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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

On one key point, the parties and all amicus curiae seem to agree: the Prison Litigation Reform Act of 1995 (PLRA) is designed to "reduce *meritless* prisoner lawsuits" without blocking indigent prisoners from pursuing legitimate claims. Resp. Br. 4 (emphasis added); *accord* U.S. Br. 11, 20, 25; Arizona Br. 2, 21; Council of State Governments Br. 4. The Act's three-strikes provision, 28 U.S.C. § 1915(g), is no different: as respondents explain, that provision operates to "curtail[] prisoners' ability to file new IFP lawsuits once they have filed three that are *non-meritorious* on their face." Resp. Br. 4 (emphasis added). But this (correct) account of section 1915(g)'s scope supports *petitioner*. By definition, a without-prejudice dismissal for "fail[ure] to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g), does *not* represent a judgment that the plaintiff's claims were "non-meritorious." Resp. Br. 4. To the contrary, such an order "is the opposite of" an "adjudication on the merits." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001). It should not qualify as a strike under section 1915(g).

Resisting that conclusion, respondents and their amici insist that the statutory text compels treating such without-prejudice dismissal orders as strikes. But their arguments fail to account for the background rule that a dismissal for failure to state a claim is an adjudication on the merits and operates with prejudice, absent an express qualification. Pet. Br. 15-20. Thus, respondents' observation (at 12-13) that the ordinary meaning of "dismiss" includes both with- and without-prejudice dismissals misses the

point, as does their reliance on other statutory provisions that authorize courts to "dismiss" actions.

Provisions that *authorize* dismissal, like Rule 12(b)(6), allow courts to qualify their orders by entering the dismissal with or without prejudice. But section 1915(g) is different: it imposes a *consequence* based on a previously-entered order. In that context, in which a court must determine whether an order limits the plaintiff's ability to pursue a new action—because of preclusion or a restriction on IFP eligibility—the background rule should guide interpretation. Congress would have expected courts to adopt the same conclusive presumption when interpreting the statutory phrase at issue: because section 1915(g) does not use any "words of qualification" when referring to dismissals for failure to state a claim, it is best read to refer only to such dismissals that were "rendered on the merits." *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 109 (1869).

The statutory context confirms that interpretation. Section 1915(g) imposes strikes for only a subset of the dismissal orders that other PLRA provisions authorize. Read as a whole, section 1915(g) targets actions that abuse the judicial process because—to borrow respondents' formulation—they are "non-meritorious on their face." Resp. Br. 4. By contrast, Congress carefully excluded categories of dismissals that "ha[ve] nothing to do with the merits" from section 1915(g)'s reach, *Tafari v. Hues*, 473 F.3d 440, 442 (2d Cir. 2007), such as dismissals for lack of jurisdiction or failure to prosecute, Pet. Br. 25-26. Without-prejudice dismissals for failure to state a claim belong in the latter camp.

Respondents and their amici warn that adopting petitioner's interpretation would reopen the floodgates for vexatious prisoner suits by allowing prisoners to file "limitless" claims that suffer from procedural flaws, such as premature filing under *Heck v. Humphrey*, 512 U.S. 477 (1994). *See* U.S. Br. 29; Council of State Governments Br. 22-24. That is manifestly wrong. Under petitioner's interpretation, courts retain ample tools to deter repetitive or otherwise abusive suits, including by dismissing them as "frivolous" or "malicious." On the flip side, respondents' expansive interpretation of section 1915(g) imposes real costs by restricting indigent prisoners' access to federal courts based on potentially curable procedural errors.

The Court should reverse the decision below and hold that petitioner did not accrue strikes under section 1915(g) for actions dismissed without prejudice for failure to state a claim.

ARGUMENT

I. A Dismissal For "Failure To State A Claim" Entered Without Prejudice Is Not A Strike Under Section 1915(g).

Respondents and their amici contend that section 1915(g) requires courts to impose strikes whenever an action is dismissed for failure to state a claim, even if the dismissal issues without prejudice—as occurs when, for example, a suit "fail[s] on procedural grounds" that do not preclude a "further action." *Holmberg v. Armbrecht*, 327 U.S. 392, 393 (1946). But their argument is flawed because it interprets the key phrase at issue—"dismissed on the ground[] that . . . [the action] fails to state a claim upon which

relief may be granted," 28 U.S.C. § 1915(g)—without proper regard for historical or statutory context.

