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1 P R O C E E D I N G S

2 (10:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 18-8369, Lomax  
5 versus Ortiz-Marquez.

6 Mr. Burgess.

7 ORAL ARGUMENT OF BRIAN T. BURGESS

8 ON BEHALF OF THE PETITIONER

9 MR. BURGESS: Mr. Chief Justice, and  
10 may it please the Court:

11 Without-prejudice dismissals for  
12 failure to state a claim are not strikes under  
13 Section 1915(g) for three reasons.

14 First, the statute uses a familiar  
15 legal phrase with a well-established meaning in  
16 the context relevant here. When courts review  
17 judicial orders to determine their impact on a  
18 future action, evaluating preclusion, for  
19 example, they conclusively presume that the  
20 phrase "dismissed for failure to state a claim"  
21 means dismissed with prejudice.

22 In 1915(g), Congress used the same  
23 phrase in the same basic context. There's every  
24 reason to think Congress expected courts to  
25 apply the phrase's settled meaning rather than

1 to convert ordinary without-prejudice dismissals  
2 into sanctions that restrict future suits.

3 Second, the structure of the PLRA  
4 further supports that interpretation. Read  
5 together, the three dismissal categories  
6 identified in 1915(g) target actions that are  
7 facially meritless or otherwise abusive.

8 Without-prejudice dismissals for  
9 failure to state a claim are different. They  
10 may be based on purely procedural defects, such  
11 as the failure to exhaust administrative  
12 remedies, and it would be odd to impose a strike  
13 for such suits since Congress excluded from  
14 1915(g)'s reach other categories of dismissals  
15 that don't implicate the merits or otherwise  
16 suggest abuse, such as dismissals based on  
17 sovereign immunity.

18 Third and related, the other side's  
19 interpretation upsets the PLRA's balance by  
20 punishing prisoners for dismissals that, by  
21 definition, say nothing about the ultimate  
22 merits of their action. This interpretation  
23 frustrates the Act's objective to filter out bad  
24 claims while still allowing for consideration of  
25 the good, since it restricts a prisoner's

1 ability to bring a potentially legitimate claim  
2 even after the prisoner has cured a procedural  
3 defect.

4 I'd like to start with the text of the  
5 statute. The -- the other side's lead argument  
6 is that the term "dismiss" is sufficiently  
7 capacious to encompass both dismissals with  
8 prejudice or dismissals without prejudice as a  
9 -- as a dictionary matter. And we don't  
10 disagree with that proposition, but we don't  
11 think that argument takes adequate account of  
12 the full statutory phrase at issue here and the  
13 context in which it is being used.

14 JUSTICE GINSBURG: You -- you are  
15 assuming that the preclusion question and the  
16 IFP status go hand in hand, but it could well be  
17 that a dismissal without prejudice will not have  
18 preclusive effect, but, at the same time, it  
19 could mean that you have to pay the filing fee.

20 You -- you seem to be assuming that  
21 these two go hand in hand, but that's not  
22 necessarily so.

23 MR. BURGESS: I think it's true that  
24 they are analytically separable. You could  
25 imagine having a consequence in the latter

1 circumstance even if there wouldn't be a  
2 preclusion consequence, but the point of our  
3 argument is that in the particular context where  
4 it is be -- this phrase is being used in  
5 1915(g), where you're looking to the consequence  
6 a dismissal has on the ability to bring a future  
7 action, that the phrase "dismissed for failure  
8 to state a claim" has an established meaning and  
9 courts would understand Congress to have meant  
10 to -- to signal that the dismissal would be with  
11 prejudice, that that is all that's being  
12 covered.

13 And we think, if you look to the  
14 structure of the statute, that further supports  
15 that interpretation. As I said at the opening,  
16 these dismissals that are being targeted -- and  
17 the other side appears to agree in its briefing  
18 -- are actions that are on their face meritless  
19 or otherwise abusive.

20 When you're dealing with a dismissal  
21 without prejudice for failure to state a claim,  
22 it does not fit into that box because it can be  
23 for things that are purely procedural defects  
24 that suggest nothing about the merits of the  
25 action.

1           And it's conspicuous that Congress  
2           excluded other types of dismissals from 1915(g)  
3           that share that feature. I mentioned sovereign  
4           immunity. The other side argues that, you know,  
5           well, even an action that is dismissed without  
6           prejudice could be considered meritless in the  
7           relevant sense because it is consuming the  
8           court's resources and not getting relief. But  
9           it's clear that that's not what Congress had in  
10          mind because, if so, there's no explanation for  
11          why it excluded things like dismissals based on  
12          sovereign immunity per 1915(g) --

13                 JUSTICE KAGAN: Mister -- Mr. Burgess,  
14           could you go back to your basic argument from  
15           the language? And you're, of course, right that  
16           there is a default rule that is used when  
17           somebody just says dismissal for a 12(b)(6)  
18           motion. We assume that that's with prejudice as  
19           a kind of default rule.

20                 But why should we think that Congress,  
21           in enacting this language, incorporated that  
22           default rule, which is used for a different  
23           purpose, or -- or at least relied on its use? I  
24           mean, this is a different context. Why would  
25           Congress have incorporated the default rule into

1 its legislative provision?

2 MR. BURGESS: It -- it is a different  
3 context, but we think it's an analogous context  
4 in that in both 1915(g) and in the preclusion  
5 context, you're looking to determine what the  
6 effect of a prior dismissal is on a future  
7 action.

8 And we think the implication of the  
9 other side's approach makes it a very unusual  
10 type of without-prejudice dismissal. To an  
11 ordinary litigant, certainly to a pro se  
12 prisoner who is confronted with a dismissal that  
13 says this is without prejudice, the ordinary  
14 understanding would be that that is not going to  
15 limit your ability to bring a future action.

16 Nonetheless, on the other side's  
17 interpretation of 1915(g), it has exactly that  
18 consequence because it is imposing a strike that  
19 might be a restriction on the ability to bring a  
20 future suit. So we --

21 CHIEF JUSTICE ROBERTS: Does 19 --

22 JUSTICE GINSBURG: But I suggested  
23 that's not necessarily so. It can -- it can  
24 be -- as far as the preclusion is concerned,  
25 without prejudice, no preclusion. But we're not

1 talking about preclusion. We're talking about a  
2 strike that means you have to pay the filing  
3 fee.

4 MR. BURGESS: That's right. I -- I  
5 think, for practical purposes, whether an  
6 indigent prisoner is going to have to pay the  
7 filing fee ends up overlapping very closely with  
8 whether that prisoner is going to be able to  
9 bring an action.

10 And that's not just conjecture.  
11 Congress recognized that in 1915(b), which --  
12 one of the things that the PLRA did was it  
13 required prisoners to pay -- even when they  
14 qualify to proceed IFP, to pay under  
15 installments. But Congress made clear that  
16 under that provision, the inability should -- to  
17 pay should never be a bar to suit.

18 So there's certainly a recognition  
19 that whether someone can proceed IFP is often  
20 going to be the ball game for whether they can  
21 bring a future suit.

22 CHIEF JUSTICE ROBERTS: I understand  
23 your -- your point that there's a different  
24 level of blameworthiness, if you would, between  
25 frivolous, malicious, and failure to state a

1 claim.

2 On the other hand, 1915 was designed  
3 to ease the burden and expense on -- on courts.  
4 You -- you have, I think, the -- the marshal  
5 doing the service, the time of the court looking  
6 at the -- the claim before it can decide that it  
7 ought to dismiss. And all that is attendant on  
8 the failure to state a claim, even without  
9 prejudice, as well as on the others.

10 And the fact is, if you fail to state  
11 a claim, you fail to state a claim. You say,  
12 well, maybe there's a procedural bar only and  
13 you can repeat. But you have filed a complaint  
14 that's not meritorious in the claim. The case  
15 is not meritorious even if the underlying claim  
16 may be if you properly plead.

17 So since the -- the -- one of the  
18 driving factors was to ease the -- the burden  
19 both in volume and in -- in court time, why  
20 shouldn't we at least consider that rather than  
21 entirely the blameworthiness of the -- of the  
22 filers?

