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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 a
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 suggest that
23 that's not necessarily so. It can -- you 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 -- and, if that's so, how should
9 we 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, amendment wouldn't be futile if
19 there's not -- if there's a reason to think you
20 could potentially provide more facts, that that
21 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 opportunity
13 to cure this. And so amendment should have
14 allowed or at least dismissal should have been
15 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 -- I don't -- I
9 don't -- I'm not concerned about that
10 consequence.

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

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

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

25 JUSTICE GINSBURG: Wasn't -- weren't

1 there successive Heck claims here?

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

4 JUSTICE GINSBURG: Well, you think the
5 second one should have been dismissed as
6 frivolous?

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

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

24 MR. BURGESS: I -- I think -- I think
25 the court would have been within its discretion

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

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

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

24 There's no question that there is
25 considerable overlap. And there's also, I

1 think, very little question that a court could
2 have determined that at least the second one had
3 been frivolous or malicious, but the court did
4 not do that. And everyone here agrees that
5 1915(g) needs to be evaluated, whether a strike
6 is to be imposed, based on what the court
7 actually did, not what the court could have
8 done.

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

16 Nonetheless, on the other side's view,
17 any time that an exhaustion issue could be dealt
18 with on a motion to dismiss basis, it is going
19 to result in a strike, which we think is
20 anomalous because it means in the circumstance
21 in which the -- the litigant exhibited candor --
22 candor and saved the judicial resources because
23 the exhaustion problem was apparent from the
24 face of the complaint, that is going to result
25 in a strike, but in the vast majority of the

1 other instances, exhaustion is not treated as a
2 strike, precisely because it is the type of
3 procedural defect that does not implicate the
4 merits of the claim, does not suggest any abuse
5 of the courts.

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

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

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

1 of the burdens on the -- on the system, I don't
2 see why it shouldn't be regarded as a strike
3 under 1915.

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

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

24 Instead, 1915(g) is targeting
25 something more specific. It's targeting actions

1 that are meritless on their face or are
2 frivolous or malicious, which are significant
3 standards that --

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

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

19 MR. BURGESS: I agree with that.

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Olson.

23 ORAL ARGUMENT OF ERIC R. OLSON
24 ON BEHALF OF THE RESPONDENTS

25 MR. OLSON: Mr. Chief Justice, and may

1 it please the Court:

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

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

22 In addition, the three-strikes use of
23 the categories frivolous and malicious alongside
24 the category fails to state a claim counsels, as
25 the colloquy with Chief Justice -- the Chief

1 Justice illustrates, that these provisions
2 should be given similar scope. Frivolous and
3 malicious dismissals can be with and without
4 prejudice. The same scope should apply here.
5 What results is an easily administrable rule to
6 see what happened, rather than look and analyze
7 the consequences.

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

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

20 JUSTICE KAVANAUGH: Suppose a prisoner
21 files a suit and the district judge, instead of
22 granting leave to amend, dismisses without
23 prejudice; the prisoner corrects the error,
24 fixes the defect, files a suit and prevails.
25 Not only is it sufficient to state a claim,

1 prevails in the case. You would still say that
2 that prisoner has a strike even though they won
3 the case?

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

7 JUSTICE KAVANAUGH: Yes.

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

13 Of course --

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

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

24 And I think what we see in the
25 District of Colorado certainly is a conversation

1 back and forth between the -- the prisoner and
2 the court before that dismissal occurs. So
3 there are --

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

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

16 MR. OLSON: Yes, in -- in that
17 circumstance.

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

22 MR. OLSON: It does under the text of
23 the statute, which says -- which asks the courts
24 to look at what happened to the action. And if
25 there is a clear rule from this Court that says

1 a dismissal with and without prejudice falls
2 under the statute, then -- then courts can
3 adjust their behavior accordingly if they're
4 concerned about giving the strike.