A. "Dismissed On The Ground[] That It . . . Fails To State A Claim Upon Which Relief May Be Granted" Is A Legal Term Of Art That Refers To With-Prejudice Dismissals.

The parties agree that, to interpret section 1915(g), the Court should look to the "settled meaning" of Rule 12(b)(6), which uses "essentially the same language" as the statute. Resp. Br. 15; *accord* Pet. Br. 15-20; U.S. Br. 15-16. But respondents and their amici fail to follow this observation to its logical endpoint. When an action is dismissed for failure to state a claim, the dismissal *always* operates with prejudice *unless* the order is expressly qualified. *See* Pet. Br. 15-17. By using this phrase in section 1915(g) without qualification, Congress should be understood to have imposed strikes only for without-prejudice dismissals for failure to state a claim. *See Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 246-247 (2014) ("[W]e presume that Congress meant to incorporate the settled meaning of [a term of art] when it incorporated the language of that [term.]"); *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (recognizing that when terms are "obviously transplanted from another legal source," they "bring[] the old soil" with them into the new statute). The Court should reject the efforts by respondents and their amici to divorce section 1915(g)'s meaning from this rule of civil practice.

1. Respondents first invoke (at 12-14) what they describe as the "plain meaning" of the word

"[d]ismissed." Respondents point out that standard dictionary definitions include both "with" and "without" prejudice dismissals. *Of course* they do. Petitioner acknowledged that courts may dismiss actions under Rule 12(b)(6) without prejudice. Pet. Br. 16.

Rather, petitioner's argument is that "[w]hen the word 'dismissed' *is coupled* with the words 'for failure to state a claim upon which relief may be granted,' the *complete phrase* has a well-established legal meaning" that presupposes a with-prejudice dismissal. *McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009) (emphasis added; alterations omitted). It is no answer for respondent to pluck a single word from section 1915(g) and use its out-of-context definition to modify the meaning of a broader legal phrase. *See F.A.A. v. Cooper*, 566 U.S. 284, 291-292 (2012) (rejecting attempt to "rely on the ordinary meaning of the word 'actual' as it is defined in standard general-purpose dictionaries" because the phrase in the statute, "actual damages," is a "legal term of art").

2. Leaving behind dictionary definitions, respondents next assert that the analogy petitioner draws to Rule 12(b)(6) supports their position. Resp. Br. 15-17; *see also* U.S. Br. 17-18. Respondents acknowledge (at 16) that, under Federal Rule of Civil Procedure 41(b), a Rule 12(b)(6) dismissal presumptively operates with prejudice. But respondents contend that the need for the Rules of Civil Procedure to adopt a default presumption shows that such dismissals may operate with or without prejudice. *Id.*; *accord* U.S. Br. 18. Respondents and their amici once again fail to give sufficient weight to the legal background against which Congress legislated.

Rule 41(b) did not create a new default rule. Rather, it "codifies a longstanding rule of equity that [w]here words of qualification, such as without prejudice, . . . do not accompany [a judicial] decree, [the decree] is presumed to be rendered on the merits." U.S. Br. 17 (quotation marks omitted) (quoting *Durant*, 74 U.S. at 109). And this presumption has long been regarded as *irrebuttable*. *See Foote v. Gibbs*, 67 Mass. (1 Gray) 412, 413 (Mass. 1854) (Shaw, C.J.) ("[T]he authorities, both in England and in this country, are decisive, that a general entry of 'bill dismissed,' with no words of qualification, such as 'dismissed without prejudice," or 'without prejudice to an action at law,' or the like, is conclusively presumed to be upon the merits[.]").

Thus, the parties agree that courts may qualify dismissals for failure to state a claim by stipulating that the dismissal operates "without prejudice." But the inference that respondents draw from this uncontroversial proposition does not follow. Section 1915(g) does not authorize district courts to dismiss actions that fail to state a claim. Rather, it operates in the past tense, imposing a consequence on already-entered dismissals. *See Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016). In that context, the phrase "dismissed on the ground[] . . . that [an action] fails to state a claim upon which relief may be granted" has an unambiguous meaning: it refers to a dismissal order that rejects an action on the merits, precluding future suits based on the same transaction and occurrence. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981). By using that same phrase in that same context, Congress presumptively intended to adopt the

same meaning. *Air Wis. Airlines*, 571 U.S. at 246-247.