23 MR. BURGESS: I -- I do think it's a  
24 relevant consideration, but I think it supports  
25 our view of the statute. The other side's

1 argument as to why it's not such a harsh  
2 consequence to have a dismissal that's based on  
3 procedural grounds without prejudice or  
4 dismissals for insufficient pleading, for  
5 example, is there -- there could be repeated  
6 opportunities to amend and that that is how the  
7 system takes account of it.

8 We think it's equally consistent and  
9 perhaps more preferable under the statute for  
10 courts to have the option to say: Look, this  
11 doesn't -- as pleaded, this does not state a  
12 claim. Rather than continuing to congest the  
13 court's dockets, I'm going to dismiss this  
14 action but make it without prejudice. And to  
15 the extent the without-prejudice dismissal is  
16 going to have a consequence --

17 CHIEF JUSTICE ROBERTS: Well, my point  
18 is the clogging of the dockets, the expense,  
19 that that has already occurred before the court  
20 can say, I'm going to dismiss this, this action.  
21 So, to that extent, the -- the impact on the  
22 system is the same for the other grounds for --  
23 for denial.

24 MR. BURGESS: I -- I think that's  
25 right. Of course, that's also true if an action

1 is dismissed based on sovereign immunity. It's  
2 having the same effect, yet it's clear that that  
3 is not something that counts as a strike under  
4 the statute. So it doesn't seem as though  
5 Congress had in mind just something that is  
6 filed that needs to be dismissed is going to  
7 result in that consequence.

8           Also -- district courts also have a  
9 great deal of power to determine whether  
10 something is going to have that consequence and  
11 result in a strike. Of course, they will have  
12 the option in the vast majority of cases, if  
13 they think there's -- that there really is no  
14 opportunity to amend and succeed, then the  
15 dismissal should be with prejudice and there  
16 would be a strike under -- under either view.

17           In the category of cases such as  
18 actions dismissed based on a Heck bar, where,  
19 just analytically, it is the kind of thing that  
20 is dismissed without prejudice, our rule  
21 perfectly allows for a district court to,  
22 nonetheless, have a strike in that instance if  
23 it -- if the Court determines that the assertion  
24 of the claim, despite Heck, is frivolous.

25           JUSTICE SOTOMAYOR: Mr. Burgess,

1 turning to that question, sort of two  
2 analytically tied questions. To call this as a  
3 Heck bar comparable to immunity is one thing,  
4 because there you might have an argument that  
5 not counting as a strike a lack of jurisdiction,  
6 failure to exhaust, sovereign immunity, even  
7 potentially a Heck bar, those are all  
8 jurisdictional questions.

9 And in my mind, that's an analytically  
10 different question than whether a mere dismissal  
11 for failure to state a claim without prejudice,  
12 that's more, did you do something where you  
13 didn't state a particular claim with enough  
14 particularity. Whether it's immunity, Heck, or  
15 -- or failure to exhaust, you're making a  
16 legitimate claim. There's another independent  
17 ground for not having you come to the court.

18 The failure to state a claim without  
19 prejudice, however, is a different statement and  
20 a different issue. I thought this case was just  
21 about the latter. The question presented  
22 addresses only whether a dismissal without  
23 prejudice should be counted as a strike.

24 Am I incorrect about that assumption?

25 MR. BURGESS: You're certainly correct

1 about the question presented, but it -- it  
2 encompasses both types of dismissals. I think  
3 there are two basic categories that would be  
4 encompassed in something that is being dismissed  
5 for failure to state a claim without prejudice.

6 One is that there is just a pleading  
7 deficiency and that the court thinks it's  
8 potentially curable and, in some instances, you  
9 would have an amendment, maybe in other  
10 instances, the court might just elect to dismiss  
11 the claim without prejudice, but there's a  
12 separate category that is implicated by the  
13 facts of this case, where there are certain  
14 claims that are treated as being dismissed for  
15 failure to state a claim that are necessarily  
16 without prejudice because there is some  
17 procedural reason that prevents the court from  
18 reaching it.

19 And -- and -- and to deal with the  
20 exhaustion example, this Court in the Jones v.  
21 Bock case interpreting the PLRA indicated that  
22 in some instances exhaustion would be dealt with  
23 under 12(b)(6).

24 JUSTICE SOTOMAYOR: You take nothing  
25 from the fact that the bio wanted us to reframe

1 this question and to include a question about  
2 whether Heck qualified as a dismissal for Heck  
3 purposes, which, frankly, there are two sets of  
4 splits out there, one on the question presented,  
5 whether a dismissal without prejudice or with  
6 prejudice should be treated as a strike, and  
7 there's a circuit split among the circuits as to  
8 whether a Heck dismissal is subject to a strike.  
9 We only granted on the first.

10 MR. BURGESS: That's -- that's right.  
11 There -- I mean, there are quite a few circuit  
12 splits involving the PLRA that are out -- that  
13 are outstanding.

14 JUSTICE SOTOMAYOR: Exactly. So  
15 you're -- you're asking us -- now I don't  
16 believe that I read anywhere -- and I purely  
17 understand that the litigant here was a pro se  
18 litigant --

19 MR. BURGESS: Yeah.

20 JUSTICE SOTOMAYOR: -- below. You've  
21 gotten the record as it is. But I don't think  
22 anywhere below he raised the Heck split  
23 question.

24 MR. BURGESS: No, that -- that's  
25 right. We are taking as a -- as a given, and

1 it's implicit in the question presented, that  
2 the dismissal was for failure to state a claim  
3 based on Heck. That is how the Tenth Circuit  
4 consistently treats Heck dismissals.

5 That is how -- and my understanding is  
6 the vast majority of circuits treat Heck  
7 dismissals as being something for failure to  
8 state a claim. So we think this Court should be  
9 resolving that -- that question about whether a  
10 dismissal for failure to state a claim without  
11 prejudice, and it doesn't -- it doesn't need to  
12 reach the question of whether that's the proper  
13 way to characterize Heck.

14 We think it probably is. Heck itself  
15 refers to it in terms of whether there's a  
16 cognizable claim. It's an -- it's an unusual  
17 circumstance because, given the bar, the statute  
18 of limitations doesn't begin to accrue for the  
19 claim until later, so it is something that is  
20 procedural in nature but, nonetheless, is often  
21 dealt with --

22 JUSTICE KAVANAUGH: On your --

23 MR. BURGESS: -- under the 12(b)(6)  
24 standard.

25 JUSTICE KAVANAUGH: -- excuse me -- on

1 your upset the balance argument of the PLRA, how  
2 should we think about Rule 15, leave to amend,  
3 which is granted once as a matter of course in  
4 response to the responsive pleading, and then  
5 district judges often and have the discretion to  
6 grant further leave to amend, which occurred in  
7 this case and occurs also in other cases, of  
8 course?

9 MR. BURGESS: Sure. I think we have  
10 two responses about Rule 15. One is the answer  
11 I gave to the Chief Justice earlier, that to the  
12 extent their argument is don't worry about  
13 dismissals without prejudice because often the  
14 judges are going to have multiple opportunities  
15 to work with the litigant and he -- he will have  
16 a full opportunity to make sure he can state his  
17 claim. It's not obvious that that is a better  
18 system or more consistent with the PLRA to avoid  
19 court congestion.

20 The other answer is that it's not  
21 actually clear the extent to which Rule 15  
22 operates in the PLRA context. Most courts of  
23 appeals have held that it does. There's --  
24 there's one outlier.

25 JUSTICE KAVANAUGH: Suppose that it

1 does, though.

2 MR. BURGESS: Sure.

3 JUSTICE KAVANAUGH: Then it does seem  
4 to mitigate some of the unfairness that you talk  
5 about that could occur from just routine  
6 correction of something in the complaint will  
7 usually happen or could happen under Rule 15 and  
8 often does happen.