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

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

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

22 JUSTICE GINSBURG: Why wouldn't it
23 lead to an unjust result? I mean, even if a
24 dismissal is made without prejudice, for
25 preclusion purposes, it doesn't bar a subsequent

1 action. If the prisoner has to pay, what, \$400
2 upfront, it's effectively preclusive because he
3 can't bring the action. He hasn't got the money
4 to do it.

5 MR. OLSON: Well, three responses,
6 Justice Ginsburg.

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

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

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

21 What Congress was trying to do with
22 the Prison Litigation Reform Act was reduce the
23 amount of prisoner litigation that was coming to
24 the court. And they balanced, as the Chief
25 Justice identified, the burdens that that

1 prisoner litigation was putting on the courts
2 with giving access to prisoners. They get three
3 strikes. And, again, these strikes occur only
4 when it's non-meritorious on their face.

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

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

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

21 And this makes sense when you also
22 look at the structure of the Act, because the
23 structure of the Act says -- again, it uses
24 failure to state a claim several times, and it
25 says in the structure, several times, you,

1 district court, have the authority and in some
2 cases the obligation to screen cases and dismiss
3 them if they fail to state a claim.

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

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

17 MR. OLSON: That's correct, Justice
18 Sotomayor.

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

24 MR. OLSON: Correct, the statute
25 focused on an action.

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

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

14 MR. OLSON: Treat the circumstance
15 where there is a complaint dismissed?

16 JUSTICE SOTOMAYOR: Yes. Yes.

17 MR. OLSON: But not the action?

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

23 MR. OLSON: Well, when we look at the
24 text of the statute, it focuses on the action
25 being dismissed. And when you look at what

1 happens in the mine-run of cases, these actions
2 are dismissed. Typically, if it's dismissed
3 without prejudice, a couple of cases that
4 Petitioner cites have this exact fact pattern,
5 where there's a dismissal without prejudice and
6 30 days or 60 days given to file an amended
7 complaint.

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

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

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

25 Some of my clerks who have clerked on

1 the D.C. District Court suggested to me that the
2 incentives all cut in favor of dismissing
3 without prejudice, rather than giving leave to
4 amend, because of the way they count their
5 docket.

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

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

20 But what it did do was put forth in
21 this text an administrable rule that was easy
22 for one district court to determine what another
23 district court did, and that easily
24 administrable rule uses the language: An action
25 was dismissed for failure to state a claim.

1 Period. It does not say without prejudice.

2 JUSTICE KAGAN: Yeah, and I think, you
3 know, there is a statutory argument, and we can
4 talk about the statutory argument. I don't want
5 to poo-poo that at all. It's important to go by
6 statutory language.

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

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

23 JUSTICE KAVANAUGH: The -- the other
24 rule is easily administrable as well, though,
25 dismissal with prejudice. If it's a dismissal

1 without saying anything more or it says with
2 prejudice, then that's the bright line.

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

11 JUSTICE KAVANAUGH: No, it just has to
12 be dismissed with prejudice.

13 MR. OLSON: The -- oh, sure. That --
14 that would be the other way to address this.
15 It's a fairly distinct point.

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

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

1 installments.

2 JUSTICE KAVANAUGH: Right.

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

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

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

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

23 So that's why we think it's the more
24 administrable --

25 JUSTICE KAVANAUGH: Can --

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

2 JUSTICE KAVANAUGH: -- can I ask one
3 related question? It's alluded to in Footnote 7
4 of the reply brief, which is, do you think the
5 PLRA allows sua sponte dismissals without leave
6 to amend?

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

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

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

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

1 unusual circumstances require us to give the
2 same meaning to the same phrase in the same
3 statute.

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

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

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

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

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 General Rosen.

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

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

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

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

24 And in Section 1915(g), the text of
25 the statute says that if we have a -- a prisoner

1 who, on three or more prior occasions while
2 incarcerated, brought an action or an appeal in
3 the courts of the United States that was
4 dismissed on the grounds that it is frivolous,
5 malicious, or fails to state a claim upon which
6 relief may be granted, they are barred, they are
7 subject to the three-strikes rule.