3. The flaws in respondents' "plain language" argument also infect their attempt to marshal this Court's case law to support their position. Respondents cite *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015), in which the Court held that a previous dismissal on a ground enumerated in section 1915(g) would count as a strike, even if that dismissal was still pending on appeal, *id.* at 1761. In reaching that conclusion, the Court noted that the prisoner's contrary interpretation would read the statute as though it imposed strikes only for "affirmed dismissal[s]"—which is not what section 1915(g) says. *Id.* at 1763. Drawing on *Coleman*'s reasoning, respondents urge the Court not to "read into the statute a limitation of just dismissals with prejudice." Resp. Br. 14; *accord* U.S. Br. 13-14.

But petitioner's interpretation "does not read an additional requirement into the statute that was not already implied by Congress' use of the familiar phrase 'dismissed . . . for failure to state a claim.'" *Millhouse v. Heath*, 866 F.3d 152, 162-163 (3d Cir. 2017) (quotation marks, citation, and brackets omitted). The flaw in respondents' reasoning is illustrated by a simple example. If, hypothetically, section 1915(g) applied only to "dismissals for lack of subject-matter jurisdiction," no one would doubt that the statute would cover only dismissals entered without prejudice. That conclusion would not "read extratextual limitations into the statute." U.S. Br. 14. Rather, it would reflect the understanding that a dismissal for lack of subject-matter jurisdiction necessarily operates without prejudice. *See* 9 Charles

Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2373, Westlaw (database updated Aug. 2019).

Respondents no doubt would respond that a Rule 12(b)(6) dismissal is not so limited—a court may dismiss for failure to state a claim with or without prejudice. This ambiguity disappears, however, once an order is entered, since the law conclusively presumes that "[a]n unqualified dismissal for failure to state a claim . . . operate[s] with prejudice." *McLean*, 566 F.3d at 398. "[T]he addition of the words 'with prejudice' to modify such a dismissal is simply not necessary." *Id.* at 398-399.

For this reason, respondents' reliance on *Coleman* is misplaced. In fact, *Coleman*'s reasoning supports *petitioner's* reading of section 1915(g). In *Coleman*, the Court based its interpretation in part on "the way in which the law ordinarily treats trial court judgments," reasoning that because "a trial court's judgment . . . normally takes effect despite a pending appeal," there was no reason to let an appeal suspend a strike's imposition. 135 S. Ct. at 1764. Other decisions from this Court interpreting the PLRA have likewise read the statute's provisions to align with background legal principles, rejecting "plain language" arguments that disregard legal context. *See Jones v. Bock*, 549 U.S. 199, 212 (2007) (aligning the PLRA's approach to exhaustion and pleading with "the usual practice under the Federal Rules"); *Woodford v. Ngo*, 548 U.S. 81, 88-90 (2006) (treating "exhausted" as a "term of art" that derived its meaning from administrative law, and rejecting the dissent's argument that the PLRA's plain text supported a different result). Likewise, section 1915(g)

should be read in harmony with "[t]he ordinary rules of civil procedure," *Coleman*, 135 S. Ct. at 1764, which dictate that an action "dismissed" "for failure to state a claim" refers to a dismissal with prejudice.

B. The PLRA's Structure Confirms That Without-Prejudice Dismissals For "Failure To State A Claim" Do Not Count As Strikes.

Petitioner's interpretation of section 1915(g) is further supported by the broader statutory context, which makes clear that Congress imposed strikes on actions that are non-meritorious or otherwise abusive—descriptions that exclude without-prejudice dismissals for failure to state a claim. Pet. Br. 20-26. Respondents' contention (at 17-24) that statutory structure favors their position is mistaken and ultimately contradicts respondents' recognition that section 1915(g) is triggered only when a prisoner has filed three lawsuits that were dismissed as "non-meritorious on their face." Resp. Br. 4.