9 MR. BURGESS: It -- it would mitigate  
10 the unfairness with respect to just pure  
11 pleading deficiencies. Of course, Colorado  
12 points to local practices in Colorado about how  
13 prisoner complaints are treated. There's no  
14 evidence that that is systematically applied  
15 across the country and that other district  
16 judges or magistrate judges are handling it in  
17 that way.

18 But even that approach would not deal  
19 with the problem of failure to exhaust being a  
20 strike because that's not just an issue of  
21 allowing a repleading. That's an issue where  
22 there is a procedural defect that is -- prevents  
23 the court from reaching the merits and something  
24 external in the world needs to happen.

25 JUSTICE KAVANAUGH: What's your

1 understanding of how different district courts  
2 treat Rule 15 as compared to dismissals without  
3 prejudice? Is it your understanding, in other  
4 words, that Judge in Courtroom 1 will routinely  
5 do a dismissal without prejudice, Judge in  
6 Courtroom 2 will do grant leave to amend over  
7 and over again and not dismiss without  
8 prejudice, and, if that's so, how should we  
9 think about that?

10 MR. BURGESS: My general sense is  
11 that, particularly dealing with prisoner cases,  
12 there's not a consistent practice across the  
13 board and across the country. And I think that  
14 that is a reason to not treat a  
15 without-prejudice dismissal as being something  
16 that can result in a strike because it could be  
17 an instance in which it is a curable defect.

18 And, in any event, as -- as I said,  
19 it's not obvious that it is a better system as  
20 far as the PLRA is concerned to force courts  
21 into the situation where they need to hold the  
22 litigant's hand to have multiple repeat  
23 opportunities to amend and keep the case on the  
24 docket before there could be a -- a final  
25 dismissal.

1 I -- I do -- I did want to --

2 JUSTICE ALITO: What is the standard  
3 that a district court applies in deciding  
4 whether to dismiss with or without prejudice,  
5 and is that enforced on appeal?

6 MR. BURGESS: The general standard --  
7 so, again, I think there are two categories. If  
8 -- if -- if there's an instance in which because  
9 -- there is a procedural defect that prevents  
10 the court from reaching the merits, it could be  
11 a jurisdictional issue, that necessarily has to  
12 be without prejudice.

13 In an instance in which the question  
14 is whether -- is just a pleading issue that  
15 could potentially be cured with -- with new  
16 facts, I think generally the courts, the way  
17 courts deal with it is, if there is any ability  
18 to -- you know, the amendment wouldn't be futile  
19 if there's not -- if there's a reason to think  
20 you could potentially provide more facts, that  
21 that should not be with prejudice.

22 JUSTICE ALITO: And --

23 JUSTICE KAGAN: And as to -- sorry.

24 JUSTICE ALITO: And if a court  
25 dismisses with prejudice, are there cases in

1 which courts of appeals reverse that on the  
2 ground this should have been done without  
3 prejudice?

4 MR. BURGESS: There are certainly in  
5 the category of cases, for example, Heck  
6 dismissals or things that are --

7 JUSTICE ALITO: But in the other  
8 category?

9 MR. BURGESS: In the cat -- they  
10 suggest that -- I mean, yes, usually it will be  
11 in -- in the context of this was not clearly --  
12 there -- there -- should have been an  
13 opportunity to cure this. And so amendments  
14 should have allowed or at least dismissals  
15 should have been without prejudice.

16 JUSTICE ALITO: I'm just wondering  
17 about the incentives that the rule that you're  
18 advocating will provide for district courts. In  
19 deciding whether to dismiss with prejudice or  
20 without prejudice, if they have to take into  
21 account -- if I dismiss without prejudice, this  
22 is -- is going to enable this frequent litigator  
23 to continue to file, will -- do you have any  
24 concern that that's going to give them an  
25 incentive to label these dismissals with

1 prejudice?

2 MR. BURGESS: That if -- no, I don't  
3 think so, because I think that would be  
4 reversible error if they are dismissing  
5 something with prejudice, without an opportunity  
6 to amend, and that there is a basis that -- in  
7 which the -- the complaint could be reformed to  
8 adequately state a claim. So I don't -- I don't  
9 -- I'm not concerned about that consequence.

10 I do think the -- the fact that  
11 district courts are the ones handling these  
12 cases and have incentives to make sure that the  
13 dockets are being appropriately managed is an  
14 important one, but it supports our -- our view  
15 that, you know, to the extent there's a concern  
16 about repeat Heck claims, for example, being  
17 asserted repeatedly, the district courts have  
18 every ability to deal with that by dismissing  
19 them as frivolous or malicious --

20 JUSTICE GINSBURG: Isn't that what  
21 happened here?

22 MR. BURGESS: -- in appropriate cases.  
23 I'm sorry, Justice Ginsburg?

24 JUSTICE GINSBURG: Wasn't -- weren't  
25 there successive Heck claims here?

1                   MR. BURGESS:  There were two different  
2 Heck claims.  That's right.  It --

3                   JUSTICE GINSBURG:  You think the  
4 second one should have been dismissed as  
5 frivolous?

6                   MR. BURGESS:  I think the court would  
7 have well been within its discretion to  
8 potentially dismiss it as frivolous or  
9 malicious.  Of course, the way 1915(g) works is  
10 that it's looking to what the court actually  
11 did, not what could have been done.  That's the  
12 significance of the -- the language "on the  
13 grounds that," that the United States relies on  
14 heavily.  It indicates --

15                   JUSTICE GINSBURG:  That it would have  
16 been -- from a litigation fairness point of  
17 view, it would have been appropriate for the  
18 district court to say you brought a Heck claim  
19 once, we dismissed it; and now you did the same  
20 thing again, nothing has changed, so it's  
21 frivolous, out you go?  That's -- that would  
22 have been an appropriate solution to this case?

23                   MR. BURGESS:  I -- I think -- I think  
24 the court would have been in its discretion to  
25 do that, and I think, going forward, if there's

1 a clear rule that without-prejudice dismissals  
2 for failure to state a claim do not result in a  
3 strike, in the category of cases like Heck that  
4 it is analytically something that is going to be  
5 without prejudice, courts can deal with that in  
6 the appropriate way by recognizing that, in some  
7 circumstances, it might be frivolous or  
8 malicious, but not every Heck-barred claim will  
9 be frivolous, and those that are not, that  
10 there's a real -- a good-faith argument about  
11 whether the Heck bar applies should not result  
12 in a strike because it's a --

13 JUSTICE GINSBURG: But, here, it was  
14 the identical claim, right? There's nothing  
15 different in the second?

16 MR. BURGESS: I think that they were  
17 slightly different claims. One focused on  
18 sentencing. The other, I think, also did raise  
19 a sentencing issue but was focused on the  
20 prosecution and other issues involving the  
21 conviction.

22 There's no question that there is  
23 considerable overlap. And there's also, I  
24 think, very little question that a court could  
25 have determined that at least the second one had

1     been frivolous or malicious, but the court did  
2     not do that. And everyone here agrees that  
3     1915(g) needs to be evaluated, whether a strike  
4     is to be imposed, based on what the court  
5     actually did, not what the court could have  
6     done.

7                     I want to talk again a little bit  
8     about dismissals based on a lack of exhaustion,  
9     which I think is an important example. As this  
10    Court noted in Woodford, it is -- it was a  
11    central aspect of the PLRA, and yet,  
12    conspicuously, it's not included in 1915(g) as a  
13    reason for imposing a strike.

14                    Nonetheless, on the other side's view,  
15    any time that an exhaustion issue could be dealt  
16    with on a motion to dismiss basis, it is going  
17    to result in a strike, which we think is  
18    anomalous because it means in the circumstance  
19    in which the -- the litigant exhibited candor --  
20    candor and saved the judicial resources because  
21    the exhaustion problem was apparent from the  
22    face of the complaint, that is going to result  
23    in a strike, but in the vast majority of events,  
24    the other instances, exhaustion is not treated  
25    as a strike, precisely because it is the type of

1 procedural defect that does not implicate the  
2 merits of the claim, does not suggest any abuse  
3 of the courts.

