a strike merely because the defect that led to the dismissal of his action was "temporary" or "curable." The PLRA's purpose was to "reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524. That purpose is readily served by deterring the filing of suits that fail to state a claim, whether or not the defect that merits dismissal might ultimately be corrected. Either way, filing the defective complaint diverts scarce judicial resources from suits that can succeed as filed.

Moreover, a prisoner must file *three* separate deficient actions before Section 1915(g)'s sanction will be triggered. And even then, Section 1915(g) only prevents the prisoner from filing additional actions *in forma pauperis*; it does not foreclose his ability to file

altogether. See, *e.g.*, *Denton*, 504 U.S. at 27 (noting that *in forma pauperis* status is a "privilege" that may be revoked for "abuses"). It is therefore more than reasonable to assume that Congress intended what the plain text of Section 1915(g) says (and what the legislative history confirms): "In no event" shall a prisoner be permitted to continue to take advantage of the *in forma pauperis* statute if he has had three actions dismissed on enumerated grounds, regardless of the nature of the defect that led to each dismissal.

2. Petitioner also exaggerates the extent to which prisoners are likely to accrue strikes for remediable defects in their pleading. Many prisoners whose complaints contain "temporary" or "curable" defects will evade a strike because they will be granted leave to amend their pleadings instead of having their actions dismissed outright. Federal Rule of Civil Procedure 15(a)(1) states that "[a] party may amend its pleading once as a matter of course," and courts often offer prisoners an opportunity to amend when there is a chance that a deficient complaint could be cured through amendment. See, *e.g.*, *Mabon* v. *Madison Cnty.*, No. 19-1300, 2020 WL 236744, at *3 (W.D. Tenn. Jan. 15, 2020) (dismissing for failure to state a claim but granting leave to file an amended complaint); *Reagor* v. *Losacco*, No. 19-cv-5493, 2019 WL 6327196, at *3 (N.D. Cal. Nov. 26, 2019) (similar).

Petitioner himself has been the beneficiary of liberal leave to amend on multiple occasions. See p. 6, *supra*. For example, when he filed suit in 2013, asserting incomprehensible Fifth Amendment claims against a host of state defendants, the magistrate judge screening his complaint first issued an order describing the defects in

his pleading and directing him to file an amended complaint. 13-cv-707 D. Ct. Doc. No. 5. After petitioner filed an amended complaint that continued to be deficient, the magistrate judge gave him a second opportunity to correct the error before the action was ultimately dismissed. 13-cv-707 D. Ct. Doc. 10. And the magistrate judge in this very case followed the same procedure before petitioner's *in forma pauperis* status was revoked. 18-cv-321 D. Ct. Doc. 3 (Feb. 28, 2018).

Petitioner suggests (Br. 35-36) that the underlying suit in *Orr* v. *Clements*, 688 F.3d 463 (8th Cir. 2012), demonstrates that district courts sometimes dismiss without prejudice instead of allowing plaintiffs leave to amend. But the prisoner in *Orr* was offered an opportunity to amend his complaint to avoid dismissal. *Id.* at 465. It was only after the prisoner failed to file an amended complaint as directed that the district court dismissed his suit without prejudice for failure to state a claim *and* for failure to follow a court order. *Ibid.* When a prisoner wastes judicial resources by declining an opportunity to amend a complaint, it is hardly inequitable for a strike to accrue.

3. Prisoners may also have their actions dismissed without prejudice for failure to state a claim where the defect is not readily curable through amendment and instead requires a change in circumstances. The most obvious example is when a complaint is dismissed for failure to state a claim under *Heck* v. *Humphrey*, 512 U.S. 477 (1994). *Heck* held that a prisoner does not have a "cause of action" under Section 1983 if he is challenging an "allegedly unconstitutional conviction or imprisonment" before he has succeeded in having the conviction or sentence overturned. *Id.* at 486-487, 489. *Heck* dismissals are often issued without prejudice because a

prisoner may successfully press the dismissed claim in the future if he succeeds in overturning his conviction or sentence.

There is no reason, however, that a prisoner should be excused from accruing a strike when he files a suit that is premature under *Heck*. As this Court has observed with respect to its own docket, "[e]very paper filed with the Clerk[,] * * * no matter how repetitious or frivolous, requires some portion of the institution's limited resources." *In re McDonald*, 489 U.S. 180, 184 (1989) (per curiam). At the very least, the clerk's office must docket the action, and the court must screen the case under the PLRA and consider any preliminary motions the plaintiff chooses to bring, such as a motion for preliminary relief. See, *e.g.*, *In re Martin-Trigona*, 795 F.2d 9, 11 (2d Cir. 1986) (per curiam) (noting that review of a prisoner's application for *in forma pauperis* status often "is no easy task"). It is eminently reasonable for Congress to have decided that courts should not be burdened by limitless *Heck*-barred suits—as petitioner's rule would allow.

That is particularly so because the *Heck* bar is well known among prison litigants. For example, one of the leading manuals for prisoners prominently cautions: "Do NOT Use Section 1983 to Challenge Your Original Criminal Conviction, Your Sentence, Loss of Good Time, or Denial of Parole." Colum. Hum. Rts. L. Rev., *A Jailhouse Lawyer's Manual* 425 (11th ed. 2017); see, *e.g.*, The Center for Constitutional Rights & The National Lawyers Guild, *The Jailhouse Lawyer's Handbook: How to Bring a Federal Lawsuit to Challenge Violations of Your Rights in Prison* 67 (Rachel Meeropol & Ian Head, eds., 5th ed. 2010) (cautioning that "[y]ou can

only challenge the fact or length of your prison sentence through a writ of habeas corpus") (emphasis omitted).