1. Section 1915(g) imposes a strike if an action or appeal was dismissed on the ground that it was (1) "frivolous," (2) "malicious," or (3) "fail[ed] to state a claim upon which relief may be granted." Respondents agree (at 18) that the meaning of the terms "frivolous" and "malicious" should inform the meaning of "fails to state a claim." And they acknowledge that "frivolous" and "malicious" dismissals share a common characteristic with dismissals for "failure to state a claim" entered with prejudice: they all connote an action that is irredeemable or abusive of the judicial process. Resp. Br. 18 (noting that "frivolous claims" are "clearly baseless"), 19-20

(explaining that "malicious" lawsuits are typically duplicative or otherwise abusive). Respondents and their amici nevertheless argue that the presence of those two terms in section 1915(g) supports their interpretation because "frivolous" or "malicious" dismissals may be rendered without prejudice. Resp. Br. 21; U.S. Br. 19. But this argument does not bridge the gap between those two terms and respondents' interpretation of section 1915(g) to include without-prejudice dismissals for what may be "a temporary, curable, procedural flaw." *Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999).

The dismissal of an action as "frivolous" or "malicious" represents a clear judgment that the plaintiff's action is irredeemable or otherwise abusive of the judicial process. Pet. Br. 21-22. The decisions respondents and their amici cite illustrate petitioner's point.[1]

A "frivolous" action "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). "In the usual case," dismissing an action as frivolous represents a judgment that "its want of merit is . . . patent." *Okoro v. Bohman*, 164 F.3d 1059, 1063-1064 (7th Cir. 1999). But a court may also dismiss an action as frivolous in contexts where it cannot adjudicate the merits, such as if the court lacks jurisdiction. Resp. Br. 19. In that circumstance, a frivolousness determination sanctions the plaintiff for burdening the court with wholly

[1] Neither respondents nor their amici suggest that there is any background rule that presumes frivolous or malicious dismissals operate with prejudice.

groundless jurisdictional arguments. Thus, dismissing the action as frivolous conveys a judgment that the action was abusive or vexatious *over and above* the fact that it was filed prematurely or in the wrong forum. As a case respondents cite (at 19) explains, "[w]hile in the ordinary case, a dismissal for a lack of jurisdiction is not a strike, . . . 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. Corr. Corp. of Am.*, 439 F. App'x 489, 491-492 (6th Cir. 2011) (quotation marks omitted); *see also Ackerman v. Mercy Behavior Health*, 617 F. App'x 114, 116-117 (3d Cir. 2015) (per curiam) (cited in U.S. Br. 15) (affirming dismissal of action as frivolous but without prejudice where the complaint invoked federal-question jurisdiction but presented "disjointed" and "difficult to decipher" allegations that were "clearly baseless").

The same reasoning applies to "malicious" dismissals. To dismiss an action as malicious, the court *must* conclude that it was brought to "vex, injure, or harass the defendants" and serves "no legitimate purpose." *Kennedy v. Getz*, 757 F. App'x 205, 207-208 (3d Cir. 2018) (cited in Resp. Br. 19). That is true regardless of whether the dismissal is entered without prejudice. Respondents' case-law examples confirm this point. In one case, the court concluded that filing a second, duplicative lawsuit was malicious; the court dismissed without prejudice merely to avoid impacting the still-pending first suit. *See*

Pittman v. Moore, 980 F.2d 994, 995 (5th Cir. 1993).[2] In other cases, courts dismissed actions as malicious based on clear misuse of the IFP process, ending the case without any need to consider the merits. *See, e.g.*, *Schmidt v. Navarro*, 576 F. App'x 897, 898-899 (11th Cir. 2014) (per curiam); *Jackson v. Fla. Dep't of Fin. Servs.*, 479 F. App'x 289, 292 (11th Cir. 2012).

Without-prejudice dismissals for failure to state a claim do not fit with these other dismissal categories. Such dismissals may be premised on technical, curable errors, they do not express a view on the merits of the claims, and they do not suggest that the plaintiff has abused the courts with her filing.[3]

2. The proper interpretation of section 1915(g) is informed not only by the categories of dismissals that are included, but also by those that Congress left out. *See Lagos v. United States*, 138 S. Ct. 1684, 1689-1690 (2018). As previously explained, the structure of the PLRA shows that Congress excluded from section 1915(g) dismissals that do not "express any view on the merits" of the action or reflect a finding of abuse—*e.g.*, actions dismissed for lack of jurisdiction, abstention, prematurity, or want of prosecution. *See* Pet. Br. 23-26 (quoting *Daker*, 820 F.3d at 1284). Most conspicuously, Congress excluded immunity-

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[2] Respondents place *Kennedy v. Getz* in this category, but there the court dismissed the action *with* prejudice. 757 F. App'x at 207.