4 And we think it is an anomalous result  
5 of the other side's interpretation that that  
6 sort of dismissal is going to result in -- in a  
7 sanction.

8 CHIEF JUSTICE ROBERTS: Why -- why do  
9 you assume that a procedural defect doesn't tax  
10 the resources of the -- of the court? And it's  
11 not just the court; it's the entire judicial  
12 system and -- and the, you know -- as I said,  
13 the service of process and all these other  
14 things. Why is that?

15 I mean, it's -- it's -- I guess the  
16 issue that you and Justice Ginsburg were talking  
17 about, if -- if it's been identified that you've  
18 got a Heck problem and then you go ahead and you  
19 file the same thing, that's still a procedural  
20 defect, but it is a -- I don't know if you want  
21 to say abusive, but it is the filing of a case  
22 that does not have the prospect of success at  
23 that time as filed, and it's from the point of  
24 view of the burdens on the -- on the system, I  
25 don't see why it shouldn't be regarded as a

1 strike under 1915.

2 MR. BURGESS: I think it would be  
3 possible to have that view. I don't disagree  
4 with the -- the proposition that it is taxing  
5 the court's resources, despite being a  
6 procedural defect, but, when you look at the  
7 structure of the statute, it does not seem like  
8 that is what Congress could have had in mind in  
9 1915(g) because, again, dismissals based on  
10 jurisdictional problems or -- including  
11 sovereign immunity are going to have the exact  
12 same feature, except that they will almost  
13 certainly not be curable in a way that a failure  
14 to exhaust or a Heck bar might well be.

15 Yet Congress did not impose a strike  
16 for those actions. So it does not appear that  
17 Congress thought the thing that is  
18 sanction-worthy, that is going to potentially  
19 restrict a prisoner's future access to the  
20 court, is just filing an action that consumes  
21 judicial resources and can't succeed as filed.

22 Instead, 1915(g) is targeting  
23 something more specific. It's targeting actions  
24 that are meritless on their face or are  
25 frivolous or malicious, which are significant

1 standards that --

2 CHIEF JUSTICE ROBERTS: Well, you can  
3 -- it -- it may seem odd, but you can -- you  
4 have frivolous cases that are dismissed as  
5 frivolous without prejudice, right? I mean, it  
6 -- it's -- if you've got the -- you're suing the  
7 wrong person, you thought Tom Smith was the  
8 guard that did this and it was Fred Jones  
9 instead, it could be characterized as frivolous  
10 because there's no possibility of success  
11 because the guy you're naming was, you know, off  
12 that day.

13 And, yes, you -- and yet you -- you  
14 would probably want that to be without prejudice  
15 because the suit's, you know, completely  
16 compelling as long as you get the right guy.

17 MR. BURGESS: I agree with that.

18 CHIEF JUSTICE ROBERTS: So the  
19 dichotomy that -- I don't know if there are  
20 three of them, what it's called, if it's a  
21 dichotomy -- between frivolous and failure to  
22 state a case -- a claim that you're trying to  
23 draw is -- is not as airtight as you suggest.

24 MR. BURGESS: I -- I don't think  
25 that's right, because a dismissal based on lack

1 of jurisdiction, for example, courts have  
2 recognized that that could be dismissed as  
3 frivolous because you could be making an  
4 argument that is just so -- it has no basis in  
5 the law that it deserves that sanction of being  
6 something that is an abuse of the courts, over  
7 and above filing an action that can't succeed  
8 because it's been filed in the wrong place.

9 So frivolous and malicious provide  
10 courts with an opportunity to recognize -- even  
11 though this procedural defect goes above and  
12 beyond because there has been an abuse of the  
13 court process in a way that is not true of a  
14 normal -- normal assertion of this court has  
15 jurisdiction when it, in fact, does not. We  
16 think that analogy applies perfectly to a Heck  
17 dismissal or a dismissal for lack of exhaustion.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Mr. Olson.

21 ORAL ARGUMENT OF ERIC R. OLSON  
22 ON BEHALF OF THE RESPONDENTS

23 MR. OLSON: Mr. Chief Justice, and may  
24 it please the Court:

25 The text, structure, and history of

1 the Prison Litigation Reform Act all support  
2 giving "was dismissed" its ordinary meaning in  
3 the three strikes provision. The text is  
4 straightforward. If a case was dismissed for  
5 failure to state a claim, it meets the statutory  
6 definition regardless of whether that dismissal  
7 was with or without prejudice because, in either  
8 circumstance, that case was dismissed, just what  
9 the statute looks to.

10 Second, the structure of the Act backs  
11 this ordinary meaning. The Prison Litigation  
12 Reform Act uses the phrase "failure to state a  
13 claim" several times in its structure -- in its  
14 -- in its text. Petitioner's proposed  
15 interpretation requires this Court to give that  
16 phrase one meaning in 1915(g), the three-strikes  
17 provision, and a different meaning in the rest  
18 of the Act. That violates basic rules of  
19 statutory interpretation.

20 In addition, the three-strikes use of  
21 the categories frivolous and malicious alongside  
22 the category fails to state a claim counsels, as  
23 the colloquy with Chief Justice -- the Chief  
24 Justice illustrates, that these provisions  
25 should be given similar scope. Frivolous and

1 malicious dismissals can be with and without  
2 prejudice. The same scope should apply here.  
3 What results is an easily administrable rule to  
4 see what happened, rather than look and analyze  
5 the consequences.

6 Finally, the history of the Act  
7 supports this reading. This Court, in the  
8 Neitzke opinion in 1989, held that although it  
9 might be an appealing proposition, having sua  
10 sponte dismissals for failure to state a claim  
11 was inconsistent with the in forma pauperis  
12 statute in effect at that time.

13 Congress responded to that suggestion  
14 in the Act a few years later, adding the  
15 opportunity for dismissals, sua sponte  
16 dismissals, and using the same language to count  
17 such dismissals as strikes.

18 JUSTICE KAVANAUGH: Suppose a prisoner  
19 files a suit and the district judge, instead of  
20 granting leave to amend, dismisses without  
21 prejudice; the prisoner corrects the error,  
22 fixes the defect, files a suit and prevails.  
23 Not only is it sufficient to state a claim,  
24 prevails in the case. You would still say that  
25 that prisoner has a strike even though they won

1 the case?

2 MR. OLSON: Well, if it was -- we look  
3 at the statutory text, which says an action was  
4 dismissed.

5 JUSTICE KAVANAUGH: Yes.

6 MR. OLSON: If the first action was  
7 dismissed, even though they won a subsequent  
8 case on the same set of operative facts, it  
9 would be a different action, so that first  
10 strike would count.

11 Of course --

12 JUSTICE KAVANAUGH: Doesn't that  
13 strike you as odd, that you have a winning case  
14 and you get a strike under the PLRA?

15 MR. OLSON: Well, no, it doesn't  
16 because Congress is look -- looking for an  
17 administrable rule. And you look at the action  
18 itself and the discussion earlier, Justice  
19 Kavanaugh, illustrates Rule 15 requires leave to  
20 amend to be freely given, where justice  
21 requires, whether or not it's as of right.

22 And I think what we see in the  
23 District of Colorado certainly is a conversation  
24 back and forth between the -- the prisoner and  
25 the court before that dismissal occurs. So

1       there are --

2                   JUSTICE KAVANAUGH: I guess that  
3 raises another question, which is -- I alluded  
4 to earlier. I don't know that that practice is  
5 uniform. In fact, I'm pretty sure it's not  
6 uniform. So a lot of district judges will grant  
7 leave to amend freely, but a number of others  
8 for a lot of reasons, clearing the docket and  
9 otherwise, will dismiss without prejudice.

10                   And yet those two things, which are  
11 functionally identical, for the prisoner, will  
12 be treated differently in terms of the strikes  
13 under your view, is that right?

14                   MR. OLSON: Yes, in -- in that  
15 circumstance.

16                   JUSTICE KAVANAUGH: Does that -- does  
17 that make sense to treat those two  
18 functionally-identical things from the  
19 prisoner's perspective differently?