Indeed, as petitioner acknowledges (Br. 42), some courts dismiss *Heck*-barred actions as frivolous, given the obvious nature of the pleading defect involved. See, *e.g.*, *Davis* v. *Kansas Dep't of Corr.*, 507 F.3d 1246, 1249 (10th Cir. 2007) (an appeal that "falls squarely within the *Heck* holding" is frivolous); *Kastner* v. *Texas*, 332 Fed. Appx. 980 (5th Cir. 2009) (per curiam) (affirming dismissal of *Heck*-barred suit as frivolous), cert. denied, 559 U.S. 1096 (2010). Petitioner does not challenge that practice, and thus he appears to accept that his approach gives rise to an anomaly: Some prisoners who file *Heck*-barred claims will have them dismissed as frivolous and accrue a strike. But other prisoners like petitioner will have their *Heck*-barred actions dismissed for failure to state a claim without prejudice, thereby evading a strike for precisely the same litigation behavior.

4. Petitioner's concerns (Br. 29-32) with respect to dismissals for failure to exhaust are also unfounded. Petitioner worries that, under the plain text, a prisoner may accrue a strike where the face of the complaint reveals that he has failed to exhaust. That is correct because, as this Court confirmed in *Jones* v. *Bock*, a prisoner's complaint may be dismissed for failure to state a claim during the PLRA's preliminary screening process where the failure to adhere to the statute's mandatory exhaustion requirement is obvious from the face of the pleading. 549 U.S. 199, 216 (2007). But there is every reason to think that Congress intended a strike in that instance because the exhaustion requirement is a "centerpiece" of the PLRA. *Woodford*, 548 U.S. at 84. Petitioner fears (Br. 30) an inequitable result because

prisoners with less obvious exhaustion defects may have their complaints dismissed at a later stage and therefore may not accrue a strike. This Court has not considered whether a dismissal for failure to exhaust at a later stage would qualify as a strike. But even if it would not, Congress could reasonably have chosen to confer a strike when the exhaustion defect is obvious from the face of the complaint, while excusing a strike when the failure may be less clear and therefore more difficult for the prisoner to discern.

D. Section 1915(g)'s Treatment Of A Dismissal Without Prejudice As A Strike Does Not Raise Constitutional Concerns

Finally, petitioner contends (Br. 36-41) that reading the PLRA's three-strikes provision to encompass 12(b)(6) dismissals that were entered without prejudice would raise serious constitutional questions. That argument is without merit. This Court has held that prisoners "have a constitutional right of access to the courts," *Bounds* v. *Smith*, 430 U.S. 817, 821 (1977), and prisoner suits may serve to vindicate important constitutional interests, see, *e.g., Cutter* v. *Wilkinson*, 544 U.S. 709, 715-717 (2005). It does not follow, however, that prisoners must be relieved of the costs of filing suit without regard to their prior litigation misconduct. See *Shieh* v. *Kakita*, 517 U.S. 343, 343 (1996) (per curiam) (barring *in forma pauperis* filings prospectively because the petitioner "has abused this Court's certiorari process"); *Martin* v. *District of Columbia*, 506 U.S. 1 (1992) (per curiam) (similar). The PLRA's three-strikes provision embodies Congress's view that federal courts should "devote [their] limited resources to the claims of [prisoners] who have not abused" the privilege of *in*

forma pauperis status. *Shieh*, 517 U.S. at 344. That view is both reasonable and permissible.

Unsurprisingly, every appellate court to address the issue has held that the three-strikes provision does not infringe a prisoner's constitutional right of access to the courts. See *Polanco* v. *Hopkins*, 510 F.3d 152 (2d Cir. 2007) (per curiam); *Abdul-Akbar* v. *McKelvie*, 239 F.3d 307 (3d Cir.) (en banc), cert. denied, 533 U.S. 953 (2001); *Carson* v. *Johnson*, 112 F.3d 818 (5th Cir. 1997); *Wilson* v. *Yaklich*, 148 F.3d 596 (6th Cir. 1998), cert. denied, 525 U.S. 1139 (1999); *Lewis* v. *Sullivan*, 279 F.3d 526 (7th Cir. 2002); *Higgins* v. *Carpenter*, 258 F.3d 797 (8th Cir. 2001) (per curiam), cert. denied, 535 U.S. 1040 (2002); *Rodriguez* v. *Cook*, 169 F.3d 1176 (9th Cir. 1999); *White* v. *Colorado*, 157 F.3d 1226 (10th Cir. 1998), cert. denied, 526 U.S. 1008 (1999); *Rivera* v. *Allin*, 144 F.3d 719 (11th Cir.), cert. dismissed, 524 U.S. 978 (1998).[3] Petitioner offers no plausible reason to disturb this consensus. The Court instead should give Section 1915(g) its plain meaning: it applies to any action "that was dismissed on the grounds that it * * * fails to state a claim upon which relief may be granted."

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[3] Three circuits may have left open whether a prisoner may raise an as-applied challenge where it appears the three-strikes provision would imperil the prisoner's fundamental constitutional rights. See *Rodriguez,* 169 F.3d at 1180; *White*, 157 F.3d at 1233-1234, *Carson,* 112 F.3d at 821. Petitioner has not raised such a challenge.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2020