[3] Because petitioner does not take issue with a court's ability to dismiss an action without prejudice as frivolous, respondents' discussion of *Denton v. Hernandez*, 504 U.S. 25 (1992), is beside the point. Resp. Br. 18-19; U.S. Br. 10, 15, 19.

based dismissals from section 1915(g), even though the three sections of the PLRA that specify bases for *sua sponte* dismissals all include actions that "seek[] monetary relief from a defendant who is immune from such relief." *See* 28 U.S.C. §§ 1915(e)(2); 1915A(b); 42 U.S.C. § 1997e(c).

Respondents have no explanation for why Congress would have excluded these other non-merits-based dismissals from section 1915(g) yet imposed strikes for actions dismissed without prejudice for failure to state a claim. Indeed, respondents simply ignore this issue.

The United States offers a cursory response, suggesting that Congress "might have omitted immunity dismissals from Section 1915(g) for any number of reasons." U.S. Br. 21. But its attempted explanations are unconvincing. First, the United States surmises (*id.*) that Congress "may have believed immunity defenses are particularly difficult for prisoners to spot." But the United States offers no support for that assertion, and it is doubtful that Congress would have believed that immunity issues are systematically more challenging for prisoners to identify than other hurdles that prisoners face when pursuing claims in federal court.[4] Second, the United

[4] In fact, the source that the United States describes (at 29) as "one of the leading manuals for prisoners" addresses questions of sovereign immunity, instructing prisoners that they "cannot sue a state or a state agency directly." The Ctr. for Constitutional Rights & The Nat'l Lawyers Guild, *The Jailhouse Lawyer's Handbook: How to Bring a Federal Lawsuit to Challenge Violations of Your Rights in Prison* 72 (Rachel Meeropol & Ian Head, eds., 5th ed. 2010).

States speculates (*id.*) that Congress "may have been focused on deterring the types of suits discussed in *Neitzke*." But that argument is nonresponsive, because it does not explain why Congress chose to expand the IFP screening provision (then section 1915(d), now codified as section 1915(e)) to require dismissal of actions that *either* failed to state a claim or sought monetary damages and are barred by immunity, yet opted for a narrower approach in section 1915(g). The best explanation is that section 1915(g) operates as a sanction, which Congress did not intend to apply to suits dismissed for procedural reasons (absent any finding of frivolousness or malice).

3. Respondents' competing structural argument (at 21-24) does not justify their broad interpretation of section 1915(g). Respondents note that several other PLRA provisions require courts to screen and dismiss certain prisoner suits that "fail[] to state a claim on which relief may be granted." *See* 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b)(1); 42 U.S.C. § 1997e(c)(1). Assuming that the phrase must have the same meaning in those screening provisions as in section 1915(g), respondents contend that petitioner's interpretation would require district courts to dismiss prisoner actions with prejudice, leaving prisoners worse off than under respondents' competing approach. Resp. Br. 23-24; U.S. Br. 21-22; Council of State Governments Br. 24-25. But respondents' premise is mistaken: section 1915(g) uses this phrase in a distinct context that limits its scope to with-prejudice dismissals—a limitation that the PLRA's screening provisions do not share.

Although "it is often true that when Congress uses a word" or phrase "to mean one thing in one part

of the statute, it will mean the same thing elsewhere in the statute," "[t]his principle . . . readily yields to context," especially when the word or phrase "is used throughout a statute and takes on distinct characters in distinct statutory provisions." *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1863 (2019) (quotation marks omitted); *see also Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion) ("We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute."). Here, section 1915(g) is distinct from the other PLRA provisions that respondents invoke in critical ways.