20                   MR. OLSON: It does under the text of  
21 the statute, which says -- which asks the courts  
22 to look at what happened to the action. And if  
23 there is a clear rule from this Court that says  
24 a dismissal with and without prejudice falls  
25 under the statute, then -- then courts can

1 adjust their behavior accordingly if they're  
2 concerned about giving the strike.

3 JUSTICE KAGAN: Well, suppose we find  
4 the statutory language at least ambiguous. And  
5 then do you have a response to Justice  
6 Kavanaugh's question?

7 MR. OLSON: Well -- well, a clear rule  
8 on this will help courts adjust their behavior.  
9 So, regardless of whether the text, the -- the  
10 statute is ambiguous or not, but, secondly, I  
11 think, given Rule 15, given the focus on  
12 amendment and fixing complaints rather than just  
13 dismissing them, I think a rule from this Court  
14 and -- and the ample tools that we have for  
15 courts to fix -- to find out if there is a way  
16 to state a claim before a dismissal, will not  
17 lead to unjust results.

18 In fact, most circuits have the rule  
19 that we advocate here in -- in effect. And --

20 JUSTICE GINSBURG: Why wouldn't it  
21 lead to an unjust result? I mean, even if a  
22 dismissal is made without prejudice, for  
23 preclusion purposes, it doesn't bar a subsequent  
24 action. If the prisoner has to pay, what, \$400  
25 upfront, it's effectively preclusive because he

1 can't bring the action. He hasn't got the money  
2 to do it.

3 MR. OLSON: Well, three responses,  
4 Justice Ginsburg.

5 First, it is a three-strikes  
6 provision, and prisoners, every prisoner gets  
7 three non-meritorious on-their-face dismissals  
8 before the three-strikes provision applies.

9 Secondly, under either rule, there are  
10 going to be some prisoners who are not going to  
11 be able to, after having three strikes, come to  
12 court and -- and seek redress without prepaying  
13 the filing fee.

14 And, third, I think there are --  
15 there's an exception in the statute for imminent  
16 bodily injury, imminent danger of bodily injury,  
17 excuse me, that allow for the -- the extreme  
18 cases to come through.

19 What Congress was trying to do with  
20 the Prison Litigation Reform Act was reduce the  
21 amount of prisoner litigation that was coming to  
22 the court. And they balanced, as the Chief  
23 Justice identified, the burdens that that  
24 prisoner litigation was putting on the courts  
25 with giving access to prisoners. They get three

1 strikes. And, again, these strikes occur only  
2 when it's non-meritorious on their face.

3 If it goes to summary judgment, if  
4 they lose at trial, if it's -- if it's dismissed  
5 for 12(b)(1) grounds, it doesn't count as a  
6 strike. So only in this category of strikes do  
7 we see the dismissals count.

8 And, yes, in any bright-line rule,  
9 there will be some examples that we can think of  
10 that fall on the other side of the rule that, if  
11 we were crafting policy ourself, we might say  
12 should be included in the policy.

13 But what Congress did was put forth an  
14 easily administrable rule that says we look at  
15 what happened in the prior cases and were those  
16 prior cases dismissed for failure to state a  
17 claim, not looking at whether there was with  
18 prejudice or without prejudice.

19 And this makes sense when you also  
20 look at the structure of the Act, because the  
21 structure of the Act says -- again, it uses  
22 failure to state a claim several times, and it  
23 says in the structure, several times, you,  
24 district court, have the authority and in some  
25 cases the obligation to screen cases and dismiss

1       them if they fail to state a claim.

2                   And then, in 1915(g), it says: For  
3       those claims that were dismissed for failure to  
4       state a claim, those count as a strike. And  
5       having that phrase mean the same thing  
6       throughout the Act is very important for  
7       statutory --

8                   JUSTICE SOTOMAYOR: Mr. Olson, you're  
9       factually incorrect about one thing. 1915(g)  
10      doesn't say failure -- a dismissal of a  
11      complaint. It talks about the dismissal of an  
12      action. And I always understood the dismissal  
13      of a complaint with leave to refile is different  
14      than a dismissal of the action.

15                  MR. OLSON: That's correct, Justice  
16      Sotomayor.

17                  JUSTICE SOTOMAYOR: So, in those cases  
18      where there's a failure to state a claim but the  
19      court believes that there's the potential of a  
20      legitimate claim, it certainly has the right to  
21      dismiss the complaint but with leave to refile?

22                  MR. OLSON: Correct, the statute  
23      focused on an action.

24                  JUSTICE SOTOMAYOR: Now I think that  
25      was what Justice Kavanaugh was getting to, which

1 is, and what your adversary is saying, that if a  
2 court erroneously -- and courts do do that  
3 erroneously, because one presumes if they say  
4 you can file a complaint without prejudice, it  
5 means -- and dismisses the action, that they're  
6 really saying the same thing: We're dismissing  
7 with leave to appeal. I think that's your  
8 adversary's argument.

9 And -- and that's what you're not  
10 getting to, which is why should we treat those  
11 differently?

12 MR. OLSON: Treat the circumstance  
13 where there is a complaint dismissed.

14 JUSTICE SOTOMAYOR: Yes.

15 MR. OLSON: But not the action?

16 JUSTICE SOTOMAYOR: Well, why don't we  
17 read a dismissal of the action without prejudice  
18 to be the functional equivalent of dismissal of  
19 the complaint with leave to refile? Because  
20 that's what without prejudice means.

21 MR. OLSON: Well, when we look at the  
22 text of the statute, it focuses on the action  
23 being dismissed. And when you look at what  
24 happens in the mine-run of cases, these actions  
25 are dismissed. Typically, if it's dismissed

1 without prejudice, a couple of cases that  
2 Petitioner cites have this exact fact pattern,  
3 where there's a dismissal without prejudice and  
4 30 days or 60 days given to file an amended  
5 complaint.

6 No amended complaint is filed. Then  
7 the action -- so the complaint was dismissed and  
8 after that failure the action is dismissed. But  
9 it is still dismissed without prejudice.

10 JUSTICE KAGAN: I -- I think, Mr.  
11 Olson, your answer suggests that there's a real  
12 reason why courts would pick one thing rather  
13 than the other, why they would dismiss the  
14 complaint with leave to amend on the one hand or  
15 dismiss the entire action without prejudice on  
16 the other.

17 And what people are suggesting to you  
18 is maybe there's not a reason. Maybe it just  
19 depends on the culture and practice of  
20 particular district courts. Maybe in some  
21 district courts the incentives actually cut the  
22 other way.

23 Some of my clerks who have clerked on  
24 the D.C. District Court suggested to me that the  
25 incentives all cut in favor of dismissing

1 without prejudice, rather than giving leave to  
2 amend, because of the way they count their  
3 docket.

4 So, if that's correct, if courts are  
5 doing this randomly or if some are subject to  
6 one set of incentives and others subject to an  
7 opposite set of incentives, but they're all  
8 trying to do the same thing, which is to deal  
9 with a complaint that has not pled sufficient  
10 facts and telling the person go do it again, why  
11 should we treat those two cases differently for  
12 purposes of counting strikes?

13 MR. OLSON: Because the Prison  
14 Litigation Reform Act did not remove that broad  
15 discretion that all district courts have that,  
16 as you say, manifests itself in some difference  
17 in practice throughout the country.

18 But what it did do was put forth in  
19 this text an administrable rule that was easy  
20 for one district court to determine what another  
21 district court did. And that easily  
22 administrable rule uses the language: An action  
23 was dismissed for failure to state a claim.  
24 Period. It does not say without prejudice.

25 JUSTICE KAGAN: Yeah, and I think, you

1 know, there is a statutory argument, and we can  
2 talk about the statutory argument. I don't want  
3 to poo-poo that at all. It's important to go by  
4 statutory language.

5 I -- I just want to -- if we think  
6 that the statute is ambiguous and allows for a  
7 result either way, why is your rule the better  
8 rule given that it seems to treat two very  
9 similar cases from two courts where they're  
10 trying to do the same thing completely  
11 differently for purposes of the strike counting?