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

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

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

25 MR. ROSEN: So, respectfully, I might

1 say I don't think it's -- that it can mean
2 either. It can mean both, that the -- the plain
3 language encompasses both dismissals with
4 prejudice and dismissals without prejudice.

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

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

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

1 MR. ROSEN: Well, the -- the word
2 "dismissal" encompasses both. We know in this
3 case there were three dismissals of the actions
4 on the -- on the grounds that were enumerated.

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

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

21 And then, secondly, as --

22 JUSTICE KAGAN: But Congress writes
23 its statute against a backdrop of the way people
24 use language. And, here, the way people use
25 language is that a dismissal on a 12(b)(6)

1 motion, a simple dismissal, is a dismissal with
2 prejudice. And you don't have to say with
3 prejudice.

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

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

13 And I think the -- the backdrop, if
14 we're really to look at the backdrop of what
15 Congress was focused on, we should really look
16 at this Court's decisions in the Neitzke and the
17 Denton cases, where the Court had said that a
18 dismissal for -- in Neitzke said that a
19 dismissal for frivolous grounds does not include
20 the set of those that are dismissed for failure
21 to state a claim. So Congress is partly
22 responding to that. And then, in Denton, the
23 Court had said that a -- a dismissal for
24 frivolousness under the prior version of -- of
25 the language in the IFP statute had said it

1 could be with or without prejudice.

2 So Congress knew the background in
3 using one of those enumerated grounds at least
4 was with both.

5 CHIEF JUSTICE ROBERTS: It -- it --

6 MR. ROSEN: And --

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

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

24 And if you say it's without prejudice,
25 they -- they're not going to think you're a bad

1 lawyer. I mean, they're just going to think
2 that you've got to refile after something else
3 happens.

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

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

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

25 And that's a Heck dismissal. It's a

1 failure to state a claim because no relief can
2 be granted on that. Nor is there any likelihood
3 that in the future this prisoner is likely to be
4 able to cure that, that is to say, there's no
5 indication that he has a habeas petition that's
6 been ruled on favorably or the like.

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

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

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

1 CHIEF JUSTICE ROBERTS: Well, I
2 suppose --

3 MR. ROSEN: -- Heck actions.

4 CHIEF JUSTICE ROBERTS: -- I suppose
5 in that scenario at some point the filings would
6 become malicious.

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

16 JUSTICE SOTOMAYOR: General --

17 MR. ROSEN: -- that.

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

23 Litigants can do exactly that. They
24 can avoid the filing fee and they can avoid
25 dismissal by continuously amending and some

1 courts permit it. At some point, they get tired
2 and they dismiss with prejudice.

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

9 CHIEF JUSTICE ROBERTS: You -- you may
10 answer briefly.

11 MR. ROSEN: Thank you.

12 Respectfully, the history since the
13 PLRA was enacted shows -- shows otherwise. At
14 its zenith, 25 percent of the civil docket of --
15 of the federal courts were prisoner filings, and
16 it is now down to about 10 percent. It's still
17 a very large number, approximately 29,000 a year
18 ago, but it's from 20 -- 25 percent to
19 10 percent.

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 General.

1 Four minutes, Mr. Burgess.

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

4 MR. BURGESS: Thank you. I'd like to
5 make a few quick points.

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

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

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

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

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

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

1 clear that that is consistent with the text of
2 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,
10 so you don't have to worry about instances in
11 which there is a without-prejudice dismissal, I
12 don't think is consistent with how the -- the
13 Act works as a 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,
19 there's no indication that there is any
20 different pattern in the Third or Fourth
21 Circuit. The Fourth Circuit has had this rule
22 for over a decade and there's no indication that
23 by 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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