Most significantly, the PLRA screening provisions that use the phrase "fail[ure] to state a claim" are *forward*-looking and describe a court's authority to dismiss an action. The PLRA screening provisions are thus analogous to Rule 12(b)(6), and they authorize courts to dismiss with or without prejudice. By contrast, section 1915(g) is *backward*-looking, as it asks courts to review a dismissal retrospectively to determine its effect. *See Daker*, 820 F.3d at 1284. As discussed, p. 5-7, *supra*, this feature of section 1915(g) is significant because it aligns the statute with the rule of procedure that conclusively presumes a dismissal for failure to state a claim operates with prejudice.

In addition, and as discussed, the screening provisions all authorize dismissals for suits seeking money damages that are barred by immunity—a dismissal category that is excluded from section 1915(g). This fact underscores that the PLRA's screening provisions are intended to sweep more

broadly than section 1915(g), requiring *sua sponte* dismissals on grounds that do not implicate the merits or indicate abuse of the courts.

4. Finally, respondents look beyond the PLRA to other statutes, attributing significance to the fact that Congress has sometimes expressly differentiated between with- and without-prejudice dismissals. Resp. Br. 25-28; *see also* U.S. Br. 13. The negative inference that respondents draw does not hold up. Most notably, none of the statutory provisions that respondents identify use the precise term of art at issue here—"dismissed on the grounds that it . . . fails to state a claim upon which relief may be granted." These other statutes accordingly are of little interpretive value.

Moreover, respondents concede (at 28), that at least one statute (governing the licensing of biosimilar products) does use as a triggering event "the dismissal with or without prejudice" of a certain action. 42 U.S.C. § 262(k)(6)(B)(ii). On respondents' account, this phrase is unnecessary surplusage, because the word "dismissal" would *always* mean with or without prejudice. Respondents try to explain away this provision on the ground that it was enacted in 2010, after the *McLean* decision in 2009. Resp. Br. 28. But the notion that Congress's language choice in a statute governing biologic medicines was prompted by a single circuit court decision applying the PLRA is implausible in the extreme.

II. Respondents' Interpretation Does Not Further The PLRA's Objectives.

A. Respondents' Approach Punishes Litigants Who Have Meritorious Claims That Merely Suffer From Technical, Curable Defects.

Respondents acknowledge (at 31) that their interpretation of section 1915(g) results in prisoners accruing strikes for failure to state a claim dismissals premised on "temporary, curable, procedural flaw[s]," such as failure to exhaust available administrative remedies. *Snider*, 199 F.3d at 111; *see also* U.S. Br. 26-27. But respondents fail to reconcile this result with their *own* understanding of the PLRA's core objective: deterring "meritless" prisoner suits. Resp. Br. 4. And contrary to respondents' efforts to downplay the practical implications of their interpretation, the resulting restriction on indigent prisoners' access to federal courts would be troubling—to the point of raising constitutional concern.

1. Numerous courts of appeals have recognized that section 1915(g) generally does not impose a strike for non-exhaustion—including in circuits on respondents' side of the circuit split.[5] But respondents and their amici acknowledge that their interpretation of section 1915(g) creates an anomalous exception: under their approach, a dismissal for failure to exhaust only counts as a strike if a prisoner pleads

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[5] *See, e.g.*, *El-Shaddai v. Zamora*, 833 F.3d 1036, 1043-1044 (9th Cir. 2016); *Owens v. Isaac*, 487 F.3d 561, 563 (8th Cir. 2007) (per curiam); *Malek v. Reding*, 195 F. App'x 714, 716 (10th Cir. 2006); *Snider*, 199 F.3d at 111.

facts that make non-exhaustion apparent on the face of the complaint, because such an order can be characterized as a dismissal for failure to state a claim. Resp. Br. 36; U.S. Br. 30-31. This result punishes prisoners for candor that *saves* judicial resources: plaintiffs can avoid a strike by omitting any allegations from their complaints relevant to exhaustion, forcing the government and the Court to wait until at least summary judgment to dispose of the case. Pet. Br. 29-31.[6]

2. Respondents try to minimize the harsh consequences of a rule that imposes strikes for temporary procedural defects by arguing (at 38) that most exhaustion issues are not curable because most prison systems impose tight administrative deadlines. (Respondents make a similar point (at 37-38) about actions dismissed as premature under *Heck*, noting the infrequency of criminal-conviction reversals.) But respondents' argument is flawed as a matter of statutory interpretation, because they have "not shown that Congress had reason to believe that every prison