12 MR. OLSON: It's a better rule because  
13 of its clarity and administrability. It allows  
14 for no uncertainty for -- to determine what  
15 happened. And it honors the scope of the other  
16 dismissal, so frivolous and malicious can be  
17 with and without prejudice. And there are --  
18 there are many examples where there can be some  
19 cases where it seems unfair that that was -- was  
20 applied, but it is an easily administrable rule.

21 JUSTICE KAVANAUGH: The -- the other  
22 rule is easily administrable as well, though,  
23 dismissal with prejudice. If it's a dismissal  
24 without saying anything more or it says with  
25 prejudice, then that's the bright line.

1                   MR. OLSON: Well, it is administrable  
2 but -- but not in the broader context. And as  
3 -- as the Chief Justice was pointing to earlier,  
4 it would allow the same litigant to file very  
5 similar cases over and over again with no  
6 penalty unless the court comes in, reviews what  
7 they've done, and says: Okay, this rises to the  
8 level of being frivolous.

9                   JUSTICE KAVANAUGH: No, it just has to  
10 be dismissed with prejudice.

11                   MR. OLSON: The -- oh, sure. That --  
12 that would be the other way to address this.  
13 It's a fair point.

14                   JUSTICE KAVANAUGH: You don't have to  
15 label it frivolous. You can file, you get leave  
16 to amend, or it's dismissed without prejudice,  
17 it comes back, nope, dismissed again, this time  
18 with prejudice.

19                   MR. OLSON: But the problem with that  
20 approach is that the with prejudice, as Justice  
21 Ginsburg pointed out earlier, the preclusive  
22 effects are much, much greater than whether or  
23 not you have to pay your filing fee in  
24 installments.

25                   JUSTICE KAVANAUGH: Right.

1           MR. OLSON: And -- and with prejudice  
2 means that you cannot bring a case on those set  
3 of operative facts again.

4           JUSTICE KAVANAUGH: That's why  
5 district judges are going to be loath to do that  
6 right out of the box.

7           MR. OLSON: Right. But that's why I  
8 think that that rule would lead to more  
9 challenges in the district court and require  
10 district courts to spend much more time before  
11 they -- they -- they dismiss it.

12           Here, under this rule, where with and  
13 without prejudice count as strikes, a district  
14 court can give prisoners some back and forth and  
15 say we haven't met -- the prisoner has not met  
16 the required threshold, I'm going to dismiss  
17 without prejudice, meaning that prisoner can  
18 bring that claim again if they do it better and  
19 develop more facts, but there is some  
20 consequence, which is the strikes.

21           So that's why we think it's the more  
22 administrable --

23           JUSTICE KAVANAUGH: Can --

24           MR. MR. OLSON: -- and better rule.

25           JUSTICE KAVANAUGH: -- can I ask one

1 related question? It's alluded to in Footnote 7  
2 of the reply brief, which is do you think the  
3 PLRA allows sua sponte dismissals without leave  
4 to amend?

5 MR. OLSON: Well, as Mr. Burgess  
6 identified, I think the general practice is to  
7 -- to give amendment where it is required. I  
8 don't know that -- that there's been a case that  
9 tests that thesis to the point.

10 The better rule, we believe, under  
11 Rule 15 is that if there's an effort to amend,  
12 it should be granted if justice so requires.  
13 But if there's not -- and in this case, for  
14 instance, in the first two strikes --

15 JUSTICE KAVANAUGH: I think you're  
16 saying then the PLRA should not be read to  
17 override Rule 15?

18 MR. OLSON: Correct, yes. I -- I do  
19 want to turn a little bit to the structural  
20 argument here, which is that the statute uses  
21 the same language several times. And it would  
22 be very odd, as this Court just held in the  
23 Cochise Consultancy case, all but the most  
24 unusual circumstances require us to give the  
25 same meaning to the same phrase in the same

1 statute.

2           And we -- we see that here. It  
3 provides strong reasons for having the strikes  
4 with -- count for those that are both with and  
5 without prejudice.

6           And I guess I'd like to end by just  
7 saying that, as we've alluded to in this  
8 conversation, this statute has had real  
9 consequences for the number of frivolous  
10 lawsuits filed by prisoners. It has reduced  
11 them substantially, as the states' amicus brief  
12 points out, and the filter of the Prison  
13 Litigation Reform Act has been effective over  
14 the years in making sure that the frivolous  
15 claims are reduced.

16           Now they are -- prisoner claims are  
17 still a substantial part of the docket of the  
18 federal courts, around 10 percent of all civil  
19 claims filed. And our respectful position is  
20 that the Court recognize the majority of the  
21 circuits who have held that failure to state a  
22 claim dismissals with and without prejudice  
23 should count as strikes under the -- the Act.

24           If there are no further questions,  
25 I'll yield the remainder of my time.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 General Rosen.

4 ORAL ARGUMENT OF JEFFREY A. ROSEN  
5 FOR THE UNITED STATES, AS AMICUS CURIAE,  
6 SUPPORTING THE RESPONDENTS

7 MR. ROSEN: Mr. Chief Justice, and may  
8 it please the Court:

9 What I would like to do is that while  
10 we maintain that all the usual tools of  
11 statutory construction point to affirmance, I  
12 want to return just briefly to the plain text of  
13 the PLRA for the simple reason that it is both  
14 the most important and we maintain it is alone,  
15 in this case, sufficient to resolve the case.

16 We have a situation where we have an  
17 inmate in prison for a felony sexual assault who  
18 brought three actions during the period of 2013  
19 and 2014, each of which was dismissed for  
20 failure to state a claim, which is one of the  
21 enumerated actions.

22 And in Section 1915(g), the text of  
23 the statute says that if we have a -- a prisoner  
24 who, on three or more prior occasions while  
25 incarcerated, brought an action or an appeal in

1 the courts of the United States that was  
2 dismissed on the grounds that it is frivolous,  
3 malicious, or fails to state a claim upon which  
4 relief may be granted, they are barred, they are  
5 subject to the three-strikes rule.

6 So, as in the Coleman case, we have a  
7 situation where it is literally what the words  
8 of the statute say. And as in Coleman, we are  
9 confronted with a question of whether the  
10 language should have an exception or should be  
11 construed to be read with things that are not  
12 actually in the text.

13 CHIEF JUSTICE ROBERTS: Well, it's --  
14 it's a little more ambiguous than that. Failure  
15 to state a claim can mean two different things.  
16 It can mean failure to state a claim with  
17 prejudice or failure to state a claim without  
18 prejudice, and the consequences of that  
19 distinction obviously are very significant.

20 So I'm -- I'm not sure -- I understand  
21 your textual argument. I'm not sure that that's  
22 the end of the case, though.

23 MR. ROSEN: So, respectfully, I might  
24 say I don't think it's -- that it can mean  
25 either. It can mean both, that the plain

1 language encompasses both dismissals with  
2 prejudice and dismissals without prejudice.

3 And, indeed, in the -- the  
4 Petitioner's reply brief, they acknowledged as  
5 much, that this language, failure to state a  
6 claim upon which relief may be granted or  
7 dismissal on that basis, encompasses both.

8 JUSTICE KAGAN: But, General, when --  
9 when an action is dismissed for failure to state  
10 a claim, it's always a dismissal with prejudice  
11 unless the order says something otherwise. So  
12 you might say what -- there are two categories  
13 and the categories are dismissals and dismissals  
14 without prejudice. And if somebody sometimes  
15 says dismissals with prejudice, they're just  
16 adding unnecessary words because, if it was just  
17 a dismissal, if a court just dismisses, it's  
18 going to be a dismissal with prejudice.

19 So the "with prejudice" part is  
20 superfluous, you might say, and when Congress  
21 just says dismissals, all it's choosing to do is  
22 not inject a superfluity into the statutory  
23 language.

24 MR. ROSEN: Well, the -- the word  
25 "dismissal" encompasses both. We know in this

1 case there were three dismissals of the actions  
2 on the -- on the grounds that were enumerated.