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[6] The United States alone seems to question (at 31) the consensus that "a dismissal for failure to exhaust at a later stage" than the pleadings does *not* qualify as a strike, but it offers no support for its passing suggestion. *Cf. Turley v. Gaetz*, 625 F.3d 1005, 1013 (7th Cir. 2010) (holding that no strike accrued where unexhausted claims were dismissed "at summary judgment"). Alternatively, the United States insists (at 31) that petitioner has not identified an anomaly, because Congress might have chosen to impose strikes only when an exhaustion defect is most obvious. That argument misses the mark because the United States' approach turns on what a prisoner has alleged regarding exhaustion—not on whether the defect is especially glaring once it is revealed.

system would have relatively short and categorical filing deadlines," making it implausible to assume that Congress would have regarded non-exhaustion as the sort of permanent flaw that justifies imposing a strike. *Woodford*, 548 U.S. at 101. Moreover, "most grievance systems give administrators the discretion to hear untimely grievances." *Id.* at 96, 101 (quoting respondent's brief).

Further, there are cases in which prisoners have cured procedural defects that previously resulted in without-prejudice dismissals, allowing them to push forward with renewed claims. Pet. Br. 31-35 & n.9. To penalize prisoners under section 1915(g) in such circumstances conflicts with the PLRA's structure and objectives.

3. Respondents also argue (at 31-35) that a handful of informal, discretionary court practices allowing prisoners multiple opportunities to correct pleadings before facing dismissal mitigates the practical impact of their rule. But that patchwork of practices, which vary by both judge and jurisdiction, provides little reassurance that courts across the country will "ensure that potentially meritorious prisoner suits are not hastily dismissed with a strike." *Id.* at 35.

In any event, the Court should disfavor an interpretation of the PLRA that relies on significant additional judicial intervention to avoid unfair outcomes. Respondents extol local practices in which judges engage in "many rounds of back and forth with the prisoner to improve the complaint before making a dismissal decision" that would result in a strike. Resp. Br. 32. But district courts may reasonably conclude that it would be more efficient to dismiss an

action without prejudice, allowing the court to clear its docket while still providing the prisoner with a chance to file a corrected pleading if he remains intent on pursuing his claim. Indeed, encouraging this latter course is more consistent with the PLRA's objective of ensuring that "the flood of nonmeritorious [prisoner] claims" does not so burden the courts and consume judicial attention as to "effectively preclude consideration of the allegations with merit." *Jones*, 529 U.S. at 203. Respondents' interpretation, however, may dissuade judges from adopting the more efficient approach because of the impact of a without-prejudice dismissal on a prisoner's future ability to access federal court.[7]

4. Constitutional avoidance principles further counsel against respondents' interpretation of section 1915(g), which would impose restrictions on prisoners' future ability to access federal courts merely for bringing actions that were dismissed without prejudice due to procedural defects. Pet. Br. 36-41. Respondents acknowledge (at 39) that application of section 1915(g) may raise "constitutional concerns" in

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[7] The United States assumes (at 27) that prisoners will have at least one chance to amend their complaints under Federal Rule of Civil Procedure 15(a) before facing dismissal. But it is an open question whether the PLRA displaces Rule 15(a) in prisoner cases by allowing district courts to dismiss prisoner suits *sua sponte* "before service of process and *without giving leave to amend*." *Christiansen v. Clarke*, 147 F.3d 655, 658 (8th Cir. 1998) (emphasis added); *see also Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1024 & n.3 (7th Cir. 2013) (acknowledging circuit division on this issue); *Ricks v. Mackey*, 141 F.3d 1185 (10th Cir. 1998) (unpublished) (affirming *sua sponte* dismissal without leave to amend in case governed by the PLRA).

certain cases, but insist that those concerns are irrelevant here, on the theory that petitioner's complaint does not "seek[] to vindicate any fundamental constitutional right." Respondents miss the point. If one interpretation of an ambiguous statute "would raise a multitude of constitutional problems, the other should prevail—*whether or not those constitutional problems pertain to the particular litigant before the Court*." *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005) (emphasis added). Here, respondents' interpretation would lead to situations in which applying section 1915(g) might violate the Constitution by restricting indigent prisoners' access to federal courts—including in actions to vindicate fundamental constitutional rights that do not fall within the statute's narrow carve-out for actions alleging "imminent danger of serious physical injury"—based on previous dismissals that reflect procedural failings rather than any pattern of abusing IFP status.

Respondents' alternative proposal would not save section 1915(g) from constitutional doubt. Respondents suggest (at 39-40) that in fundamental-rights cases, courts "could decide to . . . waive the filing fee to avoid any constitutional concerns" with section 1915(g)'s application. But section 1915(g) unambiguously takes away courts' discretion to exempt indigent prisoners from paying filing fees if they have three strikes. *See, e.g.*, *Ladeairous v. Sessions*, 884 F.3d 1172, 1173-1174 (D.C. Cir. 2018). Disregarding Congress's command and "waiv[ing] the filing fee" is thus not an option that the statute leaves open. Resp. Br. 39. Rather, it would be a *remedy* for an as-applied constitutional violation. *See Daker v. Jackson*, 942 F.3d 1252, 1258 (11th Cir. 2019) (acknowl-

edging potential contexts in which "waiver of the filing fee is constitutionally required for a three-strikes litigant").

For its part, the United States denies that prisoners have any constitutional right to "be relieved of the costs of filing suit *without regard to their prior litigation misconduct*." U.S. Br. 31 (emphasis added). The United States' own phrasing reveals the problem with its position: it defends section 1915(g)'s restriction on IFP eligibility as a *sanction* for abusive and frivolous litigation tactics, but interprets the statute to impose strikes for dismissals premised on procedural defects that carry no suggestion of such "abuse[]." *Id.* (quotation marks omitted).

B. Petitioner's Interpretation Provides Courts With Ample Tools To Deter Vexatious Prisoner Suits.

Contrary to the assertions of respondents and their amici, their broad reading of section 1915(g) is not needed to advance the PLRA's objective of deterring meritless prisoner suits. In particular, the United States' assertion (at 29) that "petitioner's rule would allow" prisoners to burden courts with "limitless *Heck*-barred suits" is just wrong. As petitioner made clear, courts may, when appropriate, dismiss *Heck*-barred actions as "frivolous" or "malicious," which would result in a strike. Pet. Br. 41-42. Nor is there anything unusual about trusting district courts to decide whether a particular filing is "frivolous" or "malicious." *See Denton*, 504 U.S. at 33 (recognizing that district courts "are in the best position to determine" whether a case is frivolous). District courts dismissing *Heck*-barred actions can apply the same

standards for determining whether an action is frivolous or malicious that they always use. *See* p. 10-12, *supra*; *cf. Meja v. Harrington*, 541 F. App'x 709, 710 (7th Cir. 2013) (recognizing that action barred by *Heck* could not be considered "malicious" or "frivolous" because it had a plausible basis in case law).

The State amici argue that jurisdictions subject to petitioner's rule have seen an uptick in prisoner lawsuits (Arizona Br. 16-17), but the data does not support this charge. Citing a study comparing state-by-state prisoner filings in 1995 (before the PLRA) and 2014, the State amici contend that prisoner filings in states in the Fourth Circuit rose relative to other states post-*McLean*. Comparing filing rates in just those two years (1995 and 2014) is not a useful way to measure the impact of a decision issued in 2009. But even on its own terms, the data do not fit the State amici's story. For example, Virginia's filing-rate ranking *dropped* ten spots (from 6 to 16) relative to other states, while many of the biggest relative increases in prisoner filings came in states located in circuits that have adopted respondents' interpretation of section 1915(g) (*e.g.*, California, Montana, and South Dakota). Margo Schlanger, *Trends in Prison Litigation, as the PLRA Approaches* 20, 28 Corr. Law Reporter 69, 73 (2017). There is no circuit-based pattern to which states saw increases in prisoner litigation, leading the study's author to observe "that it was not appellate precedent" driving state variations. *Id.* at 72.

CONCLUSION

The judgment of the Tenth Circuit affirming the denial of petitioner's application to proceed IFP should be reversed.

Respectfully submitted.

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