3 The question of whether Rule 41 should  
4 be read in, I would suggest, doesn't make sense  
5 for two reasons. One is that the -- as a  
6 statutory interpretive tool, we have plain text.  
7 I maintain that it's not ambiguous, but even if  
8 one thought it was, I think we would look to  
9 Rule 12, which provides the -- the same  
10 language, failure to state a claim on which  
11 relief can be granted, and it is understood that  
12 that can include with or without prejudice.

13 I don't think there's any reason to go  
14 to the language of Rule 41 because its language  
15 dealing with what counts as an adjudication on  
16 the merits is not language in the statute. So I  
17 don't see that it actually provides interpretive  
18 benefit.

19 And then, secondly, as --

20 JUSTICE KAGAN: But Congress writes  
21 its statute against a backdrop of the way people  
22 use language. And, here, the way people use  
23 language is that a dismissal on a 12(b)(6)  
24 motion, a simple dismissal, is a dismissal with  
25 prejudice. And you don't have to say with

1 prejudice.

2           So Congress, responding and acting  
3 against that backdrop, says all we need to do is  
4 say dismissal to have a dismissal with prejudice  
5 because there's really no such thing as a  
6 dismissal -- you -- you never have to use those  
7 three words together in the way courts operate.

8           MR. ROSEN: You don't have to, but you  
9 are permitted to do it either way. And they  
10 both count as 12(b)(6) motions that are granted.

11           And I think the -- the backdrop, if  
12 we're really to look at the backdrop of what  
13 Congress was focused on, we should really look  
14 at this Court's decisions in the Neitzke and the  
15 Denton cases, where the court had said that a  
16 dismissal for -- in Neitzke said that a  
17 dismissal for frivolous grounds does not include  
18 the set of those that are dismissed for failure  
19 to state a claim. So Congress is partly  
20 responding to that, and then in Denton, the  
21 Court had said that a -- a dismissal for  
22 frivolousness under the prior version of -- of  
23 the language in the IFP statute had said it  
24 could be with or without prejudice.

25           So Congress knew the background in

1 using one of those enumerated grounds, at least,  
2 was with both.

3 CHIEF JUSTICE ROBERTS: It --

4 MR. ROSEN: And --

5 CHIEF JUSTICE ROBERTS: It -- as I  
6 mentioned to your friend on the other side, the  
7 list of terms you have there, frivolous,  
8 malicious, failure to state a claim, the first  
9 two are plainly pejorative. I mean, I mean, the  
10 -- the -- the system does impose -- filings that  
11 aren't meritorious impose costs on the system.  
12 But at the same time the words are -- are of a  
13 different character.

14 I mean, if you -- if you file -- if  
15 your case is thrown out because it's frivolous  
16 or malicious, that's one thing. If -- if it's  
17 thrown out because of a failure to state a  
18 claim, when you report that to your -- your  
19 colleagues back at the -- the firm, they're  
20 going to say, well, is it without prejudice or  
21 with?

22 And if you say it's without prejudice,  
23 they -- they're not going to think you're a bad  
24 lawyer. I mean, they're just going to think  
25 that you've got to refile after something else

1 happens.

2 MR. ROSEN: Precisely. And so when  
3 Congress, in adding the language on failure to  
4 state a claim, was expanding the type of claims  
5 that judges would be positioned to dismiss under  
6 the PLRA and was not saying they have to be  
7 those that are -- are vexatious in some manner.  
8 They can be those that are simply deficient.

9 And that takes me to I think what is  
10 an important point I do want to get to, is if we  
11 look at the -- the dismissals in this case, two  
12 of them are Heck dismissals. And there's a  
13 suggestion that these are without prejudice, as  
14 Heck dismissals normally are in -- in most  
15 circuits, because of their -- their status.

16 The inmate here, who, as I say, was in  
17 prison for a felony conviction on sexual  
18 assault, he files a lawsuit in 2013 against five  
19 judges, two prosecutors, and the claims are that  
20 -- that he was deprived of proper bail, proper  
21 speedy trial, the sentence was no good and that  
22 he was denied a -- a -- an appeal.

23 And that's a Heck dismissal. It's a  
24 failure to state a claim because no relief can  
25 be granted on that. Nor is there any likelihood

1 that in the future this prisoner is likely to be  
2 able to cure that, that is to say, there's no  
3 indication that he has a habeas petition that's  
4 been ruled on favorably or the like.

5 So it can be styled as a procedural  
6 issue, but for all practical purposes it's  
7 likely to ever change, but it's without  
8 prejudice. And the consequence -- and I think  
9 this goes to a question Justice Kavanaugh asked  
10 -- is why would it be a better rule, I think you  
11 asked of my colleague from Colorado?

12 Why would it be a better rule is  
13 because if we say that ones without prejudice  
14 are not going to be strikes, that means, in  
15 effect, Heck dismissals will not count as  
16 strikes and inmates may file an unlimited  
17 number, in terms of not paying a filing fee, an  
18 unlimited number of IFP actions without  
19 consequence.

20 And common sense will tell you that  
21 instead of the statutory purpose, which is to  
22 have fewer but better claims, we will wind up  
23 with an unlimited number of Heck --

24 CHIEF JUSTICE ROBERTS: Well, I  
25 suppose --

1 MR. ROSEN: -- Heck actions.

2 CHIEF JUSTICE ROBERTS: I suppose in  
3 that scenario at some point the filings would  
4 become malicious.

5 MR. ROSEN: At -- at some point.  
6 There is obviously precedent from this Court in  
7 the In Re McDonnell and subsequent cases where  
8 some of the excessive litigants have come to  
9 this Court and the Court has said enough, and  
10 lower courts have done something similar, but  
11 those are really aberrations. Those are not the  
12 norm. And nor would we want the system to have  
13 to bear.

14 JUSTICE SOTOMAYOR: General --

15 MR. ROSEN: -- that.

16 JUSTICE SOTOMAYOR: -- the system  
17 bears that anyway, given that, at least your  
18 co-counselor or counsel on the -- on your side  
19 argue that courts are free to permit litigants  
20 to amend their complaints.

21 Litigants can do exactly that. They  
22 can avoid the filing fee and they can avoid  
23 dismissal by continuously amending and some  
24 courts permit it. At some point they get tired  
25 and they dismiss with prejudice.

1                   That would happen the same with  
2                   inappropriate Heck dismissals. As Justice  
3                   Ginsburg pointed out, you dismiss one. The  
4                   court tells you Heck bars you. And you refile  
5                   it again with no change and the court is going  
6                   to dismiss it as frivolous.

7                   CHIEF JUSTICE ROBERTS: You -- you may  
8                   answer briefly.

9                   MR. ROSEN: Thank you. Respectfully,  
10                  the history since the PLRA was enacted shows --  
11                  shows otherwise. At it's zenith, 25 percent of  
12                  the civil docket of -- of the federal courts  
13                  were prisoner filings. And it is now down to  
14                  about 10 percent. It's still a very large  
15                  number, approximately 29,000 a year ago, but  
16                  it's from 20 -- 25 percent to 10 percent.

17                  And in the majority of circuits, I  
18                  think it's six of eight that have ruled on this,  
19                  the rule is both with and without prejudice  
20                  count.

21                  CHIEF JUSTICE ROBERTS: Thank you,  
22                  General.

23                  Four minutes, Mr. Burgess.

24  
25

1 REBUTTAL ARGUMENT OF BRIAN T. BURGESS  
2 ON BEHALF OF THE PETITIONER

3 MR. BURGESS: Thank you. I would like  
4 to make a few quick points.

5 First, Mr. Olson a number of times in  
6 his presentation referred to 1915(g) referring  
7 to -- dealing with actions that were dismissed  
8 as non-meritorious on their face. They make the  
9 same point in their brief.

10 But it is very odd to refer to a  
11 dismissal without prejudice that may be based on  
12 purely a procedural defect as suggesting the  
13 claim is non-meritorious on its face.

14 And I suggest the reason they need to  
15 characterize it that way is precisely along the  
16 lines that the Chief Justice alluded to. The  
17 other phrases in 1915(g) are referring to  
18 actions that are clearly abusive, malicious or  
19 frivolous.

20 So it does not fit with the structure  
21 of the statute to think that actions that are  
22 being dismissed without prejudice and that might  
23 be on a purely procedural ground should receive  
24 a sanction under 1915(g).

25 I'd like -- also like to address the

1 United States argument about the literal text of  
2 the statute, and the idea that, well, it just  
3 says failure to state a claim, we shouldn't be  
4 reading in another provision, but that doesn't  
5 take full account of the fact that this is a  
6 term of art.

7           And this Court in Woodford, for  
8 example, where it was interpreting the phrase  
9 "exhaust," the argument was made, well, that  
10 doesn't include proper exhaustion. And the  
11 Court said, nevertheless, "exhaustion" is a  
12 legal term.

13           We know what it means. So it would  
14 have been redundant for Congress to have to say  
15 proper exhaustion.

16           We think the same applies here in the  
17 particular context where you're dealing with  
18 what a court interprets a prior dismissal.

19           And for that reason we think the  
20 Coleman decision supports us because Coleman, in  
21 addition to relying on the plain language,  
22 relied on the ordinary background principles of  
23 Civil Rules of Procedure.

24           And here the ordinary background rule  
25 is that, while Rule 12(b), an authorization

1 provision, allows for a dismissal with or  
2 without prejudice, when you are determining the  
3 impact of -- of a dismissal after it has  
4 previously been entered, it is -- there's a  
5 conclusive presumption that it is with  
6 prejudice.

7           So we think Congress would have  
8 understood it that way. And that fully explains  
9 the -- the difference between why the phrase is  
10 being interpreted one way in 1915(g) as opposed  
11 to the screening provisions, which mirror 12(b)  
12 in authorizing dismissal.

13           Another point I'd like to make is I  
14 didn't hear a good response to Justice  
15 Kavanaugh's question as to why there would be a  
16 good reason to treat differently actions that --  
17 instances in which a court allows amendment and  
18 then dismisses versus instances in which the  
19 court decides, well, I'm just going to dismiss  
20 this entire action without prejudice.

21           And the other side's argument seems to  
22 rely on the notion that courts will by and large  
23 apply Rule 15 and allow multiple amendments. As  
24 I indicated before, it's not clear that that is  
25 a preferable system.

1                   And I think it's also not clear that  
2                   that is consistent with the text of the PLRA.

3                   When you look at the screening  
4                   provisions, in particular 1915(e) and 1997(e),  
5                   they speak in terms of requiring the Court to  
6                   dismiss the action or the case.

7                   So the idea that they can cure the  
8                   problem that their reading has by saying, well,  
9                   courts are going to allow multiple amendments so  
10                  you don't have to worry about instances in which  
11                  there is a without prejudice dismissal, I don't  
12                  think is consistent with how the Act works as a  
13                  whole.

14                  The final point I'd like to make is  
15                  that the other side alluded multiple times to  
16                  the -- how many prisoner suits there were and  
17                  that they've decreased.

18                  As we noted in our reply brief, there  
19                  is no indication that there is any different  
20                  pattern in the Third or Fourth Circuit. The  
21                  Fourth Circuit has had this rule for over a  
22                  decade and there is no indication that by  
23                  adopting a clear rule that without prejudice  
24                  dismissals do not qualify as strikes, that  
25                  there's been any significant uptick in prisoner

1 litigation.

2 If the Court has no further questions,  
3 we urge you to reverse.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel. The case is submitted.

6 (Whereupon, at 11:13 a.m., the case  
7 was submitted.)

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<p><b>unnecessary</b> <sup>[1]</sup> 48:16  <b>until</b> <sup>[1]</sup> 16:19  <b>unusual</b> <sup>[3]</sup> 8:9 16:16 44:24  <b>up</b> <sup>[2]</sup> 9:7 53:22  <b>upfront</b> <sup>[1]</sup> 34:25  <b>upset</b> <sup>[1]</sup> 17:1  <b>upsets</b> <sup>[1]</sup> 4:19  <b>uptick</b> <sup>[1]</sup> 59:25  <b>urge</b> <sup>[1]</sup> 60:3  <b>uses</b> <sup>[5]</sup> 3:14 30:12 36:21 40:22  44:20  <b>using</b> <sup>[2]</sup> 31:16 51:1  <b>usual</b> <sup>[1]</sup> 46:10</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>vast</b> <sup>[3]</sup> 12:12 16:6 25:23  <b>version</b> <sup>[1]</sup> 50:22  <b>versus</b> <sup>[2]</sup> 3:5 58:18  <b>vexatious</b> <sup>[1]</sup> 52:7  <b>view</b> <sup>[8]</sup> 10:25 12:16 22:14 23:17  25:14 26:24 27:3 33:13  <b>violates</b> <sup>[1]</sup> 30:18  <b>volume</b> <sup>[1]</sup> 10:19</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wanted</b> <sup>[1]</sup> 14:25  <b>Washington</b> <sup>[3]</sup> 1:10,18,23  <b>way</b> <sup>[19]</sup> 16:13 18:17 20:16 23:9 24:  6 27:13 29:13 34:15 39:22 40:2  41:7 42:12 49:21,22 50:7,9 56:15  58:8,10  <b>Wednesday</b> <sup>[1]</sup> 1:11  <b>well-established</b> <sup>[1]</sup> 3:15  <b>Whereupon</b> <sup>[1]</sup> 60:6  <b>whether</b> <sup>[26]</sup> 9:5,8,19,20 12:9 13:  10,14,22 15:2,5,8 16:9,12,15 20:4,  14 21:19 24:11 25:3 30:6 32:21  34:9 36:17 42:22 47:9 49:3  <b>whole</b> <sup>[1]</sup> 59:13  <b>will</b> <sup>[21]</sup> 5:17 12:11 17:15 18:6 19:  4,6 21:10,18,23 24:8 27:12 33:6,9,  11 34:8,16 36:9 53:15,20,22 58:  22  <b>wind</b> <sup>[1]</sup> 53:22  <b>winning</b> <sup>[1]</sup> 32:13  <b>within</b> <sup>[1]</sup> 23:7  <b>without</b> <sup>[75]</sup> 5:8,17 6:21 7:5 8:13,  25 10:8 11:3,14 12:20 13:11,18,  22 14:5,11,16 15:5 16:10 17:13  19:2,5,7 20:4,12 21:2,15,20,21 22:  5 24:5 28:5,14 30:7 31:1,20 33:9,  24 34:22 35:12 36:18 38:4,17,20  39:1,3,9,15 40:1,24 41:17,24 42:  16 43:13,17 44:3 45:5,22 47:17  48:2,14 49:12 50:24 51:20,22 52:  13 53:7,13,18 55:19 56:11,22 58:  2,20 59:11,23  <b>Without-prejudice</b> <sup>[7]</sup> 3:11 4:1,8  8:10 11:15 19:15 24:1  <b>won</b> <sup>[2]</sup> 31:25 32:7  <b>wondering</b> <sup>[1]</sup> 21:16  <b>Woodford</b> <sup>[2]</sup> 25:10 57:7  <b>word</b> <sup>[1]</sup> 48:24  <b>words</b> <sup>[5]</sup> 19:4 47:7 48:16 50:7 51:</p>	<p>12  <b>work</b> <sup>[1]</sup> 17:15  <b>works</b> <sup>[2]</sup> 23:9 59:12  <b>world</b> <sup>[1]</sup> 18:24  <b>worry</b> <sup>[2]</sup> 17:12 59:10  <b>writes</b> <sup>[1]</sup> 49:20</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>year</b> <sup>[1]</sup> 55:15  <b>years</b> <sup>[2]</sup> 31:14 45:14  <b>yield</b> <sup>[1]</sup> 45:25</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p><b>zenith</b> <sup>[1]</sup> 55:11</p>
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